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Expanding Voting Rights Through Local Law

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Introduction

In an episode of the television show *The West Wing*, middle school students from a fictional children’s advocacy group called “Future Leaders for Democracy” try to convince White House Communications Director Toby Ziegler that children should enjoy the right to vote.¹ After largely agreeing with their various substantive arguments for children’s suffrage, Toby strategizes, “Well, I’d go for lowering the age in increments and I wouldn’t start at the federal level.”

The real-life push for expanded suffrage has tracked Toby’s advice. Throughout the country, local jurisdictions are debating whether to expand the right to vote in local elections for various constituencies, such as younger Americans, noncitizens, and nonresident property owners. For instance, in November 2016, Berkeley, California decided to lower the voting age to sixteen for its school board elections and San Francisco voters narrowly rejected a referendum to reduce the voting age to sixteen for all of its city elections. Some small jurisdictions have already lowered the voting age or otherwise expanded the right to vote in local elections for other interested groups, such as noncitizens or nonresident property owners. These local voting rules are significant in their own right, and they also may foreshadow expanded suffrage in state or federal elections.

If states are “laboratories of democracy” that can try out various reforms, then municipalities can be “test tubes of democracy” that may experiment with different voting rules. These expansions can then “trickle across” to other municipalities, and eventually “trickle up” to states or Congress, which will more likely adopt reforms that are working well at the local level. Thus, it is important to highlight the first movers on expanded voting rights, as they may serve as catalysts for more widespread changes. Robust protection of the right to vote depends on local voting rules as an early component of the reform effort.

This Issue Brief – a condensed version of a scholarly article that appeared in the *George Washington Law Review*² – completes the picture of what it means to enjoy the right to vote in America. The right to vote is a constitutional right inherent in the U.S. Constitution and all state constitutions. But it is

¹*The West Wing: A Good Day* (NBC television broadcast Mar. 2, 2005).

² See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

also a locally conferred right, at least in some cities and towns. This expansion of voting rights at the local level will constitute a significant part of the debate on the right to vote for years to come.

I. Today's Local Expansions of the Right to Vote

In recent years, municipalities across the country have enacted, or at least debated, local ordinances regarding the right to vote. Cities and towns have lowered the voting age in local elections to sixteen, granted the right to vote to noncitizens, expanded access for property-owning nonresidents, and called for greater overall inclusion for those otherwise disenfranchised, such as felons. This section examines these ordinances to highlight the grassroots nature of voting rights reform and demonstrates that localism should be an important consideration for anyone concerned about protecting the constitutional right to vote.

A. Lowering the Voting Age

In 2013, the city of Takoma Park, Maryland—a suburb of Washington, D.C.—passed a charter amendment lowering the voting age for city elections to sixteen. Section 601(a) of that governing document now reads:

Every person who (1) is a resident of the City of Takoma Park, (2) is at least sixteen (16) years of age or will be sixteen (16) years of age on or before the date of the next City election, (3) has resided within the corporate limits of the City for 21 days immediately preceding the City election, (4) does not claim voting residence or the right to vote in another jurisdiction, and (5) is registered to vote in accordance with the provisions of this charter, is a qualified voter of the City except as provided in subsection (b) of this section.³

Subsection (b) then denies voting rights to felons serving a prison sentence, those who have been judged mentally disabled, and anyone convicted of vote buying. Lowering the voting age expanded the voter rolls in Takoma Park by about 350 people.⁴ Council Member Tim Male sponsored the ordinance as a way to increase citizen participation in local elections.⁵ In crafting the law, Male took the advice of Rob Richie, the director of a national organization called FairVote, who thought of the idea when he read a report from Denmark saying that younger teenagers were more likely to vote than older teens.⁶

³ TAKOMA PARK, MD., MUN. CODE art. VI, § 601(a) (2016),

<http://www.codepublishing.com/MD/TakomaPark/#!/takomaparkch/TakomaParkCH06.html#06>.

⁴ See Annys Shin, *Takoma Park 16-Year-Old Savors His History-Making Moment at the Polls*, WASH. POST (Nov. 3, 2013), https://www.washingtonpost.com/local/takoma-park-16-year-old-savors-his-history-making-moment-at-the-polls/2013/11/03/89f00962-425c-11e3-b028-de922d7a3f47_story.html.

⁵ See *id.*

⁶ See *id.* I am a member of the “Leadership Circle” for a FairVote initiative called “Promote Our Vote.” See *Leadership, PROMOTE OUR VOTE*, <http://www.promoteourvote.com/leadership.html> [<https://perma.cc/5BHG-6FHJ>] (last visited May 28, 2017).

The movement in Takoma Park began with a municipal Right to Vote Resolution.⁷ That resolution noted that

local governments like ours have the power to enact laws and procedures for local elections that meet or surpass federal and state election standards, that create more accountable representation, that uphold voting rights, that encourage increased voter participation, and that promote greater awareness of our political process through civic education.⁸

The resolution then affirmed that the right to vote is a fundamental right, established a Task Force on Voting, and called on federal and state officeholders to take actions that will protect voting rights. On expanding voting opportunities, the resolution specifically directed the Task Force to “[r]ecommend actions by the City before the 2013 elections to promote new suffrage opportunities and other participation in City government for and by residents who have turned 16, same-day voter registration and residents who are currently on parole or probation as a result of a felony conviction.”⁹ The Task Force’s recommendations led to the ordinance that, among other things, lowered the voting age in Takoma Park.

Takoma Park’s initial experience with lowering the voting age—albeit a sample of one town with a small population—is instructive. In the November 2013 election, which included an incumbent mayor with only a write-in challenger and no contested city council elections, 44% of the newly enfranchised and registered sixteen- and seventeen-year-olds went to the polls, as compared to an overall turnout rate of 11%.¹⁰ Similarly, in Takoma Park’s 2014 election, 134 individuals aged sixteen or seventeen registered to vote, and about half of them showed up, far exceeding the 10% turnout rate among the rest of the city’s voters.¹¹ Although the raw numbers for this one city are small, and the novelty of gaining voting rights could wear off in subsequent elections, the potential is huge if extrapolated to a larger metropolis. Turnout among eighteen- to twenty-four-year-olds nationwide is the lowest among all age groups,¹² but that trend is reversible if sixteen- and seventeen-year-olds begin a habit of voting earlier in their lives when they are not also dealing with moving, entering the workforce, or beginning college. Assuming that younger voters turn out in sufficient numbers, they

⁷ City of Takoma Park, Md., Res. 2013-25 (May 13, 2013), http://www.promoteourvote.com/uploads/9/2/2/7/9227685/takoma_park_right_to_vote_resolution.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ See J.B. Wogan, *Takoma Park Sees High Turnout Among Teens After Election Reform*, GOVERNING (Nov. 7, 2013), <http://www.governing.com/news/headlines/gov-maryland-city-sees-high-turnout-among-teens-after-election-reform.html>.

¹¹ Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html>.

¹² See THOM FILE, U.S. CENSUS BUREAU, YOUNG-ADULT VOTING: AN ANALYSIS OF PRESIDENTIAL ELECTIONS, 1964–2012, at 2 (2014), <https://www.census.gov/prod/2014pubs/p20-573.pdf>.

could impact who is elected and the policies that affect them. Takoma Park showed that this reform is achievable city by city throughout the country.

Hyattsville, Maryland, was the next locality to heed this message. In January 2015, the Hyattsville City Council voted to lower the voting age for town elections to sixteen.¹³ In the next election, newly registered sixteen- and seventeen-year-olds voted at a rate of 25%, helping the town exceed its turnout goal.¹⁴

These successes in two small Maryland towns have been harbingers of the reform movement in larger cities.¹⁵ Berkeley, California, recently lowered the voting age to sixteen for its school board elections.¹⁶ In San Francisco, members of the San Francisco Youth Commission have been advocating for the city to lower the voting age for municipal and school district elections.¹⁷ Although the measure passed the City's Board of Supervisors, a referendum on the issue failed by a 52%–48% margin in 2016.¹⁸ Given this close outcome, advocates plan to put the question on the ballot again in 2020.¹⁹ Reformers are also working to petition the Chicago City Council to consider this change.²⁰

Similarly, Washington, D.C., has debated whether to pass an ordinance allowing sixteen- and seventeen-year-olds to vote in presidential and local elections.²¹ Advocates note that the city's lawmakers "barely listen[ed] to the District's youths amid a spike in violence" during the summer of

¹³ See HYATTSVILLE, MD., CHARTER & CODE art. IV, § C4-1 (2015),

<http://www.hyattsville.org/DocumentCenter/Home/View/340> ("Every person who is a citizen of the United States, is at least sixteen (16) years of age, resides in the State of Maryland, resides within the corporate limits of the City and is registered in accordance with the provisions of this Charter shall be a qualified voter of the City. Every qualified voter of the City shall be entitled to vote at any or all City elections.").

¹⁴ See Rebecca Bennett, *Ward and Warner Election Winners; City Exceeds Voter Turnout Goal*, HYATTSVILLE LIFE & TIMES (May 12, 2015, 6:12 PM), <http://hyattsvillelife.com/ward-and-warner-election-winners-city-exceeds-voter-turnout-goal/>.

¹⁵ In addition to lowering the voting age in municipal elections, many states allow seventeen-year-olds to vote in party primaries if they will be eighteen by Election Day. See *Voting in Primaries at 17 Years Old*, BALLOTPEdia, https://ballotpedia.org/Voting_in_primaries_at_17_years_old [https://perma.cc/V57X-Z7ZC] (last visited May 28, 2017).

¹⁶ See Aleah Jennings-Newhouse et al., *City Measures T1, U1, V1, W1, X1, Y1, Z1, AA Pass; Measures BB, CC, DD Fail*, DAILY CALIFORNIAN (Nov. 9, 2016), <http://www.dailycal.org/2016/11/09/city-measures-t1-u1-v1-w1-x1-y1-z1-aa-pass-measures-bb-cc-dd-fail/>.

¹⁷ See Laura Dudnick, *Youths Seek to Lower Voting Age to 16 in SF*, S.F. EXAMINER (Jan. 6, 2015),

<http://archives.sfexaminer.com/sanfrancisco/youths-seek-to-lower-voting-age-to-16-in-sf/Content?oid=2916012>.

¹⁸ See Press Release, Vote16USA, *Historic Measure Almost Passes: More than 172,000 Vote to Extend Voting Rights to 16-Year-Olds for Municipal Elections* (Nov. 28, 2016), <http://vote16usa.org/press-release-historic-measure-almost-passes-more-than-172000-vote-to-extend-voting-rights-to-16-year-olds-for-municipal-elections/>.

¹⁹ See *id.*

²⁰ See *Lower the Voting Age in Chicago*, CHANGE.ORG, <https://www.change.org/p/chicago-city-council-lower-the-voting-age-in-chicago-7eb9e713-a4f1-470f-812d-6c09f97492bf> [https://perma.cc/HX6Z-EYER] (last visited Mar. 26, 2017).

²¹ See Youth Vote Amendment Act of 2015, D.C. Council B21-0468 (2015),

<http://lims.dccouncil.us/Download/34820/B21-0468-Introduction.pdf>.

2015 and that lowering the voting age would give younger individuals more political power.²² The D.C. proposal goes further than the Maryland or California examples because it lowers the voting age not just for city elections but for the presidential election as well. As one proponent explains, “It’s not just about having young people vote It’s about creating a new generation of lifelong voters.”²³

Meanwhile, advocates in Lowell, Massachusetts, who under Massachusetts law must secure the state legislature’s approval to lower the voting age in municipal elections, won the support of the State Senate in 2013 but have not yet convinced the State House.²⁴ Legislators in New Mexico and youth council members in Richmond, California, are planning to introduce bills to lower the voting age for city elections or at least school board elections.²⁵ The movement also has gained the support of advocacy groups, such as Generation Citizen, a nonpartisan organization that focuses on youth participation in politics and has begun an initiative called Vote16USA.²⁶

Strong policy arguments favor lowering the voting age.²⁷ First, turning sixteen has “special significance” in our society, as that is when most states allow individuals to obtain driver’s licenses and have part-time jobs, and require them to pay taxes on their wages.²⁸ Next, the National Youth Rights Association highlights the fairness aspect of lowering the voting age: prosecutors may charge adolescents as adults if they commit crimes, but younger individuals may not participate in our democracy in a more positive way through voting.²⁹ Additionally, turning eighteen (the current voting age in most places) is a volatile time in people’s lives, when they are leaving home for the

²² See Aaron C. Davis, *16-Year-Olds in D.C. Could Vote for President in 2016, Under Proposal*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/local/dc-politics/16-year-olds-in-dc-could-vote-for-president-in-2016-under-proposal/2015/11/03/3175fede-825d-11e5-8ba6-ccc48b74b2a7_story.html.

²³ See Patrick Madden, *Unlikely Advocates Push to Give 16-Year-Olds A Vote—and a Voice*, NPR (Jan. 18, 2016, 3:54 PM), <http://www.npr.org/2016/01/18/463489043/unlikely-advocates-push-to-give-16-year-olds-a-vote-and-a-voice>.

²⁴ Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html>.

²⁵ See Yamiche Alcindor, *Campaign to Lower Voting Age to 16 in Local Races Ignites a Debate*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/10/us/politics/campaign-to-lower-voting-age-to-16-in-local-races-ignites-a-debate.html>.

²⁶ See Generation Citizen, *Young Voices at the Ballot Box: Advancing Efforts to Lower the Voting Age*, <http://generationcitizen.org/wp-content/uploads/2016/03/GC-Voting-Age-Paper-2015-12-07-11.pdf> [<https://perma.cc/ER52-6243>] (last visited May 28, 2017). I am a member of the Vote16USA Advisory Board.

²⁷ See generally Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63 (2017), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-63.pdf>.

²⁸ See *Lower the Voting Age*, FAIRVOTE, <http://www.fairvote.org/reforms/right-to-vote-amendment/lowering-the-voting-age/> (last visited Mar. 26, 2017). Although choosing any age might seem arbitrary, sixteen makes the most sense given that our society imposes various adult-like obligations at that age, such as obeying the driving laws and paying taxes on part-time wages. Psychological studies also support sixteen as the appropriate age to begin voting.

²⁹ See *Top Ten Reasons to Lower the Voting Age*, NAT’L YOUTH RTS. ASS’N, <http://youthrights.org/issues/voting-age/top-ten-reasons-to-lower-the-voting-age/> (last visited May 28, 2017).

workforce or college and are often mobile; sixteen-year-olds, by contrast, are more rooted in their current community, uniquely knowledgeable about local issues, and just as intellectually competent as an eighteen-year-old to select their leaders. Finally, studies show the potential for a “trickle up” effect: the younger a person begins to vote, the more likely they will sustain that habit throughout their lives.³⁰

Lowering the voting age would also help to achieve greater fairness in political representation. Young adults are underrepresented: they comprise a significant share of the population but have no political power until they are eighteen years old. As Professor Jane Rutherford has explained:

Currently, children are vastly underrepresented politically. Although they are counted for the purpose of determining the number of representatives and constitute twenty-six percent of an average congressional district, they cannot vote, nor can anyone else vote on their behalf. In this sense, they share the plight of women before the adoption of the Nineteenth Amendment. Their numbers swell the political power of their communities, but that political power is not shared by them.³¹

Sixteen-year-olds are mature enough—or at least as mature as individuals aged eighteen or older—to inform themselves sufficiently and make rational voting decisions. Professor Vivian E. Hamilton surveyed various fields, such as behavioral and developmental psychology and social and cognitive neuroscience, to show that individuals reach an adult-like capacity to make competent decisions such as voting by age sixteen.³² The studies conclude that the ability of young individuals to engage in well-informed and rational decisionmaking is highly context-specific: “adolescents reliably reach adultlike cognitive-processing capacities by ages fifteen or sixteen, but . . . numerous factors (e.g., situations involving high levels of emotion or stress, peer pressure, or time pressure) will predictably compromise their cognitive performance.”³³ Voting, however, is not a situation that typically entails unusual emotion, stress, or even peer pressure (given the secret ballot).³⁴ Voting instead requires

³⁰ See, e.g., Yosef Bhatti & Kasper M. Hansen, *Leaving the Nest and the Social Act of Voting: Turnout Among First-Time Voters*, 22 J. ELECTIONS PUB. OPINION & PARTIES 380, 397 (2012), http://www.promoteourvote.com/uploads/9/2/2/7/9227685/leaving_the_nest_and_the_social_act_of_voting.pdf.

³¹ Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1465 (1998) (footnote omitted) (advocating not to lower the voting age but instead to give a child’s representative a proxy vote to increase children’s political influence).

³² Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447 (2012).

³³ *Id.* at 1452; see also *id.* at 1449 (noting that “by midadolescence, when making unpressured, considered decisions—like those required to privately cast a ballot in an election that has unfolded over time—their cognitive competencies are mature.”).

³⁴ *Id.* at 1511–12 (“Elections unfold over a period of time, giving voters the opportunity to deliberate and evaluate options without undue pressure. Many sources of information are readily available over a period of time as well, which voters can use as a kind of scaffolding or heuristics to help them evaluate their choices—broadcast debates, endorsements of candidates, party affiliations, etc. Voting itself is done anonymously and in private, which diminishes

civic engagement and knowledge. In a study using national survey data, researchers found that sixteen- and seventeen-year-olds scored about the same as adults on measures of political tolerance, skill, efficacy, and interest:

[C]ivic knowledge increases between ages 14 and 16 and then changes relatively little thereafter, although, 18-year-olds might be slightly higher in civic knowledge than are 16-year-olds. Most important . . . , 16-year-olds apparently know as much about the American political system as do many young adults; indeed, the average score for 16-year-olds is higher than the averages for civic knowledge for 19-, 21-, and 23-year-olds, all of whom are entitled to vote.³⁵

The study concludes that “[b]ased on . . . developmental trajectories . . . , there is little empirical reason to award the vote to 18-year-olds but to deny it to 16-year-olds.”³⁶ In another study of around one thousand adolescents, researchers found that “scores [of cognitive ability] increased between ages 11 and 16 and then leveled off, with no improvement after this age.”³⁷ Adolescents gain the cognitive capacity to begin civic participation by at least age sixteen, but the psychological studies do not support lowering the voting age to individuals younger than sixteen.

To those who think that sixteen-year-olds are too impulsive or immature to vote, or that their brains are not yet fully developed, psychologists note that there is a variation in cognitive capacity depending on the tasks adolescents are completing. Sixteen-year-olds may not be as developed as older individuals to avoid impulsive, rash judgments, but they are just as competent to make reasoned decisions like voting. As one psychology professor explains:

Adolescents’ judgment in situations that permit measured decision-making and consultation with others—what psychologists call “cold cognition”—is just as mature as that of adults by 16. . . .

. . . Cold cognition is relevant to matters such as voting Adolescents can gather evidence, consult with others and take time before making a decision. Adolescents may make bad choices, but statistically speaking, they won’t make them any more often than adults.³⁸

the concern that adolescents’ choices will be unduly pressured or influenced by peers.”).

³⁵ Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 207–08 (2011).

³⁶ *Id.* at 213.

³⁷ Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOLOGIST 583, 592 (2009) (arguing for greater allowance for sixteen-year-olds to make their own health care decisions).

³⁸ Laurence Steinberg, *A 16-Year-Old Is As Good as an 18-Year-Old—or a 40-Year-Old—at Voting*, L.A. TIMES (Nov. 3, 2014, 5:15 PM), <http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html>; *see also*

Even if sixteen- and seventeen-year-olds are mature enough to vote, some may argue that their parents will place an undue influence on them, in essence giving the parents a second vote through their children. But the evidence refutes this objection. Leading up to the Scottish Independence vote in September 2014, a research study found that children aged sixteen and seventeen would not just copy their parents; just under half of them had opposing views and planned to vote differently from their parents.³⁹ Advocates for lowering the voting age also note that “undue influence” of husbands was an argument against women’s suffrage, and yet wives obviously do not always follow their husbands at the ballot box.⁴⁰

Both sound policy and political theory strongly favor lowering the voting age. The key democratic ideal should be a desire to include as many people as possible in the electorate to improve democratic legitimacy. The mechanism by which we accomplish this voter expansion is extremely important. Local ordinances have begun the reform effort. Victories in small towns can have a “trickle across” and “trickle up” effect, moving to other cities and then states around the country. These municipal laws can serve as the catalyst for nationwide expansion of the right to vote.

B. Noncitizen Voting

In most local elections in America, and in all federal elections, only U.S. citizens may vote.⁴¹ But that is not the rule for all local elections. Indeed, the U.S. Supreme Court has long recognized that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote.”⁴² Indeed, “it appears to be settled doctrine that, so far as the federal Constitution is concerned, alien suffrage is entirely discretionary—neither constitutionally compelled nor constitutionally forbidden.”⁴³ The history of voting rights shows an expansion, and then contraction, of the right to vote for noncitizens.⁴⁴ “[T]he United States has a long history of noncitizen voting,” at least until the 1920s, when xenophobia stemming from World War I reduced voting opportunities across the country for noncitizens.⁴⁵

Joshua Gans, *Why It’s Time to Give Children the Right to Vote*, FORBES (Apr. 20, 2012, 5:17 PM), <http://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/>.

³⁹ See Emma Langman, *Scottish Independence: Research Finds Young Voters ‘Don’t Copy Parents’*, BBC NEWS (Mar 4, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-26265299>; see also JAN EICHHORN, SCOTCEN SOC. RESEARCH, WILL 16 AND 17 YEAR OLDS MAKE A DIFFERENCE IN THE REFERENDUM? 12 (2013),

http://www.scotcen.org.uk/media/205540/131129_will-16-and-17-years-olds-make-a-difference.pdf (“Overall, just 56% of young people propose to vote the same way as the parents who gave permission for them to be interviewed.”).

⁴⁰ See Carrie Kirby, *The Case for Letting Teens Vote in Local Elections*, CITYLAB (Oct. 6, 2015), <http://www.citylab.com/politics/2015/10/the-case-for-letting-teens-vote-in-local-elections/408853/>.

⁴¹ For a history of citizenship requirements for voting, see RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006).

⁴² *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874).

⁴³ Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 292 (1992).

⁴⁴ See HAYDUK, *supra* note 41, at 4.

⁴⁵ See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ.

Even though many people may equate voting with the privilege of citizenship, localities have expanded the right to vote for noncitizens.

Currently, only Takoma Park (which also lowered its voting age) and five other Maryland towns allow noncitizens to vote in all municipal elections.⁴⁶ The Takoma Park rule came about in 1992 after “a task force ‘started redrawing voting districts to match the 1990 census and noticed that many districts in the city of 15,000 had disproportionate shares of noncitizens.’”⁴⁷

Some large jurisdictions allow resident noncitizens to vote in certain elections where these individuals may have a particular interest, such as for the school board. Chicago, for instance, allows noncitizens to vote in school council elections, as did New York City from 1968 until 2002, when the city disbanded its elected school boards.⁴⁸ Two Massachusetts towns, Cambridge and Amherst, also have passed laws granting the right to vote to noncitizens, but these ordinances cannot go into effect unless the state legislature approves them.⁴⁹

Other jurisdictions are now debating whether to expand the voter rolls to include noncitizens. New York City already allows noncitizens to vote in its Participatory Budgeting elections, which help to direct the allocation of tax funds for specific projects.⁵⁰ The City is further considering an ordinance to allow noncitizens to vote in all elections, which would add up to 800,000 people to the voting rolls.⁵¹ The proposal, debated in 2013, would allow noncitizen legal residents who have lived in New York City for six months to vote in mayoral and city council elections.⁵² The sponsor of the bill argued that “it’s unfair to deny voting rights to law-abiding noncitizens who pay taxes: ‘They contribute to society but are ultimately disenfranchised because they cannot vote.’”⁵³ Although thirty-one of the fifty-one New York City Council Members supported the ordinance, Mayor

271, 271, 282 (2000) (advocating for the expansion of voting rights for resident aliens in local elections); *see also id.* at 273 (“During the nineteenth century, at least twenty-two states and territories gave voting rights to aliens.” (citing Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114–16 (1931))).

⁴⁶ TAKOMA PARK, MD., MUN. CODE art. VI, § 601(a) (2016) (requiring voters to be “residents” of Takoma Park); *see* Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CAL. L. REV. 271, 296 (2005).

⁴⁷ Harper-Ho, *supra* note 45, at 311 (quoting *Takoma Park Asks Whether to Give Non-Citizens a Say*, BALT. SUN, Oct. 27, 1991, at 5B).

⁴⁸ Kini, *supra* note 46, at 271 n.1.

⁴⁹ *Id.*; *cf. infra* Section III.B.

⁵⁰ *See* NEW YORK CITY COUNCIL, PARTICIPATORY BUDGETING RULEBOOK 9 (2016), http://labs.council.nyc/wp-content/uploads/2016/05/PBNYC-2016_2017-Rulebook.pdf; *Participatory Budgeting*, NEW YORK CITY COUNCIL, <http://pbnyc.org/> (last visited May 28, 2017).

⁵¹ *See* Aliyah Frumin, *NYC Lawmakers Consider Allowing Non-Citizen Immigrants to Vote*, MSNBC (May 13, 2013, 8:47 AM), <http://www.msnbc.com/hardball/nyc-lawmakers-consider-allowing-non-citizen-i>.

⁵² *See* Erin Durkin, *Council Weighs Bill to Give Noncitizen Immigrants Voting Rights*, N.Y. DAILY NEWS (May 9, 2013, 9:44 PM), <http://www.nydailynews.com/news/politics/council-weighs-bill-give-noncitizen-immigrants-voting-rights-article-1.1340007>.

⁵³ *Id.*

Michael Bloomberg opposed it, and the Speaker of the Council blocked a final vote on the law.⁵⁴ The measure could come before the City Council again, especially as Mayor Bill de Blasio might support the idea.⁵⁵ These examples show that the debate on noncitizen voting is occurring around America,⁵⁶ as well as internationally, such as in Toronto, Vancouver, and various European countries.⁵⁷

Both theoretical and practical reasons support the expansion of voting rights to noncitizens. As Professor and now Congressman Jamie Raskin has explained, “the disenfranchisement of aliens at the local level is vulnerable to deep theoretical objections since resident aliens—who are governed, taxed, and often drafted just like citizens—have a strong democratic claim to being considered members, indeed citizens, of their local communities.”⁵⁸ Put another way, “[a]s a practical matter, noncitizens do not have political power because they do not have the right to vote; inherent in this lack of voting power is an absence of electoral power.”⁵⁹ Under a prevailing theory of democracy, the government is legitimate only by the consent of the governed, which includes noncitizens who must follow the law; those with equal responsibilities in society should have an equal right to vote.⁶⁰ Moreover, local residents—whether they are citizens or not—care about, and should have a say in, local affairs. Allowing them to vote facilitates greater participation in the community, which may encourage these voters to become citizens.⁶¹ Expanding noncitizen voting could affect more than ten million legal noncitizen residents in the United States.⁶²

From a theoretical standpoint, local jurisdictions should espouse and implement a broad theory of

⁵⁴ See John Fund, *Will New York City Give Non-Citizens the Right to Vote?*, NAT'L REV. (Apr. 6, 2015, 9:40 AM), <http://www.nationalreview.com/corner/416495/will-new-york-city-give-non-citizens-right-vote-john-fund>.

⁵⁵ See *id.*

⁵⁶ See *Around the U.S.*, iVOTE, http://www.ivoteny.org/?page_id=473 [<https://perma.cc/VV6C-3VWH>] (last visited May 28, 2017) (providing summary of the debate in various states).

⁵⁷ See Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 130 n.91 (2011).

⁵⁸ Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993).

⁵⁹ Harper-Ho, *supra* note 45, at 310–11.

⁶⁰ See *id.* at 295–98; see also Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57, 58 (2006) (advocating for noncitizen voting rights “to promote assimilation, to grant equity, to protect their civil rights, and to provide a viable solution to educational inequities within public schools”).

⁶¹ Kini, *supra* note 46, at 272 (“Noncitizen voting in local elections promotes civic participation and citizenship because it gives noncitizens a stake in their communities and a sense that they can make a difference. Exposure to the benefits of civic participation at the local level encourages noncitizens to naturalize so that they can then also participate in state and federal elections.”). See generally Kathleen Coll, *Citizenship Acts and Immigrant Voting Rights Movements in the US*, 15 CITIZENSHIP STUD. 993 (2011), <https://www.usfca.edu/sites/default/files/pdfs/faculty/pub-coll-2011citizenshipstudies.pdf> (highlighting the impact of enfranchising noncitizens in local elections on “notions of national belonging”).

⁶² See Harper-Ho, *supra* note 45, at 284.

democracy. Lawful permanent residents have a stake in the governance of their local communities. At a minimum, noncitizens have a particular interest in school board elections, as they legally send their children to public school. But beyond the substance of this policy recommendation, the location of the debate is also important: this discussion is occurring—and should continue to occur—at the local level. Municipal laws have driven the movement to expand the franchise to noncitizens.⁶³

C. Nonresident Voting

Various jurisdictions, such as vacation towns, allow nonresident property owners to vote. Eleven states have statutes explicitly permitting nonresidents to vote in local elections if the local jurisdictions so choose.⁶⁴ For instance, in Jefferson County, Tennessee, nonresident property owners who register their property with the local election office may vote in the city's elections.⁶⁵

Delaware's rule is particularly franchise-enhancing. The state's statute provides that if a municipality allows nonresidents to vote, then the municipality may not amend its charter to take that right to vote away.⁶⁶ In essence, the Delaware law is a one-way ratchet: jurisdictions may expand, but not restrict, voting rights in local elections for nonresidents.

The rationale for these rules is to give those who own property a say in the policies that may affect their investment, even if the owners do not live in the town full-time. For instance, the Town of Mountain Village, Colorado, explicitly justified in its town charter its decision to allow nonresident property owners to vote:

1. Like many resorts, the nature of the economy and the life-style of the people of the Town are, and will in the future remain, unusual. Furthermore, the fact that many of the Town's present and future residential and commercial property owners maintain their

⁶³ See Raskin, *supra* note 58, at 1396–97 (“If the democratic argument for alien suffrage in our history can be recaptured and reconstructed, it is possible that Takoma Park will become an early precedent for grass-roots constitutional politics in the twenty-first century.”).

⁶⁴ See *Voting by Nonresidents and Noncitizens*, NAT'L CONF. ST. LEGISLATURES (Feb. 27, 2015), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx>. These states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Nebraska, New Mexico, Oregon, Tennessee, and Wyoming. See *id.* (citing statutes). The National Conference of State Legislatures also lists Montana as allowing local jurisdictions to pass nonresident voting ordinances, but the Montana legislature repealed that provision in 2015. See MONT. CODE ANN. § 7-13-2255 (2015).

⁶⁵ See, e.g., *Non-Resident Property Rights Voting*, JEFFERSON COUNTY, TENN., <http://www.jeffersoncountyttn.gov/government/election-commission/non-resident-property-rights-voting/> [<https://perma.cc/4JHJ-6PL9>] (last visited May 28, 2017).

⁶⁶ DEL. CODE ANN. tit. 22, § 835(b) (2011) (“No municipal corporation charter which permits nonresident persons to vote in any municipal election or to hold any municipal office shall be amended, pursuant to this chapter, so as to eliminate or limit the right of nonresident persons to vote or hold office, nor shall the percentage of nonresident officials allowed or required be changed.”); see also *Nonresident Property Owners and Voting in Local Elections: A Paradigm Shift?*, CANVASS: STATES & ELECTION REFORM, Oct. 2008, at 1–2, http://www.ncsl.org/Portals/1/documents/legismgt/elect/Canvass_Vol5A.pdf.

primary residences outside of the Town, making them part-time second-home non-residents, is also unusual. Although these facts are not substantially different from most resort towns, they are very unusual for conventional small as well as large towns.

2. The framers of this Charter took cognizance of the above-mentioned singular state of affairs, most especially the fact that a large number of the property owners of the Town are, and will continue to be, only part-time residents of their Town by granting to them the right to vote on those issues that are strictly limited in nature to Town matters.⁶⁷

In a challenge to the Mountain Village charter under the Federal Equal Protection Clause, the Tenth Circuit held that because the rule was franchise-expanding instead of franchise-restricting, rational basis review applied.⁶⁸ Under that standard, the Town had a reasonable justification for allowing nonresident property owners to vote: they “have a sufficient interest in Town affairs.”⁶⁹ Similarly, a Colorado state court ruled that although the Town could not enact a rule that is more restrictive than the state constitution’s voter qualification requirements, it could expand voting rules to enfranchise more people for local elections.⁷⁰

Nonresident property owners also have become involved in the political discussion in their communities. For instance, some nonresidents have won seats on the local city council in Rehoboth Beach, Delaware.⁷¹ Indeed, nonresidents have substantial influence in Rehoboth Beach given that they make up about three-fourths of all property owners.⁷²

Yet nonresident property owners likely cannot force a jurisdiction to allow them to vote; a state may validly impose a “single domicile” rule to require voters to choose between voting in their place of

⁶⁷ *May v. Town of Mountain Vill.*, 132 F.3d 576, 579 (10th Cir. 1997) (quoting Section 1.4(b) of the town’s charter).

⁶⁸ *Id.* at 580 (“Of critical importance to any decision here is the fact that Section 2.4(b) of the Town Charter does not restrict the right to vote—it expands it to include nonresidents owning real property in the Town.”).

⁶⁹ *Id.* at 582; *see also* *Glisson v. Mayor & Councilmen of Savannah Beach*, 346 F.2d 135, 137 (5th Cir. 1965) (“It is apparent from the face of this legislation that there could be a logical and sensible reason for permitting non-residents owning property in the municipality to vote in the municipal elections on an equal basis with resident persons whether or not they are property owners. The nexus between the two is that each of them obviously has an interest in the operation of the city government.”).

⁷⁰ *May v. Town of Mountain Vill.*, 969 P.2d 790, 795–96 (Colo. App. 1998). It is unclear, however, how a court might construe a local ordinance that grants multiple votes for individuals who own multiple properties in the locality; granting people additional votes could, in theory, violate the “one person, one vote” principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), because some people will have a greater say than others. There might also be a vote dilution concern with respect to resident voters who do not own property.

⁷¹ *See* Lisa A. Phillips, *The Principle of 2nd Home, 2nd Vote*, N.Y. TIMES (June 22, 2007), <http://www.nytimes.com/2007/06/22/realestate/greathomes/22politics.html>.

⁷² *Id.* Nonresident political activity also encompasses more than just voting: “For Rehoboth Beach’s concerned part-timers, involvement often goes beyond the voting booth. Some say they routinely stretch their weekends to attend Monday night meetings of the board of commissioners, the city’s governing body.” *Id.*

domicile or their vacation home.⁷³

In sum, nonresident property owners have enjoyed expansion of the right to vote in jurisdictions where the municipality has determined that they have a particular stake in the local elections.⁷⁴ In this way, local laws play a significant role in dictating the size and scope of the electorate.

II. Policy Implications of Expanding Voting Rights for Local Elections

Debate on local voting rights is nascent yet robust. More and more jurisdictions are contemplating whether to expand the franchise or otherwise alter the rules for local elections.⁷⁵ Localities should expand voting rights because doing so will include more people in the process, create a habit of voting (especially for younger voters), make government more responsive to local constituencies, and enhance the legitimacy of the winners. If there are explicit state constitutional or legislative hurdles to local control of elections, then states should reform their laws. Courts, when faced with a challenge to a local rule expanding the franchise, should defer to the local ordinance with a presumption of validity if there is any room under state law to allow the voter expansion.

A. Benefits of Expanding the Electorate

Localities should reform their rules on the right to vote by broadening the electorate. In particular, cities and towns should enact ordinances that affirm the importance of voting and expand voter access. As Alexis de Tocqueville once said, “local assemblies of citizens constitute the strength of free nations. . . . A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.”⁷⁶

Political inclusiveness is inherently desirable to increase the legitimacy of elected officials.⁷⁷ A common theory of democracy is that the people subject to a government and its laws must collectively consent to societal rules through elections.⁷⁸ Increased participation will help to make

⁷³ See, e.g., *Wit v. Berman*, 306 F.3d 1256, 1260, 1263 (2d Cir. 2002) (upholding New York Election Law that forbids individuals from voting in multiple locations against challenge from voters who own vacation homes). *But see* Ashira Pelman Ostrow, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1958 (2002) (arguing that “excluding dual residents from voting in a second-home community simply because they are also registered to vote in another community violates the Equal Protection Clause”).

⁷⁴ As an international analogy, some countries allow nonresident citizens who live in a different country to vote in the homeland’s elections. See Caroline Carter, Note, *The Right to Vote for Non-Resident Citizens: Considered Through the Example of East Timor*, 46 TEX. INT’L L.J. 655, 671 (2011).

⁷⁵ See Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. U. L. REV. ONLINE 173, 178–84 (2017), <http://northwesternlawreview.org/online/local-democracy-ballot>.

⁷⁶ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 60 (Henry Reeve trans., Colonial Press 1899).

⁷⁷ See John Payton, *Democracy and Diversity*, 35 PEPP. L. REV. 569, 572, 581–82 (2008); *cf.* *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”).

⁷⁸ See, e.g., DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 66 (2008) (“Democracy, the authorization of laws collectively by the people who are subject to them, is inseparable from voting.”); *see also* Hamilton, *supra* note 32, at 1476 (“A typical account of democracy provides that, *in order for a political system to qualify as*

elected officials more responsive to the local population. As a general rule, then, greater participation is good for democratic legitimacy.

People are closest to their local representatives.⁷⁹ If democratic legitimacy stems from enjoying the consent of the governed, then the “governed” should include as many competent people as possible who have a stake in governmental affairs. Local governments pass many laws that have real world effects every day. Individuals often are actively involved in their community debates; democracy flourishes the most at the local level. Broadening the right to vote in local elections is thus paramount to achieving a well-functioning democracy.

Localities should expand the right to vote by adopting a theory of democracy that favors inclusiveness.⁸⁰ Crafting a local right-to-vote ordinance will force communities to delineate who has a stake in local governance. This action will make local governments more responsive to all of their constituents and better expositors of local democracy.

B. Local Jurisdictions as “Test Tubes of Democracy”

Over eighty years ago, Justice Louis Brandeis famously referred to the states as “laboratories of democracy” that can experiment with different laws to see what works best. “[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁸¹ Yet although we have fifty states—fifty laboratories—we also have tens of thousands of cities and towns that also make laws that affect their citizens.⁸² Each of these municipalities also could enact local laws to “try novel social and economic experiments,”⁸³ such as on the right to vote. If states are laboratories of democracy, then municipalities are, in

democratic, the people subject to its laws must collectively authorize them. A democratic government thus derives its authority from the ‘the people’ who are the individual members of the political community.” (footnote omitted).

⁷⁹ As Professor Heather Gerken has described, our political system is highly decentralized, with important governmental units that are even smaller than cities or towns. Thus, she argues, recognizing “federalism-all-the-way-down” would include an inquiry into the processes of special-purpose governmental units. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010). Considering “federalism-all-the-way-down” provides further support for expanding voting rights for the smallest governmental units that hold elections.

⁸⁰ *Cf.* *Holder v. Hall*, 512 U.S. 874, 897 (1994) (Thomas, J., concurring in the judgment) (“The choice [between governmental structures] is inherently a political one, and depends upon the selection of a theory for defining the fully ‘effective’ vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is ‘to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.’” (quoting *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting))).

⁸¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸² *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) [hereinafter Briffault, *Home Rule*] (“[I]f the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform. Thousands of local governments provide thousands of arenas for innovation and for testing the costs and benefits of those innovations.”); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346 (1990) (“There are more than 82,000 local governments in the United States . . .”).

⁸³ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

essence, “test tubes of democracy,” experimenting with democratic processes on an even smaller scale.⁸⁴

The prevailing notion of voting rights law is that “eligibility to vote is defined in the first instance by state law, although the contours of that state law are subject to a series of overriding federal constraints.”⁸⁵ But local government law may also play a role. Municipalities can expand voting rights in local elections if there are no explicit state constitutional or legislative impediments and so long as local jurisdictions have the power of home rule.⁸⁶ We must recognize the importance of local laws in defining and shaping the electorate, at least for municipal elections. Moreover, these local rules can have a nationwide impact as they spread throughout the country.

Local laws are easier to pass than state or federal legislation. Local ordinances typically are more “streamlined,” meaning that “there is a greater possibility that more single-issue laws overall will be passed via local governments than by higher levels of government.”⁸⁷ As the Utah Supreme Court has recognized,

the history of our political institutions is founded in large measure on the concept—at least in theory if not in practice—that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be.⁸⁸

Local governments are more effective because they are closer to their constituents.⁸⁹ Moreover, localities often elect their officials in “nonpartisan” elections, which might temper the partisanship that infiltrates state and federal lawmaking.⁹⁰ In essence, passing a right-to-vote ordinance at the

⁸⁴ See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (“In the sheer number of laboratories offered, local governments dwarf the mere 50 states: there are 15,000 municipalities and 3,000 counties, as well as 35,000 special-purpose districts.” (footnotes omitted)); Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 332 (2013) (“Local self-government also promotes policy innovation and experimentation. Similar to federalism’s facilitation of state-level innovation, local autonomy permits local governments to serve as ‘laboratories of democracy’ and ‘to try novel social and economic experiments without risk to the rest of the country.’” (quoting *New State Ice Co.*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting))).

⁸⁵ Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 919 (2007).

⁸⁶ I discuss these potential legal impediments in the full article off of which this Issue Brief is based. See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

⁸⁷ See Kellen Zale, *Urban Development Legislation for Cities, by Cities*, 67 ME. L. REV. 266, 267 (2015).

⁸⁸ *State v. Hutchinson*, 624 P.2d 1116, 1121 (Utah 1980).

⁸⁹ See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 860 (2004) (“Individual citizen voice grows as the size of the electorate shrinks; . . . if fifty state-level ‘laboratories of democracy’ are good, then the tens of thousands of laboratories provided by local government might be even better.”).

⁹⁰ See Karen I. Chang, Note, *The Party’s Over: Establishing Nonpartisan Municipal Elections in New York City*, 11 J.L. & POL’Y 579, 579 (2003) (“Today, a majority of the nation’s cities utilize nonpartisan elections, and sixty of the seventy-five largest U.S. cities have elected their mayors in nonpartisan elections.” (footnote omitted)); Nancy Northup, Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1677 (1987) (“Most local elections in America are nonpartisan.”). Of course, local consideration of election rules could lead to an increase in the

local level is easier than through a statewide or federal constitutional amendment or statutory change.

Local laws can spread throughout the country once other jurisdictions see the new rules working well.⁹¹ Social movements may begin after one locality adopts a reform to great success, causing other municipalities to emulate the first mover. Justice Brandeis’s invocation of the “laboratories of democracy” metaphor posits that states will adopt the best ideas tested initially in one courageous state.⁹² Yet cities and towns may be even more important in being the first movers, particularly for social issues.⁹³ As Professor Diller explains:

City policy experimentation is a catalyst for change at the state and national levels. From gay rights to the environment to public health, cities and other forms of local government are adopting new and innovative policies in the wake of inaction by the higher levels of government.

....

Cities have increasingly led in enacting new policies in a wide variety of areas, including living-wage laws, workers’ rights, global warming reduction, public financing of campaigns, trans fats regulation, affordable housing, universal health care, environmental protection, gay rights, and smoking prevention.⁹⁴

Municipalities were the first governmental entities to pass laws on these significant social issues, which then eventually spread to other cities and states:

These examples illustrate a widespread pattern of policy innovation: a policy first embraced by a city proves itself manageable and popular at the local level before percolating “out” to other cities and “up” to the state level. Without the possibility of city experimentation, these

partisanship of local elections.

⁹¹ See Briffault, *Home Rule*, *supra* note 82, at 32 (noting that local experimentation entails few external costs but many external benefits in “providing new information about the consequences of particular innovations”); *see also supra* Part I.

⁹² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice O’Connor, in discussing the women’s suffrage movement and the fact that Wyoming was the first state to allow women to vote when it became a state in 1890, noted that, “Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.” *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part).

⁹³ See, e.g., *Sims v. Besaw’s Café*, 997 P.2d 201, 213 n.3 (Or. Ct. App. 2000) (en banc) (noting that “municipalities tend to be the proving grounds—in terms of both need and public acceptance—for nondiscrimination policies that later are adopted at state and national levels”).

⁹⁴ Diller, *supra* note 84, at 1113–14, 1117–18 (footnotes omitted) (arguing for state courts to adopt a theory of “intrastate preemption that facilitates good-faith policy experimentation by cities, while discouraging parochial and exclusionary municipal action”).

policies might have never been embraced by other jurisdictions.⁹⁵

The movement for expanded voting rights also can begin at the local level and radiate out to other cities and then states in a “trickle across” and “trickle up” mechanism. For instance, many Americans disagree with existing policies that disenfranchise felons who have completed their sentences.⁹⁶ Advocates could look to local jurisdictions to reform the law. Successes at the local level, with felons voting in municipal elections without any issues, will then arm supporters with better evidence on the positive aspects of felon re-enfranchisement and will help to bolster democratic representation.⁹⁷ Smaller victories at the municipal level can breed broader wins city by city and state by state. As advocates for a Municipal Right to Vote ordinance explain:

Municipal reform is often overlooked, but it can be one of the most efficient and potent methods of fostering political change. The Municipal Right to Vote Initiative seeks to have cities call for a constitutional right to vote and to pledge to enact ordinances and charter changes in the spirit of that proposed amendment, thereby building both political support for an amendment and showcasing what it would mean for protecting and expanding suffrage.⁹⁸

Municipalities should pass an ordinance on voting rights that expands the electorate for local elections to those who have a direct, personal stake in the outcome.

Of course, local political actors could alter voting rules to entrench themselves in power, which is a more concerning use of local voting rights.⁹⁹ Local politicians could enact ordinances that reduce voting opportunities or exclude certain groups of voters. Yet the fact that the federal and state constitutions provide a baseline for voting rights protection tempers that concern. A local jurisdiction cannot deny the right to vote to anyone who is a citizen of the United States, a resident

⁹⁵ *Id.* at 1119.

⁹⁶ See John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 780 (2013) (“Public opinion polling conducted on the matter also demonstrates a national consensus against felon disenfranchisement.”); Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280–81 (2004), http://as.nyu.edu/docs/IO/3858/Public_Attitudes_Towards_Felon_Disenfranchisement_Laws_in_the_US.pdf; Matt Ferner, *Americans Don't Think Ex-Offenders Should Lose Their Right to Vote*, HUFFINGTON POST (Apr. 26, 2016, 6:41 PM), http://www.huffingtonpost.com/entry/ex-convict-voting-rights_us_571fb9d5e4b0b49df6a95746.

⁹⁷ See Lynn Eisenberg, Note, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 576 (2012) (noting that “the ‘laboratories of democracy’ approach can and has applied to the expansion of voting rights,” including through the repeal of felon disenfranchisement rules).

⁹⁸ Usman Ahmed et al., *A Municipal Right to Vote*, NAT'L CIVIC REV., Summer 2008, at 52, 52, http://deepblue.lib.umich.edu/bitstream/handle/2027.42/60453/215_ftp.pdf?sequence=1.

⁹⁹ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 647 (1998); David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases: Lessons from Local Government Law*, 15 ELECTION L.J. 247, 247 (2016).

of the state and locality, at least eighteen years old, and not mentally incompetent.¹⁰⁰ In addition, under the U.S. Constitution, municipalities may not discriminate on the basis of sex, race, or other protected characteristics,¹⁰¹ and local jurisdictions also may not limit the electorate by espousing a narrow view of who they believe has an actual stake in the outcome.¹⁰² Federal and state statutes also prevent discrimination in voting.¹⁰³ Thus, if legislating directly on *who* may vote, local jurisdictions can go nowhere besides up, expanding voter access.

With greater attention to voting rules, however, municipalities also could enact indirect measures to restrict voting. Jurisdictions could, for example, legislate on where to place precincts, reduce the number of machines at certain polling sites, or make redistricting decisions that effectively exclude some people from the relevant jurisdiction.¹⁰⁴ Although not about voter qualifications per se, these rules could effectively hamper the right to vote for some people. In fact, in the wake of the Supreme Court’s decision in *Shelby County v. Holder*¹⁰⁵ invalidating a provision of the Voting Rights Act, many (typically Republican-controlled) jurisdictions have passed laws that have the goal, or at least effect, of disenfranchising minority voters.¹⁰⁶ For this reason, courts should train a more skeptical eye on measures that *restrict* the right to vote. From a normative perspective, we should encourage more, not less, voter participation as a means of creating a better functioning and more representative democracy. The more people who participate, the more likely the winning candidate actually will reflect the desires of the majority of the population, thereby improving the representative’s legitimacy. Thus, enfranchising additional people should not come with a license to pass laws that restrict voting rights. In contrast, jurisdictions should freely experiment with laws that *expand* voter access in a nondiscriminatory way. That is, measures that expand the right to vote are qualitatively

¹⁰⁰ See U.S. CONST. amend. XIV, § 2; Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014) (highlighting state constitutional rules for voter eligibility); see also Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 283 (pointing to Section 2 of the Fourteenth Amendment as delineating the scope of the constitutional protection for the right to vote); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) (arguing for an expansive understanding of Congress’s authority to regulate the right to vote under the Fourteenth Amendment).

¹⁰¹ See Douglas, *supra* note 100 at 151.

¹⁰² *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629, 632 (1969).

¹⁰³ See, e.g., 52 U.S.C. § 10301 (2012) (Federal Voting Rights Act); CAL. ELEC. CODE §§ 14025–14032 (West 2003) (California Voting Rights Act).

¹⁰⁴ See, e.g., *Arizona Democrats Say Cost-Saving Resulted in Voter Suppression*, WTKR (March 23, 2016, 3:11 PM), <http://wtkr.com/2016/03/23/arizona-democrats-say-cost-saving-resulted-in-voter-suppression/> (“Liberal activists are demanding an investigation into what they see as possible voter suppression as a result of Maricopa County officials’ decision to reduce the number of polling stations as a cost-saving measure.”).

¹⁰⁵ 133 S. Ct. 2612 (2013).

¹⁰⁶ See Harry Baumgarten & Jacob Zionce, *Shelby County v. Holder’s Biggest and Most Harmful Impact May Be on Our Nation’s Smallest Towns*, CAMPAIGN LEGAL CTR. (June 20, 2016), <http://www.campaignlegalcenter.org/news/blog/shelby-county-v-holder-s-biggest-and-most-harmful-impact-may-be-our-nation-s-smallest>; *Democracy Diminished: State and Local Threats to Voting Post-Shelby County*, ALABAMA V. HOLDER, NAACP LEGAL DEF. & EDUC. FUND (June 9, 2016), <http://www.naacpldf.org/publication/democracy-diminished-state-and-local-threats-voting-post-shelby-county-alabama-v-holder>.

different from rules that (directly or indirectly) restrict democratic participation, so local governing bodies and courts should treat the two kinds of measures differently.

Of course, states that oppose these local voter expansions could pass state laws that expressly preempt local action.¹⁰⁷ But states should not do so for all of the policy reasons discussed above: municipalities should have the power to dictate the scope of their own governmental structures and electorate, and localities should experiment and innovate with their voting rules. If a state legislature insists on preempting local voting laws, however, then the solution is to elect different state representatives who will support local democracy.

Conclusion

Strong policy arguments support an expansion of the right to vote for local offices. History shows that some individuals initially gained the right to vote through municipal ordinances. Enhanced local voting rights will produce a more representative local government, create a habit of voting for various groups such as younger voters that will ameliorate low turnout, and strengthen local democracy.

In some states, supporters of local voting rules must pass a state constitutional amendment or legislative fix. These states should change their laws to give municipalities a say in who can vote for local offices. In states where municipalities already have more control over their elections, any new voting rules may result in legal challenges. Courts should defer to local laws that expand the franchise, while training a more skeptical eye on voter restrictions. This deference best comports with a notion of democracy that favors inclusivity and permits local jurisdictions to experiment with different forms of representation.

The time is ripe, then, for every jurisdiction in the United States to expand the local electorate—for sixteen- and seventeen-year-olds, noncitizens (who are lawful permanent residents), nonresident property owners, felons, or anyone else that the local population believes has a sufficient tie to the community, stake in local governance, and cognitive ability. Local expansions of the right to vote will help to improve our democracy by including more people in the democratic process.

About the Author

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¹⁰⁷ See Richard Briffault, et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, ACS ISSUE BRIEF (Sept. 28, 2017), <https://aclaw.org/preemption>.

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