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**Lost Votes and Voices at the Margins--and Center--of American Politics:
The Disenfranchisement of Non-Citizens and Citizens of the Nation’s Capital**

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(*Outline—Not for Quotation or Attribution*)

“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” *Reynolds v. Sims*, 377 U.S. 533 (1964)

1. *Participation in the Schizophrenic Regime of American Politics.* American political institutions began on both a republican and exclusionary basis so that a proud ideology of full civic participation has always coexisted with a ferocious determination to exclude and disenfranchise outsider groups. Given the formal political exclusion of large numbers of people, there have always been informal modes of political participation by outsiders while insiders exercise the franchise and participate in government. During the long period of disenfranchisement between Reconstruction and the modern Civil Rights movement, for example, African-Americans developed a strong political culture in churches, community groups, and fraternal organizations. Similarly, there was a League of Women Voters in Washington, D.C. even before the citizens of modern Washington had home rule or the right to vote in presidential elections. Moreover, most significant expansions in the franchise have followed upon mass protest and agitation by the disenfranchised, who use First Amendment protest rights and civil disobedience to force the political system to respond and expand the franchise.
2. *Voting as the Paradigm Act of Citizenship.* In the United States, voting—like working for oneself—has been an emblematic act of the first-class citizen. Voting has both *instrumental* and *symbolic* functions. A tiny fraction of national sovereignty, it is a primary currency of political power wherever pluralist democracy obtains, and so it is necessary for groups to secure and exercise voting rights to pursue public agendas. But the vote also has immense symbolic and expressive social meaning. It “has always been a certificate of full membership in society,” with its value depending “on its capacity to confer a minimum of social dignity.” Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 2 (1991).
3. *The Struggle for Universal Suffrage and One Person-One Vote.* The original Constitution primarily left voting qualifications up to the states. The struggle to expand the franchise has been a political and constitutional struggle for national

democratic values and has encountered federalism-based “states’ rights” resistance at every turn: This is the history of controversy surrounding the 15th, 17th, 19th, 24th and 26th amendments. At the same time, the Supreme Court has struggled to articulate an Equal Protection-based doctrinal principle of “one person-one vote.” Although it seems intuitive today, there is nothing constitutionally or logically required about legislative districts of equal population. After all, many states had upper chambers based on county lines or geographic principles rather than population, and of course the U.S. Senate is still organized on that principle rooted in the “Great Compromise.” So why the doctrinal and rhetorical emphasis on “one person-one vote”? As Pam Karlan and Grant Hayden have both argued, our central democratic slogan is an “under-theorized” juridical principle. Professor Hayden has recently argued that it is our desire to avoid “interpersonal utility comparisons” that likely “drives us to an equiproportional standard.” Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 Mich. L. Rev. 213, 216 (2003). Although it would be more just, arguably, to have people’s votes register the strength and depth of their commitment (certainly many John Kerry supporters felt this would have been to their advantage in 2004), Hayden shows that this is not a technically or philosophically feasible system—thus, *faute de mieux*, we fall back on “one person, one vote.” Hayden’s fancy explanation would be more convincing had “one person one vote” emerged against a background of attempts to define and register the intensity of political preferences. The problem is that the phrase was developed by Bob Moses and the voting rights activists of the Student Non-Violent Coordinating Committee (SNCC) in the early 1960s to convince disenfranchised African-Americans in Mississippi to register to vote in the face of bitter and violent opposition by the local racist power structure. See Robert Moses and Charles Cobb, *Radical Equations: Math Literacy and Civil Rights* (2001). When the Warren Court adopted the phrase to define the requirements of Equal Protection, it was dismantling power structures that were not trying to read subtle patterns of voter preferences but rather trying to entrench their dominance and exclude large numbers of people from participation. So, as appealing as the theory of avoiding “interpersonal utility comparisons” may be, we should, rather, understand “one person one vote” as a “radical equation” expressing the moral equality and dignity of all citizens in American democracy.

4. *The Wavering Dynamics of Democratic Inclusion*: Now, it is tempting to depict the progress of democracy as a single linear development in which irrational barriers to participation are challenged and then fall. And certainly this Whiggish conception tells an important part of the story of the civilizing movements of American history. But some groups have actually *lost ground* over the centuries, and their experience helps us to see—along with the shocking and melancholy experience of African Americans between the end of Reconstruction and the modern Civil Rights Movement—that participatory democracy is not a single rising slope but a continuing see-saw struggle for political rights. So I want to invoke two social groups that were once mostly enfranchised in the United States but lost their voting rights over time.

5. *The Lost History of Non-Citizen Voting.* When the slave Republic of “Christian white men of property over the age of 21” began, the principal suffrage qualifications were those of race, gender, property, wealth, age and religion— not citizenship. Aliens could vote and run for office in most states--just so long as they were wealthy Christian white males over the age of 21. The states defined their own electorates, made their own citizens and treated U.S. citizenship in the nascent Republic as an essentially irrelevant factor for local political participation. Natural rights theory and democratic ideology (no-taxation-without-representation, consent of the governed) were routinely invoked by citizens and courts to defend alien suffrage policies. My law review article, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993), canvasses the twists and turns of alien suffrage over the centuries in detail, but one important theme deserves notice here. While war has tended to both generate outsider demands for democratic rights and create the political and ideological conditions for suffrage expansion (i.e. the American Revolution and abolition of the property requirement, the Civil War and the 15th Amendment, World War I and the 19th Amendment, Vietnam and the 26th Amendment), war has had the opposite effect for aliens. While outsiders seeking voting rights like African-Americans and women have been able to catch the waves of nationalism associated with war and military mobilization, non-citizens have been swamped and battered by these waves. Thus, the War of 1812 momentarily halted the spread of alien suffrage and the last states to practice it stopped after the nationalistic fervor of World War I. But there is a significant exception to the pattern and that is the Civil War. Alien suffrage had been a bone of contention between the north and the south leading up to secession, and the white South rightly saw most immigrants as hostile to slavery. Many of the slave-focused fights in the Senate over statehood admissions also featured harsh conflicts over alien voting. Indeed, Article I of the Confederate Constitution specifically forbade alien voting at any level of the Confederate government. After the war ended on a high note for immigrants (with 25% of the Union army being aliens), and as the western states sought to attract population, non-citizen voting spread quickly across the country. But the xenophobic and anti-immigrant passions of the early 20th century led most states to abandon non-citizen voting. Today, non-citizen voting is no longer practiced at the state (and therefore federal) level, but numerous municipalities have non-citizen voting policies and a surprisingly powerful movement for non-citizen voting has spread across the country (San Diego, New York, Amherst) since my hometown of Takoma Park adopted it in the early 1990s. A proposal for non-citizen voting by parents in San Francisco school board elections was just narrowly defeated in November.
6. *The Loss of Representation for Citizens in the Capital City.* When the nation was formed, qualified citizens living on the land that is now the District of Columbia enjoyed full political rights and voting representation in the U.S. Congress. Even after the states of Maryland and Virginia ceded land to Congress in 1790, residents of the new federal “District” continued to vote for Senators and Congressmen from Maryland and Virginia (depending on which part of the

- District they lived in). Indeed there were even Maryland and Virginia Congressmen whose residences were within the boundaries of the District. *See Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. (1999) 39, 82. Yet, when the Organic Act was passed and a new local government was organized for the District of Columbia in 1800, Washingtonians suddenly lost federal representation. Although there have been periods of limited “home rule” and Congressional permission for the District to have a “non-voting Delegate” in the U.S. House (including today), the people of Washington have been denied voting representation in Congress for more than two centuries and are now the only residents of a capital city on earth denied the right to participate in their national legislature. In *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C) (three-judge court)(per curiam), *aff’d sub nom*, a three-judge panel split 2-1 but found that Congressional disenfranchisement of the nearly 600,000 American citizens living in the District of Columbia does not violate Equal Protection, Due Process or the Privileges and Immunities of citizenship. Thus, a population of hundreds of thousands of taxpaying, draftable American citizens has no voting representation in the Congress that is not only their national legislature but their state legislature as well under the terms of the District Clause contained in Article I, section 8, Clause 17. This is deemed to be implicit and required by the constitutional regime. A drive for a constitutional amendment to give the District a number of Senators and representatives equal to what it would be entitled if it were a state passed both houses of Congress by more than two-thirds in 1978, but languished in the states, with only 17 ratifying. A campaign for statehood admission throughout the 1980’s fizzled in Congress when it was rejected 2-1 on the House floor in 1993 and never even was considered by the Senate. Today there are several outstanding proposals, including Del. Norton’s bill to grant the District full representation by way of statute and a similar bill by Congressman Tom Davis (R.-Va.) that would give the District’s Delegate the right to vote but also add another member from the state of Utah. None of these proposals is considered to have any real chance of passage in the new Congress.
7. *How the Disenfranchised Win the Vote.* It is an obvious yet unexplored dynamic of American political history that the enfranchised have enfranchised the disenfranchised. How does this happen? The marginalized appeal to common democratic principles and universal values of equal dignity, make common cause with enfranchised groups, try out different political tactics, and demonstrate their civic merit and virtue in different ways. The suffragettes, for example, appealed to founding principles of liberty, equality and democracy; made alliances with male groups; appealed at different times to abolitionist and anti-racist sentiments and also, later on, to white supremacist and racist sentiments; engaged in civil disobedience by chaining themselves to the White House fence and also demonstrated their patriotism in the World War I civil mobilization effort.
 8. *Can Washingtonians win representation in Congress?* The statehood drive has languished. The idea of statutory enfranchisement has seized few people’s imagination, invites all kinds of constitutional doubts and has little political constituency at this point. The most promising avenue for D.C. is to link up with widespread social anxiety about the vulnerability and tenuousness of voting rights

- generally and lead a national movement for a constitutional amendment to guarantee the right to vote. Such an amendment would (a) enfranchise more than 9 million disenfranchised Americans (a majority-Hispanic and African-American population larger than that of nine states that includes more than 4 million U.S. citizens living in Puerto Rico, American Samoa, Guam and the Virgin Islands, nearly 5 million citizens who have been disenfranchised because of felony criminal convictions--including more than one million who have been released from prison and yet are disenfranchised for life short of a gubernatorial pardon--and the District population itself); (b) reverse the Supreme Court's determination in *Bush v. Gore* that the "individual citizen has no federal constitutional right to vote for electors for the President of the United States," 531 U.S. 98, 104 (2000), by guaranteeing that the state's presidential electors are awarded by reference to the popular vote and not the independent decisions of the state legislature; (c) require states to protect the votes of citizens by ceasing the use of poor technology, registration obstacles, flawed purge lists and other devices that disenfranchise haphazardly and randomly; and (d) subject the pervasive discriminatory limitations on third party and independent candidates to heightened constitutional scrutiny by guaranteeing fundamental political rights. The campaign for a right-to-vote will have immediate national appeal. In order to make it multi-partisan, it should be linked to the campaign to amend the Constitution to allow naturalized U.S. citizens to run for president, the so-called "Schwarzanegger amendment." This amendment deserves support as a matter of constitutional principle since every citizen should have the right to run for president and naturalized citizens presently serve as governors of two of our biggest states (California—Schwarzanegger and Michigan—Jennifer Granholm).
9. *Making Non-Citizens Politically Visible at the Local Level.* The voteless are civically invisible most of the time, and we now have more than 10 million immigrants to the U.S. who are not citizens and, with current naturalization waiting periods of up to ten years, will not be any time soon. The old-fashioned democratic and natural rights principles justifying local alien suffrage may find a new lease on life in the context of massive immigration and the processes of economic and social globalization. The locality may be the displaced individual's best hope for meaningful political participation and the world's best hope for countering the deracinating effects of the new global economic system. The European Union has granted citizens of member nations the right to vote in local elections wherever they are living in Europe, and this logic has a growing persistence in the U.S. as well. However, the insecurity attendant to globalization and the anxieties about immigrants released after the horrors of 9/11 also make people fearful of immigrant political participation. The cases of Takoma Park and San Francisco have important lessons for the future of non-citizen voting in local elections in terms of school-based organizing, xenophobia, racial conflict, business backlash, and political idealism.
 10. *The Role of Law Schools and Law Professors.* The late Judith Shklar distinguished between passive and active justice. Passive justice is a fair reading and enforcement of the existing rules; active justice is testing the existing body of rules against the claims of people who are not include or represented in the

current legal structure. Law schools and professors teaching about political democracy have done an excellent job bolstering the mechanisms of “passive justice” but have not generally made themselves of service to the claims of active justice. In the field of political democracy, the active claims by outsiders for voting and participatory rights are compelling. To advance “engaged scholarship,” in the words of our conference theme, we need to connect to the political needs of the disenfranchised. We might begin with the outstanding law schools in Washington, D.C., where there is a struggle for representation in Congress and also a move to grant non-citizens voting rights in local elections.

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