

VIRGINIA LAW REVIEW ONLINE

VOLUME 110

JULY 2024

119–158

ESSAY

EXPANDING DEMOCRACY: THE CASE FOR ENFRANCHISING NONCITIZENS IN LOCAL ELECTIONS

*Maya Kammourieh**

*In the wake of recent state-led movements to restrict voting rights in the United States, New York City passed a law expanding local voting rights. Intro 1867-A defines municipal elections as the “designation, nomination[,] and election process for the offices of mayor, comptroller, public advocate, city council member, and borough president.” This law limits “municipal voters” to lawful permanent residents and noncitizens authorized to work in the United States who have been residents of New York City for at least thirty consecutive days by the date of a given election and who meet all other voting registration requirements under election law. Intro 1867-A was subsequently struck down on appeal on February 21, 2024, when a New York appeals court held that it violated the New York State Constitution. This Essay is the first to argue that *Fossella v. Adams* should be reversed by proposing a reading of the New York Constitution that permits enfranchising noncitizens at the local level and providing a policy-driven analysis that supports this framework. This examination*

* J.D., University of Virginia School of Law, 2024. I would like to express my gratitude to Vice Dean Michael Gilbert for the invaluable discussions and feedback that assisted me in writing this piece. I am also thankful to Professor Amanda Frost, Catherine Ward, Sheena Patel, Jamie Miller, and the editors of the *Virginia Law Review*, especially Cameron Beach, for their thoughtful suggestions. Writing this piece would not have been possible without the unwavering support of my family: Manal, Maher, Omar, Amal, and Christopher.

is especially important since the Fossella challenge is not unique to New York; instead, the movement to enfranchise noncitizens at the local election level is rapidly growing nationwide. Markedly, a comparable law was recently challenged without success in the United States District Court for the District of Columbia on similar grounds. Thus, Intro 1867-A's future is pivotal in shaping the landscape of noncitizen voting rights in local elections.

INTRODUCTION

In the wake of state-led movements to curtail voting rights in the United States, New York City boldly enacted a law expanding local voting rights to enfranchise eligible noncitizens. In January 2020, City Council member Ydanis Rodriguez introduced Intro 1867-A, which, after a decisive 33-14 City Council vote, became law in January 2022.¹ Intro 1867-A created an uncommon novel class of “municipal voters” limited to (1) “lawful permanent residents” and (2) *noncitizens* “authorized to work” in the U.S. who (i) have been residents of New York City for at least thirty consecutive days before a given election and (ii) meet “all [other voting] qualifications” under “election law.”² As a result, eligible noncitizens are permitted to vote in elections for municipal offices but are expressly prohibited from voting for any state or federal office, political party position, or on any state or federal ballot question.³

This law stands out as unusual because it meaningfully increases New York State’s total number of voters by enfranchising approximately 800,000 noncitizens directly affected by municipal policies, thus empowering them with a voice they would not have otherwise possessed.⁴ New York City is now the largest U.S. city to extend local voting rights to noncitizens, joining other municipalities including those in California, Maryland, and Vermont.⁵

¹ Int. 1867-2020, N.Y.C. Council (2022), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4313327&GUID=DF600BDA-B675-41D8-A8BD-282C38DC4C62> [<https://perma.cc/SR3F-VJQZ>].

² N.Y.C. Charter, ch. 46-A, § 1057-AA(a) (2022).

³ *Id.* (defining “municipal office” as “the offices of mayor, public advocate, comptroller, borough president, and council member”); *id.* § 1057-RR.

⁴ Els de Graauw, *New York City Restores Local Voting Rights for Noncitizens*, EUI Global Citizenship Observatory (Feb. 8, 2022), <https://globalcit.eu/new-york-city-restores-local-voting-rights-for-noncitizens/> [<https://perma.cc/6MDT-KMGN>].

⁵ *Id.*

This significant change sparked immediate controversy. Two days after Intro 1867-A became law, a group of plaintiffs—including seventeen U.S. citizens, the New York Republican State Committee, and the Republican National Committee—filed a complaint in the New York Supreme Court challenging the validity of the law under the New York Constitution, New York Election Law, and the New York Municipal Home Rule Law.⁶ The complaint alleged that Intro 1867-A would dilute U.S. citizens’ votes, including those of the voter plaintiffs, by introducing new voters likely to impact election outcomes.⁷ It also argued that the legislation would require the officeholder plaintiffs to revise their campaign tactics to account for this “sizeable change” in the electorate’s makeup and compel “the political party plaintiffs to ‘adjust their strategies’” to elect Republicans in New York.⁸ On June 27, 2022, the trial court granted the plaintiffs’ permanent injunction request in *Fossella v. Adams*, holding that the law violated the New York Constitution, New York Election Law, and the New York Municipal Home Rule Law.⁹

The defendants subsequently challenged this injunction, and on February 21, 2024, a New York appeals court ruled that the lower court had correctly invalidated Intro 1867-A, determining it contravened the New York Constitution and the Municipal Home Rule Law.¹⁰ However, the appeals court identified an error in the trial court’s decision to void the legislation based on a violation of the New York Election Law, leading to a modification of the order and its return to the Supreme Court of Richmond County for entry of judgment.¹¹

In striking down the law as unconstitutional under Article II, Section 1 of the New York Constitution, the court focused on two inquiries: (1) whether “citizen” refers to U.S. citizens or New York citizens, and (2) whether “every election for all officers elected by the people” encompasses both municipal and statewide elections, or statewide elections exclusively.¹² The court adopted a narrow construction of the term “citizen” as used in the New York Constitution, interpreting it to

⁶ *Fossella v. Adams*, 206 N.Y.S.3d 611, 618 (2024).

⁷ *Id.* at 619.

⁸ *Id.*

⁹ *Id.* at 618.

¹⁰ *Id.*

¹¹ *Id.* at 634.

¹² *Id.* at 626–27. The court also discussed the plaintiffs’ standing and Intro 1867-A’s constitutionality under New York Election Law and the New York Municipal Home Rule Law, but these issues are beyond the scope of this Essay.

refer only to U.S. citizens, thus excluding noncitizens.¹³ Further, it concluded that the plain language of Article II, Section 1 indicates that the clause covers both municipal and statewide elections, noting the lack of specific language to restrict its application to statewide elections only.¹⁴ The ruling has now been appealed to the state's highest court.¹⁵

This Essay is the first to argue that *Fossella v. Adams* was wrongly decided and should be reversed by the New York Court of Appeals. Part I surveys the historical landscape of noncitizen suffrage in the United States. Part II posits a framework that supports reading the New York Constitution as enfranchising noncitizens at the local election level. Part III explores policy considerations that support this line of reasoning and refutes some of the concerns mentioned in *Fossella*.

These analyses hold particular importance given that the challenge posed by *Fossella* is not unique to New York; rather, the push for noncitizen enfranchisement at the local election level represents a rapidly growing trend across the United States. Notably, a comparable municipal law was challenged on vote-dilution grounds and upheld in the United States District Court for the District of Columbia.¹⁶ Success on appeal is possible, as evidenced by similar laws that, despite being overturned at the lower court level, have later been upheld.¹⁷ Although the outcomes of

¹³ *Id.* at 627.

¹⁴ *Id.*

¹⁵ Emily Ngo, *New York City Council Appeals Decision to Strike Down Non-Citizen Voting Law*, Politico (Mar. 25, 2024, 1:57 PM), <https://www.politico.com/news/2024/03/25/new-york-city-council-appeals-decision-to-strike-down-non-citizen-voting-law-00148854> [<https://perma.cc/3AKU-8NX3>].

¹⁶ See, e.g., *Hall v. D.C. Bd. of Elections*, No. 23-cv-01261, 2024 WL 1212953 (D.D.C. Mar. 20, 2024). In *Hall*, petitioners challenged D.C. Act 26-640, which eliminates the prior citizenship requirement for voting in municipal elections, and argued that this law dilutes the vote of U.S. citizen voters in the District by enfranchising noncitizens, including undocumented ones, who do not have a fundamental right to vote in the United States nor a constitutional right to govern the United States. *Id.* at *3–5. Intro-1867-A differs from D.C. Act 26-640 as it does not apply to the estimated 500,000 undocumented immigrants residing in New York City. On March 20, 2024, *Hall* was dismissed on standing grounds, so the D.C. Act was upheld. *Hall*, 2024 WL 1212953, at *1. However, the U.S. House of Representatives recently voted to block Act 26-640, so it will not take effect. Meagan Flynn, *House Votes to Block Noncitizen Voting in D.C. Elections—Again*, Wash. Post (May 23, 2024), <https://www.washingtonpost.com/dc-md-va/2024/05/23/house-vote-dc-noncitizen-voting/> [<https://perma.cc/L7NR-PT8A>].

¹⁷ In 2018, San Francisco implemented a law permitting eligible noncitizens to participate in school board elections. This law was overturned in July 2022 when the San Francisco Superior Court ruled that it contravened the California Constitution. See *Lacy v. San Francisco*, No. CPF-22-517714, slip op. at 2, 7 (Cal. Super. Ct. July 29, 2022). However, in

such cases will ultimately depend on their respective state laws, this Essay's analysis of *Fossella* provides a workable framework pivotal in shaping the ongoing national project of noncitizen voting rights in local elections.

I. A HISTORICAL WINDOW INTO NONCITIZEN VOTING

An analysis of the record of noncitizen suffrage in the U.S. demonstrates a pivotal historical reality: noncitizen voting is firmly embedded in this nation's history.¹⁸ Part I distills key elements of this practice. Accounting for this history serves two objectives: First, it refutes the notion that noncitizen voting is a contemporary or radical innovation. Second, it lays the foundation for the argument that the reintegration of noncitizen suffrage at the local election level is not an experimental initiative, but rather a re-engagement with a longstanding and democratic American tradition.

A. A Practice Rooted in History: Noncitizen Voting in the United States

During the 1700s and 1800s, the issue of noncitizen suffrage was surrounded by oscillating sentiments of support and opposition. This Essay posits that this instability is a symptom of the U.S. Constitution's silence on the eligibility of noncitizens to participate in the local electoral process. This absence of explicit guidance or prohibition in federal law thus afforded states the autonomy to engage in legislative experimentation, culminating in a disparate array of laws.

Noncitizen suffrage in the U.S. traces its origins to the early colonial period, when eligibility to vote was contingent upon being a "local inhabitant[] or resident[]."¹⁹ After the American Revolution, many states built on this practice by granting noncitizens "state citizenship."²⁰ The War of 1812 marked a negative turning point for this momentum when a

2023, an appellate court reversed and remanded, finding that charter cities possess the authority under the California Constitution to allow noncitizens to vote in school board elections. See *Lacy v. San Francisco*, 312 Cal. Rptr. 3d 391, 398, 413 (Cal. Ct. App. 2023).

¹⁸ See generally Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993) (discussing the presence of noncitizen voting throughout American history).

¹⁹ *Id.* at 1399.

²⁰ *Id.* at 1400 (internal quotation marks omitted) (citing the example of German populations being allowed to vote in Pennsylvania as an example of this practice).

number of recently-admitted states began to restrict the franchise to U.S. citizens. This exclusion was instigated by two factors: first, a substantial influx of immigrants whose ethnic origins were distinct from “English stock,” thereby fostering perceptions of them as “incapable of ready assimilation,” and second, the abolition of property ownership as a prerequisite for suffrage, introducing the possibility of granting voting privileges to a new group of economically disadvantaged noncitizens, who were often deemed unsuitable for voting.²¹

However, given the role of “alien suffrage” as an enticement to bolster immigration, it once again gained traction during the 1850s and 1860s when Northerners started advocating for immigrants’ political influence as part of their broader opposition to slavery.²² The resulting “Wisconsin Solution” curbed the restrictive trend spurred in 1812 and revived an expansion of noncitizen voting by extending the franchise to “declarant aliens,” who were noncitizens who had declared their intention to become citizens.²³ Similar provisions were subsequently passed in Oregon and Minnesota in 1848 and 1849.²⁴ According to then-professor Jamie Raskin, this transformed voting into “a *pathway* to citizenship rather than a substitute for it: *noncitizen* voting became *pre-citizen* voting.”²⁵

In the aftermath of the Civil War, numerous states, including former Confederate states, embraced noncitizen voting as an established electoral practice by integrating the concept of “declarant alien suffrage” into their state constitutions.²⁶ This expansion was partially motivated by a sense of equity toward white male noncitizens, many of whom had been conscripted into the Union Army during the Civil War, constituting approximately 25% of its ranks.²⁷ Moreover, Supreme Court jurisprudence did not disavow this practice and affirmed that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage,” thus bolstering this movement.²⁸ By the mid-

²¹ *Id.* at 1403–04.

²² *Id.* at 1409.

²³ *Id.* at 1406–07.

²⁴ *Id.* at 1407.

²⁵ *Id.*

²⁶ *Id.* at 1414.

²⁷ *Id.* at 1409–10, 1414–15. The state of emergency imposed by the COVID-19 pandemic and the crucial involvement of noncitizens on the front lines, especially in New York, can serve as a modern parallel to establish a duty of fairness toward noncitizens’ voting rights as the draft once did.

²⁸ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1875).

nineteenth century, nearly half of the states had at some point endorsed noncitizen suffrage, and for some, that lasted over half a century.²⁹

Despite this positive trend, the early twentieth century ushered in a second wave of restrictions on noncitizen voting. World War I reignited anti-immigration nationalist sentiments reminiscent of the War of 1812, wherein Catholic immigrants and others were portrayed as foreign enemies due to the “threat” that they posed to Protestant values in the United States.³⁰ Opposition to noncitizen voting was thus rekindled and primarily rooted in ideological and xenophobic movements instead of law. Consequently, the 1928 national election was the first in over a hundred years where no noncitizens “in any state had the right to cast a vote for a candidate for any office—national, state, or local.”³¹

B. State Discretion: Noncitizen Voting in New York

Early on, New York exercised the above-mentioned discretion delegated to states by rooting the practice of noncitizen voting in its constitution. Specifically, it introduced the broad concept of “citizenship,” which can be understood as state citizenship or U.S. citizenship, as a prerequisite to taking part in the electoral process. Since the U.S. Constitution does not clearly define “citizenship,” New York’s constitutional conventions and the various iterations of the New York Constitution sought to fill the gap.³²

New York has adopted four constitutions (1777, 1821, 1846, and 1894) and held eight constitutional conventions to amend those documents (1801, 1821, 1846, 1867, 1894, 1915, 1938, and 1967).³³ The 1894 New York Constitution, “revised in 1938 and amended over 200 times,” remains in place and is at the heart of *Fossella*.³⁴

²⁹ Raskin, *supra* note 18, at 1415.

³⁰ Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 4, 34 (2006).

³¹ Raskin, *supra* note 18, at 1416–17.

³² Laura-Eve Moss, *Democracy, Citizenship and Constitution-Making in New York, 1777–1894*, at 42 (1999) (Ph.D. dissertation, University of Connecticut) (on file with author) (“The founders left no blueprints defining the nature of citizenship. In fact, their contemporaries never closely analyzed the status of an ‘American citizen,’ which was a creation of the Revolution.”).

³³ *Constitutions and Constitutional Conventions*, N.Y. State Archives, <https://www.archives.nysed.gov/research/constitutions-and-constitutional-conventions> [<https://perma.cc/3PGS-3NBR>] (last visited Apr. 14, 2024).

³⁴ *Id.*

In its first iteration, the 1777 New York Constitution enfranchised New Yorkers based on residency status and economic criteria.³⁵ This emphasis on property ownership and residency stemmed from laws enacted between 1691 and 1701 that delineated suffrage requirements and limited the franchise to property-owning male residents.³⁶ To qualify to vote in 1777, one had to be a property-owning “male *inhabitant*” who had “personally resided” in a New York county for at least six months before an election.³⁷ In the U.S., “inhabitant” has historically been understood to include noncitizens. For example, an Illinois court “found it indisputable, as a matter of both textual interpretation and historical analysis, that the word ‘inhabitants’ in the Illinois Constitution’s suffrage provision was designed to include aliens and was not meant to be synonymous with [U.S.] ‘citizens.’”³⁸ Therefore, it is not historically anomalous to posit that the 1777 New York Constitution’s reference to “inhabitants” includes eligible noncitizens.

By 1790, a mere 10% of New York City’s male residents satisfied the property requirements necessary to vote for city officers.³⁹ This limited participation prompted a significant shift in voting qualifications, moving from residency and property-based criteria to “citizenship” as a requisite to vote in the 1821 New York Constitution. The primary impetus for this transition was an expansion of the electorate to ensure that all eligible U.S. citizens had access to the voting process, which was then considered a privilege contingent on service to the state instead of an inherent right. This reform sought to abandon the restrictive “freeholder” model rather than confine voting rights to U.S. citizens, aiming to expand the electorate by including residents who, despite meeting other eligibility criteria, had been excluded due to their property ownership status.⁴⁰

Indeed, no iteration of the New York Constitution explicitly supports or prohibits noncitizen voting in local elections. From 1969 to 2002, New

³⁵ N.Y. Const. art. VII (1777). The *Fossella* decision and the briefs submitted by appellants and respondents do not touch upon the legislative history surrounding Article VII (subsequently referred to as Article II, § 1 starting with the 1821 N.Y. Constitution). In the absence of such legislative history, this Essay seeks to provide some historical background to clarify the climate at the time of this provision’s enactment.

³⁶ Moss, *supra* note 32, at 48–49.

³⁷ N.Y. Const. of 1777, art. VII (emphasis added).

³⁸ Raskin, *supra* note 18, at 1404–05, 1405 n.74.

³⁹ Moss, *supra* note 32, at 54.

⁴⁰ *Id.*

York City allowed noncitizens to vote in local school board elections.⁴¹ This practice ended when school boards were disbanded, not because noncitizen voting itself was disavowed. This permissive stance contrasts with prohibitions other groups have faced when disenfranchised. For example, women were impliedly excluded from the right to vote in the initial four versions of the New York Constitution since the relevant provisions started with “male inhabitant[s]” or “male citizen[s].”⁴² Similarly, many African-Americans were expressly excluded in the early iterations of the New York Constitution.⁴³ While the ratification of the Fifteenth Amendment enfranchised African-American males, women remained excluded at the federal and state election levels until 1920 but were allowed to vote at the local election level in New York.⁴⁴ This model, wherein a group is excluded from participating in federal and state elections but is allowed to vote in local elections, should be applied to noncitizens. In other words, the fact that noncitizens are barred from voting in federal and state elections should not be a sufficient reason to prevent them from voting at the local level.

⁴¹ Matthew H. Frame, Conn. Off. Legis. Rsch., Noncitizen Voting (Oct. 25, 2022), <https://www.cga.ct.gov/2022/rpt/pdf/2022-R-0231.pdf> [<https://perma.cc/9V4L-LU3T>].

⁴² See, e.g., N.Y. Const. of 1777, art. VII; N.Y. Const. of 1821, art. II, § 1; N.Y. Const. of 1846, art. II, § 1; N.Y. Const. of 1894, art. II, § 1.

⁴³ See, e.g., N.Y. Const. of 1821, art. I, § 1 (“[B]ut no man of colour, [may vote] unless he shall have been for three years a citizen of this state . . . shall be seized and possessed of a freehold estate . . . over and above all debts and incumbrances charged thereon.”).

⁴⁴ Moss, *supra* note 32, at 77–78.

N.Y. State Constitutional Restrictions on Voting Over Time⁴⁵

	Race	Gender	Age	“Citizen”	Citizenship Duration	Resident / Inhabitant Distinction	General Exclusions
1777 Constitution	No	Yes	Yes (“full age”)	No	No	No (6 months county resident)	No
1821 Constitution	Yes	Yes	Yes (21 y/o)	Yes	No	Yes (1-year state inhabitant; 6 months county resident)	Yes
1846 Constitution	Yes	Yes	Yes (21 y/o)	Yes	Yes (10 days)	Yes (1-year state inhabitant; 4 months county resident)	Yes
1894 Constitution	No (abolished by 15A)	Yes	Yes (21 y/o)	Yes	Yes (90 days)	Yes (1-year state inhabitant; 4 months county resident; 30-day election district resident)	Yes
1938 Constitution	No	No (abolished by 19A)	Yes (21 y/o)	Yes	Yes (90 days)	Yes (1-year state inhabitant; 4 months county resident; 30-day election district resident)	Yes
Current Constitution	No	No	Yes (18 y/o)	Yes	No	No (30-day resident of state and county, city, or village)	Yes

In light of these historical developments, Raskin argued that alien suffrage now replaces former qualifications like property, wealth, or race.⁴⁶ However, considering that these other requirements have been invalidated, I question the necessity of mandating citizenship as a prerequisite for voting in local elections. This is especially pertinent when such a prohibition is neither grounded in federal nor New York State law, suggesting that it too may face a similar fate: being struck down.

⁴⁵ This chart lists characteristics used to determine the right to vote in each iteration of the N.Y. Constitution. See N.Y. Const. of 1777, art. VII; N.Y. Const. of 1821, art. II, § 1; N.Y. Const. of 1846, art. II, § 1; N.Y. Const. of 1846, art. II, § 2; N.Y. Const. of 1894, art. II, § 1; N.Y. Const. of 1894, art. II, § 2; N.Y. Const. of 1938, art. II, § 1; N.Y. Const. of 1938, art. II, § 3; N.Y. Const. art. II, § 1; N.Y. Const. art. II, § 3.

⁴⁶ Raskin, *supra* note 18, at 1392–94.

II. NEW YORK CONSTITUTION: PATHWAYS TO ENFRANCHISING NONCITIZENS IN LOCAL ELECTIONS

Despite this historical tradition of alien suffrage in New York and the United States, *Fossella* held that a plain reading of Article II, Section 1 of the New York Constitution finds that “every citizen” means every citizen of the *United States*, not of New York State, and that any category that is omitted or not included in this provision (i.e., noncitizens) was intended to be omitted and excluded.⁴⁷

Part II restates *Fossella*’s main takeaways and introduces the state constitutional provisions at the heart of the court’s reasoning. It then presents two constitutionally permissible arguments that pave the way for noncitizen voting at the local election level in New York.⁴⁸ *First*, by providing two readings of “citizen” in Article II, Section 1 which do not exclude noncitizens from the right to vote. *Second*, by positing that, should one instead wish to rely on *Fossella*’s exclusive reading of “citizen,” Article II, Section 1 should not be read to apply to local elections in New York; instead, Article IX, which addresses local governments, should govern.

A. Fossella and the New York Constitution’s Current Suffrage Provisions

1. Fossella: Main Takeaways

Fossella struck down Intro 1867-A on the grounds that it violated the New York Constitution and the Municipal Home Rule Law. To exclude noncitizens from voting in local elections, the court relied on two primary lines of reasoning.

First, the court found that “every citizen” in Article II, Section 1 means every citizen of the *United States*.⁴⁹ Drawing negative inferences based on the canon of *expressio unius* discussed in the section below, the court reasoned that the absence of any mention of noncitizens constitutes “an irrefutable inference . . . that noncitizens were intended to be excluded

⁴⁷ *Fossella v. Adams*, 206 N.Y.S.3d 611, 627 (2024) (emphasis omitted).

⁴⁸ In addition to ample support for these arguments in text and history, as demonstrated in this section, the *Fossella* partial concurrence and partial dissent endorsed the applicability of Article II, Section 1 to statewide elections *only* and of Article IX to municipal elections. *Id.* at 639–40 (Wan, J., concurring in part and dissenting in part).

⁴⁹ *Id.* at 627.

from those individuals entitled to vote in elections.”⁵⁰ Notably, the court found it persuasive that the New York Constitution elsewhere references “citizens of the state” in particular.⁵¹

Second, the court turned to the “plain language” of the New York Constitution, rather than New York caselaw, to determine that Article II, Section 1 covers both municipal and statewide elections.⁵² The majority reasoned that the term “people” in Article II, Section 1—which refers to the “people of the State of New York”—should not be exclusively associated with statewide elections, as voters in municipal elections are “various subsets” of New York’s population.⁵³ The court also indicated that the mention of municipal elections in the text suggests an intention to encompass them within Article II’s scope.⁵⁴

2. *New York Constitution Suffrage Provisions: Overview and Ambiguity*

To better understand the court’s reasoning as to the meaning of “citizen,” I will briefly review the suffrage provisions discussed above and then present plausible alternate readings that allow noncitizen voting in local elections.

Article II, Section 1 secures the right to vote for individuals who are (i) citizens, (ii) at least eighteen years old, and (iii) residents for at least thirty days preceding the election of the state and county, city, or village they seek to vote in. To fully comprehend the scope of voter eligibility in New York, this provision should be read in conjunction with Article II, Section 3, which enumerates exclusions from the right to vote, and Article IX, Section 3(d)(3), which defines “people” (a term appearing in Article II, Sections 1 and 3) as “persons entitled to vote as provided by Article II, Section 1.” Article II, Section 1 provides as follows:

Every *citizen* shall be entitled to vote at every election for all officers elected by the *people* and upon all questions submitted to the vote of the people provided that such citizen is *eighteen years of age or over*

⁵⁰ *Id.* at 626.

⁵¹ *Id.* at 627.

⁵² *Id.* at 626–27 (noting the lack of language specifically restricting the provision to statewide elections).

⁵³ *Id.* at 628 (internal quotation marks omitted).

⁵⁴ *Id.*

and shall have been a *resident of this state*, and of the *county, city, or village* for *thirty days* next preceding an election.⁵⁵

Further, Article II, Section 3 provides as follows:

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.⁵⁶

Finally, Article IX, Section 3(d)(3) provides as follows:

Whenever used in this article the following terms shall mean or include:

“People.” Persons entitled to vote as provided in section one of article two of this constitution.⁵⁷

Contrary to *Fossella’s* portrayal of this language as “plain and precise,”⁵⁸ none of these provisions directly prohibit noncitizens from voting in local elections, nor do they expressly define who is encapsulated by the “citizens” this section seeks to protect. When confronted with such ambiguity, the U.S. Supreme Court often refers to dictionaries that are contemporary with the text at issue to identify or clarify any ambiguity.⁵⁹

Following the U.S. Supreme Court’s lead, I will highlight the ambiguity arising from “citizen” in Article II, Section 1 by providing an overview of the available definitions associated with “citizen” at the time this provision was first (1) enacted (i.e., as Article VII in the 1777 New York Constitution) and (2) amended to include “citizen” instead of

⁵⁵ N.Y. Const. art. II, § 1 (emphases added).

⁵⁶ N.Y. Const. art. II, § 3.

⁵⁷ N.Y. Const. art. IX, § 3(d)(3).

⁵⁸ *Fossella*, 206 N.Y.S.3d at 626.

⁵⁹ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (“Before addressing the verbs ‘keep’ and ‘bear,’ we interpret their object: ‘Arms.’ The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘[w]eapons of offence, or armour of defence.’” (quoting *Arms*, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773))).

“inhabitant” (i.e., as Article II, Section 1 in the 1821 New York Constitution). While critics may argue that the mainstream usage of “citizen” should be adopted (i.e., U.S. citizens), common usage may be inapplicable when a term is used in a particular context to refer to a narrower technical term as prescribed by the legislature.⁶⁰

In 1777, when the first New York Constitution—which enfranchised “inhabitants” rather than “citizens”—was ratified, the meaning of “citizen” clearly did not exclude noncitizens. In 1806, Noah Webster’s first published dictionary defined “citizen” as “one inhabiting a city, a freeman,” mirroring the language of the 1777 New York Constitution and emphasizing residency, not federal citizenship.⁶¹ By 1828, however, Webster’s second dictionary offered five definitions:

- (1) The native of a city, or an inhabitant who enjoys the *freedom and privileges of the city* in which he resides; the freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises.
- (2) (omitted)
- (3) An inhabitant; a dweller in any city, town or place.
- (4) In a *general sense*, a native or *permanent resident* in a city or country; as the *citizens* of London or Philadelphia; the *citizens* of the United States.
- (5) (omitted)⁶²

While some of these definitions, notably (3), (4), and the first part of (1), support allowing certain noncitizens (as outlined in Intro 1867-A) to vote in local elections if they are citizens of the *state*; others support *Fossella*’s restrictive reading that excludes noncitizens from the franchise. Therefore, contemporary dictionaries published around the time Article II, Section 1 was enacted accommodate both conflicting interpretations of Article II, Section 1: “citizen” as “citizen of New York” and as “citizen of the United States.”

⁶⁰ See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974) (“While a layman might well assume that time of day worked reflects one aspect of a job’s ‘working conditions,’ the term has a different and much more specific meaning in the language of industrial relations.”).

⁶¹ Citizen, *A Compendious Dictionary of the English Language* (Hartford, Hudson & Goodwin 1806).

⁶² Citizen, *American Dictionary of the English Language* (New York, S. Converse 1828) (emphases added).

B. “Citizen” in Article II, Section 1 Does Not Exclude Noncitizens

In cases of textual ambiguity insufficiently clarified by dictionaries, the U.S. Supreme Court has often relied on canons of construction to interpret ambiguous constitutional or statutory language.⁶³ Following suit, I consider *expressio unius est exclusio alterius* (“*expressio unius*”), a commonly used statutory interpretation canon also invoked by the court in *Fossella*, which means “to express or include one thing implies the exclusion of the other, or of the alternative.”⁶⁴

Applying this linguistic canon, the best interpretation of Article II, Section 1 is one that does not exclude noncitizens from the term “citizen.” Two permissible readings support this argument. First, a narrower construction finds that Article II, Section 1 secures the rights of U.S. citizens without excluding noncitizens, particularly since otherwise eligible U.S. citizens have been historically disenfranchised, as demonstrated above. Second, a broader construction of Article II, Section 1 finds that “citizen” refers to “citizen of *New York*,” rather than “citizen of the *United States*.”

For those unconvinced by the argument that Article II, Section 1 does not exclude noncitizens from voting in local elections, I later propose that Article II, Section 1 should not apply to local elections. Instead, Article IX, which governs local elections and applies to “people of the local government” instead of “citizens,” should delineate local elections’ voting requirements.⁶⁵

I. Expressio Unius and Ambiguous Provisions

Fossella construed “citizen” as “citizen of the United States” rather than “citizen of New York” based in part on the fact that language referencing “citizens of the state” appears elsewhere in the New York Constitution.⁶⁶ The court writes that “the language used, if plain and precise, should be given its full effect.”⁶⁷ However, the majority takes for

⁶³ See, e.g., *Haaland v. Brackeen*, 143 S. Ct. 1609, 1670 (2023) (Thomas, J., dissenting) (“[T]he Founders deliberately chose to enumerate one power specific to Indian tribes . . . Because the Constitution contains one Indian-specific power, there is simply no reason to think that there is some sort of free-floating, unlimited power over all things related to Indians. That is common sense: *expressio unius est exclusio alterius*.”).

⁶⁴ *Expressio Unius Est Exclusio Alterius*, Black’s Law Dictionary (11th ed. 2019).

⁶⁵ N.Y. Const. art. IX, § 1(b).

⁶⁶ *Fossella v. Adams*, 206 N.Y.S.3d 611, 627 (2024) (emphasis added).

⁶⁷ *Id.* at 626 (internal quotation marks omitted).

granted that the language used *was* indeed “plain and precise.” While some provisions of the New York Constitution explicitly define the requisite parameters for voting, there remains room for an ambiguous reading of “citizen” in Article II, Section I.⁶⁸

“Citizen” appears in several forms in the New York Constitution, including as a standalone (“citizen”) and as a term that is clarified by a qualifier when the drafters meant to communicate specificity (“citizen of the United States” and “citizen of this State”).⁶⁹

When the drafters meant to refer to U.S. citizens, they did so unequivocally. For instance, only “citizens of the *United States*” are eligible to serve as legislature members or assume the role of governor.⁷⁰ Moreover, in cases where “citizen” is used in its standalone form but is meant to be read as designating U.S. citizens, it is consistently qualified by a clarifying term immediately following it. For example, when discussing civil service, the New York Constitution provided that a member of the armed forces may be promoted provided they are a “*citizen* or an *alien* lawfully admitted for permanent residence in the United States and a resident of this state.”⁷¹ Here, “citizen” is most logically read as “citizen of the United States,” since it is differentiated from “alien[s] lawfully admitted for permanent residence.” Furthermore, the New York Constitution also explicitly delineates when it intends to refer to “citizens of New York.” For instance, it prohibits the legislature from auditing, allowing, or paying any claim which, “as between citizens *of the state*, would be barred by lapse of time.”⁷²

Given these variations, it becomes evident that the drafters of the New York Constitution retained a level of ambiguity in certain designations of the term “citizen” to allow for flexible interpretations that could adapt to the contemporary needs of the state. This Essay argues that Article II, Section 1 is one of those instances.

⁶⁸ This expansion is demonstrated by the removal of restrictive conditions based on characteristics like gender, age, race, tax, and literacy, as well as the requirement of minimum duration of citizenship. See, e.g., N.Y. Const. of 1777, art. VII (“male inhabitant of full age”); N.Y. Const. of 1821, art. II, § 1 (“male citizen of the age of twenty-one years”); N.Y. Const. of 1938, art. II, § 1 (“citizen of the age of twenty-one years”); N.Y. Const. art. II, § 1 (“citizen is eighteen years of age or over”); N.Y. Const. of 1821, art. II, § 1 (“shall have . . . paid a [property] tax to the state or county”); N.Y. Const. of 1938, art. II, § 1 (“unless such person is also able, except for physical disability, to read and write English”).

⁶⁹ An appendix to this Essay provides a chart referencing each of these iterations.

⁷⁰ See, e.g., N.Y. Const. art. III, § 7; N.Y. Const. art. IV, § 2 (emphasis added).

⁷¹ N.Y. Const. art. V, § 6 (emphases added).

⁷² N.Y. Const. art. III, § 19 (emphasis added).

In *Barnhart v. Peabody Coal Co.*, the U.S. Supreme Court confronted such ambiguity when interpreting the Coal Act and invoked *expressio unius* in its analysis.⁷³ *Barnhart* considered whether a law stating that a government agent “shall” act by October 1st was intended as a spur of action to meet that date or instead served as a strict deadline prohibiting actions *beyond* that date. The Court embraced the former interpretation, characterizing the statute as encouraging a spur to action, thus upholding the agent’s assignments beyond that date. In doing so, the Court softened the *expressio unius* canon and did not read in an automatic exclusion of any assignment made after the specified date.⁷⁴

Fossella offers a mirror inquiry. Here, the issue confronted is whether “citizen” in Article II, Section 1 (i) guarantees the rights of U.S. citizens without excluding noncitizens (i.e., narrow reading) or (ii) refers to “citizens of New York” instead of “the United States” (i.e., broad reading); or, as the *Fossella* Court found, (iii) restricts the right to vote to U.S. citizens. The Supreme Court’s reasoning in *Barnhart* should serve as a model for interpreting Article II, Section 1, as detailed below.

2. “Citizen” Secures the Rights of “U.S. Citizens” Without Excluding Noncitizens

A narrow construction of Article II, Section 1 reads the provision as securing the rights of U.S. citizens without affecting noncitizens. The drafters’ use of the mandatory “shall” should be understood as a “spur to action,” like *Barnhart*, to secure the rights of U.S. citizens.⁷⁵ A provision

⁷³ *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 156 (2003) (involving a challenge to assignments made after October 1, 1993, on the basis that the date set forth in the Coal Act determined a time limit on the Commissioner’s power to assign, so that a beneficiary not assigned on October 1, 1993 must be left unassigned for life); 28 U.S.C. § 9706(a) (2000) (stating that the Commissioner of Social Security “shall, before October 1, 1993,” assign each coal industry retiree eligible for benefits to an extant operating company or a “related” entity, which shall then be responsible for funding the assigned beneficiary’s benefits).

⁷⁴ *Barnhart*, 537 U.S. at 161 (“[A] statute directing official action needs more than a mandatory ‘shall’ before the grant of power can sensibly be read to expire when the job is supposed to be done.”). In *Barnhart*, the Court stated that *expressio unius* should only have force if the drafters considered the “unnamed possibility” and rejected it. *Id.* at 168. Therefore, the Court did not apply *expressio unius*, as there was no reason to read the challenged statute as implying that the Commissioner should not use her authority to make assignments beyond the October 1, 1993 date. *Id.* at 169. In contrast, as this Essay argues, the framers of the New York Constitution did not consider and reject the notion of noncitizens voting in local elections. Their intent with regards to this issue is not clear.

⁷⁵ N.Y. Const. art. II, § 1 (“Every citizen *shall* be entitled to vote.” (emphasis added)).

otherwise intending to exclude noncitizens should have incorporated more than a mandatory “shall” for that exclusion to be read in.

This straightforward textual reading is enhanced when the historical context of the New York Constitution is considered. As mentioned in Part I, eligible U.S. citizens were previously disenfranchised based on race, gender, and property ownership, which are arbitrary characteristics unrelated to one’s ability to vote effectively. Article II, Section 1 should thus be viewed as codifying a prohibition against such practices. Case law stemming from New York courts further strengthens the “liberalization” purpose of Article II, Section 1. For example, the state’s highest court in *Blaikie v. Power* articulated that the purpose of this provision “was solely to remove the disqualifications which attached to the person of the voter in earlier times and thereby assure to a citizen, qualified by age and residence, the same right to vote as every other similarly qualified voter possessed.”⁷⁶

The court in *Fossella*, however, found that Article II, Section 5 of the New York Constitution precludes this proposed reading of “citizen,” as the provision requires citizens to make “‘proper proofs’ of their entitlement to vote.”⁷⁷ Judge Wan’s partial concurrence and partial dissent disagreed, finding that Section 5 merely instructs the legislature to establish laws for registering voters and confirming their identities, and that exempting village elections from registration requirements does not imply that Article II, Section 1 inherently pertains to local elections.⁷⁸ Rather, as Judge Wan emphasized, this exemption pertains to the conduct of elections *in* towns and villages, not the election of town and village officers.⁷⁹

⁷⁶ *Blaikie v. Power*, 193 N.E.2d 55, 57 (N.Y. 1963) (citing *Johnson v. City of New York*, 9 N.E.2d 30, 32 (N.Y. 1937)). Lower courts in New York have similarly found that Article II, Section 1 should be read broadly. While not binding, this precedent should be viewed as persuasive authority that supplements the New York Court of Appeals’s binding precedent. See, e.g., *Kashman v. Bd. of Elections*, 282 N.Y.S.2d 394, 396 (N.Y. Sup. Ct. 1967) (“The amendment of Article 2, section 1 greatly broadened and liberalized the general qualifications voters now need to possess in order to vote in this state.”).

⁷⁷ *Fossella v. Adams*, 206 N.Y.S.3d 611, 626 (2024); see also N.Y. Const. art. II, § 5 (“Laws shall be made for ascertaining, by proper proofs, *the citizens* who shall be entitled to the right of suffrage hereby established, and for the registration of voters. . . . Such registration shall not be required for *town and village elections* except by express provision of law.” (emphases added)).

⁷⁸ *Fossella*, 206 N.Y.S.3d at 639 (Wan, J., concurring in part and dissenting in part).

⁷⁹ *Id.*

Echoing this line of reasoning, this Essay posits that the *Fossella* majority adopts an unnecessarily restrictive reading of Article II, Section 5. In addition to Judge Wan’s proposed reading, this section may plausibly be read as merely creating a carveout for municipal elections from “proper proof” registration unless expressly required by the law. Indeed, in a treatise on New York election law authored by John G. Saxe II, one of the delegates to the New York Constitutional Convention of 1915, Saxe cautioned against using Section 5 to limit the franchise, highlighting that “[t]he [New York] constitution thus guarantees freedom in voting . . . and the power of the legislature to regulate elections must be so exercised as *not to deny or impair* the franchise, rights and privileges of *members of the state*.”⁸⁰ Therefore, relying on text and history, Article II, Section 1 should be read as setting a floor—rather than a ceiling—that expands and secures the voting rights of U.S. citizens without excluding noncitizens.

3. “Citizen” Refers to “Citizen of New York,” Not “Citizen of the United States”

In declining to read “citizen” as “citizen of New York,” *Fossella* stated that there is “no basis to construe” it as such.⁸¹ However, a broad construction of Article II, Section 1 is permissible under *Barnhart* and a historical analysis of the text, which support a reading of the provision as extending the right to vote to eligible noncitizens.

In *Barnhart*, the Court relied on the purpose behind the Coal Act, which was designed to assign the greatest number of beneficiaries.⁸² Similarly, the current version of the New York Constitution aims to enfranchise as many eligible persons as constitutionally permissible. As early as the 1846 New York Constitution, a Bill of Rights was added, exemplifying the document’s overarching purpose to expand the franchise. Its first article (Article I, Section 1), which highlights its importance based on its placement, focused on prohibiting the disenfranchisement of all “*member[s]* of th[e] state,” which includes

⁸⁰ John Godfrey Saxe, *A Treatise on the New York Laws Relating to Elections 5* (final ed. 1918) (emphasis added).

⁸¹ *Fossella*, 206 N.Y.S.3d at 627.

⁸² *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171–72 (2003) (“In the words of Senator Wallop’s report delivered shortly before enactment, the statute is ‘designed to allocate the greatest number of beneficiaries in the Plans to a prior responsible operator.’”).

noncitizen New Yorkers.⁸³ The evolution of both the title and contents of Article I, Section 1 illustrates the inclusive sentiment of this expansive language.

Article I, Section 1's title, originally "[r]ights of *citizens*" in 1846, was expanded to "[p]ersons not to be disfranchised" in 1894.⁸⁴ In its 1938 and current amended version, the New York Constitution embraced this expansive spirit and re-titled the provision as "[r]ights, privileges and franchise secured," thereby eliminating the subject (i.e., "citizens" and "persons") that may have given way to a restrictive interpretation that does not include noncitizens.⁸⁵ While the 1846 New York Constitution may be read narrowly as only securing or enumerating the rights reserved for U.S. citizens, the 1894 New York Constitution suggests a more expansive goal. Indeed, "citizen" is replaced by "person," an ambiguous term that accommodates the inclusion of noncitizens when combined with "member of this State" in the provision's text. This evolution underscores that Article I, Section 1 should be regarded as a shield that generally protects all members of New York, including noncitizens, instead of just U.S. citizens who reside in New York.

Similarly, Article I, Section 1's contents have always sought to protect "*member[s]* of this state" from being "deprived of any of the rights or privileges secured to any citizen thereof," instead of U.S. citizens who are "*member[s]* of this state."⁸⁶ The use of the inclusive and ambiguous phrase "*member[s]* of this state" suggests that Article I, Section 1 guarantees noncitizens the same rights as U.S. citizens, provided that they do not go against "the law of the land."⁸⁷ Intro 1867-A aligns with the text and historical context of this provision in that it aims to extend voting rights to a broader group of New York residents.

This interpretation is further supported by other provisions within the New York Constitution that extend the definition of "citizen" to encompass noncitizens. For example, Article I, Section 8 guarantees that "[e]very citizen may freely speak . . . and no law shall be passed to

⁸³ N.Y. Const. of 1846, art. I, § 1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.").

⁸⁴ N.Y. Const. of 1846, art. I, § 1 (emphasis added); N.Y. Const. of 1894, art. I, § 1 (emphasis added).

⁸⁵ N.Y. Const. of 1938, art. I, § 1; N.Y. Const. art. I, § 1 ("Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases.").

⁸⁶ N.Y. Const. art. I, § 1 (emphasis added).

⁸⁷ *Id.*

restrain or abridge the liberty of speech or of the press.”⁸⁸ While “citizen” is used in this provision, it extends the right to freedom of speech and press to noncitizens. Much like my proposed readings of Article II, Section 1, this provision can be construed as either securing (i) the freedom of speech and press rights of U.S. citizens, without excluding noncitizens; or (ii) the rights of New York citizens, thus including noncitizens who are “citizens” of New York.⁸⁹ The latter reading of Article I, Section 8 is reinforced when read in conjunction with Article I, Section 1, which protects “member[s] of this state” from being disenfranchised, which includes noncitizens residing in New York.

Beyond the constitutional text and its historical context, Saxe’s treatise on New York election laws supports this interpretation of the term “citizen.” In his chapter on the New York Constitution, he invokes Article I, Section 1 and Article II, Section 1 to assert that “the New York constitution . . . confers the right to vote upon *citizens of New York* who possess the requisite qualifications,” instead of using “citizens of the United States” or the more ambiguous “citizen.”⁹⁰ This perspective aligns with this Essay’s understanding of *citizen*, indicating a specific grant of voting rights to state citizens within the constitutional framework.

Considering that the constitutional convention’s purpose was to draft a constitution tailored to New York’s contemporary needs, including the trend towards expansive voting rights reflected in the New York Constitution, these assertions support a broad construction of Article II, Section 1. This interpretation leads us in *this* historical moment to enfranchise noncitizens at the local level, recognizing their vital role in New York’s contemporary society.⁹¹ The historical precedent of women voting at the local election level when they were otherwise barred from voting at the federal and state levels underscores the viability of my model when applied to noncitizens in modern times.

⁸⁸ N.Y. Const. art. I, § 8.

⁸⁹ See, e.g., Hayduk, *supra* note 30, at 1 (“When Mayor Michael Bloomberg spoke at his funeral, he said, ‘We are proud he was a citizen of New York.’ But Tejada was born in the Dominican Republic and was not yet a U.S. citizen.”).

⁹⁰ Saxe, *supra* note 80, at 5 (emphasis added).

⁹¹ Part III of this Essay touches on noncitizens’ growing presence in New York and the resulting shift in the city’s demographic composition.

4. Noncitizens Are Not Covered by Article II, Section 3, Which Details Exclusions from the Right of Suffrage

The U.S. Supreme Court's reasoning in *Barnhart* thus offers a permissible reading of Article II, Section 1, which does not prohibit noncitizens from voting in local elections. Similarly, the Court's analysis in *TRW Inc. v. Andrews* should be invoked to establish that Article II, Section 3, titled "Persons excluded from the right of suffrage," may not be used to exclude noncitizens from voting in local elections.⁹²

In *TRW*, the Court stated the principle that when exceptions are explicitly enumerated to a general rule, additional exceptions are not implied without explicit contrary intent.⁹³ Similar to the language examined in *TRW*, Article II, Section 3 excludes from the general right to suffrage secured in Article II, Section 1 (i.e., the general rule) persons who engage in quid pro quo or corrupt practices while voting, or persons who have previously been convicted of infamous crimes (i.e., the exception).⁹⁴ By the logic of *expressio unius*, because these offenses are explicitly included, others that may lead to disenfranchisement are excluded. Using *expressio unius* in conjunction with the Court's ruling in *TRW* suggests that noncitizens are not excluded from voting at the local election level. Any intention to prohibit them would have been explicitly stated in the text by the drafters of the New York Constitution.

Noncitizens voting in local elections does not fall under the quid pro quo umbrella that this provision targets and prohibits. Nor does it fall under the "infamous crimes" umbrella, which captures "felonious offenses," such as noncitizens voting in federal elections. Had Intro 1867-A centered around enfranchising noncitizens at the federal level, the prohibition against such enfranchisement would be automatically read into Article II, Section 3 since the Illegal Immigration Reform and Immigrant Responsibility Act criminalizes noncitizens voting in federal elections.⁹⁵ Some states interpret "infamous crime" to mean "crimes that

⁹² See *TRW Inc. v. Andrews*, 534 U.S. 19, 22 (2001); see also *Fossella v. Adams*, 206 N.Y.S.3d 611, 639 (2024) (Wan, J., concurring in part and dissenting in part) (arguing that Article II, Section 3 "does not include noncitizens among the list of those unable to vote, nor does any other provision of the State Constitution expressly exclude noncitizens from the franchise on statewide or local matters, or both" (internal citation omitted)).

⁹³ *TRW*, 534 U.S. at 28 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

⁹⁴ N.Y. Const. art. II, § 3.

⁹⁵ 18 U.S.C. § 611.

involve corruption, such as fraud or embezzlement.”⁹⁶ If New York adopted this definition, Article II, Section 3’s silence on a prohibition on noncitizen voting would make sense, as it does not fall within the same exclusions category. However, New York adheres to a broader reading of “infamous crime.” The New York Court of Appeals defined “infamous crimes” as crimes where “punishment may be in [the] state’s prison or for a longer term than one year in any prison.”⁹⁷ Therefore, in New York, “infamous crimes” generally refer to felonies, as opposed to crimes that imply corruption or fraud. Given that New York broadly defines these terms, it is inappropriate to automatically infer a prohibition on noncitizen voting at the local election level, as it does not constitute a felony. Instead, only a prohibition on noncitizen voting at the federal level may justifiably be implied, as it pertains to a criminal offense qualifying as an “infamous crime.”

An alternative interpretation that reads in a prohibition on noncitizen voting at the local election level through Article II, Section 3 risks rendering the entire clause superfluous and should thus be disregarded. Per *TRW*’s logic, reading in additional prohibitions, unless evidenced by legislative intent, turns a narrow exception into a general prohibition that could serve to disenfranchise otherwise eligible people.⁹⁸ Such an approach goes against the spirit of the New York Constitution’s Bill of Rights, which was built into the document to champion the protection of the rights of eligible members of the state of New York, not just U.S. citizens.

*C. Even if “Citizen” Excludes Noncitizens, Article II,
Section 1 Does Not Apply to Local Elections*

While this Essay proposes an interpretation that enfranchises noncitizens at the local election level through Article II, Section 1—as read in conjunction with Article I, Section 1, Article II, Section 3, and Article IX, Section 3(d)(3)—an alternative approach exists to enfranchising noncitizens. As the *Fossella* partial dissent contends, Article II, Section 1 should be read as applying to statewide elections *only*. The voting procedures at the local election level should be viewed

⁹⁶ Infamous Crime, Wex Legal Dictionary, https://www.law.cornell.edu/wex/infamous_crime [<https://perma.cc/Y3ZF-6EE8>] (last updated Mar. 2023).

⁹⁷ *People v. Bellinger*, 199 N.E. 213, 215–16 (N.Y. 1935); see also *People v. Van Dusen*, 287 N.Y.S.2d 741, 744 (N.Y. 1967).

⁹⁸ *TRW*, 543 U.S. at 28–29.

as an entirely distinct process, governed by separate voter requirements that do not exclude noncitizens, as they are “members” of the state of New York. In this alternative view, Article IX, titled “Local Governments,” governs.

1. Article II, Section 1 Does Not Apply to Local Elections

Fossella adopted a broad interpretation of Article II, Section 1, concluding that it covers both statewide and local elections.⁹⁹ However, Judge Wan’s opinion noted that New York case law has consistently found Article II, Section 1 to be inapplicable to local elections. In turn, the majority distinguished these cases by limiting their scope, instead of citing precedents that reinforced its perspective. Leaning on the “plain language” of the provision, the court determined that Article II, Section 1 extends to both statewide and local electoral processes.¹⁰⁰

Consider the *Fossella* majority and partial dissent’s back-and-forth over *Spitzer v. Village of Fulton*.¹⁰¹ In this case, the New York Court of Appeals interpreted the objectives of Article II, Section 1 and reviewed a

⁹⁹ *Fossella v. Adams*, 206 N.Y.S.3d 611, 627 (2024).

¹⁰⁰ *Id.* The court also relied on Article II, Section 7, which directs that elections should largely be by ballot, stating that the “exception for municipal elections for ‘town officers’ . . . suggests an intent to encompass elections in towns and other municipalities within the elections covered by article II.” *Id.* at 628. Judge Wan rebutted that argument by stating that this provision only “confirms that secrecy in voting must be preserved.” *Id.* at 639. Indeed, research into the intent of the framers of the New York Constitution aligns more closely with Judge Wan’s view. For example, in an 1894 opinion for the Myers Ballot Machine Company written by Lewis L. Delafield, the lawyer argued that the New York Constitution’s framers intended for Article II, Section 5’s (currently Article II, Section 7) ballot requirement to be satisfied by reliance on a secret method. T. David Zukerman, Pol. Rsch. Bureau of the Republican Cnty. Comm. of N.Y., *The Voting Machine: Report on the History, Use and Advantages of Mechanical Means for Casting and Counting Ballots* 29 (1925); N.Y. Const. of 1894, art. II, § 5; N.Y. Const. art. II, § 7. Notably, Delafield provided a history of this provision as being enacted “against ‘viva voce’ voting,” not as an attempt to define the applicability of Article II to statewide and municipal elections. Zukerman, *supra*, at 30.

¹⁰¹ *Spitzer v. Vill. of Fulton*, 64 N.E. 957, 957–58 (N.Y. 1902) (per curiam); *Fossella*, 206 N.Y.S.3d at 618, 634. A number of other cases have adopted the understanding of Article II’s applicability to *solely* statewide elections endorsed by both *Spitzer* and the *Fossella* partial dissent. See, e.g., *Blaikie v. Power*, 193 N.Y.2d 55, 57 (N.Y. 1963) (quoting *Johnson v. New York*, 9 N.E.2d 30, 33 (N.Y. 1937)); *Schulz v. Horseheads Cent. Sch. Dist. Bd. of Educ.*, 634 N.Y.S.2d 792, 794 (N.Y. App. Div. 1995); *In re Carrick*, 170 N.Y.S. 1071 (N.Y. App. Div. 1918) (per curiam), *aff’d on other grounds*, 119 N.E. 1034 (N.Y. 1918) (per curiam); *Turco v. Union Free Sch. Dist. No. Four*, 251 N.Y.S.2d 141, 143 (N.Y. Sup. Ct. 1964), *aff’d mem.*, 256 N.Y.S.2d 553 (N.Y. App. Div. 1964), *appeal dismissed*, 15 N.Y.2d 967 (N.Y. 1965).

statute that was challenged under this constitutional provision.¹⁰² The state’s highest court pinpointed the primary purpose of Article II, Section 1 as “prescrib[ing] [the] general qualifications that voters throughout the *state* were required to possess to authorize them to vote for public officers,” but not as “defin[ing] the qualifications of voters upon questions relating to the financial interests or private affairs of *the various cities*.”¹⁰³

Quoting *Spitzer*, Judge Wan found that Article II, Section 1’s goal was to define voters’ qualifications for “elective officers or upon questions . . . which affect the public affairs of the *state*.”¹⁰⁴ In response, the majority contended that *Spitzer* was of “limited instructive value,” as it did not consider Article II’s relevance to municipal elections for elective officers, but rather determined that this article was inapplicable to qualifications to vote on a village’s financial matters.¹⁰⁵ However, *Fossella* incorrectly narrowed the scope of *Spitzer*.

A more compelling reading of the case suggests that it *does* consider whether Article II applies to municipal elections for elective officers. Contrary to *Fossella*’s assertion, *Spitzer*’s finding—that Article II, Section 1 concerns voter qualifications for state elections—addresses the clause’s applicability to municipal elections for elective positions. The issue before the *Spitzer* court was the scope of Article II, Section 1 in all types of elections, since the provision was not explicitly cabined to a specific type of election.¹⁰⁶ In opting to confine Article II, Section 1’s scope to statewide elections, *Spitzer* implicitly excluded municipal elections. In other words, by limiting the provision’s scope to statewide elections and omitting municipal elections, *Spitzer* implicitly denotes its inapplicability to the latter.

¹⁰² *Spitzer*, 64 N.E. at 957–58.

¹⁰³ *Id.* at 958 (emphases added).

¹⁰⁴ *Fossella*, 206 N.Y.S.3d 611 at 638 (emphasis added) (quoting *Spitzer*, 64 N.E. at 958). Judge Wan also highlighted that the majority’s examination of the constitutional issue had neglected to mention the stringent standard that should be applied here: the plaintiffs are required to prove the invalidity of the noncitizen voting law “beyond a reasonable doubt.” *Id.* at 637 (emphasis omitted) (quoting 1160 Mamaroneck Ave. Corp. v. City of White Plains, 180 N.Y.S.3d 211, 214 (N.Y. App. Div. 2022)). Judge Wan later found that the plaintiffs had failed to demonstrate that Intro 1867-A was unconstitutional “beyond a reasonable doubt.” *Id.* at 643.

¹⁰⁵ *Id.* at 628. The court similarly distinguished *Turco* on the grounds that it “did not involve the applicability of article II to municipal elections for elective officers.” *Id.*

¹⁰⁶ *Spitzer*, 64 N.E. at 957–58 (the plaintiff’s argument contested the challenged statute’s restriction on Article II’s “right to vote for *elective officers* and upon all questions which may be submitted to the vote of the people” (emphasis added)).

Moreover, a review of New York legal precedents reveals a *per curiam* opinion that aligns with this Essay's argument: Article II, Section 1 should be confined to statewide elections. Citing *Spitzer, In re Carrick* held that Article II, Section 1 "applies only to such propositions as relate to the general governmental affairs of the state, and not to local affairs of municipalities."¹⁰⁷ New York's highest court later affirmed this decision.¹⁰⁸

In light of these analyses, *Spitzer* should not be automatically distinguished as the *Fossella* majority did, and instead can be relied upon, along with *In re Carrick*, to provide a solid foundation for the argument that Article II, Section 1 does not apply to local elections.

2. Article IX Should Govern Local Elections

The New York Constitution, its surrounding historical context, and New York case law all support the assertion that Article IX governs voter qualifications for elective officers in municipal elections.

The 1821 New York Constitution introduced the first reference to local elections when Article II, Section 4 established a separate method of casting votes in "town officer[]" elections.¹⁰⁹ While this provision required all elections to be administered through ballots, it created a carve-out for local elections, specifically town officer elections, which permitted other administrative formats as long as they followed the law.¹¹⁰ The 1846 New York Constitution maintained this exception and supplemented it with a provision that described, in detail, the process of electing local officers, thus building on the power and legitimacy of local elections.¹¹¹

This process was also extended to the removal of local officers. Article X, Section 7 outlined the methods for removing officers, but it specifically excluded the removal of *local* officials, suggesting that a different

¹⁰⁷ *In re Carrick*, 170 N.Y.S. 1071, 1072 (N.Y. App. Div. 1918) (*per curiam*).

¹⁰⁸ *In re Carrick*, 119 N.E. 1034, 1034 (N.Y. 1918).

¹⁰⁹ N.Y. Const. of 1821, art. II, § 4.

¹¹⁰ N.Y. Const. of 1821, art. II, § 4. ("[Elections to be by ballot.]—All elections by the citizens shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen.")

¹¹¹ N.Y. Const. of 1846, art. X, § 2 (establishing the respective electors for, *inter alia*, county, city, town, and village officers when not provided for in the constitution).

process, not covered by this section, should be utilized.¹¹² Similarly, the 1938 New York Constitution expressly addressed the separate procedures for local officers when discussing judicial officers' election. Section 17 of Article VI provided two options for these processes: either have town electors vote for justices of the peace at their annual meetings or defer to the legislature to direct the "time and . . . manner" of such elections.¹¹³

The current version of the New York Constitution continues to build on the independent character of local elections by including a Bill of Rights specific to local governments and separate from Article I, the New York Constitution's overall Bill of Rights.¹¹⁴ Notably, Article IX grants "local governments . . . rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution."¹¹⁵ In addition to granting powers to local elections from the second iteration onwards,¹¹⁶ thus rooting this practice in history, the latest version of the New York Constitution cements that authority by including the most comprehensive version of the local elections provision to date.¹¹⁷ When describing the process of electing local officials, previous iterations granted "electors" of local areas the power to cast votes.¹¹⁸ However, the latest iteration broadened the term "elector" by replacing it with "people of the local government," which allows reading in noncitizens as they are members of the local governments they reside in.¹¹⁹

¹¹² N.Y. Const. of 1846, art. X, § 7 ("[Removal of officers.]—Provision shall be made by law for the removal for misconduct or malversation in office, of all officers (except judicial) whose powers and duties are not local or legislative . . .").

¹¹³ N.Y. Const. of 1938, art. VI, § 17; see also N.Y. Const. of 1938, art. IX (describing the election process at the local municipal level); N.Y. Const. of 1938, art. XIII, § 10 (describing the removal process for non-judicial officers and maintaining the carve-out for local officers observed previously).

¹¹⁴ N.Y. Const. art. IX, § 1.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., N.Y. Const. of 1821, art. IV, §§ 8–9.

¹¹⁷ See generally N.Y. Const. art. IX (describing, inter alia, local governments' authority to host elections and determine selection procedures for officers and legislators, respectively).

¹¹⁸ See, e.g., N.Y. Const. of 1846, art. X, §§ 1–2; N.Y. Const. of 1894, art. X, §§ 1–2.

¹¹⁹ N.Y. Const. art. IX, § 1(b). Article IX defines "people" as "mean[ing] or includ[ing] . . . [p]ersons entitled to vote as provided in" Article II, Section 1. N.Y. Const. art. IX, § 3(d)(3). Judge Wan argued that the "mean or include" language creates an ambiguity since it permits "people" to be read restrictively as only *meaning* "citizens" entitled to vote per Article II, Section 1 or, more expansively, as *including* those "citizens," which the court reads as "United States citizens," without excluding noncitizens. Judge Wan advocated for the latter interpretation and relied on Article IX's history, liberalizing purpose, and pro-independence sentiment for local governments in dealing with local problems, which arguably includes choosing their elective officers. *Fossella*, 206 N.Y.S.3d at 642–43. Conversely, the

New York case law also supports this liberalization argument. The state's highest court held in *Resnick v. County of Ulster* that "article IX[] command[s] that the rights and powers granted to local governments 'shall be liberally construed.'"¹²⁰ Later, a New York appellate court echoed this sentiment in *Radich v. Council of Lackawanna*, but distinguished the facts at hand.¹²¹ In *Radich*, unlike *Resnick*, the state legislature had made a *clear* decision directly concerning the city charter by specifically regulating mayoral succession in some cities and overriding local laws on the matter.¹²² Because the law at stake in *Radich* involved an area of "State-wide significance," the court held, it did not "implicate local governmental home rule powers."¹²³ Since New York City, in this case, does not have any explicit direction from the legislature (unlike the cities in *Radich*) concerning the regulation of noncitizen voting in local elections, the city's Article IX power should be liberally construed.

The textual evolution of the provisions addressing local government in the New York Constitution and New York case law thus demonstrate a shift towards establishing an independent process for local elections with distinct requirements separate from general elections. Therefore, it is plausible that noncitizen voting in local elections is permissible under Article IX while impermissible in state and federal elections through Article II, Section 1.

III. BEYOND THE LAW: POLICY CONSIDERATIONS FAVORING NONCITIZENS VOTING IN LOCAL ELECTIONS

The previous Part articulated the most compelling interpretation of the New York Constitution, arguing that it inherently allows noncitizen

Fossella majority adopted the restrictive reading, relying on *In re U.S. Steel Corp. v. Gerosa*, 160 N.E.2d 489 (N.Y. 1960), which interpreted this language as evidencing "an intent to restrict application of the definition to the items listed, and to exclude any items which are not listed." *Fossella*, 206 N.Y.S.3d at 629. In doing so, the majority disregarded Judge Wan's calls to distinguish the case due to its subject matter (tax), which is usually accompanied by a restrictive lens, instead of the liberalizing lens typically associated with Article IX. *Id.*

¹²⁰ *Resnick v. County of Ulster*, 376 N.E.2d 1271, 1274 (N.Y. 1978) (quoting N.Y. Const. art. IX, § 3(c)).

¹²¹ *Radich v. Council of City of Lackawanna*, 462 N.Y.S.2d 928, 932–33 (N.Y. App. Div. 1983), *aff'd*, 460 N.E.2d 223 (N.Y. 1983); *id.* at 932 ("We recognize that the home rule provisions must be interpreted liberally and that local governments are vested with broad power to deal with the mode of selection of their officers.").

¹²² *Id.* at 932–33.

¹²³ *Id.* at 933 (internal citation omitted).

voting in local elections. Part III builds upon that foundation, asserting and substantiating the claim that such enfranchisement of noncitizens is not merely a legal possibility within New York’s constitutional framework, but also a judicious and advantageous policy choice.

A. Enfranchising Noncitizens in Local Elections Is Economically Efficient

A voting system with “perfect inclusion” permits all those impacted by an election’s outcome to participate.¹²⁴ Such a system would thus enfranchise noncitizens at all levels, including local, state, and even federal elections, as long as the outcome impacts them. Conversely, a system of “perfect exclusion” prohibits all persons affected by an election from voting in it.¹²⁵ The current voting scheme in New York, which excludes noncitizen New Yorkers from local elections, aligns more with the latter model. While the “perfect inclusion” mechanism presents several benefits, its implementation produces inefficiencies and conflicts with the law (e.g., by allowing noncitizens to vote in federal elections). Consequently, the United States has adopted a combination of inclusive and exclusive characteristics in establishing a national system and state-level counterparts where states and localities establish their voting requirements by setting outer limits on who may be included in their “political community.”¹²⁶

However, by preventing Intro 1867-A from enfranchising noncitizens at the local election level, *Fossella* advances a definition of “political community” that leads to negative legal externalities, which are costs caused by person A that are not incurred or received by them.¹²⁷ Here, noncitizens are prohibited from voting on local issues directly impacting them. For example, foreigners with children may be unable to vote in school board elections even though those elections affect them directly, while childless U.S. citizens can.¹²⁸ Viewed from an economics lens, this outcome is not good since it does not best satisfy people’s preferences.

¹²⁴ Robert D. Cooter & Michael D. Gilbert, *Public Law and Economics* 131 (2022).

¹²⁵ *Id.* at 131–32.

¹²⁶ *Id.* at 132 (quoting *Skafta v. Rorex*, 553 P.2d 830, 832 (Colo. 1976)).

¹²⁷ Will Kenton, Investopedia, *Externality: What It Means in Economics, with Positive and Negative Examples*, <https://www.investopedia.com/terms/e/externality.asp> [https://perma.cc/MJY5-YJYX] (last updated June 18, 2024).

¹²⁸ Cooter & Gilbert, *supra* note 124, at 132.

Excluding noncitizens from local elections impacts the overall social welfare of the city, which exemplifies welfare economics, or “the study of how the allocation of resources and goods affects . . . the overall well-being of people in the economy,” which usually provides a basis for choosing among policies.¹²⁹ Notably, 30% of New York City’s population is composed of green card holders and people of “[o]ther [s]tatus” (not including undocumented immigrants), with immigrants representing 44.2% of the labor force.¹³⁰ This population is not insignificant and should not be overlooked in a cost-benefit analysis focused on welfare.

In a welfare analysis, a given law is efficient and should be adopted if its “benefits to the winners exceed the losses to the losers.”¹³¹ Here, Intro 1867-A should be adopted if the benefits to noncitizens in becoming a part of the local voting population exceed the losses incurred by U.S. citizens, who may have their voting power diluted by the increase of voters (an argument made by the *Fossella* plaintiff-respondents).¹³² To determine the outcome of this inquiry, one needs to determine whether the addition of noncitizens to the voting pool results in symmetric or asymmetric voting patterns.¹³³ Suppose the current voter population at the local election level (i.e., excluding noncitizens) is a representative sample of all residents (i.e., both U.S. citizens and noncitizens). In that case, the median voter’s preferred outcome will remain the same with the addition of noncitizens—therefore, there will be no implications for social welfare calculations. However, if the current voter population is a biased or unrepresentative sample, adding noncitizen voters may shift the median voter’s preferred outcome.

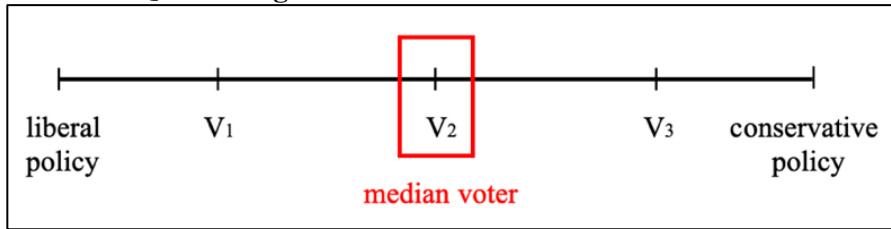
¹²⁹ See Welfare Economics, Investopedia, https://www.investopedia.com/terms/w/welfare_economics.asp [<https://perma.cc/K7YQ-LVH8>] (last updated Sept. 28, 2023).

¹³⁰ N.Y.C. Mayor’s Off. for Econ. Opportunity, An Economic Profile of Immigrants in New York City 2017, at 6, 11 (Feb. 2020), <https://www1.nyc.gov/assets/opportunity/pdf/immigrant-poverty-report-2017.pdf> [<https://perma.cc/85NP-GLHJ>].

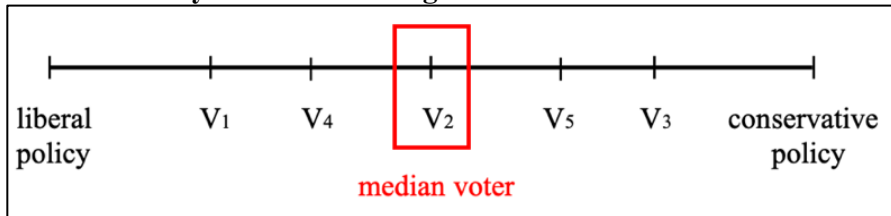
¹³¹ Cooter & Gilbert, *supra* note 124, at 112.

¹³² Brief of Plaintiffs-Respondents at 7, *Fossella v. Adams*, 206 N.Y.S.3d 611 (2024).

¹³³ Cooter & Gilbert, *supra* note 124, at 129 (“[S]ymmetric voting restrictions disfranchise equal numbers of people on both sides of the median, which does not cause representation errors. In contrast, asymmetric voting restrictions disfranchise more people on one side of the median than the other, which causes representation errors.” (emphasis omitted)).

Status Quo Voting Scheme Without Noncitizens Illustration¹³⁴

On the one hand, if symmetric voting patterns occur, equal numbers of noncitizens will be enfranchised on both sides of the median, thereby maintaining the current median voter's preferences. Indeed, "strong symmetry" voting patterns can help maximize social welfare since the added intensity on both left- and right-leaning positions cancel each other out—for every voter's utility on one side of the median, there will be an identical outcome on the other side.¹³⁵

Symmetrical Voting Pattern Illustration¹³⁶

On the other hand, if asymmetric voting patterns occur, all noncitizens (or a significant portion of them) will cluster on one side of the median voter and cause shifts in preferences.¹³⁷ This scenario is likely to occur if all noncitizens share "characteristics and experiences that affect their

¹³⁴ V1-3 are all U.S. citizens, with V2 being the most moderate and, thus, assuming the median voter position.

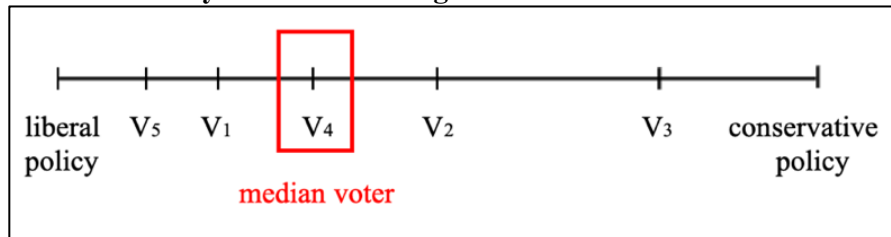
¹³⁵ Cooter & Gilbert, *supra* note 124, at 112.

¹³⁶ V1-3 are all U.S. citizens, and V4-5 are noncitizens enfranchised at the local election level. Since V4 and V5 fall on quasi-identical opposing views across the line, V2 remains the median voter. Yet, general welfare is increased since everyone's points of view are accounted for. Note that V4 and V5 do not need to fall on quasi-identical opposite sides of the spectrum to lead to this conclusion—all that is required is enough noncitizens on both sides to maintain this equilibrium. See Cooter & Gilbert, *supra* note 124, at 113 ("Given approximate symmetry in voters' preferences, the median rule approximately maximizes welfare.")

¹³⁷ *Id.* at 129.

political views,” thus leading them to gather on one side of the voting patterns median.¹³⁸ In such an asymmetric voting scheme, the median voter is likely to shift, diluting the votes of people falling on the other end of the spectrum. In this situation, a risk exists that the current sample of voters (i.e., U.S. citizen voters) is not representative of noncitizens, since the current median voter’s ideal outcome (i.e., U.S. citizen voters) differs from the median resident’s ideal outcome (i.e., both U.S. citizens and noncitizens). This exclusive voting leads to representation errors and reduces general welfare.¹³⁹ Therefore, should New York fall under an asymmetrical voting scheme, enfranchising noncitizens at the local election level increases the general welfare. After all, election outcomes would reflect the overall population’s preferences, despite running the risk of diluting the votes of certain U.S. citizens.

Asymmetrical Voting Pattern Illustration¹⁴⁰



However, it is overly simplistic to assume that all noncitizens share quasi-identical characteristics which will align them on one side of the political spectrum. In reality, features like education levels, age, gender, and race likely position noncitizens all over the voting preferences spectrum, thereby not necessarily shifting the median voter nor causing voting dilution issues, as the *Fossella* plaintiffs-respondents claim.¹⁴¹ Some noncitizens may even align more with groups of U.S. citizens than

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ V1-3 are U.S. citizens, and V4-5 are noncitizens that are being enfranchised on the local election level. Since V4 and V5 cluster on one side of the line, the median voter shifts from V2 (U.S. citizen) to V4 (noncitizen).

¹⁴¹ See, e.g., N.Y.C. Mayor’s Off. for Econ. Opportunity, supra note 130, at 8, 12 (showing differences in noncitizens’ education levels and median age in New York City); Brief of Plaintiffs-Respondents, supra note 132, at 7.

they do with other noncitizens.¹⁴² Therefore, the view that noncitizens' addition may end up being tiebreakers that take away from the voices of certain U.S. citizens is not a foregone conclusion¹⁴³ since noncitizens often come from eclectic backgrounds that reflect diverse political, social, and economic ideologies and standings.

B. Criticisms and Solutions

While the economic analysis surrounding noncitizens voting at the local election level is well-founded, critics have voiced concerns against Intro 1867-A and this movement more broadly.¹⁴⁴ These criticisms can be broadly categorized into three issues: slippery slope, costs, and low voter turnout. While these arguments are theoretically plausible, their application fails in the context of Intro 1867-A.

First, the slippery slope criticism of Intro 1867-A is rooted in the fear that such proposals are covert attempts to prompt noncitizen enfranchisement at the state and federal election levels, despite the law's express prohibition on such extension.¹⁴⁵

Consider the following example as a model for this apprehension. Suppose Proposal A enfranchises noncitizens at the local municipal election level (e.g., Intro 1867-A). As a standalone, Proposal A is viewed as a generally efficient economic proposal if, in its aftermath, noncitizens' utility gains, which encompass the total benefit derived from a service, outweigh U.S. citizens' losses, thus increasing the general welfare.¹⁴⁶ However, lurking in the background is Proposal B, which enfranchises noncitizens at the federal election level. Proposal B is viewed negatively by critics of noncitizens' enfranchisement due to national security concerns, compromises of election integrity, and constitutional

¹⁴² Raskin, *supra* note 18, at 1447 (“Resident noncitizen Irish may identify more closely with Irish-Americans than they do with noncitizen Mexicans . . .”).

¹⁴³ See, e.g., Mark Baldassare, Dean Bonner, Alyssa Dykman & Lunna Lopes, Pub. Pol’y Inst. of Cal., *Immigrants and Political Engagement 2* (Mar. 2018), <https://www.ppic.org/wp-content/uploads/jtf-immigrants-political-engagement.pdf> [<https://perma.cc/3MMT-9UJ9>] (showing that immigrant residents in California, for example, are nearly split in ideology between liberal, moderate, and conservative political leanings).

¹⁴⁴ See generally John Ketcham, *Manhattan Inst.*, *Noncitizen Voting* (2022) (discussing potential problems with, and possible modifications or alternatives to, the enfranchisement law).

¹⁴⁵ See, e.g., *id.* at 3.

¹⁴⁶ *Utility in Economics Explained: Types and Measurement*, Investopedia, <https://www.investopedia.com/terms/u/utility.asp> [<https://perma.cc/F89W-FW84>] (last updated Sept. 25, 2023); Cooter & Gilbert, *supra* note 124, at 112.

violations.¹⁴⁷ Hence, if powerful political actors believe that Proposal A is the first of several small, incremental changes to ultimately reach Proposal B, no matter how likely or permissible this shift is, Proposal A will be rejected. However, substantive constitutional limits safeguard against such slippery slope arguments by being both a regulation-enabling and regulation-frustrating force.¹⁴⁸ In the case of noncitizen voting, limits that would prevent the extension of noncitizen voting rights to federal elections already exist.¹⁴⁹ Recognizing these limitations should alleviate fears of undesirable outcomes, such as noncitizens voting at the federal election level.

Second, opponents of Intro 1867-A also raise concerns about the potential increase in government administrative costs (e.g., through an overhaul of the voting system) and traditional administrative costs associated with elections (e.g., printing more ballots, opening additional voting booths, and counting votes).¹⁵⁰ In the case of New York, this criticism is further fueled by claims that the New York City Board of Elections is already burdened, inefficient, and not well-equipped to curb fraudulent voting.¹⁵¹ However, despite these costs, the increase in welfare for noncitizens and the city of New York is generally beneficial enough to survive a cost-benefit analysis. Indeed, the Board recently overhauled its system to incorporate ranked-choice voting into the city's election system.¹⁵² Therefore, implementing provisions accommodating noncitizen voting at the local election level would not entail a herculean effort. Moreover, since New York's election system is being represented negatively, with risks of fraud touted by the opposition, the manageable changes needed to implement noncitizen voting could be accompanied by other, more radical, changes that would help overhaul the system and make it safer for all. These changes would enhance the state's election

¹⁴⁷ See, e.g., Miles Parker, *Republicans Aim to Stop Noncitizen Voting in Federal Elections. It's Already Illegal*, NPR (Apr. 12, 2024, 6:36 PM), <https://www.npr.org/2024/04/12/1244302080/trump-johnson-noncitizen-voting-bill> [<https://perma.cc/92WV-MXM6>].

¹⁴⁸ See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 *Harv. L. Rev.* 1026, 1037 (2003).

¹⁴⁹ 18 U.S.C. § 611 (prohibiting noncitizens from voting in federal elections, including races for president, vice president, Senate or House of Representatives).

¹⁵⁰ See, e.g., Ketcham, *supra* note 144, at 7, 13.

¹⁵¹ *Id.* at 7–9.

¹⁵² Emma G. Fitzsimmons, *Choose Wisely, Choose Often: Ranked-Choice Voting Returns to New York*, *N.Y. Times* (June 16, 2023), <https://www.nytimes.com/2023/06/16/nyregion/ranked-choice-voting-nyc.html> [<https://perma.cc/ART2-NPXW>].

system for all residents irrespective of their citizenship status, boosting voter engagement and confidence in the system.

Finally, critics have argued that this voting expansion will incur costs for no good reason, given the anticipated low voter turnout on the part of noncitizens.¹⁵³ However, an overhaul of the electoral system could increase voter turnout on both the citizen and noncitizen levels, since people may feel more motivated to vote with further trust in the system.¹⁵⁴ Indeed, in *Fossella*, the plaintiff-respondents argued that the law would significantly alter the electoral community of New York City and force candidates to adjust their campaign reelection strategies.¹⁵⁵ From an economic standpoint, this consequence is positive, not negative, because considering a broader spectrum of interests would increase representation and, thus, overall social welfare. Noncitizen voting at the local level may incentivize candidates to adopt more moderate platforms and tailor their policies to a larger demographic, rather than pursuing more radical platforms at the primary level. This would make candidates' platforms and proposed policies more reflective of the public's welfare and encourage noncitizens to vote, increasing their representation and preparing them for their civic duties upon naturalization.

CONCLUSION

In sum, *Fossella v. Adams* was wrongly decided from a legal, economic, and social perspective and should be reversed on appeal. At a minimum, the New York Constitution should serve as a floor for voting rights instead of a limiting ceiling. Enfranchising noncitizens at the local municipal level is legally optimal as it upholds the mission of the New York Constitution: securing and enfranchising as many members of the state as constitutionally permissible. Moreover, this law is economically sound as it increases general social welfare by fostering more representative outcomes, prioritizing persons with higher utility curves, and preparing noncitizens for their civic duties should they be naturalized. Consequently, New York should reverse the injunction against Intro 1867-A and follow states like California and Maryland, which have enfranchised noncitizens at the local election level in certain regions. This

¹⁵³ Ketcham, *supra* note 144, at 2, 12.

¹⁵⁴ See, e.g., Hayduk, *supra* note 30, at 30 (finding that historical data on New York's state and local elections show higher voter turnout when noncitizens were enfranchised: "nineteenth-century voter turnout ranged . . . between 85 and 90 percent").

¹⁵⁵ *Fossella v. Adams*, 206 N.Y.S.3d 611, 619 (2024).

move would establish valuable persuasive authority for other courts when they consider the expansion of noncitizen voting rights at the local election level.

APPENDIX

“Citizen,” “Citizen of the United States,” and “Citizen of this State” in the New York Constitution¹⁵⁶

	“Citizen” as a Standalone	“Citizen of the U.S.”	“Citizen” / “Resident” of this State
1777 Constitution	-	-	-
1821 Constitution	<p>Article II, Section 1 (qualifications of voters)</p> <p>Article II, Section 3 (registration of voters)</p> <p>Article II, Section 4 (elections to be by ballot)</p> <p>Article VII, Section 1 (rights of citizens)</p> <p>Article VII, Section 8 (freedom of speech and press; evidence in libel cases)</p>	<p>Article III, Section 2 (qualifications of governor)</p>	<p>Article II, Section 1 (qualifications of voters)</p>

¹⁵⁶ This chart lists whether the terms “citizen,” “U.S. citizen,” and “N.Y. citizen” are used in the various iterations of the N.Y. Constitution and includes the titles of the cited provisions.

	“Citizen” as a Standalone	“Citizen of the U.S.”	“Citizen” / “Resident” of this State
1846 Constitution	<p>Article I, Section 1 (rights of citizens)</p> <p>Article I, Section 8 (freedom of speech and press; evidence in libel cases)</p> <p>Article II, Section 1 (qualifications of voters)</p> <p>Article II, Section 4 (registration of voters)</p> <p>Article II, Section 5 (elections to be by ballot)</p> <p>Article VI, Section 8 (judges to hold no other office)</p>	<p>Article IV, Section 2 (qualifications of governor)</p>	<p>Article II, Section 1 (qualifications of voters)</p>
1894 Constitution	<p>Article I, Section 1 (persons not to be disenfranchised)</p> <p>Article I, Section 8 (freedom of speech and press; evidence in libel cases)</p> <p>Article II, Section 1 (qualifications of voters)</p> <p>Article II, Section 4 (registration and election laws to be passed)</p> <p>Article II, Section 5 (manner of voting)</p> <p>Article III, Section 5 (apportionment of assemblymen; creation of assembly districts)</p>	<p>Article IV, Section 2 (qualifications of governor and lieutenant-governor)</p>	<p>Article V, Section 9 (civil service appointments and promotions)</p> <p>Article VII, Section 6 (claims barred by statute of limitations)</p> <p>Article XI, Section 1 (state militia)</p>

	“Citizen” as a Standalone	“Citizen of the U.S.”	“Citizen” / “Resident” of this State
1938 Constitution	<p>Article I, Section 1 (rights, privileges and franchise secured)</p> <p>Article I, Section 8 (freedom of speech and press; criminal prosecutions for libel cases)</p> <p>Article II, Section 1 (qualifications of voters)</p> <p>Article II, Section 5 (registration and election laws to be passed)</p> <p>Article II, Section 7 (manner of voting; identification of voters)</p>	<p>Article III, Section 7 (members; qualifications; not to receive certain civil appointments; acceptance to vacate seat)</p> <p>Article XII, Section 1 (state militia)</p>	<p>Article III, Section 19 (private claims not to be audited by legislature; claims barred by lapse of time)</p>
Current Constitution	<p>Article I, Section 1 (rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases)</p> <p>Article I, Section 8 (freedom of speech and press; criminal prosecutions for libel cases)</p> <p>Article II, Section 1 (qualifications of voters)</p> <p>Article II, Section 5 (registration and election laws to be passed)</p> <p>Article II, Section 7 (manner of voting; identification of voters)</p>	<p>Article III, Section 7 (qualifications of members; prohibitions on certain civil appointments; acceptance to vacate seat)</p> <p>Article IV, Section 2 (qualifications of governor and lieutenant-governor)</p>	<p>Article III, Section 7 (qualifications of members; prohibitions on certain civil appointments; acceptance to vacate seat)</p> <p>Article III, Section 19 (private claims not to be audited by legislature; claims barred by lapse of time)</p>

	“Citizen” as a Standalone	“Citizen of the U.S.”	“Citizen” / “Resident” of this State
	<p>Article III, Section 5 (apportionment of assemblymen; creation of assembly districts)</p> <p>Article V, Section 6 (civil service appointments and promotions; veterans’ credits)</p> <p>Article XIV, Section 5 (violations of articles; how restrained)</p>		