

**Degrees of Belonging and Graduated Rights:  
Immigrants and Immigration Regulation in the American States  
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**Introduction**

Recent years have witnessed the ascendance of states and localities as core components in the immigration discourse, both among academics and in the public domain at large. There is good reason for this focus on sub-national governments: state legislatures and city councils have been busy regulating immigrants as part of their functional role in policies such as healthcare, welfare, education, crime, property rights, and the labor market among others. Many of these sub-national responses have been far from welcoming. Maricopa County (Arizona) Sheriff Joe Arpaio has made the news for his extreme methods of dealing with undocumented immigrants. Sheriff Arpaio has 160 officers trained by Immigration and Customs Enforcement (ICE) to enforce national immigration law under the controversial 287(g) program. The officers are known to use racial profiling, stop Latinos for routine traffic violations and ask for identification and immigration status documentation and even conduct raids outside the county's jurisdiction to apprehend undocumented immigrants. Sheriff Arpaio's popularity among county residents hit 80 percent last year, but other local and state officials are concerned about his tactics (Arizona New Times, 2008). On the East Coast, the town of Hazelton, PA has been involved in a lawsuit as a result of a city ordinance which penalized landlords if they did not verify that their tenants are citizens or legal U.S. residents. Hazelton is one of more than thirty Pennsylvania towns to have considered this type of ordinance. In addition to housing ordinances, other towns across the U.S. have tried to penalize employers for hiring undocumented immigrants.

State and local authorities are not alone in regulating immigrants; private actors have also been making decisions that fall under the purview of noncitizen regulation. Not only are groups such as the Minutemen patrolling the Southern border on the look-out for unauthorized border-crossers, but healthcare providers across the nation have been initiating private deportations of seriously ill but uninsured noncitizens.<sup>1</sup> According to the *New York Times* (Sontag, 2008) which reported the story, hospital-arranged involuntary deportations of this type are not uncommon; Arizona's St. Joseph's Hospital alone deports an average of eight people a month.

Anti-immigrant police tactics, raids and unauthorized deportations are not the only responses to noncitizens to have emerged at the local and state level. More than 100 towns and cities across the country have declared themselves "sanctuaries" for undocumented immigrants in violation of federal law. The Catholic Church has also favored the sanctuary concept, with many local

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<sup>1</sup> In June 2008, Antonio Torres, a U.S. legal permanent resident from Mexico who worked as a farm worker in Arizona, sustained serious injuries in a car accident. Once the Phoenix hospital had admitted him through its Emergency Room and realized that Mr. Torres was uninsured, it made arrangements for a private deportation to Mexico.

churches protecting the identity of undocumented immigrants in their community. Furthermore, ten states offer in-state tuition rates to undocumented immigrant children attending state colleges and universities, while others have developed prenatal healthcare programs for undocumented pregnant women. In the wake of the 1996 Welfare Reform Act (PRWORA) which excluded many low-income legal permanent residents from welfare and Medicaid, many states took it upon themselves to cover these populations with state-funded programs.

The intense activity at the subnational level flies in the face of the Supreme Court's plenary power doctrine which accorded exclusive authority over immigration and immigrants to the federal government. The realization that there is more to immigration issues than the plenary power doctrine, introduces new theoretical challenges to the study of immigrants in American. Chief among them: what happens at the intersection of federalism and immigration? And what is the appropriate role for states and localities in the immigration domain? This study argues that there are two ways to view immigration which have led to two distinct discourses and to very different understandings of the interaction between federalism and immigration. I argue that whether we seek federal or sub-national solutions to the immigration issue is a function of how we decide to define the problem.

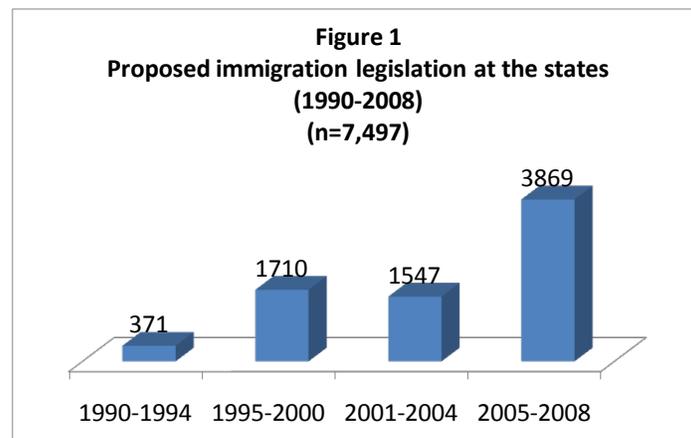
We can define immigration as a *policy* issue or as a *rights* issue. If viewed as a policy, we can use the analytical tools of functional federalism to assess the costs and benefits of immigration and determine which level of government should have decision-making authority vis a vis immigrants. In this context, immigration can be conceptualized as an externality of economic development or as a sector of the economy to be managed and regulated by government. However, if immigration is to be seen as an issue of *rights*, then we need to re-evaluate our understanding of (national) membership and think about what the presence of noncitizens means for American democracy. As Linda Bosniak (2006) has successfully argued, democratic theory of justice has no room for noncitizens and a new framework of membership is needed to accommodate their presence. In this context, looking at noncitizens as a category may not be enough: not only do we need to account for the various types of noncitizens that American immigration law has given life to, but we also need to understand how the federal structure of the country affects and distorts the picture. I argue that if we choose to define immigration in membership terms, then a uniform rights regime must be decided upon and established. If the relationship between the noncitizen and America is to be based on some form of a social contract as suggested by Motomura (2006) then the country's federal institutions, Congress and the Courts, must specify the parameters of that contract and state and local policies and planning can then take shape within that framework. Doing it the other way around, with states and localities in charge of specifying noncitizen rights, comes in direct clash with our expectations of justice and democracy.

This study consists of three sections: first, I provide a short description of the view from the states, showing the breadth and variation in sub-national responses to immigrants over the past

decade. The second part of the paper discusses immigration as a question of policy through the logic of functional federalism, and part three analyzes immigration as a membership issue.

### **Immigration as an Empirical Reality: The View from the States**

State involvement in noncitizen regulation has been long-standing: states have always made decisions that affected the lives of noncitizens whether it was in the form of prohibiting black sailors from British ships to disembark in Southern ports in the Antebellum period, or regulating admissions at the Port of New York in the 19<sup>th</sup> century, or providing charity care to newly arrived immigrants (Newman, 1995; Filindra and Tichenor, 2008). In the past two decades, state immigration-related activity has been on the increase both in terms of the absolute number of bills considered and in the number of states involved in enacting immigrant regulations. A Lexis-Nexis State Capitals legislative bill search on “immigration”, “immigrant”, “alien” or “non-citizen” reveals a total of 6,815 bills since 1990; of those 969 had been enacted as of February 2008. Figure 1, below, shows that state involvement in immigration policymaking has increased dramatically in the years after 2001 and especially since 2005.



According to the National Conference of State Legislatures, in 2006, states introduced 570 bills of which 84 were enacted into law. In 2007, the number of bills tripled to a total of 1,652 and 240 of them were enacted. By November 2008, NCSL had counted 1,267 immigration-related bills and resolutions on state dockets, with 190 being enacted [Table 1].

	<b>2006</b>	<b>2007</b>	<b>2008</b>
Proposed	570	1,562	1,267
Enacted	84	240	190
Vetoed	6	12	12
Number of States	32	46	39

*Source: National Conference of State Legislatures (2006, 2007, 2008)*

Today, state legislatures regulate immigrant access to education and public benefits, they extend driver's privileges to them, provide them with valid forms of identification, determine whether banks can give noncitizens loans or credit cards, and can even take on the issue of whether or not undocumented immigrants may own property in the state. NCSL data from 2007 show precisely how extensive and in how many areas of life is state involvement with noncitizens [Table 2].

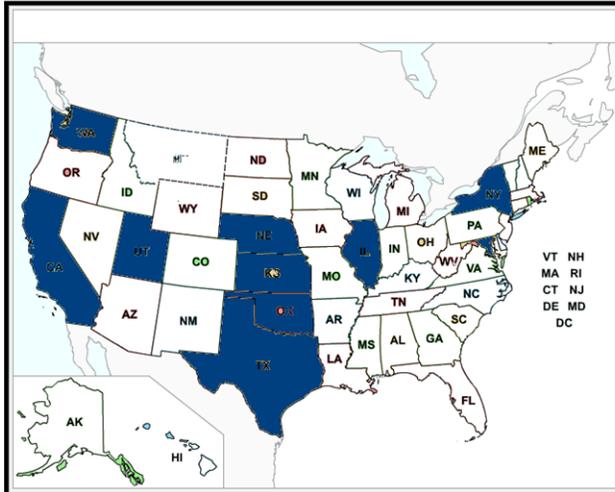
	<b>Introduced Legislation</b>		<b>Enacted Legislation</b>	
	<b>Bills</b>	<b>States</b>	<b>Bills</b>	<b>States</b>
Licenses/IDs	259	47	40	30
Employment	244	45	29	20
Law Enforcement	165	37	16	9
Resolutions	162	37	50	18
Public Benefits	153	40	33	19
Health	147	32	14	11
Education	131	34	22	17
Human Trafficking	83	29	18	13
Voting	53	23	0	0
Omnibus	29	8	1	1
Legal Services	20	12	3	3
Miscellaneous	116	34	14	12
<b>Total</b>	<b>1562</b>	<b>50</b>	<b>240</b>	<b>46</b>

*Source: NCSL, "2007 Enacted State Legislation Related to Immigrants and Immigration", January 31, 2008, p. 2.*

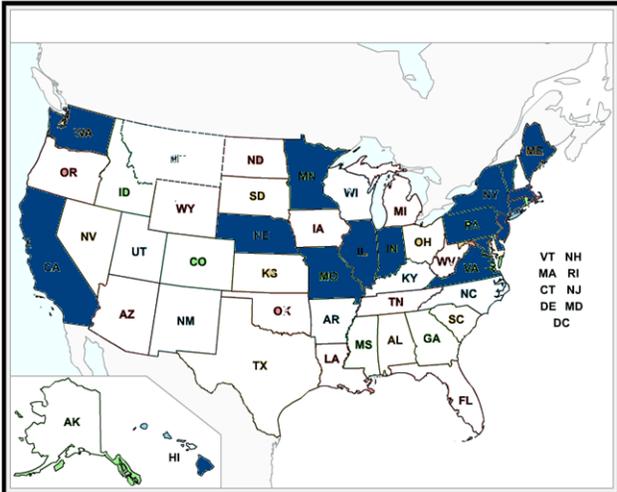
Increasingly over the past two decades, the federal government has delegated more and more power over classes of noncitizens to state legislatures. As a result of the Personal Opportunity and Work Reconciliation Act of 1996 (PRWORA or Welfare Reform Act), criteria for inclusion in a number of safety net programs for low-income individuals and families are now determined by the states. Not only has the federal government created new and rather arbitrary categories of aliens based on the date on which the act went into effect, but it has given license to states to exclude several classifications of noncitizens from federally funded programs such as the



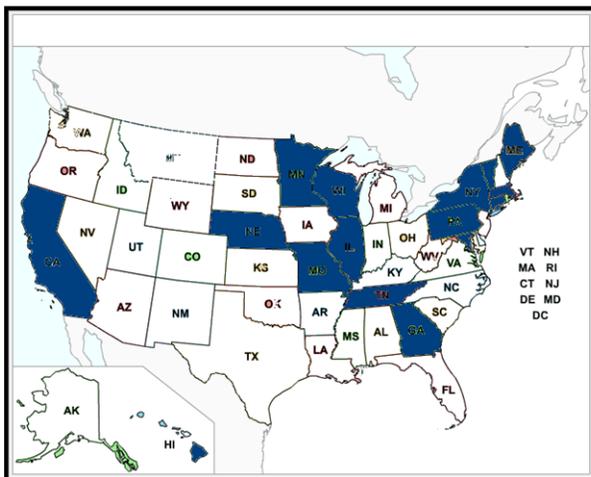
**Map 3: States that offer in-state tuition to undocumented immigrants**



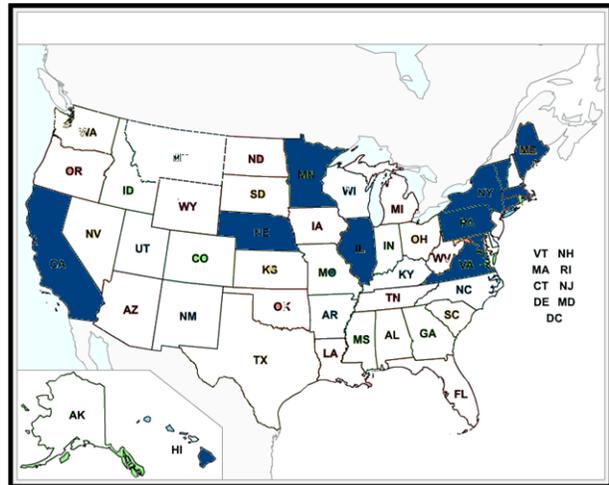
**Map 4: States that offer prenatal services to undocumented pregnant women**



**Map 5: States that cover unqualified legal permanent residents under TANF**



**Map 6: States that cover unqualified legal permanent residents under Medicaid/SCHIP**



The sub-national picture is further complicated by local activism which has increased exponentially in recent years. Local authorities in several states have tried to restrict access to housing for undocumented immigrants by requiring formal identification documentation for the signing of leases, or introduce penalties for landlords who rent properties to undocumented aliens [Map 7]. This type of legislation has already been condemned by federal district courts, but the town of Hazelton has now appealed the case (*Hazelton v. Lozano*) to the Third Circuit Court of Appeals.<sup>2</sup> In the same vein, in November 2008, more that 60 years since the U.S. Supreme Court declared alien land laws unconstitutional, the state of Florida defeated by the thinnest of margins

<sup>2</sup> Details on the case which as scheduled for oral argument on October 30, 2008, can be found on the ACLU website: <http://www.aclu.org/immigrants/discrim/27452res20061115.html>

a referendum proposing a constitutional amendment that would prohibit undocumented aliens from owning property in the state.

**Map 7: Proposed restrictive local ordinances (2006)**



**Map 8: Sanctuary Cities (2006)**



*Local Immigration Ordinances (2006 Update)*  
Based on data from [www.fairimmigration.org](http://www.fairimmigration.org)  
<http://www.ojjpac.org/sanctuary.asp> and Associated Press coverage

On the opposite side, some other towns, many in California but also major cities on the East Coast, have passed “sanctuary” ordinances, in defiance of federal law, declaring their towns as “safe havens” for undocumented immigrants and discouraging the local police from actively pursuing immigration violators. Although Congress has prohibited states and localities from placing these types of restrictions on law enforcement on two occasions<sup>3</sup> and currently has several bills on the issue under consideration, more than 100 cities and towns have declared themselves as some form of “sanctuary” or have enacted a “don’t ask, don’t tell” policy in relation to undocumented immigrants [Map 8].

The view from the ground is a complex patchwork of policies. States are not always consistent in their behavior towards noncitizens: they may be inclusive and welcoming from the point of view of one policy area and restrictive and exclusionary from the perspective of the next. Simple theories which attribute noncitizen policies to the “red” or “blue” leanings of states, or even to “old” immigration and “new” immigration are not sufficient to make sense of the noise on the ground, especially when one adds local activism to state legislative output. In fact, the combination of increased decentralization of immigration authority and the many policy areas where noncitizen rights need to be determined makes for a tableau that defies elegant, parsimonious logic.

<sup>3</sup> Boatright, L. (2006) “Clear Eye for the State Guy: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement,” *Texas Law Review*, 84 Tex. L. Rev. 1633

## **Immigration as a Question of Policy: The Logic of Functional Federalism**

The purpose of policy is to provide a set of solutions to a specific, well-defined problem. In the context of the American federal system, the vast majority of policy domains are characterized by shared authority across levels of government as solutions involve action and resources from multiple government players. Over time, an intricate web of partnerships, shared domains, joined authority and jointly run programs and policies have developed. These complex interrelationships span across a variety of policy areas and their depth and complexity differs by domain.

Federalism as a theory of policy provides functional justifications for dividing authority which in turn are based on neoliberal assumptions about the operation of the market and the role of competition. According to functional federalism, a theory derived from public goods theories in economics, not all governments are created equal. Lower level governments are well-suited to have control over economic development policy, while the federal government should focus more on policies of income redistribution (Peterson, 1995; Buchanan and Tullock 1995; 1962; Hirschman, 1970; Tiebut, 1956).

States and localities are better suited to assess the physical and social infrastructure needs of their communities. As they know the needs and preferences of their residents, they can provide a bundle of goods and services geared to meet voters' expectations. The decisions and choices of states and localities are subject to market control: both the economic market in the form of capital and labor and the political market in the voice of voters have a direct influence on state decision-making. As a result of the competitive environment within which they operate, and their close proximity to the individuals within their jurisdiction, states and localities have a different cost-benefit calculus than does the federal government. Thus, states can be more efficient and effective in deciding on policies such as transportation, education, and other policies linked to economic development (Peterson, 1995).

Contemporary public choice theory exalts federalism as the optimal system for ensuring competition across governmental units. In this view, competition in government will result in better outcomes for those whom government serves, better representation of interests and ultimately more democracy. The public choice school has argued that individuals have two ways to react to government decisions with which they do not agree: they can voice their objections through political participation and voting, or they can move out of a jurisdiction and into one that offers a bundle of goods and services that they like, or at the very least a locality they perceive more amenable to implementing their preferences. As a result, governments will behave much

like firms: in an effort to maintain citizen/consumers within their jurisdiction, states will compete with each other offering various bundles of services and taxes that are perceived to be most likely to attract residents (Peterson, 1995; Buchanan and Tullock 1995; 1962; Hirschman, 1970; Tiebut, 1956).

In the American federal structure, exclusive responsibility for establishing labels and categories of noncitizens rests with federal authorities. Federal law determines the criteria for admission to permanent residency, and delineates who can be defined as a refugee, a foreign student, a visiting scholar, a guest worker, a diplomat or an undocumented immigrant. However, much of the regulatory authority over those noncitizens present in the country rests with states. This pattern is not new: states have been involved in regulating aliens since colonial times, establishing laws relating to property ownership, education, access to the labor market, health, or poverty (Filindra and Tichenor, 2008; Motomura, 2006; Price, 1999; Newman, 1996).

Following in the logic of functional federalism, some immigration law scholars have argued for a stronger role of states and localities in regulating noncitizens on the basis that noncitizen integration into local communities falls on the shoulders of lower tiers of government. Christina Rodriguez (2008:571) defining immigration as an externality of economic development, believes that regulation of noncitizens should be among those “quintessentially state interests, such as education, crime control, and the regulation of health, safety and welfare... because managing immigrant movement is itself a state interest.” Essentially, the argument goes that states bear the costs of the presence of noncitizens within their territory and thus states should have the option to determine their relationship with noncitizens independently of the federal government. Drawing from the same public choice model, Rodriguez (2008) argues that state regulation of noncitizens is a pragmatic necessity given the competitive environment within which states operate. States and localities have the right to determine the composition of their population and their economic present and future and for that reason, they should be involved in the regulation of noncitizens. In this view, the terms of the contract between the state and the noncitizen should be consistent with state or local interests, objectives and ideology, not federal ones. As state and local reality changes in response to economic and social conditions, states can adjust their response to noncitizens accordingly. Peter Spiro (1994) has linked the devolutionary impetus to globalization, arguing that in an age of international integration, the impact of economic transformative phenomena differs significantly by locality. Furthermore, states have developed their own relationships with foreign countries and people. Therefore, they are in a better position than the federal government to evaluate the impact of immigration on their community. Therefore, federal monopoly in the immigration domain is both impractical and inefficient and given the pressures from federalism it will steadily diminish over time.

When viewed as a public policy domain, immigration is clearly associated with both costs and benefits. What is more, many of the benefits are national while the states and local governments are expected to shoulder the costs. For example, noncitizens are likely to pay federal taxes

which benefit the federal government, but draw on state education and healthcare benefits thus contributing to the depletion of state and local budgets. Given the asymmetrical distribution of costs and benefits across levels of government, there is certainly *prima facie* validity to the argument that states and localities should be responsible for developing policies that suit the needs and views of their residents, rather than have to cope with national decisions that are contrary to the local community wants. Following this logic, immigration policy should be determined at the local level, based on local needs and should be adjusted in accordance with local market and social conditions.

The logic of functional federalism in the context of immigration is suspect on two grounds: normatively, the idea that people's rights should be determined by the states' economic business cycle and be subject to change in accordance with the ebbs and flows of state and local economies is inconsistent with the country's values and understanding of equality and justice. Empirically, there is a significant volume of social science research which demonstrates that economic considerations are not the most significant drivers of social policy, but rather ideology and the racial composition of the population are strong predictors of whether a state will be generous or not in its benefits to low income residents. A number of studies have indicated that states with large minority populations, especially African-Americans, tend to be less generous than other states (Keiser et.al., 2004; Fellows and Rowe, 2004; Johnson, 2001; Soss et.al., 2001; Zylan and Soule, 2000; Howard, 1990; Wright, 1976). Recent studies of immigrant eligibility rules for welfare and other social benefits also find that the racial composition of a state plays a role in the type of benefits available for noncitizens at the state level (Filindra, 2008; Graefe, et.al., 2008; Hero and Preuhs, 2007).

The importance of non-economic considerations in decisions concerning welfare are also highlighted in studies of public opinion and of media have show that there is a strong bias among Americans who tend to think of welfare policy in highly racialized terms, views that are reinforced by media coverage that tends to present welfare recipients as members of minorities (Sears, Sidanius and Bobo, 2000; Gilens, 1999). Recent studies have shown that a spike in anti-welfare sentiments that prevailed in the mid-1990s was strongly correlated with media coverage of the topic during that period (Schneider and Jacoby, 2005).

If immigration policy were similar to transportation policy the logic of functional federalism would be valid. States and localities can and should determine where to build roads and bridges, which communities to link together and in what ways. Sub-national authorities should also have flexibility in adjusting their transportation policies over time based on local economic conditions, local needs, and local budgets. However, immigration is not another economic sector nor should it be viewed as an externality of economic development and noncitizens are not roads. They are human beings whose only difference from other residents is that they lack an American birth certificate or a naturalization card. What sets noncitizens apart from Americans is that the country has not formally recognized them as members of the national community.

The United States does not have policies regulating specific socio-demographic groups the way other countries have had. There are no “Black” policies, “Hispanic” policies, or “Jewish” policies in the country. This is because the country was explicitly founded on principles of individual equality, recognizing that membership in a liberal democratic society should not be conditional upon demography or socio-cultural characteristics. How is it then consistent with the country’s democratic principles to have a policy for people based on their status? The question is certainly not new: in 1866, during the debates over the Reconstruction Amendments, Representative Bingham, one of the authors of the resolution that became the 14<sup>th</sup> Amendment, asked: “Is it not essential to the unity of the Government and the unity of the people that all persons, *whether citizens or strangers, within this land*, shall have equal protection in every State in this Union in the rights of life and liberty and property?”<sup>4</sup>

### **Immigration as a Question of Membership: The Logic of Rights**

Contrary to Alexander Bickel’s dismissal of citizenship as “a simple idea for a simple government” (Bickel, 1977:54), the content and meaning of citizenship has remained a complex normative and political issue both for those with claims to the title and for those on the outside of its realm. Furthermore, normative and empirical theory alike have struggled to understand the relationship between the “haves” and “have nots” of citizenship as it develops and becomes contested in the context of the nation state.

As Michael Walzer has aptly noted, “the role of citizens over noncitizens, of members over strangers, is probably the most common form of tyranny in human history” (Walzer, 1983:62). The allocation of rights to those who are not covered by the umbrella of citizenship has proven to be a contentious normative issue that has surfaced repeatedly over the past two decades in the context of the growth in transnational migration into Europe and North America (Brubaker, 1998). Yet, the formal and informal roles of noncitizens in modern nation-states have been largely ignored by much of the democratic theory literature as a result of the rigid distinction between the “inside” and the “outside” of a polity.<sup>5</sup>

In our traditional understanding of membership, the state has the right to determine the criteria of entry and inclusion for noncitizens as a result of the nation-state’s right to self-preservation (Schuck, 1998; Walzer, 1983; Bickel, 1977). Classical immigration law perceived the relationship between the host state and the alien guest in terms similar to the way 19<sup>th</sup> century private law encapsulated the interaction between a landowner and a trespasser: according to Peter Schuck (1998:24), the purpose and goal of immigration law was to preserve and protect

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<sup>4</sup> Cong.Globe, 39th Cong., 1st Sess., 1033 (1866, as quoted in *Plyler v. Doe* (1982))

<sup>5</sup> Feminist theorists have also criticized this limiting view of membership which is based on the concept of the traditional patriarchal nuclear family with the state-father in the role of the protector and decision-maker as to the rules that apply and to the definition of the family (Stevens, 1999).

state sovereignty and as such, the nation-state was accorded the discretionary privilege of assigning or removing noncitizen rights.

In fact, the traditional conceptualization of membership in American law has its roots further back than the 19<sup>th</sup> century, in the British feudal era. In British common law of yesteryear, a system developed at a time when feudal lords ruled the Old World, those born under the authority of the Sovereign were under his protection. The relationship was one of “natural allegiance” defined by Blackstone as “perpetual fidelity to the Sovereign... [as] a debt of gratitude... which cannot be forfeited, cancelled or altered, by any change of time, place or circumstance” (Blackstone, 1783:359). Thus, those born under the tutelage of the King were part of his family and entitled to his protection in exchange for loyalty. Neither the protection nor the loyalty was negotiable in this conceptualization of the relationship between the King and the subject.

On the other hand, aliens owed only “local allegiance” to a foreign sovereign and while in residence within his territory, they were required to subject themselves to the rules and the will of the King. Aliens continued to owe “perpetual allegiance” to the sovereign of their own country which made their loyalty to their new ruler suspect and thus alienage served as a disqualification for rights. Therefore, while those born within the realm of the Sovereign were entitled to the core right of his protection and to the crucial right to property, aliens could not put forth similar claims. The American colonies transferred the allegiance requirement of the British common law tradition from the King to the “People” but the norms on which the new theory rested remained the same. In the New World order, it was the state that owed allegiance to its citizens, but noncitizens continued to be outside of this relationship. Membership thus required “naturalization,” in essence the declaration by the state that the alien has now transitioned to a relationship of “natural allegiance” from one of “local allegiance.” It is not thus surprising that American naturalization law since the 1790 required naturalized citizens to renounce their allegiance to their country of origin (Aleinkoff, 2001).

This monolithic binary perception of political society which includes only those with formal citizenship status and relegates to oblivion those missing that designation “disables theorists from seeing... that the global is not merely situated “out there” but is also located, increasingly, within national borders” (Bosniak, 2006:7). The “border” is thus not solely a physical barrier but a social divider as well: it follows noncitizens into the interior of the host country, determines their rights, guides their experiences and influences the shape of their identity (Bosniak, 2006:9).

Today, there is general agreement among scholars and political practitioners alike that not all rights are derived from an individual’s status as a citizen. Individuals, regardless of their citizenship status, are members of the polity within which they reside and as such they are entitled to a set of fundamental rights resulting from their human existence rather than their legal existence (Bosniak, 2006; Motomura, 2006). *Territorial personhood*, as it is termed by

Motomura (2006:10), bestows upon noncitizen-members of the community a minimum set of rights. In spite of the fundamental understanding that these rights of personhood exist, many aspects of them remain to be determined and discussed both on a normative and on a policy level. For example, it is not clear what these fundamental rights are, whether they are procedural only or if substantive rights are also to be extended to noncitizens, how flexible or inflexible is their content, who determines them or how are they communicated to the noncitizens.

**a. The Tyranny of Labels: Within Noncitizen Classifications in American Immigration Law**

The issue of membership rights is further complicated by the arcane categorization system embraced by American immigration law. Not only is the distinction between the internal and the global illusory, but so is the easy dichotomy between citizens and noncitizens. U.S. law recognizes a multitude of alien classifications –from diplomats to refugees, to undocumented immigrants- each of which inhabits a different place on the membership continuum. Peter Shuck (1998:184), following David Martin (1995) describes citizenship as a set of concentric circles, “a community of citizens at the central core is surrounded by a series of more peripheral status categories with ever more attenuated ties to the polity, weaker claims on it, and more limited rights against it.” The category of “aliens” encompasses groups that differ significantly not only in legal status but also in social and demographic characteristics and in access to rights and benefits. Aliens have access to partial membership (Brubaker, 1998; 1989), are often delegated to second-class citizenship (Bosniak, 2006) and their rights and relationship with the state shifts in accordance with the alienage category to which they are fitted.

Academic, political and public views and positions on the rights of various noncitizen groups vary by the type of group that is being discussed. Legal permanent residents (LPRs), those among the noncitizens who have been granted the right by the state to live and work in the country for as long as they wish to stay, generally inhabit the portion of the membership continuum closest to citizenship. LPR status is often perceived as “something less than citizenship but more than the minimum status that all noncitizens enjoy by virtue of their basic human rights” (Motomura, 1998:200). “Greencard” holders –as they are often called in colloquial parlance- are typically conceptualized as probationary citizens or citizens-in-waiting who will eventually be granted the honor of applying for full membership to the American club. This is the period for them to adapt to the norms of their new country and adopt its identity. Although LPRs have not had the franchise for almost 100 years, until 1996 they enjoyed most other benefits of citizenship including full access to government-funded assistance programs, such as welfare and healthcare. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) changed that landscape by creating new and quite arbitrary classifications of LPRs, some with access to most programs, others with access to a limited number of programs, and yet others with no access.

At the lower end of the membership spectrum is a crowd of more than 12 million undocumented immigrants, individuals and families who entered the United States without the formal consent of the federal government. The normative debate here is between those who emphasize the “immigrant” or “noncitizen” part of the term, choosing to underplay these individuals’ lack of authorized entry, and those who laser in on the legal status question, arguing that undocumented entry is a crime which makes these people “illegal” and “criminals.” From newspaper articles to Congressional hearings, people’s position on rights for undocumented immigrants is often indistinguishable from their normative view of unauthorized entry. Although, as aptly observed by Mae Ngai, “no human being is ‘illegal’” and “illegality” is a descriptor of particular actions not of classes of people, in this discourse, “illegality” has been used very successfully to brand immigrants (Ngai, 2006). As Lina Newton (2008), Mae Ngai (2006), and Lucy Cohen (1973) among others have demonstrated, the “undocumented immigrant equals criminal” discourse is a pervasive pattern even in the Congressional Record and a common way of morally categorizing noncitizens into “deserving” and “undeserving.” Furthermore, the criminality theme allows its proponents to make the argument that much like other “law-breakers,” undocumented immigrants should be banished from moral society and physically excluded, both by imprisonment and by deportation (Filindra and Kovacs, 2008).

What this indicates is that the concept of membership is not one part of a dichotomy, but rather a continuum driven by the structures and institutions of immigration legislation. Thus if there is a contractual relationship between the alien and the host state, as liberal theorists would have it, it is one of fundamental inequity based on a conception of justice which assumes an *a priori* inequality between noncitizens and citizens and also across categories of noncitizens (Motomura, 2006). In the term coined by Douglas Massey (2007), noncitizens are *categorically unequal* both in relation to citizens and across noncitizen categories.

#### **b. The American Kaleidoscope: Circling Back to Federalism**

Critics of democratic theory and of theories of membership typically rest their case by showing this antithesis between the inclusive analysis and exclusionary assumptions of much of the theoretical cannon in this field. However, in the case of the United States, the story hardly ends there. The federal structure of the polity and the power-sharing arrangements that exist across levels of government extend to the regulation of noncitizens and have profound effects on the lives of those enjoying the least protection by the government.

Federalism as a theory of political authority provides explanations and justifications for why political power should be distributed across two or more levels of government. According to Alexander Hamilton in Federalist #51, federalism is a form of “double security” for the rights of the people because “the different governments will control each other, at the same time they each will be controlled by itself.”

By creating two sovereigns, federalism also created two layers of citizenship. In the early years of the country's history, there was a substantive and important distinction between national and state citizenship and the rights and obligations that each conferred. History, however, vindicated the view that citizenship rights must be uniform across the nation and that the federal government, not the states, should have the authority to determine these rights. For holders of formal citizenship, the Reconstruction amendments and 20<sup>th</sup> century civil rights jurisprudence have made the distinction between state and national citizenship largely symbolic (Schuck, 2000). However, that is not the case for noncitizens for whom the civil rights revolution, federal law, and equal protection jurisprudence have created *de novo* a system of dual legal existence.

As discussed earlier, theories of functional federalism espouse the logic of equal opportunity espoused by theories of federalism: *ceteris paribus*, the economic theory of the firm teaches us, competition breeds choice which in this view is a requirement for democracy if not part and parcel. However, the unstated assumption of the competitive federalism model is that it only includes citizens under the equal opportunity umbrella. Only within the community of citizens are structural impediments assumed to be non-existent and thus opportunity can be equal.

Functional federalism and its progeny are established on the notion of access to *both* political participation and freedom of movement. The idea behind it is that there will always be some community that wants your vote and will thus be willing to accommodate your demands. Thus, this conceptualization of federalism has no room for noncitizens as they exist in the modern American polity: the logic is grounded in the fundamental political assumption that the power to control government is derived from the power to vote. In the words of Benjamin Franklin, "they who have no voice nor vote in the electing of representatives do not enjoy liberty, but are absolutely enslaved to those who have votes." Keenly aware of the importance of the franchise, the Founding Fathers and those who came after them allowed noncitizens to participate in elections at all levels of government and even to run for political office. It was only in the early 20<sup>th</sup> century, in the midst of the strongest restrictionist movement to have ever swept the nation that noncitizens were disenfranchised (Hayduk, 2006; Raskin, 1993).

The power of exit which is the second fundamental assumption of the model may bring leverage to large firms for whose investment and jobs local communities compete. However, theories of migration and empirical research on migratory networks have demonstrated that the underlying assumptions of rational choice and complete information on which the "exit option" is hinged, deviate significantly from actual patterns on the ground (Massey, Durand and Malone, 2002).

The U.S. Supreme Court, in its efforts to carve out the boundaries between federal and state authority in this domain, has time and again shown its skepticism about the role of states and localities in the regulation of immigrants. The plenary power doctrine<sup>6</sup> and its progeny

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<sup>6</sup>In 1889 the U.S. Supreme Court upheld the Chinese Exclusion Act, a decision that has been marked as one of the most bigoted pronouncements in history. In the process, it also allocated exclusive authority over "entry and abode" to the federal

notwithstanding, the Court had taken a careful look at state actions and extended the protections of the 14<sup>th</sup> Amendment to noncitizens. In 1971, the Supreme Court determined that states are required to use the same standards for noncitizens as they do for citizens. In *Graham v. Richardson*,<sup>7</sup> the Court struck down state laws in Arizona and Pennsylvania that restricted legal immigrants' access to welfare services based on duration of residency requirements. Writing for a unanimous Court, Justice Blackmun, emphasized that

“[state] classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”<sup>8</sup>

Several decisions have followed *Graham*, all striking down state statutes that discriminate against legal (and on occasion undocumented<sup>9</sup>) aliens on the basis of the 14<sup>th</sup> Amendment's equal protection clause as well as federal preemption. Most notably, in 1994, federal courts challenged the constitutionality of California's Proposition 187 (also known as the “Save Our State” initiative) which sought to eliminate access to education, healthcare and social services for illegal immigrants in the state. More recently, in *Lozano v. Hazelton* (2007), the federal Court of Appeals struck down a local ordinance that required landlords to verify the identification and legal status of potential tenants. The Court noted that “we cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single act ... The United States Supreme Court has consistently interpreted [the 14th Amendment] to apply to all people present in the United States, whether they were born here, immigrated here through legal means, or violated federal law to enter the country” (ACLU, 2007).

## Conclusion

As the relationship between citizens and noncitizens and even that between classes of noncitizens is inherently unequal, the delegation of power over noncitizens to lower levels of government can lead to more inequality and certainly create far less consistency and uniformity of rights for noncitizens. This has both normative and economic implications. On the economic front, the lack of well-defined, uniform rules of the game that provides a clear understanding of

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government. The federal government was designated as the sole sovereign over immigrants, responsible for determining not only who is allowed to enter, who is barred, and who can be expelled, but also what rights do noncitizens have while present in the United States. According to the Court's assessment, which has held almost unchanged to this day, “over no conceivable subject is the legislative power of Congress more complete than it is over [immigration and naturalization].” Thus not only is the federal government's power exclusive, but it is also unreviewable. (See: *Fong Yue Ting v. United States*, 149 US 698, 724, 730 (1893); *Nishimura Ekiu v. United States*, 142 US 651, 660 (1892))

<sup>7</sup> *Graham v. Richardson* 403 U.S. 365 (1971)

<sup>8</sup> *Graham v. Richardson* [403 U.S. 365 (1971)], as quoted in Wishnie, “Laboratories of Bigotry,” 505

<sup>9</sup> In *Plyler v. Doe*, 457 US 202 (1982), the Court determined that states cannot exclude undocumented alien children from public primary and secondary schools.

roles and expectations for both noncitizens and their American hosts creates an environment that lacks transparency and predictability. This leaves everyone from employers and local hospitals to mixed-status families and noncitizens themselves in confusion. For clarity in the contract between noncitizens and their host country would greatly facilitate the relationship and interaction between the two. Furthermore, uniformity would improve the conditions under which noncitizens compete with other noncitizens across the country. Today, equal opportunity is geographically constrained: some states are status-blind offering categories of noncitizens important benefits the same way they do to citizens, while in others, noncitizens are partially or wholly excluded. A uniform set of rule may not necessarily alleviate the inequalities between citizens and noncitizens, but it would provide noncitizens with one set of rights regardless of where they reside within the country. Motomura's (2006) theory of immigration based on the contract model would thus be fulfilled: at the time of entry, noncitizens depending on their classification would be granted a specific set of rights which they would take with them to the interior of the country. This is certainly not a model of justice and fairness based on equality, but it is one based on uniformity; extraneous and temporal criteria such as geographic location, date of entry and others would not play a role in the determination of a noncitizen's rights.

Certainly the possibility of a double-edged sword is always present in this context where rights are not "inalienable" but rather at the discretion of the sovereign. The federal government in its uniformity may be as discriminating and harsh as any state or even more so. After all, the Chinese Exclusion Act was the doing of Washington and so were the immigration control laws of the 1920s. The states on the other hand, are largely different in the way they handle policy and as PRWORA showed, the probability of a "race to the bottom" is unlikely. Absent federal regulations that prohibit them from doing so, some states will continue their tradition of generosity and openness to noncitizens, while others will seek to exclude them to the degree allowed.

This has become a major dilemma for those of us with a normative or a pragmatic stake in immigration policy. The political calculus that lies at the foundation of this debate between advocates of immigration control and the proponents of open borders and immigrant integration rests with their assessment of the probability that the federal government will act in their favor. Those who believe that the federal government is on their corner, or who have reason to believe that their influence over Washington will be significant and fruitful in the near future, will develop arguments for federalization and for the dominance of the plenary power doctrine. On the other hand, those with a more pessimistic outlook who fear that uniformity will not be of the type they espouse will argue for more extensive state role in immigrant regulation.

Writing in 1998, Peter Schuck in agreement with Peter Spiro (1994) noted that the country is on a strong devolutionary trajectory with states getting more and more involved in the determination of the rights of noncitizens and their access to the welfare state. Schuck viewed this development as inevitable and irreversible arguing that "the structures supporting national power

will be almost impossible to restore once they are dismantled, for restoration would require three conditions to converge: a convulsive national crisis equivalent to the Great Depression; a renewal of public confidence in the efficacy of centralized power and of national governmental solutions; and a surrender by the states of their hard-won powers” (Shuck, 1998:194). Recent events, however, may cast doubt on Schuck’s determinism. The past two months have brought the near collapse of the American economy, a situation often compared to the Great Depression. The recession has brought with it calls for more involvement of the federal government in economic policy, federal loan guarantees for home-owners, federal purchase of private companies (at least temporarily) and a new discourse on the role that the federal government can and should play in the life of the polity. States too have been asking for federal assistance as they hover on the brink of bankruptcy, doubtlessly aware that federal assistance comes with federal conditions. The election of the country’s first African-American President in the person of Barack Obama also signals that the country may be open to some modifications of the existing social contract that govern not just state-federal relations, but also the country’s identity as a whole. Thus maybe this is the right time to revisit the issue of immigration from the perspective of uniformity and rights and open a new discussion on the role that noncitizens should play in the American polity.

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