

EUI Working Paper RSC No. 96/26

The Re-evaluation of American Citizenship

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WP
321.0209
4 EUR



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The Re-evaluation of American Citizenship

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Printed in Italy in May 1996
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Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

Citizenship seems to be very much on the collective mind of American society these days. Congress is debating it. Scholars and other commentators are writing books about it. Citizens are complaining that it has lost much of its meaning. Aliens are lining up to apply for it in unprecedented numbers. What, one may ask, is going on here?

Citizenship-talk proceeds through several different tropes. Sometimes we advance it as a powerful aspirational ideal. In this normative usage, it serves as a proxy or placeholder for our deepest commitments to a common life. Citizens, in this view, mutually pledge their trust and concern for each other and their full participation in shared civic and civil cultures. Sometimes - perhaps even at the same time - we also deploy citizenship as a positive concept. In this positive usage, it describes a legal-political status that some individuals enjoy, some can only aspire to, and still others have little hope of ever attaining. Here, citizenship defines a relationship between individuals and the polity in which citizens owe allegiance to their polity - they must not betray it and may have to serve it - while the polity owes its citizens the fullest measure of protection that its law affords, including (except for minors and some convicted felons) the right to vote.

These two uses of citizenship - the normative and the positive - are linked rhetorically, and perhaps even psychologically. Like the serpents on a caduceus, they are tightly intertwined. We often use the ideal of citizenship as a standard against which to evaluate the actual conduct of others. When sometimes hurl the ideal as an accusation, bitterly condemning what we do not like about contemporary life and ascribing it to the defects of our fellow citizens. Whether the offense is the despoilment of public spaces in our cities, the failure to vote in our elections, the violence in our schools and neighborhoods, or the erosion of our families, we indict not only the individual perpetrators but the polity that, by debasing citizenship, has fostered or at least countenanced these wrongs. At times - and today seems such a time - our despair may be so great that we wonder whether we remain one people dedicated to common purposes. The most disillusioned of us may conclude that citizenship should be a privilege that requires us to be better in order to claim it, a prize that can be earned only through greater rectitude.

It is precisely at these censorious moments, however, that citizenship's positive meaning can check the harsh, exclusionary impulses that its normative meaning reflexively arouses in us. When we are tempted to say (or feel) that our fellow citizens should "shape up or ship out," or should "love America or leave it", we may recall that our law does not view citizenship as a reward for civic virtue. The target of criticism may respond with what he imagines is a rhetorical trump: "it's a free country". But far from silencing the critic, this reply simply

invites a rebuttal in which he invokes his underlying conception of freedom - and of citizenship. So the conversation goes.

In the U.S. today, this conversation is particularly heated. Not since the McCarthy era in the early 1950s, when many Americans aggressively questioned the loyalty of their fellow citizens, relatively few immigrants were admitted, and relatively few of those sought to become citizens, has citizenship-talk been so energetic and morally charged. In Congress, at the bar of public opinion, and even in the courts, citizenship in both its normative and positive dimensions is being closely reexamined.

In this paper, I explore the reasons why Americans are arguing more passionately about citizenship today, and why the rules that have long structured this status are under serious reconsideration - and in some cases, under vigorous assault. I shall argue that the intensity of this debate reflects the tensions that arise within and among three analytically distinct relational domains, each of which is characterized by a distinctive problematic, a wrenching conflict between competing and deeply-held values.

The first domain is international law and politics. Here the nation defines the scope of its sovereignty by classifying all individuals as either insiders or outsiders. By insiders, I mean those whom the polity brings into its constitutional community by granting them legal rights against it. The American constitutional community includes citizens, legal resident aliens, and in some cases illegal aliens. Outsiders are everybody else in the world. The U.S. defines its sovereignty in this international domain largely, but not exclusively, in terms of its power over territory; its constitutional community embraces virtually all individuals within its national borders and territories, as well as some who are outside them but to whom the U.S. has acknowledged some special political and legal relationship. The distinctive problematic in this domain is a tension between the values of national sovereignty and autonomy and the reality that many outsiders possess the power to transform themselves into insiders without the nation's consent and beyond its effective control.

The second domain is national politics. Here, public law classifies the body of insiders into different categories, defining what the polity owes to each of them and what they in turn owe to the polity. Its distinctive problematic is a tension between the values of equal treatment and communal self-definition, and the reality of limited resources. This tension is particularly delicate because it encourages the marginalization not only of outsiders but of some insiders as well. The meaning of citizenship in the national political domain is highly controversial in the U.S. today because it is intimately connected to bitterly divisive questions about the welfare state - its essential legitimacy, its moral character, its purposes, its programmatic scope, and its availability to citizens and to various categories of aliens.

The third domain is federalism - the structural division of the American polity into multiple, overlapping sovereignties. (As I note below, I mean to include in "sovereignties" both public and private governance regimes to which individuals may be subjected). Each individual possesses a civic status in the national polity and in a state polity. She may also live in a private enclave in which her status is regulated, often extensively, by contract. Different rights and duties attach to these diverse statuses. Federalism's distinctive problematic is a tension between the values of equality and uniformity, which the nation can promote through its power to unify the same policy throughout its territory, and the value of diversity among, and responsiveness to, the policies advanced by different states and contractual regimes. In this domain, as in that of national politics, Americans are bitterly debating the meaning of citizenship in the most divisive of contexts: fundamental reconsideration of the welfare state.

The paper is divided into three parts, corresponding to these three domains of citizenship. In each, I discuss how changing conditions, ideas, and values have provoked a reevaluation of American citizenship by deepening its characteristic tensions.

I. Citizenship in the International Domain

In dividing up the world's population into insiders and outsiders, the U.S. is remarkably inclusive, at least relative to other polities. This inclusiveness takes a number of different forms. First, the U.S. has adopted a very liberal legal immigration policy, admitting approximately 800,000 aliens each year for permanent residence. This annual influx probably exceeds the legal admissions totals of the rest of the world combined. Moreover, the U.S. has increased its legal admissions during the 1990s, a period during which other countries have been restricting it. Second, the U.S. has extended legal permanent resident status to approximately 2.5 million illegal aliens through a massive amnesty, a program to legalize their dependents, and more conventional immigration remedies. Third, a combination of expansive jus sanguinis and jus soli rules extends citizenship very broadly - to essentially all individuals who are born on U.S. soil, regardless of their parents' legal status, all children born abroad to two American parents, and many children born abroad to one American parent. Fourth, U.S. naturalization requirements are relatively easy to satisfy. From 1990 to 1994, the U.S. naturalized between 240,000 and 400,000 aliens a year; naturalizations in 1995 are expected to approach 1 million, the largest in history.

Finally, more than one million aliens enter the U.S. illegally each year; some 250,000 to 300,000 remain in illegal status more or less permanently. Simply by virtue of their presence in the U.S., they can claim extensive procedural rights,

and in some cases substantive entitlements as well, under the Constitution, statutes, and administrative rules. Even excludable aliens stopped at the border, who possess only the most elementary constitutional rights (e.g., access to the courts; freedom from physical abuse), can claim many statutory rights under U.S. law.

In the international arena, the principal force reshaping Americans' conceptions of citizenship is the growing anxiety aroused by their perception that their national sovereignty is under serious challenge. Three recent developments are particularly salient: the globalization of the U.S. economy; the increase in illegal migration; and a more general diminution of American autonomy in the world.

Globalization

The integration of the world economy - its "globalization," in the already-hackneyed phrase - has proceeded at an ever-quickening pace. This integration, moreover, is comprehensive, encompassing all factors of production and distribution including goods, services, capital, technology, intellectual property rules, and (most pertinent for present purposes) labor. Because other participants in this conference are focusing on this phenomenon, it suffices for me to add that the U.S. economy, while primarily focused on its enormous domestic market, has in recent years become a nimble exporter and importer of capital and, to a lesser extent, of jobs. A number of factors strongly suggest that this trend will continue. Powerful economic and political interests are fueling it, while enfeebled labor unions lack the bargaining power to arrest, much less reverse, it. American producers, no longer able to count on policies protecting them from foreign competition, are rationalizing their operations by sending low-skill jobs abroad while importing high-skill technicians, managers, and professionals where needed.

Nowhere is the force of this globalization dynamic more apparent than in the formation of regional free trade blocs and their gradual extension - through the inclusion of new members, merge with other such blocs, and coverage of additional goods and services. This dynamic first occurred in Europe with the progressive expansion of the Treaty of Rome leading to the EU and its absorption of much of the former European Free Trade Area and its addition of other new members and trade sectors. For the U.S., of course, the crucial development has been the creation of the North American Free Trade Agreement (NAFTA), which is likely to be enlarged to include Chile and perhaps other hemispheric nations, as well as being extended to include other areas of economic activity. Long before NAFTA, of course, the U.S. and Mexican governments had concluded a number of formal and informal arrangements involving economic activities in the border areas and the control of migration

to the U.S. from South and Central America. NAFTA has altered and extended these arrangements, with consequences that will not be well understood for years to come.

For present purposes, the important point is that these developments signal a growing recognition by the U.S. government that America's fate is increasingly linked to that of her neighbors, her other trading partners, and the rest of the world. These linked fates are not merely economic but are also demographic, social, and political. The U.S. is increasingly vulnerable to the immense migratory pressures being generated by conditions beyond both her borders and her control. These "push" factors are magnified and reinforced by powerful, indeed tidal "pull" factors: a vast and burgeoning American economy that often prefers foreign workers to domestic ones, a dynamic American culture that promises immigrants great personal freedom and mobility, and grooved pathways of kinship-based chain migration that constantly creates and replenishes immigrant and ethnic communities in the U.S.

Illegal Migration

In recent decades, illegal migration has grown fairly steadily except for the period immediately following the enactment of the employer sanctions provisions of the Immigration Reform and Control Act of 1986. The number has already returned to its pre-1986 level, and even the extraordinary growth in the resources devoted to border control shows no sign of stemming (as opposed to rechanneling) this influx. The continuing ineffectiveness of border control is a source of enormous frustration to Americans and their politicians, especially in the relatively small number of communities with high concentrations of illegals. At the same time, Americans have become both more dependent on it and more aware of this dependence, which for many employers, consumers, and communities can approach an addiction. This can produce hypocrisy of comical dimensions. California Governor Pete Wilson, for example, sought to build a political movement by denouncing illegal aliens, only to be caught employing them and then failing to pay their Social Security benefits!

Because many Americans feel beleaguered and victimized by illegal immigration, it is profoundly affecting their political identity. These feelings are likely to intensify as the large cohort of former illegal aliens who received amnesty in the late 1980s begin to become U.S. citizens in large numbers, many reportedly impelled by a desire to assure their access to welfare state benefits. Moreover, the families of these amnestied illegals are now exerting strong pressures on the legal immigration system, competing with the more compelling claims of legal immigrants' relatives who wish to join their families in the U.S.

For the first time, Congress is considering legislation that would differentiate between the immigration-sponsorship rights of native-born citizens

and previously naturalized citizens, on the one hand, and the rights of the newly-naturalized citizens who were formerly illegal, on the other. (By creating two classes of citizens, such a change would raise serious constitutional questions - although it would probably pass muster). Congress is also considering whether to eliminate automatic birthright (jus soli) citizenship for the U.S.-born children of illegal alien parents. But although the number of illegals residing in the U.S. may now be even higher than the number whose plight prompted the 1986 legalization, Congress is unlikely to propose a new amnesty.

As the number of illegal aliens grows, their position in the American polity becomes increasingly anomalous. Americans admire illegal aliens' tenacity, hard work, and resourcefulness but at the same time deeply resent their furtive success in penetrating U.S. territory, working in U.S. jobs, earning (and exporting) dollars, and securing legal status - even the ultimate prize, citizenship - for themselves and their families. As the voting for California's Proposition 187 demonstrated, many legal resident aliens and recently-naturalized citizens are also strongly opposed to illegal migration.¹ The fact that the U.S. has long countenanced illegal migrants, derived tax revenues and other economic benefits from them, and built important sectors of her economy around their continued flow arouses cognitive dissonance; it does not really alter the resentment. Americans believe that illegal aliens impose large costs on American society. Even if they did not believe this, however, they would still demand the interdiction and expulsion of illegals. After all, illegals are like trespassers; they have no right to enter or remain. Control of illegal migration, then, is not merely a pragmatic policy goal; it assumes the character of a legal duty and a moral crusade. Americans' conceptions of citizenship reflect this imperative.

Diminished Autonomy

The massive breaching of American borders by illegal aliens is most vivid evidence of her vulnerability; "invasion" and "flood" are the metaphors that are conventionally used to describe the influx. Americans, however, are experiencing a more general sense of unease that their national destiny is moving beyond their control. This anxiety springs from many sources. I have already mentioned our growing reliance on the global economy; our prosperity now depends almost as much on public and private decisions in Tokyo, Bonn, and Hong Kong as it does on those in Washington or Wall Street. But the loss of control is not confined to the economic realm. The protracted trauma of the Vietnam War convinced many Americans that the U.S. can no longer work its will in the world militarily. The geopolitical fragmentation with the end of the Cold War

¹ Peter H. Schuck, *The Meaning of 187, The American Prospect*, Spring 1995.

has left the U.S. as the sole remaining superpower, yet the American Goliath is now at the mercy of myriad ethnic rivalries and sub-national conflicts that defy international intervention and order. Even threats to public health, traditionally the province of national governments, increasingly cross national borders, as the recent examples of AIDS, Dengue fever, tuberculosis, and other communicable diseases suggest.

The world has always been a dangerous place. Most Americans probably believe that it is more dangerous today than ever before, although precisely the opposite is true - at least for them but also for many others. They evidently feel growing insecurity about their jobs, marriages, safety, and personal future. People in such a state of uncertainty naturally search for safe havens from these storms. Their citizenship serves as a dependable anchorage; it gives them a secure mooring in an increasingly intrusive, turbulent, uncontrollable 'worldwind'. A valuable legal status, it can never be taken away. It defines who is a member of the extended political family that like its natural counterpart offers some consolation in a harsh world. We imagine that we can count on the company of citizens to join us in a search for the common good. Our concern for our fellow citizens is usually greater than that for the rest of humankind. They share our lifeboat and are in it for the long haul.

Citizenship thus imparts to the polity a special shape and expectancy - a common claim to enjoy the 'American way of life'. The more perplexing and menacing we find the world and the more buffeting its gales of change, the more tenaciously we cling to our citizenship value and insist on maintaining its value.²

II. Citizenship in the Domestic Domain

If citizenship provides succor to Americans in their confrontation with the outside world, it also promises them political and social standing and national identity in the domestic one. Here, citizenship crowns a hierarchy of statuses, with each one bearing a distinctive set of legal rights and obligations.³ David

² Some commentators maintain that the justifications for citizenship lie primarily in the international law realm; this status, they believe, has - or ought to have - little significance inside a nation's borders. See, e.g., Stephen H. Legomsky, "Why Citizenship ?", 35 *Va. J. Int'l. L.* 279, 300 (1994).

³ For each status, these rights are more expansive and valuable than the rights of those who occupy the status beneath it. The obligations attaching to these statuses, however, are not calibrated or distributed in quite the same way as the rights. The obligations owed by citizens are not necessarily greater than those owed by lesser statuses;

Martin has suggested that this domain may be represented metaphorically by 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.⁴ Citizenship's normative meaning can be inferred from (among other things) the magnitude and nature of the gap between citizens and those in the outer circles with respect to their rights and duties.

American citizenship, as Alexander Bickel famously observed, "is at best a simple idea for a simple government".⁵ By this, he meant that the ratification of the Fourteenth Amendment to the Constitution made membership in the American polity widely and easily available, that the legal rights and duties associated with citizenship have long ceased to be an important or divisive public issue, and that this consensus has been both firm and highly desirable. In an article published only seven years ago, I found merit in Bickel's point and suggested that it was probably even truer then than it had been in 1973 when he asserted it.⁶

Today, however, Bickel's (and my) confident assurances seem embarrassingly premature. In a radically altered political environment, the question of citizenship is now both salient and divisive. To understand the larger significance of what has transpired, it is necessary to describe the basic structure of U.S. citizenship law, and the differences between the rights and duties of citizens and those of legal permanent residents (LPRs). I shall then discuss the re-evaluation of citizenship that is now occurring in the U.S. in the shadow of more fundamental debates - notably, debates concerning the role of immigration in America's future and the legitimacy and shape of the welfare state.

in some respects - for example, the resident alien's paperwork obligations to the INS - citizens' duties may actually be less onerous.

⁴ David A. Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond", 44 *U. Pitt. L. Rev.* 165 (1983).

⁵ Alexander M. Bickel, *The Morality of Consent* 54 (1975)

⁶ Much depends, of course, on what one means by membership and how full it must be in order to satisfy Bickel's terms. Women, for example, were citizens but lacked the franchise, at least in federal elections, until the ratification of the Nineteenth Amendment in 1920. Young adults only obtained it in 1971 with the adoption of the Twenty-Sixth Amendment. A full, robust citizenship, moreover, demands more than the right to vote. See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (1991); Rogers M. Smith, [forthcoming]

The Structure of U.S. Citizenship Law

U.S. citizenship can be acquired in three ways. The most common way - citizenship by birth in the U.S. - reflects the Anglo-American tradition of jus soli (although the United Kingdom no longer strongly adheres to it, while France does⁷), and it is protected by the Fourteenth Amendment's Citizenship Clause.⁸ Judicial interpretation of the Citizenship Clause has long been understood as extending this status to the native-born children of aliens who are in the country, even if illegally or on a temporary visa. This interpretation has never been seriously questioned in the courts, although it has recently come under scrutiny, and some criticism, from some politicians, commentators, and scholars.⁹

A second route to citizenship is through naturalization. In 1993, almost 315,000 individuals naturalized; this represented a 31% increase over the 1992 figure, and the total for 1995 will approach one million, the largest number in history. To naturalize, an LPR must have resided in the U.S. with that status for five years, be of good moral character, demonstrate an ability to speak, read, and write English; and demonstrate a basic knowledge of U.S. government and history. More than 85% of all naturalizations in 1993 took place under these general provisions, although some people are permitted to use less restrictive procedures. Spouses of American citizens can naturalize after only three years; children who immigrate with their parents can be naturalized more or less automatically (simply by obtaining a certificate) when their parents naturalize; and adopted children of U.S. citizens can also naturalize in that fashion. Certain aliens who served with the American military during past wars may naturalize easily. Some individual or categorical naturalizations are effectuated directly by statute. It is significant that a large number of citizenship-eligible aliens choose not to naturalize.¹⁰

⁷ Patrick Weil, *La France et ses Etrangers* (1995)

⁸ Customary exceptions to the *jus soli* rule exist; they include, for example, children born on foreign-flag vessels and children of diplomatic personnel.

⁹ Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985). Legislation to eliminate birthright citizenship in these circumstances is now pending in Congress.

¹⁰ An INS study of the cohort of aliens who immigrated to the United States in 1977 found that 60.4 percent had not naturalized by 1992, fifteen years later when they had already been eligible for at least a decade. Moreover, most aliens who do naturalize do not apply until well after they become eligible; their median period of U.S. residency is now nine years. There are, however, important regional and country variations in speed of naturalization.

The third route to citizenship is through descent from one or more American parents. The principle of jus sanguinis is codified in the statute. For example, a child born outside the U.S. of two citizen parents is a citizen if one of the parents resided in the U.S. prior to the child's birth. If one of the parents is an alien but the citizen parent was physically present in the U.S. or an outlying possession for a period or periods totaling five years, two of which were after the age of 14, the child is a citizen. Over time, Congress has liberalized these eligibility requirements.

Dual (and even triple) citizenship is increasingly common in the United States due to the combination of the American jus soli rule with the various jus sanguinis rules of other countries. Thus aliens who naturalize in the U.S. must renounce their prior allegiance. This renunciation may or may not effectively terminate that foreign citizenship under that state's law, but U.S. naturalization law - unlike Germany's - does not require that the renunciation have such effect. In this sense, the U.S. government tolerates and protects dual citizenship even though it disapproves of it.¹¹

U.S. citizenship, once acquired, is almost impossible to lose without the citizen's express consent. Supreme Court decisions since the 1960s have severely restricted the government's power to denationalize a citizen for reasons of disloyalty, divided allegiance, or otherwise. Today, the government cannot prevail against a birthright citizen unless it can prove that the citizen specifically intended to renounce his or her citizenship. This standard is difficult to satisfy - as it should be. Relatively few denationalization proceedings are brought and the number of successful ones is probably declining. Denaturalization proceedings against citizens who procured citizenship by misrepresenting their backgrounds or through other illegality are largely directed against Nazi and Soviet persecutors, and under a 1988 decision of the Supreme Court (Kungys v. United States), the standards that the government must satisfy to prevail are quite demanding.

Advantages of Citizenship Status

The differences in the legal rights enjoyed by citizens and those enjoyed by LPRs are now more political than legal or economic, and they have narrowed over time. In the same 1989 article referred to earlier, I argued that the narrowing of these differences constituted a "devaluation" of citizenship, one that raised important questions about the evolving political identity of the U.S. Today, partly in response to widespread dissatisfaction with this devaluation,

¹¹ See generally, Gerald L. Neuman, "Justifying U.S. Naturalization Policies", 35 *Va. J. Int'l. L.* 237 (1994); Peter H. Schuck, "Whose Membership Is It Anyway? Comments on Gerald Neuman", 35 *Va. J. Int'l. L.* 321, 326 (1994).

a re-evaluation of citizenship is in progress, one in which the differentiation of the rights of citizens and LPRs is a central theme.

The power of Congress to treat citizens and LPRs differently is subject to certain constitutional constraints. First, U.S. courts have established that the constitutionality of government-imposed discriminations between citizens and aliens turns on whether the discrimination being challenged is imposed by the federal government or by a state. In several Supreme Court decisions during the 1970s, the Court held that Congress could exclude resident aliens from public benefits under Medicare (and presumably under other federal programs as well), but that the states could not do so. Since then, the constitutional rationale for decisions restricting the states' power to discriminate may have changed. The Court originally seemed to view state law discriminations on the basis of alienage as a "suspect classification" like race, which under the Equal Protection Clause would impose a very heavy, probably impossible, burden on the state to demonstrate that its interest in discriminating against aliens was "compelling" and narrowly tailored to achieve its purpose. In subsequent cases, however, the Court rested its decisions on a different constitutional theory based on the Supremacy Clause, not the Equal Protection Clause. This latter theory, known as "federal preemption," is discussed below and in Part III.

Despite these constitutional constraints on discrimination against aliens, some noteworthy differences in legal rights have been established. Three are political in nature: the right to vote, the right to serve on federal and many state juries, and the right to run for certain high elective offices and to be appointed to some high (and not-so-high) appointive ones. Each of these restrictions seems to be premised on one or more of the following assumptions: that aliens' political socialization is too fragmentary and embryonic to be trusted in matters of public choice; that confining political participation of this kind to citizens carries an important symbolic message about the value and significance of full membership; and that exclusion of aliens from such participation encourages them to naturalize as soon as possible.

Although aliens enjoyed the franchise in many American states during the nineteenth century, only U.S. citizens may exercise it today - a rule that applies in virtually all other countries as well, at least in national elections. A number of local communities have allowed aliens (some even include illegals) to vote in some or all of their local elections, and proposals to extend the franchise to aliens have been advanced in several large cities, including Washington, D.C. and Los Angeles. In addition, some academic commentators support such a

change, drawing on the historical precedent for alien voting and on liberal, republican, and natural rights theories.¹²

Most individual LPRs (as distinct from immigrants' rights advocates) probably do not view their inability to vote as a major disadvantage, although they may well resent the second-class status that this disability implies. (U.S. citizens, it should be noted, usually decline to vote; only 38 percent of those eligible to vote cast ballots in the 1994 congressional elections - a higher rate than in recent off-year elections). Their collective political identities have focused far more on ethnicity than on alienage per se; most empowerment campaigns have been mounted by ethnic organizations and promote naturalization, not legal changes to allow aliens to vote. But in a new development, which is discussed below, Congress is considering measures that would disadvantage legal aliens broadly as a class. If enacted, these changes would greatly increase the political salience of alienage per se and hence the value that aliens may place on the vote in the future.

Citizenship requirements for jury service are less of an issue in the U.S. In the framing of the Bill of Rights, which protected the right to trial by jury in both criminal and civil cases, the jury service was seen as an important political, as well as legal, institution protecting the people from the oppression of governmental and private elites. Prior to the notorious O.J. Simpson trial, Americans esteemed the institution. Although most serve on it conscientiously, many also view it as less a privilege than a burden. Unlike the right to vote, the notion of extending jury service to aliens has not surfaced in the recent public debate about improving the jury system.

Aliens' ineligibility for federal employment, which is similar to the practice in virtually all nations,¹³ is likely to be of greater concern to many of them than their inability to serve on juries. Few if any LPRs are likely to seek high elective or appointive offices during the period prior to naturalization. Many LPRs, however, might want to pursue employment in the federal, state, and local civil service systems. In two Supreme Court decisions in the mid-1970s, the Court applied the constitutional principles relating to discrimination against aliens in the civil service setting. It held that the Constitution permitted Congress and the President to limit federal civil service jobs to citizens (which

¹² Gerald Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote?", 75 *Mich. L. Rev.* 1092 (1977); Jamin Raskin, Legal Aliens, "Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage", 141 *U. Pa. L. Rev.* 1391 (1993); Gerald L. Neuman, "We Are the People: Alien Suffrage in German and American Perspective," 13 *Mich. J. Int'l. L.*, 259, 291-335 (1992).

¹³ Canada's citizenship preference was recently upheld against a constitutional challenge (*Lavoie v. The Queen*, 1995).

has been done since the 1880s) but that the states could not impose citizenship requirements for their own civil service systems. The Court emphasized the exclusive federal interest in regulating immigration, a principle that is discussed more fully below. It recognized, however, the state's power to exclude LPRs from particular job categories that represented the state's "political function," such as schoolteachers and police officers. This distinction has proved exceedingly difficult to apply but continues to enjoy the Court's support.

Two other disadvantages to LPRs are worth mentioning. First, LPRs have a lesser right to sponsor their family members for immigration. As noted earlier, "immediate relatives" of citizens receive a preferred immigration status without regard to numerical quotas, and citizens' siblings and adult children have a preferred status under the numerical quota system. In contrast, the spouses and unmarried children of resident aliens qualify for only a numerically limited preference, and their siblings receive no preference at all.

This disadvantage is currently being debated in Congress. Many policymakers, including the congressionally-established Commission on Immigration Reform, are concerned about the potential chain migration effects triggered by the large overhang of imminent naturalizations by many of the more than 2.5 million illegal aliens who were legalized under the 1986 amnesty program, are now LPRs, and will soon be citizens, enabling their immediate family members -- and in turn their family members -- to immigrate legally to the United States in large numbers. At a time when Congress is under considerable political pressure to reduce legal immigration, Congress may decide to limit LPRs' family immigration rights further. It may even decide to limit the family immigration rights of U.S. citizens who achieved that status only by virtue of the amnesty program enacted in 1986. Such a policy would raise novel and important constitutional questions concerning Congress's power to discriminate against U.S. citizens based on their prior immigration status.

In addition to different sponsorship rights, citizens and LPRs differ with respect to their right to remain in the United States. LPRs are subject to deportation; citizens (whether by birth, naturalization, or statute) are not. Deportation of a long-term resident can wreak enormous deprivation upon aliens and their families and friends. Although the Supreme Court has repeatedly held that deportation is not punishment and therefore does not implicate the Due Process and other constitutional guarantees that surround the imposition of criminal sanctions, the fact is that as Justice Douglas once put it, deportation "may deprive a man and his family of all that makes life worthwhile."¹⁴

¹⁴ Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

Still, it is important to place this risk in realistic context. The actual risk of deportation for non-criminal aliens is vanishingly small.¹⁵ Formal deportation is a costly process for the INS to effectuate. Beyond the applicable statutes and regulations, which confer extensive procedural safeguards on deportable LPRs, the courts require the agency to observe high standards of procedural fairness in adjudicating the qualified right of deportable LPRs to remain in the United States. Severe administrative failures further limit the INS's ability to implement even the relatively few formal deportation orders and the far more numerous informal departure agreements that it does manage to obtain. Except at the border where the INS can often effectuate the "voluntary departure" of aliens, the agency has been notoriously ineffective in actually deporting aliens who want to remain - even including the "aggravated felons" as to whom Congress has provided special summary enforcement and deportation powers. As a legal and practical matter, then, a long-term, non-criminal LPR's chances of remaining in the U.S. if he wishes is almost as great as that of a citizen.

Today, the most controversial issue concerning the rights of LPRs concerns their access to public benefits to which citizens are entitled. Under federal law, LPRs and some other aliens who are present in the U.S. legally and will probably gain LPR status in the future but do not yet enjoy it (e.g., family members of amnestied aliens, refugees and asylees, parolees, and Cuban/Haitian entrants) are eligible for many cash assistance, medical care, food, education, housing, and other social programs. albeit subject to some restrictions.¹⁶ (In

¹⁵ In 1993, only 42,000 aliens were formally deported or removed "under docket control" and virtually all of these were illegal entrants, out-of-status nonimmigrants, violators of narcotics laws, or convicted criminals. The proportion of aliens removed who were charged with crimes or narcotics activity was 48 percent. A far larger number (1.2 million) were expelled without formal proceedings, but almost all of these fell into the same four categories. Moreover, relatively those who were deported or expelled had been in the U.S. for a long period of time. U.S. Department of Justice, Immigration and Naturalization Service, Statistical Yearbook for 1993, at 156.

¹⁶ First, so-called "deeming" provisions apply to many federal and state benefit programs. Even an alien with a visa to enter as an LPR can be excluded if he is "likely at any time to become a public charge" (i.e., receive means-tested public assistance), and an LPR or other alien already in the United States can be deported if he has become a public charge within five years after entry, unless he can show that his poverty was caused by conditions that arose after entry. Very few deportations have been enforced under this provision. All entering aliens (except for refugees) must show that they will have a steady source of support through employment, family resources, or otherwise. If they cannot do so, a portion of the income of their U.S. resident sponsors is deemed to be available to the alien for a number of years after arrival, which will ordinarily render him ineligible for the public benefits. The deeming period is now five years in the case of SSI, a means-tested

addition, LPRs are often eligible for benefit programs under state law such as low tuition in state university systems). In the omnibus budget bill passed by Congress in November 1995, which the President has vetoed, Congress made current LPRs ineligible for some of these programs (some of which would themselves be transformed into block grants to the states), and imposed more stringent restrictions on LPRs' eligibility for others. Future LPRs would be barred from some of these benefits altogether, and existing LPRs would become deportable if they received certain benefits for twelve months over the course of a certain number of years.¹⁷

These legal differences between the social program benefits that are available to citizens and to LPRs have no parallel in the welfare states of the EU. In the U.S., however, these differences are somewhat palliated by several facts. Some states and cities (New York is a notable example) have been lax in their enforcement of these limitations. Many LPRs and illegal aliens have managed to circumvent them through fraudulent applications. Most important, the vast majority of LPRs can easily remove them in five years (three if they have a citizen spouse) by naturalizing. If, as seems likely, new legislation widens the gap between the rights of LPRs and those of citizens, many LPRs will surely respond by naturalizing at higher rates than in the past. Indeed, much of the remarkable surge in naturalization petitions since the 1994 election apparently reflects precisely this kind of anticipatory calculation on the part of LPRs.

The Re-evaluation of Citizenship

In recent years, public discourse about citizenship has returned to first principles: its nature, sources, and significance. So fundamental are these principles that the new discourse amounts to a re-evaluation of American citizenship in both its normative and positive dimensions. This re-evaluation has been prompted by deep concerns about the unity and coherence of the civic culture in the U.S., concerns that flow from five developments on the post-1965 era. They are the accumulation of multicultural pressures; the loss of a unifying ideology;

cash assistance program for the aged, blind, and disabled which has been used by a growing number of elderly aliens. An alien who receives welfare would also encounter difficulty in sponsoring other family members as immigrants. Finally, aliens who received legal status under the 1986 amnesty program are not permitted to receive most federal benefits, except emergency health care, for five years after they are legalized - a period that has already ended for most amnestied aliens.

¹⁷ LPRs do enjoy the benefits of a special program, adopted as part of the compromise that led to the 1986 employer sanctions provisions, which bars job discrimination against aliens who are legally authorized to work.

technological change; the expansion and consolidation of the welfare state; and the devaluation of citizenship.

Multicultural pressures

With the enactment of the 1965 law, the composition of the immigration stream to the United States changed radically. Of the ten top source countries, only the Philippines and India were sending immigrants who speak English well. Bilingual education thus became a major curricular issue in public education, and teaching in dozens of languages became necessary in many urban school systems. With the growing politicization of ethnicity and widespread attacks on the traditional assimilative ideal, anxieties about linguistic and cultural fragmentation increased. These anxieties have led to public referenda establishing English as the official language in California and other states and proposals to restrict the rights of aliens. As genuine racial integration proved elusive, the civil rights movement took a turn toward separatism. Blacks, already severely disadvantaged, were increasingly obliged to cede political and economic influence to more recently-arrived Hispanic and Asian voters. Certain economic sectors came to depend almost entirely upon immigrant workers, legal and illegal. Relatively parochial immigrant enclaves grew larger. These multicultural pressures caused many Americans to feel more and more like strangers in their own country.

Loss of unifying ideology

The end of the Cold War deprived the United States of an ideology, anti-communism, that had served for many decades as a unifying, coherent force in American political culture and as an obsessive preoccupation and goal in U.S. foreign policy. No alternative ideology has yet emerged to replace it. Only constitutionalism, our civic religion, seems potentially capable of performing this function of binding together a nation of diverse peoples.

Technological change

Rapid changes in transportation and communication technologies have transformed a world of sovereign nations into a global web of multinational enterprises and interdependent societies. Migration became inexpensive and reversible. Immigrants no longer needed to make an irrevocable commitment to their new society; they can more easily retain their emotional ties to their countries and cultures of origin. On the other hand, there was growing evidence that TV was helping to assimilate second-generation immigrant youths into an underclass culture rather than into the mainstream American culture.

Welfare state expansion

In the U.S., the welfare state - especially the creation of entitlements to income support, food stamps, medical care, and subsidized housing - grew enormously during a period of time that was remarkably brief, at least by the standards of European social systems. With this growth, the behavior, values, and economic progress of immigrants became matters of great fiscal significance and public policy concern. Some observers noted that in contrast to the historical pattern, immigration no longer ebbed and flowed with the business cycle -- presumably because of the growth of the social safety net. Immigration increasingly pitted citizens and aliens against one another as they competed for scarce public resources. The perennial debate over how the polity should conceive of community, affinity, and mutual obligation took on a new significance as the stakes in the outcome grew larger. Demands that Americans' obsession with legal rights be balanced by an equal concern for their social responsibilities and civic behaviors were increasingly heard in the land.¹⁸

Devaluation of citizenship

The egalitarian thrust of the welfare state, its nourishing of entitlement as an ideal, and the repeal of the military draft led to a progressive erosion of citizenship as a distinctive status bearing special privileges and demanding special commitments and obligations. The rights of legal aliens converged with those of citizens until there was little to separate them but the franchise and immigration sponsorship privileges. Americans began to feel that U.S. citizenship had lost much of its value, that it should somehow count for more.¹⁹ These developments have led to calls for a revitalization of citizenship. One type of proposal, which led to the enactment in 1993 of the National Community Service Corps, looks to the creation of a spirit among young people of public service to their nation. Another type of proposal, embodied in the 1988 welfare reform legislation, seeks to combat the entitlement mentality by insisting that those able-bodied applicants for cash assistance perform some kind of socially useful work as a condition of receiving it. A third approach, exemplified by proposed restrictions in legal aliens' rights to public benefits, is largely motivated by the desire to save scarce public resources and to favor citizens in the allocation of those resources. Its incidental effect, however, would be to increase the value of citizenship by widening the gap between the rights of citizens and aliens, thereby creating stronger incentives for the latter to naturalize.

¹⁸ See, e.g., Lawrence Mead and Mary Ann Glendon.

¹⁹ Peter H. Schuck, "Membership in the Liberal Polity: The Devaluation of American Citizenship", 3 *Georgetown Imm. L.J.* 1 (1989).

Two other types of reforms are aimed directly at citizenship itself. An incremental change, one to which the current INS Commissioner is firmly committed and to which there is no discernible opposition, would seek to enhance the attractiveness of the naturalization process, thereby encouraging more LPRs to acquire citizenship.

A more radical proposal is not at all inconsistent with the first but takes a very different approach: it would deny citizenship to some who would otherwise obtain it. This approach would alter the traditional understanding of the jus soli rule, embodied in the Citizenship Clause of the Fourteenth Amendment, under which one automatically becomes a citizen merely by being born in the United States, even if the child's parents are in the country illegally or only as temporary residents. Such proposals take the form of legislation that would eliminate this form of automatic birthright citizenship either by constitutional amendment or by statute. Advocates of such a change emphasize the importance of mutual consent - the polity's as well as the alien's - in legitimating American citizenship. They also point to the irrationality of permitting a Mexican woman with no claims on the United States to be able to confer American citizenship on her new child simply by crossing the border and giving birth, perhaps at public expense, in an American hospital. Defenders of birthright citizenship stress the importance of avoiding the creation and perpetuation of an underclass of long-term residents who do not qualify as citizens, a situation that applies to many guestworkers and their descendants stranded in countries that reject the jus soli principle. (Schuck & Smith, 1985; Martin, 1985; Schuck & Smith, 1986)

For this reason, Congress is not likely to eliminate birthright citizenship per se. Many other nations already apply a birthright citizenship rule. Some others, notably Germany, have been moving toward (although remaining well short of) the American position (Adams, 1993). Nevertheless, some modification of the traditional birthright citizenship rule might attract wider support in the U.S. For example, the law might deny automatic citizenship for those who are born in the United States in illegal status but still enable those native-born illegals who continue to reside here more or less permanently to naturalize. Alternatively, it might reduce somewhat the perverse incentive effects of the current birthright citizenship rule by denying to the illegal parents any immigration benefits derived through their birthright citizen child.

III. Citizenship in the Federal System

Among the most striking features of contemporary geopolitics is the fragmentation of national political authority, and its devolution - through the

collapse of centralized regimes, civil wars, negotiated agreements, and other decentralizing processes - to smaller, sub-national, often ethnically-defined groups. This devolution, of course, is still very much in flux; it has not yet reached an equilibrium. Indeed, as the economic, military, and political disadvantages of radical decentralization become more manifest, some re-centralization is bound to occur. Nevertheless, the rapidity and militancy with which devolution has proceeded are remarkable. This has been most famously true in the former Soviet Union, which fissioned in the aftermath of the Cold War. But even before the dissolution of the Soviet empire, the weaker states of Africa and Asia had been disintegrating into chaos. Devolution is also occurring, albeit more slowly and less dramatically, in stronger nation-states like Italy and Mexico, and even in paradigmatically strong ones like the United Kingdom and France. It is even occurring in nation-states like Canada with highly decentralized federal systems already in place.

The U.S. falls into this last category. Devolution to the states is perhaps the most prominent area of policy innovation pursued by the Republican congressional majority since the 1994 elections. As of this writing, many of the programs that comprise the modern welfare state - AFDC, Medicaid, food stamps, public housing, and others - are being reshaped to give the states control of virtually all aspects of the policy process: policy design, financing, eligibility, administration, evaluation, and enforcement. Although the precise division of authority between the federal and state governments is still the subject of bitter struggle and intense negotiations, there can be no doubt that the final legislation will constitute a major curtailment of federal power and an equally great augmentation of the states' authority. This devolution, along with deregulation and privatization initiatives in a number of other policy areas and programs, constitutes a substantial repudiation of the New Deal and Great Society. The spasmodic but unmistakable nationalizing trajectory of American political development has not merely been interrupted; it has been reversed.

These changes are no mere ephemera. They do not simply mark a discontinuity in the ongoing evolution of the American polity, a temporary aberration after which the ascendancy of national power at the expense of the states will continue. The changes instead reflect deep and abiding forces in U.S. society - and, on the evidence elsewhere, perhaps in the world. They are likely to be long-lived, if not permanent, for the structures supporting national power will be almost impossible to restore once they are dismantled. This task of restoration would require the convergence of three unlikely conditions: a convulsive national crisis equivalent to the Great Depression that spawned the national regime; a growth in public confidence in the efficacy of centralized power and of national governmental solutions; and a surrender by the states of their hard-won powers.

In emphasizing the changing conceptions and roles of national and state citizenship, one must also take note of another institutional development - the private residential enclave - that is becoming an increasingly significant locus of civic membership and governance in the U.S.²⁰ Whether these enclaves take the form of urban apartment condominiums, suburban homeowners' associations, or other cooperative community arrangements, they are territorial organizations that create new kinds of governance regimes that exercise far-reaching powers over millions of Americans. That such enclaves are more creatures of private law than public law, that the relationships of people and activities within them are structured more by contracts than by political constitutions, does not alter the fact that they regulate important aspects of their members' lives in ways that closely resemble the powers of government. This is another domain in which devolution of authority - here, from the states, which ordinarily regulate property rights and community development, to private organizations - is proceeding.

These reconfigurations of governance and authority relationships amount to a reconstruction of American citizenship. By redefining the relationships between the citizen and the nation, the citizen and the states, and the citizen and his or her community, this devolution is fundamentally transforming the rights and duties of membership in the various layers of American politics. In doing so, it is also transforming the meanings that attach to those memberships and those politics.

An important, if relatively unremarked, aspect of this devolution-driven redefinition of citizenship is its possible effect on the status of aliens. The role of the states in defining the rights of aliens in the U.S. has a somewhat complex history. Until 1875 when the first federal statute restricting immigration was enacted, the states exercised broad authority over aliens' entry and legal rights. Although a Supreme Court decision in 1849 (The Passenger Cases) had indicated that the states could not regulate immigration *per se*, they still possessed a residual constitutional responsibility for protecting the health, safety, and morals of those within its jurisdiction, including aliens. As a number of scholars have shown, the states often exercised this responsibility during this period in ways that had the effect of limiting immigration, especially by aliens who were poor, ill, or were otherwise considered undesirable.²¹ Even after the

²⁰ For leading, and contrasting, discussions of this development, see Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (1994); Robert C. Ellickson, "Cities and Homeowners Associations", 130 *U. Pa. L. Rev.* 1519 (1982); Richard T. Ford, "The Boundaries of Race: Political Geography in Legal Analysis", 107 *Harv. L. Rev.* 1841 (1994).

²¹ E.g., Gerald L. Neuman, "The Lost Century of American Immigration Law (1776-1875)", 93 *Colum. L. Rev.* 1833 (1993); Peter Skerry, "Many Borders to Cross: Is

federal government entered and occupied the field of general immigration control and the Supreme Court invalidated some state laws regulating aliens, the states continued to enforce local laws that limited aliens' rights with respect to employment, property ownership, use of public resources, eligibility for public benefits, and other matters. With some exceptions, these statutes were generally upheld by the courts until the 1970s, when the Court began to apply strict scrutiny to such statutes, except for those that limited aliens' rights to certain public jobs involving "political functions". The exclusive federal authority over immigration - its "plenary power," in the words of a seminal Supreme Court decision on the subject - went so far as to invalidate state laws that tended to reinforce federal policies against illegal aliens by disadvantaging them. In perhaps no other area of legislation has the federal government's primacy been more firmly established and the power of the states more clearly circumscribed.²²

This "plenary power doctrine" is a double-edged sword. It has aroused sustained criticism from legal scholars who find no textual warrant for it in the Constitution and who contend that the structural and policy justifications that have been used to support it, such as the need for a single voice in foreign affairs, are either weak or overbroad.²³ These scholars (and I count myself among them) believe that the federal government's power over aliens cannot be complete but must instead be subject to some constitutional limitations. On the other hand, the courts have used the federal preemption logic of the plenary power doctrine to constrain the power of states to regulate and discriminate against aliens, a result that scholars generally applaud. This tension is deepened somewhat by the fact that the main alternative doctrinal route to constraining state law alienage discriminations - heightened scrutiny under the Equal Protection Clause - is itself problematic, although perhaps not insuperably so. The question, then, is how fairness in the treatment of aliens can be assured in a federal system in which the national government possesses plenary, or at least primary, responsibility for regulating them and the states, which sometimes have

Immigration the Exclusive Responsibility of the Federal Government?", 25 *J. of Federalism* 71 (1995).

²² If anything, the courts, led by the Supreme Court, have reaffirmed this primacy in the last decade. For a review of some of the recent cases, see Stephen H. Legomsky, "Ten More Years of Plenary Power: Immigration, Congress, and the Courts", 22 *Hastings Const. L. Qtrly.* 925 (1995).

²³ E.g., Peter H. Schuck, "The Transformation of Immigration Law", 84 *Colum. L. Rev.* 1, 14-30 (1984); Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power", 1984 *Sup. Ct. Rev.* 255.

strong fiscal, and perhaps political, incentives to discriminate against them, possess some degree of policy autonomy.

Today, however, this old question has taken on new coloration. The U.S. has entered a period of extraordinary constitutional ferment in which the federal government's authority - even over subjects over which it has long played the exclusive or dominant policymaking role - is being increasingly called into question. The most dramatic example of this ferment occurred in the Supreme Court's United States v. Lopez decision, rendered in 1995. In Lopez, a sharply-divided Court invalidated a federal statute that prohibited the possession of firearms near schools. It did so on the ground that the federal power to regulate under the Commerce Clause of the Constitution did not extend to such a local activity. Although the decision's scope and significance remain unclear, it cast doubt on almost sixty years of jurisprudence that construed the Commerce Clause to permit virtually any regulation that Congress wished to enact. Lopez will certainly provoke new challenges to long-established laws in policy areas involving highly localized impacts - for example, environmental regulation, drug enforcement, and abortion - that had previously been considered well within the ambit of federal power.

There is every reason, of course, to expect that federal regulation of immigration would survive a constitutional challenge under Lopez. As noted above, more than a century of Supreme Court decisions have emphasized the national sovereignty and foreign policy implications of immigration law, the exclusive federal prerogatives in this area, and the dangers of state encroachment. There is much to be said for the traditional approach on the merits, and it is difficult to imagine that this conservative Court, ironically radical as some of its conservatism is, would jettison it as a matter of constitutional law.

It is not the Constitution, however, that has been the main barrier to greater state responsibilities in the immigration field. In a series of decisions invalidating state laws on federal preemption grounds, the Court has clearly indicated that Congress remains free as a matter of policy to authorize, or perhaps even require, the states to act in this area. The real impediment to a larger state role is Congress, which has chosen essentially to occupy the fields of immigration policy through federal legislation. In recent years, Congress has recognized only a very limited role for the states in immigration policy - largely that of providers of federally-mandated social services for refugees. The decision by a lower federal court invalidating most of California's Proposition 187 on

preemption grounds is simply the most recent example of this confinement of state policy discretion where immigrants are concerned.²⁴

This situation, however, could change. Nothing in the nature of immigration policy requires that it be an exclusively national level responsibility. Although immigration control is a national function in all countries, sub-national units in some federal systems - Canada and Germany, for example - do exercise important policymaking functions with respect to immigration. With devolution occurring in so many other areas of public policy traditionally controlled at the center, can devolution of immigration regulation be impervious to the trend? And if the states were to assume a more significant, independent role in immigration policy, a role that Congress might encourage and that the courts might therefore sustain, how would this development alter the nature of citizenship in the American polities?

These questions are by no means academic. Some of the same economic, social, political, and ideological forces that are propelling devolution in other policy areas also affect the politics of immigration. Immigrants are not distributed randomly across the nation. Quite the contrary; immigration is a largely regional phenomenon, with the vast majority of immigrants tending to live in a handful of states and metropolitan areas. However great the economic and other benefits of immigration to the nation as a whole may be, its costs - especially those resulting from immigrants' use of schools, hospitals, prisons, and other public services - are highly concentrated in these few high-impact states and metropolitan areas, while the rest of the country need not incur immigration's costs in order to enjoy many of its benefits. The disproportionate stakes of immigrant-receiving areas prompted Proposition 187 in California and similar anti-illegal immigration proposals in some other states. For the high-impact states, immigration is as salient as any policy area with which they deal.

That these state-level impacts also have enormous political significance is obvious when one considers (as politicians surely do) that the seven states with the largest immigrant populations account for two-thirds of the electoral votes needed to win the presidency.²⁵ This fact places immigration reform high on the national political agenda - and it is from the national level, principally the Congress, that devolution of power over immigration policy must ultimately issue. One can glimpse signs of movement in this direction in the recently-enacted law limiting unfunded national mandates on states and localities, and in the current welfare reform legislation. One of the practices prompting the unfunded mandates law was the federal government's recent policy of admitting

²⁴ League of United Latin American Citizens v. Wilson, 1995 WL 699583 (C.D. Cal., November 20, 1995).

²⁵ Skerry, p. 84.

an growing number of refugees while at the same time reducing its funding for resettlement support, forcing states, localities, and non-governmental organizations to pick up the increasing deficit.²⁶ The new legislation will presumably limit, if not eliminate, this practice. At this writing, the Congress's welfare reform bill would transmute numerous categorical programs into block grants, leaving the states free to determine how to distribute those funds and which aliens would be eligible to receive them. If Congress also renders legal aliens ineligible for federal student loan programs, as it threatens to do, this may enable states to impose similar restrictions under their own loan programs.

In a recent article, Professor Peter Spiro develops a more sweeping rationale for the devolution of immigration policy to the states.²⁷ He argues that the interests in national uniformity and control over foreign relations, which constitute the traditional justifications for federal preemption in immigration policy, are no longer decisive in "a post-national world order". In that order, according to Spiro, states are the major fiscal and political stakeholders in immigration policy. They also play larger, more independent roles in their dealings with foreign nations. He attributes the more robust state role in foreign relations to the globalization of information, communications, and travel, and to the economic and cultural ties that states have increasingly forged with foreign governments and communities. "This international engagement on the states' part", Spiro writes, "has inevitably undermined the [traditional preemption doctrine's] more fundamental underpinning, viz., that other countries will not distinguish the states and their actions from the nation's."

Spiro's argument is less important for his prescriptions, which I find quite problematic, than for his empirical claim that the federal government's monopoly of authority and influence in foreign relations and immigration is steadily (and in his view, irrevocably) eroding, as the states (and private non-governmental organizations) operate more independently of Washington, D.C.²⁸

Assuming that he is correct about this, however, it does not follow that Congress would devolve immigration policy to the states - even if Congress continues its efforts to devolve power in a broad range of other policy domains. Congress may instead conclude that immigration is simply different, perhaps because it believes, contrary to Spiro, that immigration's foreign policy

²⁶ Id., pp. 78-9.

²⁷ Peter J. Spiro, "The States and Immigration in an Era of Demi-Sovereignties", 35 *Va. J. Int'l L.* 121 (1994).

²⁸ One presumes that this development is not confined to the U.S. but is occurring in other developed nations as well.

implications and the need to speak with one voice are considerations of overriding importance.

Alternatively, Congress might adopt a middle path. It might decide that as a matter of national policy, it is prepared to tolerate greater diversity among, and discrimination by, states in their treatment of aliens. By adopting an affirmative national policy that allows states to discriminate against aliens in certain areas such as welfare benefits or student loans, Congress could continue to uphold the principle of federal preemption while encouraging policy diversity among the states. Such a national policy might well pass constitutional muster as an exercise of Congress's plenary federal power, and discriminatory state laws that would otherwise raise serious constitutional questions might also be upheld by the courts because it would be consistent with, and in furtherance of, this plenary federal power. Graham v. Richardson and other court precedents that invalidated state law discriminations might be distinguished on the ground that those discriminations were not authorized by this kind of clearly-expressed congressional policy.

In the world that the current Congress is seeking to create, the rights and obligations of individuals - U.S. citizens and aliens alike - will depend more on state law and less on federal law than at any time since the New Deal. This world will be even more unfamiliar to the extent that Congress devolves immigration policy to the states, but it will be novel in any event. In such a world, state citizenship could become more salient than in the past, and the constitutional limits on states' power to discriminate - constraints derived from state constitutions as well as from the U.S. Constitution - will become more significant. State citizenship is a status that has received little scholarly attention of late; it ceased to have much practical significance once states barred aliens from voting in their elections, Indians received U.S. citizenship, and the Supreme Court interpreted the Constitution's Privileges and Immunities Clause to limit the states' power to discriminate against citizens of other states.

Should Congress expressly permit the states to favor their own state citizens over aliens, however, this might change. The plenary power doctrine might then preclude aliens from challenging Congress's decision to do so under the U.S. Constitution; in that event, aliens' only recourse might be to challenge the state law discrimination under the applicable state constitution. State constitutions typically contain equal protection clauses, and those clauses proscribe many kinds of discrimination. But the extent to which they would limit alienage discrimination is uncertain. It will be particularly uncertain where the constitutional issues arise in a novel devolution context in which states exercise new powers and operate outside the shadow cast by traditional federal preemption principles.

If devolution thus transforms the structure of American federalism, the nature of citizenship in the American polities must also be transformed. The legal, political, and social relationships between an individual alien and the larger juridical communities that affect her relative status and well-being - the national government; state governments; local self-governing enclaves; those individuals who are U.S. and state citizens; and other aliens - will in effect be redefined. Like so much else in this new devolutionary regime, it is difficult to predict how aliens will fare under it.

Nevertheless, it is safe to say that some aliens will be better off than they are now, while others will be worse off. Some states and local communities already embrace legal aliens at least as warmly as the federal government does. In such states, this favorable reception is likely to continue, as it is driven by enduring forces. These communities regard the newcomers as valuable economic and cultural assets. Community leaders recognize that the immigrants and their families and friends may soon become voters and citizens; the community may also wish to mollify the immigrants' many co-ethnics who are already such. The new governor of Texas, George Bush, Jr., seems to view immigrants as beneficial to his state,²⁹ while politicians in New York (both state and city) and Massachusetts have welcomed even illegal aliens.

Many other states and communities, however, are likely to view at least certain types of immigrants as unwanted invaders, as fiscal and political burdens that the state can hope, through discriminatory policies, to shift to other states. The possibility of this dynamic - of a so-called "race to the bottom" in which states seek to discourage some categories of immigration by adopting more discriminatory policies than its sister states - is a powerful argument in favor of preempting state immigration policies in a federal system or at least for imposing limits on permissible state discriminations.³⁰ The experience of other genuinely federal states in dealing with this risk of immigration policy fragmentation should be of special interest to the U.S. in this devolutionary era.

²⁹ Scott McCartney and Karen Blumenthal, "Texas Strives to Avoid California's Mistakes, And It Is Prospering," *Wall St. Journal*, September 13, 1995.

³⁰ A similar analysis has been applied, mutatis mutandis, to many other areas of public policy in the U.S. See, e.g., Roberta Romano, *The Genius of American Corporate Law* (1993); Daniel Esty, "In Defense of Environmental Federalism: Debunking the Presumption for Decentralized Environmental Regulation," unpub. ms, November 1995 (environmental regulation).

Conclusion

Citizenship is a status whose meaning in any particular society depends entirely on the political commitments and understandings to which its members subscribe. In the U.S., many of these commitments and understandings are still tenuous, contestable, and contested. Of no political arrangement is this more true than the national welfare state. It was first established only sixty years ago and it only reached its current form in the 1970s and 80s, with the rapid expansion of the food stamp, Medicaid, and Social Security programs. In this mature form,³¹ then, the American welfare state is only two decades old. During most of that period, moreover, its legitimacy has been under constant attack by much of the political and intellectual establishment; the present political struggle will determine precisely how firm its hold on the public's allegiance actually is.

This feverish debate over the welfare state, which has continued and in some ways deepened since its inception in the New Deal era, has inevitably shaped Americans' conceptions of the meaning and incidents of citizenship. In this sense, the American debate might be seen as yet another example of what has tendentiously been called "American exceptionalism" - the notion that for a variety of complex historical reasons, some of the patterns that have shaped the character of European democracies do not apply, or apply quite differently, to the U.S. In this case, however, I believe that such a perception would be mistaken. More likely, the American debate prefigures a reevaluation of citizenship in Europe.

Such a reevaluation appears to be inescapable in light of a number of extremely important developments: the enlarged scope and ambition of the European Union, the migration and asylum pressures unleashed by the fall of the Iron Curtain, the recognition among many European leaders that recent budget deficits are both unsustainable and inconsistent with further monetary (not to speak of political) integration, and the sclerotic performance in recent years of the high-cost European economies in the intensely competitive global markets. Although this debate will surely resemble the American one in some respects, it will be distinctively European in many others. As the social, economic, and political conditions of Europe and the U.S. increasingly converge, we shall have unprecedented opportunities to learn from one another - from our triumphs as well as our mistakes.

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³¹ Even in this mature form, most European (and American) analysts consider it a limited, laggard example of the species.



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