Citizenship in a Federal System

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I. Introduction

An odd and somewhat disquieting feature of citizenship talk[1] in the academy is its oscillation between two discursive poles, one formalistic and the other substantive. We speak of the legal rules that govern and distinguish between citizens[2] and non-citizens,[3] but we also speak of what citizenship actually means in a society in which citizens and aliens tend to be unequal in resources as well as status.[4] We generally use the formalistic conception to describe what the law says citizenship is, and the substantive conception to lament the fact that it is not yet what it could and should be.[5] This tension between formal and substantive conceptions of citizenship reflects the stark difference between political reality and civic aspiration.

Recent developments have heightened this tension by infusing new uncertainties and complexities into the current debate over citizenship, gathered under the thematic portmanteau - I am tempted to say *idee fixe* - of globalism. Whether commentators think that globalism is a harbinger of universal human rights, political reform, and multicultural ethics,[6] an insidious agent

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[1] I discuss some different dimensions of what I call citizenship talk in Peter H. Schuck, Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship 176-78 (1998).

[2] For sound normative and perhaps constitutional reasons, citizenship in the U.S. (and presumably elsewhere) is an essentially undifferentiated status. The conventional distinction between citizens and "nationals" (i.e., near-citizens but with lesser status and rights, as with voting) under domestic and international law is not germane here. See id. at 412, n. 2.

[3] Although "alien" can have a more unpleasant connotation than "non-citizen" of the U.S., using it can reduce confusion when one discusses both federal and state citizenship, as I do here. We do not speak of U.S. citizens who are citizens of New York who enter New Jersey as "aliens" there. Unlike the citizen category, immigration law divides aliens into many subcategories, each with different rights, duties, and administrative status. See Peter H. Schuck, "Current Debates About U.S. Citizenship," in In Defense of the Alien, 1998 (L. Tomasi, ed., 1999), at 83-4.

[4] Inequalities, of course, also persist *within* each of these groups, perhaps especially among non-citizens who are distributed bimodally (in the U.S., at least) as to their socioeconomic status.

[5] I rejoice, for example, that Germany has decided to permit long-resident descendants of former guestworkers to acquire and transmit citizenship, but I also wonder whether their new status as Germans will succeed in integrating them into civil society. See generally, Paths to Inclusion: The Integration of Migrants in the United States and Germany (P. Schuck & R. Munz, eds., 1998).

[6] Two premature celebrants are David Jacobson, Rights Across Borders: Immigration and the Decline of Citizenship (1996), and Yasemin Soysal, Limits of Citizenship: Migrants and Postnational Membership in Europe (1994), to whom I react in Schuck, supra note 1, at 202-05. For other upbeat views, see Thomas L. Friedman, The Lexus and the Olive Tree (1998); Kim Rubenstein, "Citizenship in a Borderless World," in Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry (A. Anghie & G. Sturgess, eds., 1998), at 1; Tina Rosenberg, "A Bad Year for the World's Border Guards," N.Y. Times, July 2, 1999, at A16 (NATO bombing of Serbia, Pinochet arrest in London, and war crimes indictments show hopeful erosion of sovereignty).

of a corrosive world capitalism, or something else, all agree that it will have profound implications for the future of the nation-state.

Globalism's cheerleaders and skeptics alike claim that an integrated world economy and new communications and information technologies are inexorably shrinking the planet, transforming a system of territorial nation-states into a global village bounded only by cyberspace. This, they say, renders anachronistic the notion of political identity tied to a nation's institutions, laws, borders, culture,[7] and citizenship.[8] Instead, globalism subjects even the most insular communities to the remorseless, tradition-withering, homogenizing discipline of world markets. These forces in turn threaten the safety net and indeed any other social practice that cannot meet the bottom-line test of economic efficiency. Competition for global pools of capital that can be moved instantaneously with the click of a mouse is unleashing a headlong race to the bottom in hot pursuit of the almighty dollar (or Euro).[9]

I have serious misgivings about many of these claims, especially in their more extreme, Marxist-Hegelian forms, which imagine an economically determinist, universalizing unfolding of history.[10] This paper, however, is not concerned with the external, centrifugal forces that threaten to transcend the nation-state, but with their opposites: the internal, centripetal forces, described in part II, that may impel nation-states to federalize power, devolving it downward to sub-national units. These forces, I claim, are altering the nature and significance of citizenship. In part III, I explore citizenship's political, constitutional, sociological, and psychological meanings and the legal and policy instruments through which different polities may instantiate these meanings, including federalism.

How does federalism (which I shall define shortly) affect citizenship? Part IV focuses on four aspects of a federation that shape citizenship's meaning in that polity: its historical and political origins; its social diversity; its distribution of powers between the national (or federal)

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[7] Canada and other countries have imposed strict legal rules to inoculate their national cultures from the American virus, but to little avail. See Anthony DePalma, "It Isn't So Simple To Be Canadian," N.Y. Times, July 14, 1999, at E1.

[8] Observing the carnage in Kosovo, leading political figures and thinkers have embraced this view. See, e.g., Vaclav Havel, "Beyond the Nation-State," The Responsive Community __ (1999). For a deeply skeptical account of these currents, see Leon Wieseltier, "Winning Ugly," The New Republic, June 28, 1999, at 33 (mocking statements of Havel; Bronislaw Geremek, Poland's foreign minister; and Jurgen Habermas). The debate and its associated literature are summarized in Linda Bosniak, "Citizenship Denationalized," unpub. ms., March 1999.

[9] For a representative example of the pessimistic side of this debate, see John Gray, The False Dawn (1998).

[10] Such prophesies ignore some inconvenient facts. Nation-states have been proliferating, not dying, as failed empires and states collapse, demands for ethnic self-determination and even independence multiply, and jerry-built compromises to suppress nationality collapse. For an example of the latter, see Jane Perlez, "U.S. Asking Taiwan to Explain Its Policy After Uproar," N.Y. Times, July 14, 1999, at A3 (Taiwan asserting its sovereignty). In many ways, national borders have become more important, not less. See Herbert Dittgen, World Without Borders? Reflections on the Future of the Nation-State," 34 Gov. & Opposition 161, 166-74 (1999). National institutions, identities, and ideologies have proved remarkably durable; fierce competition from religion, socialism, and other universalizing forces have failed to dislodge it. Nationalism, which combines both rational and irrational appeals, has been resilient and resourceful in a more global, diasporic economy. For India's example, see Celia W. Dugger, "India Offers Rights to Attract Its Offspring's Cash," N.Y. Times, Apr. 4, 1999, at p. 12 (investors of Indian descent receive special privileges); Dugger, "Gandhi's Choice: Be Indian and Lead Party," N.Y. Times, May 25, 1999, at A1 (Sonia Gandhi must affirm Indian, and mute Italian, nationality). Most important, no alternative to nation-states as sources and enforcers of rights yet appears on the horizon.

level and the sub-national levels and among the latter; and the rights and duties it accords to citizens of each level. This discussion draws on the federal systems in Australia, Canada, Germany, Switzerland, the U.S., and to a lesser extent Belgium. Part V reports on the recent, unexpected renaissance of America's dual sovereignty form of federalism.

I wish that this comparative analysis yielded analytically crisp models of federal citizenship capable of both cystallizing our understanding and guiding future research. Alas, it does not. All federal systems are complex, contingent products of unique historical, social, and political forces. Comparisons can limn certain interesting relationships, and this paper reveals some. For example, the pre-federation status of the sub-national entity and the nature of the political crisis that led it to federate seem largely to determine the degree of its independence from the center and the significance of sub-national citizenship. But this is not the same as developing coherent, non-trivial, useful schema.[11] Such an effort far exceeds the scope of this paper. I conclude, then, with some brief observations about the future of federative citizenship.

II. The Changing Context of Citizenship

The social developments that militate in favor of globalism are by now well known. They include the integration of world markets through more mobile capital, technology, and labor, a mobility fostered by revolutions in telecommunications and transportation; the proliferation of "transnational communities"; the end of the Cold War; rising education levels; and the spread of liberal democratic hegemony, human rights norms, market rationalism, and English as lingua franca.

At the same time, however other social forces are blunting globalism, pressing both supranational formations and nation-states to devolve political authority downward.[12] To further complicate the picture, some of these developments are pushing in both directions - transnational and sub-national - at once.

Buffeted by these cross-winds, the nation-state can choose among several stabilization and survival strategies. The first, political mitosis, is exemplifed by the former Yugoslavia and Soviet Union. States no longer viable as integrated, sovereign units may split, forming new states more or less independent of their reluctant parent state. A second strategy, exemplified by the Nazi abolition of German federalism in 1934 and by Yugoslavia today, is hyper-nationalism. Here, nation-states try to reinforce ideologies and institutions that support its unity in hopes of consolidating power or staving off more wrenching change. A third strategy is supra-nationalism, in which states surrender some of their sovereignty to a larger entity such as the EU, to that extent merging themselves in it. A fourth strategy, the focus of this paper, is federalism.

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[11] Recall that my sample size is only six and cannot be much enlarged because few other federal systems satisfy the paper's definition, which is discussed infra.

[12] At the supranational level, this pressure is reflected in the growing importance of the EU's subsidiarity principle, which requires that policy functions be lodged at the lowest feasible level. Treaty Establishing the European Community, Feb. 7, 1992, Art. 3b, [1992]C.M.L.R. 573, 590.

By federalism, I mean a system that divides political authority[13] between a democratic nation-state and sub-national polities within its territory, and that confers both national and sub-national citizenships.[14] Some preliminary distinctions are in order here. Federalism entails decentralized administration but they are not the same thing. Although unitary states like France, Spain, and the United Kingdom often devolve authority to regional or local units of administration, this does not thereby create a sub-national polity, much less sub-national citizenship. Nor is a federation's dual citizenship - national and sub-national - the same as citizenship in international law (i.e., citizenship in more than one nation-state).[15] I also exclude nation-states like India that are federal in form but unitary in substance,[16] and the European Union, which is a fully developed common market with only embryonic political institutions and thus a thin but gradually waxing conception of citizenship.[17] Finally, I exclude non-democratic federations like Yugoslavia and the Russian-led Commonwealth of Independent States.

What is the problem to which federalism might be a plausible solution? The answer to this question, I believe, can largely be found in the conjunction of three forces: minority group demands, the functional advantages of devolution, and public discontent with centralized governance.

1. Minority group demands.[18] Many historians date the 20th century from the assassination in 1914 of the Archduke Francis Ferdinand by a Serbian nationalist, which led directly to the outbreak of World War I. Similar demands within and between nation-states, often backed by violence, constitute this century's bloody hallmark and will certainly continue well into the next, as evidenced by the endless Balkan conflicts and the insurgencies by Kurdish, Palestinian, Chechnyan, religious fundamentalist, and other minorities. Disaggregative pressures, moreover, are by no means confined to the Third World. Serious disaffection persists in Spain, Belgium, and

[13] I say political authority in order to avoid the well-known uncertainties surrounding the more traditional term, sovereignty. As noted in the text, I also mean to distinguish it from mere decentralization of national policy implementation.

[14] Sub-national citizenship is not usually an element of conventional definitions of federalism. In some federations, citizenship in a sub-national unit follows more or less automatically from legal residence there coupled with national citizenship. In the U.S., the Citizenship Clause of the 14th Amendment mandates this. This is discussed in Part V infra. In Switzerland, cantonal citizenship is also based on residency. Christopher Hughes, "Cantonalism: The Golden Epoch of Switzerland," in Comparative Federalism and Federation (Burgess & Gagnon, eds. 1993)(hereinafter "Comparative Federalism"), at 160.

[15] On the latter, see Schuck, supra note _, chap. 10; Peter J. Spiro, "Dual Nationality and the Meaning of Citizenship," 46 Emory L.J. 1435 (1997).

[16] India's states are little more than administrative agents of the national government. Among other things, the national government not only appoints state governors but can (and sometimes does) dismiss the entire state government simply by declaring an emergency. See Jonathan Rodden & Susan Rose-Ackerman, "Does Federalism Preserve Markets?" 83 Va. L. Rev. 1521, n. 129 (1997).

[17] See, e.g., Carlos A. Ball, "The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order," 37 Harv. Int'l L. J. 307 (1996). Even today, EU citizenship is not insigificant; it confers the right to vote for the European Parliament and to reside and work in any EU member state and to vote in its local elections. Otherwise, however, it is still largely concerned with economic, not political, rights.

[18] Sometimes, as in South Africa before 1994 and Malaysia today, the majority asserts this claim against a ruling minority.

French Canada, for example, and the claims of indigenes are being pressed - non-violently, for the most part, and with considerable success - in Canada and the U.S.

At a minimum, these minority claims seek "recognition" of, or respect for, their group identity by the state and its civil society.[19] Depending on various demographic, military, economic, and political factors, these claims for recognition may evolve into demands for some form of self-determination. A complex process ensues in which the state and the groups bargain in the form of threats, violence, side payments, horsetrading, internal and international politics, and other modes of influence. If states grant them recognition, it may take the form of patronage, special benefit programs, constitutional protections, cultural rights, group representation, economic concessions, political party status, administrative autonomy, leverage within a federal structure, self-determination within a commonwealth, independent nation-state status, and many other variants.

Indeed, minority demands for autonomy may be so compelling, and the forces of devolution so strong that even long-settled, unitary nation-states may be unable to resist them. Robert Cottrell has recently noted that "[t]he most headstrong of Europe's regions - such as Catalonia in Spain, Flanders in Belgium, Scotland (a country in its own right, technically) within the United Kingdom - tend to be distinguished linguistically, and by the sense of a distinct history of their own. In the new, borderless Europe, they must be kept happy by a grant of powers over matters such as culture, education, and local planning, for example - because otherwise such regions cannot be maintained at all."[20] Federal states are even more vulnerable to such claims, particularly when the minority is concentrated in a discrete geographic area. The point is illustrated by Canada's recent creation of the Nunavut territory in response to Intuit demands for autonomy.[21]

Disputes over the territorial boundaries of national and sub-national units provide an especially clear focus for state-destabilizing claims by both minorities and majorities. Colonial powers traditionally drew the borders of their colonies according to political, military, or physical criteria that made sense to them but that often seemed arbitrary by later and different lights. This legacy invites cross-border conflicts, as when a cohesive, strongly identified ethnic group is divided between two or more states, or when a region's valuable natural resources are concentrated in one state to the exclusion of its neighbors.

With the collapse of the Austro-Hungarian and Ottoman empires in the wake of World War I, the victorious allies established many new states with controverted borders that often divided ethnic groups, forming even smaller minorities in each of the states. This highly politicized and opportunistic practice sowed the seeds of insurgency, revanchism, and other sources of

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[19] Charles Taylor, Multiculturalism: Examining the Politics of Recognition (1994).

[20] Cottrell, "Europe So Far, It Flies," N.Y. Rev. of Books, Apr. 8, 1999, at p. 73. Westminster's recent grant of broad legislative authority to Scotland, Wales, and Northern Ireland, and Madrid's concessions to Catalonia, confirm the truth of this observation.

[21] See Anthony DePalma, "A New State for Inuit: Frigid but Optimistic," N.Y. Times, Jan. 29, 1999, at A1 ("the Inuit of Nunavut will be the first indigenous people in the Americas to govern themselves so completely"). It is equally illustrated by the militant refusals of Turkey and Iraq to recognize the legitimacy of Kurdish claims.

political instability. State-creation resumed after World War II, when Europe's former colonies and protectorates won their independence and quickly contested their borders, and recurred with the end of the Cold War and the dissolution of the Soviet Union and Yugoslavia. The long-standing conflicts between India and Pakistan, between Israel and the Palestinians, and among many African states show that territorial disputes remain potent pressure points for challenges to state legitimacy and structure.

Ethnic self-assertion will likely become an even more potent source of fragmentation in the future. Hundreds of ethnic groups yearn to gain cultural, economic, or political autonomy from, or within, the larger polities in which they find themselves.[22] Human rights rhetoric and practice - including, post-Kosovo, a more credible threat of military intervention on humanitarian grounds - also will encourage such claims.

Federalism, as in the past, offers a possible remedy for such majority-minority conflicts. But in an international order that increasingly countenances and in principle protects ethnic self-expression, if not always self-determination or autonomy, the phenomenon of minorities-within-minorities complicates any federalist solution to this problem. Indeed, a federation that organizes a sub-unit around a particular mode of ethnic representation and patronage may actually exacerbate inta-ethnic conflicts in that sub-unit, inviting new minority claims for political recognition.

2. Functional advantages of devolution. The durability of the nation-state[23] reflects more than just the conservative forces of inertia, ideology, and path dependency, important as they surely are. Its survival and indeed its flourishing - the number of states is steadily growing - also reflects its functionality.

The state enjoys some comparative advantages over smaller political units. Some of these are readily explicable by standard economic analysis. Thus, in an increasingly interdependent world in which one's actions benefit and burden others with whom they cannot easily contract, only a polity as large as some states can effectively "internalize" many of these "externalities." States, moreover, can exploit some economies of scale that smaller units cannot, such as monetary, taxation, military, and regulatory systems. Indeed, some problems like cross-border air pollution, epidemic diseases, and labor migration may yield to scale economies only at the supra-national level.[24] For such problems, state-level regulation may be ineffective - or worse.[25]

The state also enjoys comparative advantages in certain respects that tend to elude

[22] An estimated 1700 languages and 150 religions exist. Migration News, July 1999 http://migration.ucdavis.edu.

[23] Historians often date the recognition of sovereignty in the nation-state to the Treaty of Westphalia in 1648.

[24] This helps to explain why regional groupings like the EU are attractive. Other factors are also important, however, such as the collective memory of two world wars fought in Europe.

[25] For example, state-level regulation, together with obstacles to inter-state collective action, might trigger a "race-to-the-bottom" dynamic in which all states would be worse off as competition among states drives their standards down to that of the lowest level state. Empirical studies, however, suggest that this competitive dynamic is a very complex one, that it operates differently in different policy domains, and that races to the bottom are by no means inevitable. The recent literature on this is cited in Peter H. Schuck, The Limits of Law: Essays on Democratic Governance (forthcoming Westview Press, 1999), chap. 13, n. __.

economic analysis. I have argued elsewhere, for example, that for reasons of history, ideology, and group psychology, the state may in general be a better locus than either a smaller or a larger unit for eliciting feelings of social solidarity and liberal community,[26] and the collective actions needed to instantiate those values. For similar reasons, most people experience patriotism, self-sacrifice, and political identity largely if not exclusively at the level of the nation-state.[27] As Euro-skeptics observe, who is prepared to risk his life for the EU? (Or, one might add, for Yorkshire). Sentiments like these seem to find cathexis in the nation-state, not some larger or smaller unit.

But this is hardly the entire story. Some forces that favor integration at the national or even supra-national level may also - perhaps at the same time - be disaggregative. Examples of such forces are labor migration, which may affect sub-national regions very differently, and comparative economic advantage, which often and increasingly favors decentralization.[28]

Thus, social complexity can produce scale diseconomies as well as scale economies. The transaction, information, and political costs of resolving issues at the national level may be much higher than doing so at a lower level.[29] Other things being equal (a crucial qualification in discussions like this), centralized decision processes that must engage and govern a large, heterogeneous national population tend to be slower, more cumbersome, more costly, and more error-prone than processes that address smaller, more homogeneous populations that are closer to the key decisionmakers.

These general tendencies, of course, are often tempered by countervailing factors; in particular cases, the former may overwhelm the latter. In a larger unit, the political compromises that are needed to accommodate greater diversity may be harder to strike.[30] On the other hand, decisionmakers whose constituents have more diverse interests may find it easier to logroll and compromise because more trades are possible in which everybody stands to gain. A central decisionmaker's greater distance from a policy's true cost bearers and benefit recipients may leave her less informed, it may enable her to be more courageous in addressing an issue (e.g., ethnic conflict), or both.

In deciding the level at which power should be exercised, then, it can be hard to determine precisely where the balance of advantage lies. The best locus for some decisions will be the worst

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[26] The notion of liberal community is not an oxymoron. In the U.S. version of liberalism, at least, the primary value of individual freedom has been opposed not to community *per se* but to governmental intrusion into the sphere of civil society. See, e.g., Everett C. Ladd, "Bowling with Tocqueville," 9 The Responsive Community 11, 20 (1999) ("The drift and consequences of American individualism are collectivist, though certainly not of a state-centered variety").

[27] See "Europe Goes to the Polls," The Economist, June 12, 1999, at p. 21 (March 1999 survey indicating that roughly 90% of Europeans identify themselves by their country alone or first by their country and only second as a "European," with some variations among countries). See generally, Peter H. Schuck, "Immigration Law and the Problem of Community," in Clamor at the Gates: The New American Immigration (N. Glazer, ed., 1985).

[28] See, e.g., Richard Deeg, "Economic Globalizatin and the Shifting Boundaries of German Federalism," 26 Publius 27, 28 (1996).

[29] See, e.g., Peter H. Schuck and John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 Harv. J. L. & Pub. Policy 367 (1999) (favoring decentralization of some immigration enforcement functions).

[30] See discussion and citations in Schuck, supra note 24.

locus for others, depending on the specific nature of the particular policy at issue and the values of those who live in the polity. Federalism is an admirably flexible tool for finding and striking that balance.

3. Public discontent with centralized governance. Still, many citizens in the liberal democracies seem convinced that important public policy decisions are too centralized.[31] This is most apparent in the U.S., where the public has pressed Congress to devolve federal authority over some major policy areas to the states, and the U.S. Supreme Court has forced Congress to devolve even more than Congress would like.[32] Congress has gone still further in some other areas, adopting market-based regulation and even full privatization, the ultimate form of devolution. I shall return to the American case in part V.

National governments in Europe have been far more reluctant than the U.S. to shift economic and social policymaking authority to lower levels. This is obviously so for unitary states like France, Italy, Spain, and the U.K. that have no sub-national polities to receive the authority, but it is also true of some federal states like Germany. Although the EU states have privatized some state-owned companies, national policies imposing intrusive regulation and high taxes on labor and capital continue to stifle job growth and entrepreneurial activity.

"Eurosclerosis" (as this condition is often called) has persisted for two decades and stricken all EU states, especially Germany, the engine of European prosperity. The crisis that this condition has engendered, moreover, seems destined to will surely worsen. as Europe's rigid, politically entrenched welfare states, whose already high costs will be magnified by their rapidly aging populations, collide with the dire economic effects of higher tax rates. The future trajectory of this crisis can be glimpsed in the swift loss of public confidence in Germany's new SPD-Green government and in the June 1999 elections for the EU Parliament, which signal widespread voter apathy about EU politics and a conservative backlash in many countries against the EU's power and policies.[33]

Regional and local interests stand to gain in their power struggles with central authorities as public dissatisfaction with national policies grows and technological changes reduce many of the center's comparative advantages. As I detail in part V, recent U.S. experience illustrates this devolutionary dynamic - and not only in domestic policy but even in foreign trade and diplomacy, the areas in which national control is least controversial. Such developments[34] suggest a larger

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[31] During the 1980s, the same was said about decisionmaking in large U.S. corporations. However, competitive capital and product markets, and new management theories stressing flexibility, drove them to adopt the flatter hierarchical structures and decentralized decisionmaking that have become the conventional wisdom in corporate circles, as even a cursory reading of current business publications confirms.

[32] See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 67 U.S.L.W. 3682 (June 23, 1999) (states' Eleventh Amendment immunity protects them against intellectual property infringement claims); Alden v. Maine, 67 U.S.L.W. 3683 (June 23, 2999) (Eleventh Amendment immunity protects states against suits in state courts).

[33] See Warren Hoge, "Voters in Britain Rebuff Blair in Europe Parliament Election," N.Y. Times, June 15, 1999, at A5 (low turnout coupled with Europe-wide rejection of socialist and center-left dominance of EU Parliament for first time).

[34] An interesting example occurred recently in Brazil, where the state of Manas Gerais sought to gain domestic political leverage over the national government by withholding its federal taxes, which made international credit agencies more

shift in the terms of political trade between the state's center and its periphery, strengthening the latter. These changes are bound to be reflected in the allocation of power between them and thus in the need for federal structures.

III. The Multiple Dimensions of Citizenship

Citizenship is an ancient phenomenon - as social fact, as legal status, as idea, and as ideal - with no agreed-upon definition.[35] Hence it is hardly surprising that citizenship has many dimensions and bears many meanings. Different analysts on citizenship, of course, have sliced the concept in a variety of ways.[36] Nevertheless, four dimensions capture the full range of its essential meanings, both normative and positive. For want of better terms, I call them political, legal, psychological, and sociological. After briefly defining each dimension, I shall discuss the most important policy variables or levers that states deploy when enacting their visions of citizenship into law.

The political dimension of citizenship (at least in a democratic polity) affirms the value of public participation in the project of self-government,[37] tempered by the exclusionary notion that certain types of political activity, notably voting,[38] is properly limited to those who meet the standards of full membership in the polity, however those standards may be defined.

The legal dimension is the most easily defined and measured. It emphasizes two aspects of citizenship: the creation of the distinctive status of citizen by positive law, usually in a constitution or other fundamental charter, and the prescription of specific rights and obligations attaching only to citizens and not to others on the state's territory, much less to humankind generally.

The psychological dimension is concerned with the political identity of citizens. Their political identity is determined by whether they conceive of themselves as members of a particular state rather than as members of some other political community, and by how salient this identity is for them. Political identity is not inconsistent with other domains of identity such as ethnicity, nor does it even preclude the possibility that a citizen may identify politically with more than one polity.[39]

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reluctant to renew loans to the national government. Larry Rohter, "Brazil's Economic Crisis Pits President Against Governors," N.Y. Times, Jan. 25, 1999, at A8. The gambit backfired, at least temporarily. See Diana Jean Schemo, "World Bank Cuts Off Loans to 2 Brazilian States," N.Y. Times, Jan. 29, 1999, at A3.

[35] See Aristotle, The Politics (trans. T.A. Sinclair, revised ed. 1981).

[36] See discussion in Bosniak, supra note 7.

[37] After all, following the ancient practice conspicuously revived by the French Revolution, we call participants citizens, not subjects.

[38] As discussed infra, many polities permit aliens to vote in some elections (usually local) but not others.

[39] In fact, many dual citizens and single citizens do so. See Schuck, supra note 1, chapter 10.

The sociological dimension looks to how well an individual is integrated into civil society.[40] More than the other dimensions of citizenship, this has a particularly normative resonance in public debates. Commentators often use a notion like "second-class citizenship" to criticize the effective exclusion of women or members of minority groups from full participation in economic, cultural, political, or other aspects of community life despite their legal status as citizens. Conversely, critics may point to a polity's failure to accord citizenship status to long-resident groups, such as third-generation Turks in Germany, that may be socially integrated in some ways (e.g., language) but not in others (e.g., economic mobility).

Each state's laws governing citizenship, immigration, and the rights of aliens[41] ("immigrant law") instantiate its particular values about how inclusive it should be, and on what terms. Although immigration is the gateway to citizenship for all non-indigenes, few states viewed themselves as countries of immigration until very recently, and even those that did such as the U.S., Australia, and Israel imposed racial, religious, or nationality barriers.[42] Most European states thought of themselves as countries of *e*migration long after they had in fact begun to experience net migratory inflows. The extreme example is Germany where this self-image persists today[43] despite almost 10% of its population being foreign-born (a larger share than in the U.S.) and millions of its residents having been born and permanently settled there without gaining German citizenship for themselves or even for their German-born children.[44]

In general, states permit citizenship to be acquired in some or all of the following ways: birth within the state's territory (*jus soli*), birth to parents who are citizens of the state (*jus sanguinis*), marriage to a citizen, naturalization after a prescribed period of legal residence, ethnicity,[45] and ethno-cultural ties.[46] (Less common routes to citizenship are service in a state's military and incorporation through annexation.)

The specific rules that govern each of these modes varies from state to state. Two of the most important variables have to do with the scope of the *jus soli*[47] and *jus sanguinis*[48] rules.

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[40] T.H. Marshall, Citizenship and Social Class (1949), an early but very influential analysis of this dimension, emphasized the social rights needed to achieve equality.

[41] This last category is sometimes referred to as "immigrant" (as distinct from "immigration") law.

[42] On the U.S., see, e.g., Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (1997).

[43] On Germany, see, e.g., Klaus J. Bade, "From Emigration to Immigration: The German Experience in the Nineteenth and Twentieth Centuries," in Migration Past, Migration Future (K. Bade & M. Weiner, eds., 1997), p. 1.

[44] The nationality law enacted in 1999 will gradually reverse this pattern through liberalization of the rules governing *jus sanguinis*, naturalization, and dual citizenship. See Roger Cohen, "Germany Makes Citizenship Easier for Foreigners to Get," N.Y. Times, May 22, 1999, at A3.

[45] Israel's Law of Return is perhaps the purest example of ethnically-based citizenship; a Jew may acquire it even if his parents were not Israeli citizens.

[46] German *aussiedlers* must show some German ancestry and cultural, especially linguistic, relationship to the German nation in order to acquire citizenship there.

[47] For example, some states apply *jus soli* to the first generation born in the state, while others apply it only to the second or even third generation born there. For a summary of the rules in the 25 states studied by the International Migration Policy Project of the Carnegie Endowment for International Peace, see Patrick Weil, Access to Citizenship, unpub. ms, 1999.

[48] For example, states differ as to whether, in order to transmit citizenship, one or both parents must be citizens; required

These rules primarily reflect historical and political factors. Thus England used *jus soli* to cement its subjects' perpetual allegiance to the Crown, the U.S. used it to attract immigrants, and many European states used *jus sanguinis* to maintain links to their emigrant diasporas.[49] Other important variables shaping acquisition-of-citizenship rules are the period and continuity of residence necessary to become eligible for naturalization, the availability of a shorter residence period for spouses,[50] and the permissibility of dual citizenship.[51] States' rules also differ as to whether and how a state may terminate, and a citizen may renounce, citizenship.[52]

Citizenship's most consequential dimension, of course, is the value that accrues to the state that grants it and the individual who receives it, above and beyond the value that they gain from mere legal residence without citizenship. Some commentators doubt that citizenship produces any real "value added" in a liberal democracy.[53] Others, noting that the marginal benefits of citizenship relative to legal residence have declined (at least in the U.S.) while the costs have changed little, are more ambivalent about this status devaluation.[54] Citizenship's value to both state and citizen, of course, mainly depends on the value of the rights and duties that are unique to the status. Domestic law defines the most important of these but some others are prescribed by international law[55] and even by other states.[56]

IV. Citizenship in a Federal System

A federation's effects on citizenship depend on many factors, of which four seem most important: (1) the historical and political reasons for federating; (2) the valuation of social and political pluralism in the federation; (3) the allocation of powers between its national and sub-national levels, and among sub-national units; and (4) the rights[57] granted to the federation's

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periods of residence for the parents), the child, or both; the number of generations of such transmission; and the like. Id.

[49] This may also account for the kinship-based citizenship in Ancient Greece. See H.D.F. Kitto, The Greeks (1951), p. 125.

[50] Weil, supra note 46.

[51] Here, the main determinants are whether the state requires those who are naturalizing to renounce their other nationalities, whether and how the applicant must prove the legal effectiveness of that renunciation in the state of first citizenship, and whether a citizen of state A may acquire citizenship in state B without losing his citizenship in A as a result. Id. See also, Schuck, supra note 1, chapter 10.

[52] State-initiated termination is called denationalization or denaturalization. Citizen-initiated termination is called expatriation. For the rules on loss of U.S. citizenship, see Schuck, supra note 3.

[53] See, e.g., Stephen H. Legomsky, "Why Citizenship?" 35 Va. J. Int'l L. 279 (1994).

[54] See, e.g., Schuck, supra note 1, chapter 7.

[55] Examples include the right to be repatriated to one's state if one wishes, and the right, when arrested in a foreign state, to consult there with the consul of one's own state. In one more example of the gap between rights and remedies in international law, see supra note 9, the U.S. Supreme Court recently denied relief against a violation of this consultation right. Breard v. Greene, 523 U.S. 371 (1998).

[56] The rights of dual citizens in one of their states, for example, may be affected by the law of their other state, including the law prescribed by treaties concluded between the two states.

[57] I discuss rights and not duties because citizenship entails few legal (as distinguished from moral) duties other than military service. Nations that require military service usually limit it to citizens, but the U.S. conscripted aliens into its military before it abolished the draft.

citizens and to citizens of sub-national units.

Origins. The reasons for creating federations help determine their political and social coherence, at least initially.[58] Most federations originate in one of four ways. First, pre-existing, independent polities may decide to become sub-national units in a new federated polity, retaining some portion of their former sovereignty. The more consensual their decision to federate was (as in the U.S. case), the more significant their retained sovereignty, and thus their sub-national citizenship status, is likely to be,[59] in contrast to coerced federations like the former Soviet Union. Instead, some federations are created under imperial auspices from what were colonial administrative units, in which case the de-colonization settlement determines what sovereignty the center retains, as with Canada[60] and Australia.[61] Third, a nation-state may create sub-national units corresponding to pre-existing cultural or political entities, as Belgium did.[62] Finally, sub-national polities may reflect political, military, or administrative[63] goals of the new state's architects.[64]

Pluralism. Some federations like the U.S., Switzerland, and Canada are more socially heterogeneous than others like Germany [65]and Australia.[66] Still, most federations are designed to

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[58] Those reasons, of course, may cease to be persuasive or even relevant as conditions change. Because political structures tend to exhibit path dependency, however, few if any federations have freely decided to transform themselves into unitary states. [check this claim] But it is common for federations, once established, to alter their internal allocations of power, as occurred when the U.S. Constitution replaced the Articles of Confederation.

[59] The Swiss federation shows a variant of this. The 25 original cantons that came together in 1815 and later federated under a constitution had not previously been sovereign states but did have distinct, state-like political histories. Hughes, supra note 13, at 156-57 (sovereignty "a fiction. . . they scrambled from one pre-state subordinate status straight into federal subjection"). There are now 26 cantons, as one was carved out of the territory of another in 1980. Id.

[60] See Martha A Field, The Differing Federalisms of Canada and the United States, 55 Law & Contemp. Problems 107 (1992).

[61] See Joan Rydon, "The Australian Tradition of Federalsim and Federation," in Comparative Federalism 227.

[62] See Michael O'Neill, "Re-Imagining Belgium: New Federalism and the Political Management of Cultural Diversity," 51 Parl. Affairs 241 (1998).

[63] This differs from administrative decentralization within a unitary state. See discussion part II supra.

[64] In creating the Federal Republic of Germany, the occupying allies established and configured the *new Lander* for geopolitical reasons. Except for Bavaria and the free cities of Hamburg and Bremen, the *Lander* were not previously independent polities, but their borders contained some. Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 61 (1997)("Schleswig-Holstein contains much of its former territory, as do. . . Brandenburg, Mecklenburg, Saxony, Saxony-Anhalt, and Thuringia. The remaining states were carved artifically out of postwar zones of occupation. . .yet these boundaries have proved remarkably durable.") [check page cite] Political motives also fueled the creation of western states in the U.S. and in Canada. See, e.g., Rogers Gibbons, Federal Societies, Institutions, and Politics, in Federalism and the Role of the State (Bakvis & Chandler, eds., 1987) 15, 19 (Canada's provincial lines drawn not only to accommodate religious and linguistic diversity but also to avoid creating a single prairie province that could rival Ontario and Quebec).

[66] See Rydon, supra note 60, at 229 (advocates of Australian federation "stressed the 'crimson thread of kinship' linking the people of the six colonies. There were no basic cultural, racial, religious or linguistic differences between them. Differences between the colonies which became the states were, and have remained, differences of geography, size, and economic activity and potential."); William Riker, "Six Books in Search of a Subject, or Does Federalism Exist and Does It Matter?," 2 Compar. Pol. 135 (1969) (puzzled by federalism in homogeneous society). Recent immigration to

contain the centrifugal forces of diverse cultural, linguistic, economic, and political interests by giving those interests recognition and representation, while also gaining the advantages of aggregation.

Federalism cannot easily solve the political conflicts generated by diversity, however, for its effort to defuse them can end up deepening and hardening them. And when a federation empowers a geographically concentrated minority group by making it the core of a sub-national polity, it may easily foster new and more intractable conflicts between that minority and others now subordinated to its control - for example, Anglophones in Quebec, Francophones in Flanders,[67] Russians in the Baltic states,[68] and Croats or Muslims in Yugoslavia today.[69] Whether a federation can ameliorate this minorities-within-minorities problem depends on how minorities are distributed geographically, the nature and depth of social cleavages, and whether the system as a whole tends to reinforce them, as Canada does,[70] or to bridge them, as the U.S. does.[71] A federation's ability to mute such conflicts may also depend on how gradually the power-sharing is introduced and whether it is negotiated or imposed.[72]

Allocations of Power. The significance of citizenships in a federation is shaped not only by the formal structures of power-sharing between the national and sub-national levels, but also by the informal processes of conflict and cooperation that adapt and invigorate those structures.[73] As a formal matter, the distribution of power between the nation and its sub-units depends on how the fundamental law allocates the authority to make, implement, and enforce law in different policy domains,[74] how the sub-units are represented in the national parliament and administration,[75] the relationship between national and sub-national judiciaries,[76] the rules for

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Australia, of course, has increased its diversity. The same is true of Germany.

[67] See O'Neill, supra note 61.

[68] See, e.g., Ruta M. Kalvaites, "Citizenship and National Identity in Baltic States," 16 B.U. J. Int'l L. 231 (1998).

[69] See, e.g., Allan C. Cairns, "Constitutional Government and the Two Faces of Ethnicity: Federalism is Not Enough," in Rethinking Federalism(K. Knop et al., eds., 1995), at 15, 26-7 ("In democratic federalisms the extensive movement of citizens across internal 'borders' is difficult to control without violating norms of equal citizenship. As a result, an ethnically pure political unit will be a rarity [thus raising] the question of the status and treatment of those who do not belong to the empowered regional majority").

[70] See Richard Simeon, "Canada and the United States: Lessons from the North American Experience," in Rethinking Federalism , id., at 257 (Canada "entrenches, perpetuates and institutionalizes" cleavages).

[71] Id., at 253 (U.S. cross-cuts cleavages).

[72] The Belgian federation, for example, developed incrementally over thirty years in a multi-stage process beginning with the formal recognition of linguistic "frontiers" in 1962 and culminating in the current settlement adopted in 1993. See O'Neill, supra note 61.

[73] For this reason, the constitutional divisions of power are an inadequate guide to the nature of any particular federal system. See, e.g., Vernon Bogdanor, "Forms of Autonomy and the Protection of Minorities," 126 Daedalus 65 (Spring 1997).

[74] See discussion in text immediately following.

[75] This is often a key role of the parliament's upper chamber, as in the German Bundesrat and the Swiss Council of States. This is also true of the Austalian and American senates, which are both powerful and directly elected by state voters, not legislatures. See Campbell Sharman, "Second Chambers," in Federalism and the Role of the State, supra note 64, at 82, 84.

[76] In the U.S., for example, the national and state court systems are wholly indepedent, although comity may be required

resolving conflicts between and among the levels,[77] the structure of the party systems,[78] voting rules,[79] and other institutional factors.[80]

Because effective power flows from the integration of many informal and structural elements that are distributed differently in different federations, simple comparisons of federal systems can be misleading. For example, Canada does not give provinces any formal representation in Parliament's upper house,[81] as most federations do, yet it may still be the most decentralized one of all. Its provinces possesss much more independent policymaking authority than German Lander or American states, particularly in areas like commerce, economic regulation, labor relations, and immigration.[82] The provinces' prerogatives are also protected by the Supreme Court, Canadian federalism's umpire, and provincial legislatures that oppose certain constitutional rulings by the Court can vote to override them.[83] Informally, moreover, Canada's version of "cooperative executive federalism," a continuous process of negotiations and "treaties" between Ottawa and the provinces over policy design and implementation, assures the latter a strong role even in national policymaking.[84]

Germany's *"administrative federalism"* is different. It gives *Lander* the sole authority to administer laws unless the Basic Law permits national administration. Through the Bundesrat, the *Lander* also enjoy an absolute veto power over national laws affecting their vital interests,[85] and they wield power over immigration and citizenship policy[86] denied to Australian and American

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either by the U.S. Constitution's Supremacy Clause or by judicial decision. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal courts must apply state's substantive law in diversity-of-citizenship cases).

[77] On the importance of such umpires to safeguard federalism, see Martha Derthick, "The Structural Protections of American Federalism," in North American and Comparative Federalism (Schreiber ed., 1992), at 8. The German Constitutional Court, with half its members selected by the Bundesrat, also actively protects *Lander* prerogatives. Switzerland's Federal Tribunal can srike down cantonal, but not national, legislation. See Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 254 (1990).

[78] In Australia, as in the U.S., parties are organized primarily at the state level. See Rydon, supra note 60, at 230.

[79] See generally, Donald L. Horowitz, Ethnic Groups in Conflict (1985).

[80] An example is the U.S. practice of "senatorial courtesy" in certain appointments matters.

[81] See William C. Hodge, "Patriation of the Canadian Constitution: Comparative Federalism in a New Context," 60 Wash. L. Rev. 585, 605 (1984) (Canadian Senate "never a true repository of sectional, provincial interest").

[82] On provincial power over immigration policy, see Kevin Tessier, "Immigration and the Crisis in Federalism: A Comparison of the United States and Canada," 3 Ind. J. Global Legal Stud. 211 (1995).

[83] Canadian Charter of Rights and Freedoms, Sec. 33. Quebec has often done so.

[84] See Ralph J.K. Chapman, "Structure, Process, and the Federal Factor," in Comparative Federalism, supra note __, at 69. Indeed, their autonomy, already great, appears to be growing. See, e.g., Anthony DePalma, "Ottawa and Provinces (but Not Quebec) Agree on Social Program," N.Y. Times, Feb. 5, 1999, at A5 (nation losing power to the provinces).

Germany has also been characterized as a system of "cooperative federalism" terms, see Deeg, supra note 27, at 30-1, as has Australia's more formally centralized one. See John Warhurst, "Managing Intergovernmental Relations," in Federalism and the Role of the States, supra note 64, at 259, 261-63; Brian R. Opeskin & Donald R. Rothwell, "The Impact of Treaties on Australian Federalism," 27 Case W. Res. J. Int'l L. 1 (1995). The integration of national and sub-national administration in these three parliamentary systems is more extensive and fully institutionalized than in the American system.

[85] The vital interests specified in the Basic Law include all constitutional amendments, laws affecting *Lander* revenues, and laws affecting *Lander* administration of federal law. [cite]

[86] See, e.g., Thomas M. Franck, "Clan and Superclan: Loyalty, Identify, and Community in Law and Practice," 90 Am. J. Int'l L. 359, 380 (1996) (*Lander* must each decide whether to allow their citizens to obtain another nationality).

states[87] and even to Canadian provinces. Swiss cantons control cultural policy (e.g., language, education, and religion) and exercise broad powers over taxation, banking and welfare.[88] Despite these important examples of decentralized federalism, however, some commentators discern a general centralizing trend over the 20th century.[89]

The nature of citizenship in a federation is affected not only by these "vertical" relationships between national and sub-national governments but also by their effect on "horizontal" relationships - particularly equality of resources and outcomes - among the sub-national units. Indeed, promoting equality among sub-national units is sometimes the principal normative and political justification for a federation further centralizing power, and discrimination by one sub-national unit against the citizens of another sub-national unit is usually proscribed.[90]

This justification, however, often conflicts with other federalist goals like tolerating pluralism and limiting governmental power.[91] When German Chancellor Kohl used massive redistribution to reintegrate the eastern Lander, he invoked a Basic Law provision requiring the national government to ensure reasonable equality between financially strong and weak *Lander*.[92] The fiscal burdens borne by Germans in the west, however, contributed to his 1998 electoral defeat and remain highly controversial.

Citizens' Rights. In most federal systems, the fundamental laws of both national and sub-national governments define the rights that attach to their own citizenship status. These specific individual rights, together with any additional protections created by structural limits on public power, constitute citizens' legal endowment. Some federations countenance greater heterogeneity between national and sub-national laws than others do. In the U.S., for example, state constitutions often describe their citizens' rights in the very same words that the federal constitution uses for U.S. citizens yet define them differently, and one finds even more variation between the federal and state polities, and among the states, in the common law and statutory rights that they confer. Much the same seems to be true in Canada,[93] while Australia's state constitutions apparently do not serve as autonomous sources of individual rights in the same

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[87] Although this seems to have always been the case in Australia, see Mary Crock, Immigration and Refugee Law in Australia (1998) (no mention of state role), it was not always so in the U.S. See Gerald L. Neuman, "The Lost Century of Immigration Law (1776-1875)," 93 Colum. L. Rev. 1833 (1993).

[88] See, e.g., Thomas W. Merrill, 1 Green Bag 2d 153, 158 (1998); Simon Hix, "Elections, Parties, and Institutional Design: A Comparative Perspective on Eastern European Democracy," W. Eur. Politics, July 1, 1998, at n. 30.

[89] See, e.g., Thomas O. Heugelin, "New Wine in Old Bottles? Federalism and Nation-States in the Twenty-First Century: A Conceptual Overview," in Rethinking Federalism, supra note 68, at 203, 206; Merrill, id. See also, Schuck, supra note 24, chap. 13 (on U.S.).

[90] See, e.g., U.S. Const., Art. IV, Sec. 2 and 14th Amend., Sec. 1, discussed in part V infra; Basic Law of Germany, Art. 33.

[91] See, e.g., Simeon, supra note 69, at 258 (Canada); Deeg, supra note 27, at 49 (Germany).

[92] Kommers, supra note 64, at 90. Australia also has a system of "fiscal federalism." Rydon, supra note 60, at 233-34. As discussed in part V infra, the U.S. Congress and Supreme Court impose only weak constraints on inter-state inequalities.

[93] See, e.g., Mark L. Kasserman, "Putting the Professor to Bed,"17 Contemp. Lab. L.J. 206, 217 (1995) (strong provincial statutes against employment discrimination); Harvetta Asamoah et al., "International Legal Developments in Review, 1997," 32 Int'l Law. 559, 573 (1997) (all but 2 provinces ban discrimination on basis of sexual orientation).

sense.[94]

Two final rights-oriented aspects of federative citizenship are whether (1) citizens of the nation enjoy greater rights than aliens, and (2) citizens of a sub-national unit enjoy greater rights than citizens of another sub-national unit who enter, or reside in, the first one. That is, to what extent do nations (1) discriminate against aliens, and (2) permit their sub-units to do so with respect to either aliens or citizens of other sub-units?

The answer to the first question is complicated by the details of national and sub-national law and by the variety of alien statuses in each country. All federations bar aliens from voting in national elections and limit their access to certain public benefits and public employment, but the commonalities end there.[95] Federations also differ on the second question. The U.S. and Australian constitutions, for example, bar their states from discriminating against citizens of other states;[96] Germany's also seems to do so.[97] Canadian provinces, however, apparently can discriminate against citizens of other provinces in some respects.[98]

V. Citizenship in the U.S.

The U.S. is perhaps the paradigmatic example of a federation providing for dual sovereignty and dual citizenship, principles the Supreme Court recently reaffirmed.[99] This seems evident when one reconsiders the four factors just discussed - the origins of the federation and its social diversity, power allocations, and protection of individual rights - in the American context.

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[94] See James A. Thompson, "State Constitutional Law: American Lessons for Australian Adventures," 63 Texas L. Rev. 1225 (1985). State parliaments, however, protect some individual rights by statute. Id. at n. 234.

[95] The Canadian provinces and German *Lander* regulate access to many public benefits. [cites] Germany also requires residency permits that restrict non-citizens' ability to travel and work. [cite] On Switzerland, see, e.g., Demetra K. Matsis, "Guestworker Policies," 74 Marq. L. Rev. 525 (1991) (limits on public assistance); Patrick R. Ireland, The Policy Challenge of Ethnic Diversity" Immigrant Politics in France and Switzerland (1994) (Switzerland more restrictive); Martin Heisler, "Contextualizing Global Migration: Sketching the Socio-Political Landscape in Europe," 3 UCLA J. Int'l & Foreign Aff. 557, 588 (1999) (cantons have some authority over rights of non-citizens). On the U.S., see Peter H. Schuck, "The Treatment of Aliens in the United States," in Paths to Inclusion, supra note 5, chap. 7.

[96] See U.S. Constitution, Art. IV, Sec. 2 and Amendment 14, Sec. 1 (Privileges and Immunities Clauses); Australia Constitution, Sec. 117 (non-discrimination by states). Some recent U.S. developments on point are discussed in Part V infra.

[97] German Basic Law, Arts. 10 and 11 (freedom of mobility and occupational choice).

[98] See Robert A. Sedlar, "Constitutional Protection of Individual Rights in Canada," 59 Notre Dame L. Rev. 1191 (1984) ("Apart from the right to pursue a livelihood in another province, a non-resident is not protected from discriminatory provincial laws, such as those barring landholding by non-residents.").

[99] "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. . .each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." Saenz v. Roe, ___ U.S. ___, 119 S. Ct. 1518, 1527, n.17 (1999), quoting from U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

The Republic's origins seem almost to have preordained a federal form. This, despite the fact that, as the Framers knew,[100] no such system had ever been successfully implemented on so large a scale. No imperial sovereign in retreat was imposing federalism on its former colonies, nor was a unitary state fissioning. The American confederation, as it was called, was rather a consensual union of polities. The Declaration of Independence recites that they saw themselves as free and independent states creating a new sovereignty while retaining much of their former sovereignty.[101] Having recently emerged from a long war of liberation in which disunity had brought them perilously close to defeat, the states viewed federation as a military and diplomatic necessity. As a loose confederation of sovereign states whose beggar-thy-neighbor policies had caused monetary, fiscal, and commercial chaos, the Framers also saw the Constitution as an embryonic common market and monetary union.[102]

The states' remarkable social diversity also dictated a federation. Their British heritage and English language provided only a thin veneer of commonality. Even European visitors were struck by the cultural, religious, geographic, political, and economic heterogeneity among and within the states. Two centuries later, of course, American society is far, far more diverse and pluralistic in almost every dimension. Only a federal polity can accommodate values and interests this conflictual.[103]

The federation's vertical allocation of political authority between the nation and the states was designed to accommodate this diversity, but it also had a second, overriding purpose: to fragment public power in order to limit the reach of both levels of government. This same power-diffusing, liberty-enlarging spirit motivated another constitutional innovation:[104] the horizontal division of authority and competence among separate branches of the national and state governments.[105]

These constitutionally-mandated principles of federalism and separation of powers, however, do not exhaust the decentralizing thrust of the American system. Decentralization of federal-level domestic programs not geared to war has always been the norm. The U.S. Department of Agriculture, for example, from its origins in the 1860s has organized its most important programs around state and local extension services dominated by local political elites.[106]

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[100] Id. ("Federalism was our Nation's own discovery.") In 1786, James Madison undertook an exhaustive study of all past and present confederacies. The editor of Madison's papers notes that "The fundamental lesson that [Madison] drew from his study was that confederacies were fragile creations, continually tending toward dissolution or impotency. [Madison] saw the same fate in store for the American confederation unless drastic corrective surgery were applied." The Papers of James Madison, Vol. 9 (R. Rutland, ed., 1975), at 4.

[101] According to federalism scholar Daniel Elazar, polities founded by design have always been federal. Elazar, "Contrasting Unitary and Federal Systems," 18 Int'l Pol. Sci. Rev. 237 (1997).

[102] See generally, Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1998).

[103] See Schuck, supra note 24, chap. 3.

[104] See generally, Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996).

[105] Separation of powers principles are in some respects even more robust in state constitutional law. See Jim Rossi, "Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States," 52 Vand. L. Rev. ___ (1999).

[106] See Theodore A. Lowi, The End of Liberalism (2d ed., 1979). This was true even of the U.S. military force. See Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920

The federal regulatory programs of the Progressive, New Deal, and Great Society eras and augmented since the 1970s[107] usually divide policy, fiscal, and enforcement responsibilities between the federal and state governments.[108] The state and local responsibilities in federal health, education, welfare, and other social service programs are greater still.[109]

Congress often bypasses even the states and localities, thus decentralizing policymaking even more radically. By devolving federal authority to private groups rather than to state and local governments, it in effect privatizes public law.[110] By allowing a highly diffuse court system to shape the content and enforcement of federal law through private litigation,[111] it in effect renounces any hope for national uniformity. By moving from decentralization to deregulation, it ordains that private contract, not federal or state public law, will define rights and duties. These devolutions may or may not be justified[112] but they are an important dimension in the meaning of citizenship.[113]

I noted in part IV that courts in the U.S. often interpret federally-created rights differently than state-created rights, even when their wording is identical, and that inter-state differences in legal rights are greatest in statutory and common law. This brings us to the final set of issues raised in part IV, now focusing on American federalsim: do U.S. citizens enjoy greater rights than aliens? and do citizens of one state enjoy greater rights than citizens of another state who enter, or reside in, the first state?

The answer to the first question is "yes" if Congress decides to discriminate, and probably "no" if a state does so, although the law is of course more complex than this.[114] Courts traditionally upheld discrimination by federal or state law against legal permanent residents and other aliens in public employment, access to public services, and even in some private spheres unless it was based on race rather than alienage. However, the Supreme Court's decisions in Takahashi v. Fish & Game Commission,[115] and Graham v. Richardson[116] created a strong

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(1982).

[107] For a discussion summarizing recent developments, see Schuck, supra note 24, chaps. 7 and 13.

[108] Two important examples of this divided responsibility include federal laws regulating occupational safety and health, and the environment.

[109] Some major exceptions are Social Security retirement, Food Stamp, Medicare, and federal tax programs, which are federally administered.

[110] Such laws permit private groups to develop and enforce government standards. See Schuck, supra note 24, chap. 13 for examples.

[111] See, e.g., R. Shep Melnick, Between the Lines: Interpreting Welfare Rights (1994). Congress has also allowed private litigants in some federal civil rights cases to sue in the state courts.

[112] There is much to be said for these moves under certain circumstances. See Schuck, supra note 24, chap. 13.

[113] Sociologist Theda Skocpol notes that historically, federalism and decentralization have affected the nature of Americans' conceptions and practice of citizenship through their membership in federated civic organizations. Skocpol, "How Americans Became Civic," in Civic Engagement in American Democracy (M. Fiorina & T. Skocpol, eds., forthcoming).

[114] It is detailed in Peter J. Spiro, "The States and Immigration in an Era of Demi-Sovereignties," 35 Va. J. Int'l L. 121 (1994).

[115] 334 U.S. 410 (1948) (invalidating statute barring issuance of commercial fishing license to person ineligible for citizenship).

[116] 403 U.S. 365 (1971) (invalidating alienage classification in state welfare law).

presumption against state laws that discriminate against aliens.[117] Graham's rationales were that such laws involve a constitutionally suspect classification and also conflict with Congress's plenary power over immigration.

In contrast, the Court in Mathews v. Diaz[118] recognized an even stronger presumption that favors discrimination against aliens if Congress enacts it. This principle was exploited in 1996 when Congress enacted, and a federal court upheld, welfare reforms that not only allowed states to discriminate against aliens but actually mandated it in certain situations as a matter of national policy.[119] After much public criticism of this policy, Congress eased it but continues to adhere to the principle that discrimination against aliens is often justified.

The answer to the second question - whether the rights of U.S. citizens change as they move from one American state to another - is less clear. Two recent developments, one legislative and one judicial, assure that policy heterogeneity among the American states will grow. First, Congress has ceded greater autonomy to the states in many important domestic policy domains such as health care, welfare, public education, highways and mass transit, legal gambling, urban renewal, and insurance. The states and even some localities are also forging direct trade and diplomatic ties with other nations, relationships that are not only independent of national policies but sometimes in deep conflict with them.[120] Second, the Court has recently launched a radical campaign of constitutional reinterpretation, limiting Congress's power to adopt nationally uniform policies enforceable in the federal or even state[121] courts. This leaves the states free to develop their own rules and escape legal accountability in a variety of policy areas.[122]

As a consequence, the rights and duties of U.S. citizens and aliens alike will now depend more on state law and less on federal law than at any time since the New Deal. Federal or state constitutional limits on states' power to discriminate against citizens of other states and against aliens will count for more. Given greater inter-state diversity in public policies, the stakes in state citizenship could become higher than ever before.

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[117] Other decisions have recognized an exception, permitting states to discriminate against aliens where necessary to express the state's "political sovereignty." See, e.g., Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (upholding state law excluding aliens from certain public jobs).

[118] 426 U.S. 67 (1976) (upholding alienage classification in federal Medicare law).

[119] See discussion in Schuck, supra note 1, at 193-202. The discriminatory provisions of the 1996 law were upheld in Abreu v. Callahan, 971 F.Supp. 799 (S.D.N.Y. 1997).

[120] It is now common, for example, for states and cities to refuse on human rights or environmental grounds to do business with foreign nations with whom the U.S. has or seeks friendly relations. Although some scholars applaud this development, see, e.g., Peter J. Spiro, Foreign Relations Federalism, 70 U. Colo. L. Rev. 331 (1999); Spiro, supra note 113; Jack L. Goldsmith, "Federal Courts, Foreign Affairs, and Federalism," 83 Va. L. Rev. 1617 (1997), the position that states may properly play independent roles in foreign policy remains a decidedly minority view.

[121] See, Alden, supra note 31.

[122] This campaign is being conducted along at least three different salients: the Commerce Clause (see, e.g., U.S. v. Lopez, 514 U.S. 549 (1995)); the Eleventh Amendment (see, e.g., College Savings Bank, supra note 31); and the Tenth Amendment (see, e.g., Printz v. U.S., 521 U.S. 898 (1997). And in the sensitive area of abortion rights, the Court has also given states some regulatory flexibility. E.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Yet the precise nature and significance of state citizenship remain uncertain. The 14th Amendment's Citizenship Clause made state citizenship a matter of federal law, defining it simply as residence in a state. Noting this, constitutional scholar Laurence Tribe adds "the state has nothing to say about the matter."[123] But Tribe's addition seems a non sequitur. The Clause indeed provides that people are citizens of the state "in which they reside," but a state retains power, within constitutional limits, to define what conduct constitutes "residence."[124]

What, then, are these limits? The Supreme Court recently addressed this question and, as often occurs, raised new ones. In Saenz v. Roe,[125] decided in May 1999, the Court struck down a California law that limited the amount of welfare benefits payable to families residing in the state for less than a year to the (generally lower) amount they would have received in the state of previous residence.[126] The Court, which had previously protected U.S. citizens' "right to travel" from one state to another for any legitimate reason,[127] distinguished three parts of that right: the right to enter or leave a state; to be treated as a welcome visitor while temporarily in another state; and to reside permanently in another state and be treated like the state's other citizens. Saenz, the Court noted, only involved the last of these rights.[128]

The Court held that California's reasons for treating its citizens differently depending on their previous residence were not sufficiently compelling to satisfy the 14th Amendment's Citizenship Clause, which not only confers state citizenship on residents but also bars states from abridging the "privileges and immunities" of U.S. citizens who reside in, and thus are citizens of, that state.[129] The Court stunned the legal community by basing this right on the "privileges and immunities" element of Citizenship Clause. This exhumed a provision that the Court buried in 1872, that has been a dead letter ever since, and whose meaning - and thus the implications of state citizenship - has remained famously opaque.[130]

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[123] Tribe, N.Y. Rev. of Books, Sept. 24, 1998, at p. 33 (reviewing Charles Black, Jr., A New Birth of Freedom).

[124] See discussion infra. Peter Spiro suggests, intriguingly, that states could grant state citizenship to non-residents and might even grant it to people who lack U.S. citizenship. Spiro, "The Citizenship Dilemma," 51 Stan. L. Rev. 597, 619 n.111 (reasons why immigrant-friendly states might wish to do this).

[125] Supra note ___.

[126] The relevant federal agency had reviewed this law and issued it a waiver, permitting California to receive federal reimbursement for welfare payments made under the state's law. In the 1996 welfare reform, Congress specifically authorized such state laws. California's limitation applied only to migrants from other states, not to immigrants from other countries.

[127] I say "legitimate" because while the Court has held that inter-state movement in order to increase one's welfare benefits is not only legitimate but constitutionally protected, Shapiro v. Thompson, 394 U.S. 618 (1969), Congress sometimes criminalizes the crossing of state lines for purposes it deems illegitimate. Thus, the Mann Act prohibits transporting women across state lines for immoral purposes, and a pending bill would bar inter-state travel for the purpose of avoiding a state's abortion restrictions. See also, the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (barring states from giving full faith and credit to homosexual marriages contracted in other states).

[128] Saenz v. Roe, supra note 99, at 1525.

[129] Nevertheless, the Court reaffirmed the principle that under the U.S. Constitution's Privileges and Immunities Clause, Art. IV, Sec. 2, a state may not disadvantage a visitor without a "substantial reason. . .beyond the mere fact that" he is from another state. It noted, however, that a state might be justified in charging a visitor more for a service (e.g., state college tuition) than it charged its own citizens. Id. at 1526.

[130] See, e.g., Jonathan D. Varat, "State Citizenship and Interstate Equality," 48 U. Chi. L. Rev. 487 (1981) (exploring

One measure of this opacity, even after Saenz, is the Court majority's concession that a state might justify disciminating against out-of-staters if it could either challenge the *bona fides* of their residency and hence of their state citizenship, or show that they might "establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile."[131] The two dissenters pressed both possibilities, stressing both that states must be allowed to "use *bona fide* residence requirements to ferret out those who intend to take the privileges and run," and that even welfare benefits are portable - they free up other resources and help one acquire permanent skills - and thus invite abuse by out-of-stater's that states can properly regulate.[132]

It is too early to know what kind of federation the Court has in mind and how far it is willing to take its vision. It is simplistic to say that the Court favors states' rights; after all, the same Court that protects state policymaking autonomy[133] also limits that autonomy.[134] Still, it is clear that it now takes dual sovereignty more seriously than it has for generations.

Whether state citizenship once again becomes a meaningful constitutional category, however, ultimately depends on political factors: whether Congress continues to devolve policymaking initiative to the states, how diverse the states' policies become, and how much equality those policies accord out-of-staters.

The same factors will also affect federal citizenship but in different ways. For example, diverse policies among states reduce the horizontal equality value of federal citizenship. Conversely, the distinctive status and rights of federal citizens are enhanced when discrimination against aliens is permitted.

Conclusion

The nation-state, with its national citizenship, will remain the fundament of international law and politics for the foreseeable future. On the whole, this should be a source of relief, not lamentation, among friends of liberal democracy and the rule of law.[135] The implosion of collapsing empires and failed states has ignited an ethnic explosion whose reverberations are only now beginning to be felt. Today's ethnic demands for political autonomy and independence are

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possible meanings).

[131] Id. at 1527.

[132] Id. at 1533-34. The dissenters also maintained that the 14th Amendment Privileges and Immunities Clause, like the one in Art. IV, Sec. 2, was meant to protect only "fundamental rights, rather than every public benefit established by positive law." Id. at 1536-38.

[133] See supra note 122.

[134] In addition to Saenz, for example, the Court has barred states from imposing term limits in congressional elections. See Thornton, supra note 99.

[135] See Schuck, supra note 1, at 202-05.

reinforced by a more robust rhetoric of human rights and new geopolitics of ethnic autonomy. This geopolitics is foreshadowed both by continuing conflicts in the former Yugoslavia, central Africa, central Asia, and even the British Isles, and by a growing - albeit rationally reluctant - willingness of outside powers to violate national sovereignty in hopes of forestalling ethnic wars, mass refugee movements, rogue state nuclearization, and other vital concerns.

In this new geopolitical world, the innumerable variations on the ancient themes of federalism and sub-national citizenship will be increasingly attractive as a mode of political, legal, psychological, and sociological settlement of conflicts.[136] Only in a federal system - and often not even then - can the diverse interests of center and periphery be adjusted in ways that can exploit the advantages of both scale and devolution.

The devil, as always, will be in the details; the details in turn will depend on the federation's distinctive historical and political origins, the diversity of the civil society in the federating population, the formal and informal allocations of power between national and sub-national units, and the distribution of rights among national citizens, sub-national citizens, and non-citizens of each.[137]

Because the American, dual sovereignty model reflects these differentiating factors, its utility as a model for polities with very different histories, values, and civil societies is limited. This limitation is underscored by U.S. federalism's remarkable dynamism, illustrated by the recent enhancements of state power launched by the Supreme Court and Congress,[138] as well as its complexity and contradictions, illustrated most recently by the Court's nationalizing decision in Saenz.

For other polities desperately searching for new forms of power-sharing to contain the centripetal forces of economic, cultural, and social fragmentation and to accommodate more assertive minorities, other federalism systems like the Australian, German, Swiss, Belgian, and Canadian may prove more serviceable, though they no less than the U.S. are creatures of their unique histories, sociologies, and values. Nevertheless, the federating polity may perhaps draw some more general lessons from the American experience: the need for flexibility, for nurturing cross-cutting diversities that tend to mute social cleavages rather than reinforcing them, and for genuine power-sharing between center and periphery, which are reflected in the nature of their distinct citizenships.

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[136] See part III, supra.

[137] See part IV, supra.

[138] Some administrative agencies in the U.S. have also undertaken important devolutionary initiatives, including deregulation. Administrative innovations in federalism, however, tend to be more episodic and equivocal due to agencies' uncertain political legitimacy. See Schuck, supra note 25.