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Citizenship in Federal Systems

I. INTRODUCTION

An odd and somewhat disquieting feature of citizenship talk¹ in the academy is its oscillation between two discursive poles, one formalistic and the other substantive. We commonly speak of the legal principles that regulate the statuses of citizen² and non-citizen.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 in status.⁴ We generally use the formalistic conception to describe what the law says citizenship *is*, and the substantive conception to compare what it is with what we think it *could* and *should* be.⁵ This ten-

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1. I discuss 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. American law treats all citizens, whether native-born or naturalized, the same for virtually all purposes, save two: eligibility to be elected President of the United States, and the renunciation oath required of naturalizing citizens, leading to somewhat different dual citizenship rules. See *id.* at 227-29. Not germane here is the conventional distinction between citizens and "nationals" (i.e., near-citizens but with lesser status and rights, usually as to voting) under domestic and international law. See *id.* at 412, n. 2.

3. The term "alien" carries a more unpleasant — and for some, offensive — connotation than the term "non-citizen." Johnson, "'Aliens' and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons," 28 *Miami Inter-American L. Rev.* 263 (1996-97). Nevertheless, using "alien" can reduce confusion when one wishes to discuss both federal and state citizenship, as I do here. We do not speak of U.S. citizens who are citizens of New York and who enter New Jersey as "aliens" there. Unlike the citizen category, immigration law divides aliens into many subcategories, each bearing different rights, duties, and administrative statuses. See Schuck, "Current Debates About U.S. Citizenship," in *In Defense of the Alien, 1998* (Lydio Tomasi, ed., 1999), at 83-84.

4. Inequalities, of course, also persist, and may even be growing, *within* each of these groups, perhaps especially among non-citizens who are distributed bimodally (in the U.S., at least) with respect to their socioeconomic status at the time of entry.

5. This comparison can prompt disparate reactions. I rejoice, for example, that Germany has decided to permit long-resident descendants of former guestworkers to acquire and transmit German citizenship, but I also wonder whether their new status

sion between formal and substantive conceptions of citizenship reflects, among other things, the stark differences among legal rules, political realities, and civic aspirations.

Recent developments have heightened this tension by infusing new uncertainties and complexities into the current debate over citizenship. Many of these developments are gathered under the thematic portmanteau — I am tempted to say *idee fixe* — of globalization. Whether commentators view globalization as a harbinger of universal human rights, political reform, and multicultural ethics,⁶ as an insidious agent of a corrosive world capitalism, or as something else, all seem to agree that globalization is already having profound effects on the nation-state, present and future.

Most of globalization's cheerleaders, skeptics, and agnostics converge on the view 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, globalization subjects even the most insular communities to the remorseless, tradition-withering, homogenizing discipline of world markets. In turn, the argument continues, these forces threaten the safety net and indeed any other social practice that cannot meet the acid test of economic efficiency. In this view, the competition for pools of capital that can be moved around the world instantaneously with the click of

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* (Peter H. Schuck & Rainer Münz, eds., 1998).

6. Two premature celebrants are David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996), and Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994), to whose views I have reacted in Schuck, *supra* n. 1, at 202-05. For other relatively upbeat treatments of this question, see Thomas L. Friedman, *The Lexus and the Olive Tree* (1998); Rubenstein, "Citizenship in a Borderless World," in *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Antony Anghie & Garry Sturges, eds., 1998), at 183; 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). This debate and its associated literature are summarized and extended in Bosniak, "Citizenship Denationalized," 7 *Ind. J. of Global Legal Stud.* 447 (2000).

7. Canada, France, and other countries have imposed strict legal rules to inoculate their national cultures against the American virus, but to little avail. See, e.g., Susan Catto, "Keeping Canada's Public TV Network Purely Canadian," *N.Y. Times*, Jan. 25, 2000, at B2; 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., Havel, "Beyond the Nation-State," 9 *The Responsive Community* (Summer 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; of Bronislaw Geremek, Poland's foreign minister; and of Jurgen Habermas).

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 determined, universalized unfolding of history.¹⁰ This paper, however, is concerned not with the external, centrifugal forces that threaten to transcend the nation-state, but with their opposites. Part III describes the internal, centripetal forces that may impel nation-states to federalize power, devolving it downward to sub-national units and in the process altering the nature and significance of citizenship. Part III also explores citizenship's political, constitutional, sociological, and psychological meanings and the legal and policy instruments (federalism, most notably) through which different polities may instantiate these meanings.

How does federalism¹¹ affect citizenship? Part IV focuses on four aspects of a federation that shape citizenship's meaning in that polity: (1) its historical and political origins; (2) its social diversity; (3) its distribution of powers between the national (or federal) level and the sub-national levels and among the latter; and (4) the rights and duties that the federation accords to each level's citizens. This discussion draws on legal and political analyses of the federal systems in Australia, Canada, Germany, Switzerland, the U.S., and to a lesser extent Belgium. Part V discusses the recent, unanticipated renaissance in the U.S. of a dual sovereignty form of federalism that many

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

10. Such prophecies ignore some inconvenient facts. Nation-states have been proliferating, not dying, as failed empires and states collapse, as demands for ethnic self-determination and even independence multiply, and as jerry-built compromises to suppress nationality fail. 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). Many of these new nation-states, of course, are poorly equipped to exercise much independent power on the world stage.

In many ways, national borders now seem more important, not less, as migratory pressures on them increase. See, e.g., Dittgen, "World Without Borders? Reflections on the Future of the Nation-State," 34 *Gov. & Opposition* 161, 166-74 (1999). National institutions, identities, and ideologies are proving to be remarkably durable; fierce competition from religion, socialism, and other universalizing forces often fail to dislodge them. Nationalism, which combines both rational and irrational appeals, has been resilient and resourceful in a more global, diasporic economy that often challenges traditional notions and mechanisms of sovereignty. For the example of India, see, e.g., Celia W. Dugger, "India Offers Rights to Attract Its Offspring's Cash," *N.Y. Times*, Apr. 4, 1999, at p. 12 (India gives foreign investors of Indian descent special privileges); Dugger, "Gandhi's Choice: Be Indian and Lead Party," *N.Y. Times*, May 25, 1999, at A1 (Sonia Gandhi must affirm her Indian, and mute her Italian, nationality). Most important, no alternative to nation-states as sources and enforcers of rights yet appears on the horizon. But see Spiro, "The Citizenship Dilemma," 51 *Stan. L. Rev.* 597, 633-36 (1999) (loyalties that previously attached to the nation-state are increasingly attaching to the non-state groups that constitute a kind of international civil society).

11. See my definition *infra* nn. 16-22.

commentators hoped (or feared) had passed irretrievably from the scene. I conclude with some brief observations about the future of citizenship in federal systems.

I wish that this comparative analysis could yield analytically crisp models of federal citizenship, models that could both crystallize our understanding and guide future research. Alas, it cannot. All genuine federal systems are highly complex, contingent products of unique historical, social, and political forces. Comparisons can limn certain interesting relationships, as this paper does. For example, the sub-national entity's pre-federation status and the nature of the political crisis that impelled it to federate seem largely to determine the nature and extent of its independence from the center and hence the significance of sub-national citizenship. But extracting this kind of insight is not the same as developing coherent, non-trivial, generalizable hypotheses, much less testable ones.¹² Such a worthy ambition far exceeds the scope of this paper — and perhaps the scientific capacities of comparative methodology as well.¹³

II. THE CHANGING CONTEXT OF CITIZENSHIP

The social developments that drive globalization have been much discussed. They include the integration of world markets through more mobile capital, technology, and labor; related revolutions in telecommunications and transportation; the migration-driven 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, dollarization (and Euro-ization) of national currencies, and English as the world's *lingua franca*.

At the same time, however, other social forces are blunting this global thrust, pressing both supranational formations and nation-states to devolve political authority both inward and downward.¹⁴ To further complicate the picture, some of these developments are simultaneously pushing in both transnational and sub-national directions.

12. Recall that my sample size is only six and cannot be much enlarged because few other federal systems satisfy the paper's definition, which I present *infra* nn. 16-22.

13. For a recent and trenchant exploration of these capacities, see Chodosh, "Comparing Comparisons: In Search of Methodology," 84 *Iowa L. Rev.* 1025 (1999).

14. 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. In some tension with this principle, however, is the expansive universalist jurisprudence of the European Court of Human Rights. See, e.g., Roger Cohen, "A European Identity: Nation-State Losing Ground," *N.Y. Times*, Jan. 14, 2000, at A3 (Court ruling requiring Britain to end ban on openly gay members of armed forces an example of surrender of national sovereignty over law to European institutions).

Buffeted by these powerful cross-winds, the nation-state can choose among several stabilization and survival strategies. One strategy, political mitosis, is exemplified by the former Yugoslavia and the former Soviet Union. States that are no longer viable as integrated, sovereign units may fracture, forming new states that are 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, Pakistan, and Singapore today, is hyper-nationalism. Here, nation-states try to reinforce ideologies and institutions that support or symbolize 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,¹⁵ merging themselves in it to that extent. Federalism, the focus of this article, is a fourth strategy.

By federalism, I mean a system that divides political authority¹⁶ between a nation-state and sub-national polities within its territory so that both the national and sub-national polities directly govern individuals within their jurisdiction, *and* that confers both national and sub-national citizenships.¹⁷ Some preliminary distinctions are in order here. Federalism entails decentralized administration, but they are by no means the same thing. Although long-unitary states like France, Spain, and the United Kingdom often devolve authority

15. Or to the U.S., as with various forms of dollarization adopted by Argentina, Ecuador, and other nation-states. See, e.g., Larry Rohter, "U.S. Currency Becomes Ecuador," *N.Y. Times*, Jan. 18, 2000, at C1.

16. I say political authority in order to minimize the well-known uncertainties surrounding the more traditional term, sovereignty. For a recent analysis of different kinds of sovereignty, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 3-4 (1999). As noted in the text immediately below, I also mean to distinguish federalism from its more common cognate, the decentralization of national policy administration and implementation.

17. The nature of sub-national citizenship in a federation varies. 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., for example, the Citizenship Clause of the 14th Amendment mandated this relationship, which reversed an earlier constitutional logic in which, according to Joseph Story, "Every citizen of a State is ipso facto a citizen of the United States." Cited in Beaud, "The Question of Nationality Within a Federation: A Neglected Issue in Legislation Regarding Nationality," in *Reinventing Citizenship: Dual Citizenship, Social Rights, and Federal Citizenship in Europe and the United States* (Patrick Weil & Randall Hansen, eds., 2000). I discuss the Supreme Court's current understanding of this relationship in Part V *infra*.

Switzerland reverses the American pattern, deriving federation citizenship from cantonal citizenship, which in turn is based on residency. See, e.g., Hughes, "Cantonalism: The Golden Epoch of Switzerland," in *Comparative Federalism and Federation* (Michael Burgess & Alain Gagnon, eds., 1993)(hereinafter "*Comparative Federalism*"), at 160. There are no references to provincial citizenship in the Canadian Charter, and none to state citizenship in India's Constitution. See Vicki C. Jackson, "Citizenship and Federalism" (paper presented for Carnegie Comparative Citizenship Project: International Migration Policy Program, Carnegie Endowment for International Peace, forthcoming 2000) (on Switzerland, Canada, India, and U.S. citizenship rules).

to regional or local units of administration, this devolution does not thereby create a sub-national polity, much less sub-national citizenship. Nor is a federation's dual citizenship (national and sub-national¹⁸) the same as dual citizenship in international law (citizenship in more than one nation-state).¹⁹ I also exclude nation-states like India that are federal in form but largely unitary in substance,²⁰ as well as supra-national formations like European Union, a fully developed common market that has developed only embryonic political institutions and bears a weak, though gradually more robust, conception of citizenship.²¹ Finally, I exclude non-democratic federations like Yugoslavia, the Russian-led Commonwealth of Independent States, and many sub-Sahara African polities.

Having provided a working definition of federalism, our question becomes: 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 related but analytically separable forces: minority group demands, devolution's functional advantages, and public discontent with centralized governance.

1. *Minority group demands.*²² Some 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. They 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. Such disaggregative pressures, moreover, are by no means confined to the Third World. Serious disaffection persists in Spain, Belgium, Indonesia, and French Canada, for example, and the claims of indigenes in

18. Beaud calls this citizenship in a sub-national unit "federated nationality." *Id.*

19. On the latter, see Schuck, *supra* n. 1, chap. 10; Spiro, "Dual Nationality and the Meaning of Citizenship," 46 *Emory L.J.* 1435 (1997).

20. India's states traditionally were little more than administrative agents of the national government. Among other things, the national government can (and sometimes does) dismiss states' chief ministers and their governments simply by declaring an emergency. See Rodden & Rose-Ackerman, "Does Federalism Preserve Markets?," 83 *Va. L. Rev.* 1521, n. 129 (1997). Recently, however, Indian states have been able to exploit a more fluid political system to extract concessions from New Delhi.

21. See, e.g., 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 insignificant; it confers the right to vote for the European Parliament, to reside and work in any EU member state and to vote in its local elections, and to invoke the protection of European institutions such as the European Court of Human Rights and the European Court of Justice. Otherwise, however, it is still largely concerned with economic, not political, rights.

22. Sometimes, as in South Africa before 1994, the majority asserts this claim against a ruling minority.

Canada and the U.S. are being pressed — non-violently, for the most part, and with considerable success.²³

At a minimum, these minority claims seek “recognition” of, or respect for, their group identity by the state and its civil society.²⁴ Depending on various demographic, military, economic, and political factors, these claims for recognition may evolve into more strident demands for some form of self-determination. The state and the claimant groups then engage in a complex bargaining process in which threats, violence, side payments, horsetrading, internal and international politics, and other modes of influence all play their parts. The recognition granted by states may take the form of patronage, affirmative action and other special benefit programs, constitutional protections, linguistic and other 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-unitary nation-states may be unable to suppress or resist them. Robert Cottrell 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.”²⁵ Federal states are even more vulnerable to such centrifugal claims, particularly when their minorities are concentrated in discrete geographical areas. This vulnerability is illustrated by Canada’s recent creation of the Nunavut territory in response to Inuit demands for autonomy.²⁶

23. See, e.g., 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”); Michael Janofsky, “Agreement Is Signed on Return of 84,000 Acres to Ute Indians,” *N.Y. Times*, Jan. 14, 2000, at A14.

24. Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (1994); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

25. 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. Even Turkey may be moving, albeit glacially, toward some accommodation with its Kurdish minority. See Stephen Kinzer, “Turkey Delays the Execution of Rebel Kurd,” *N.Y. Times*, Jan. 13, 2000, at 1 (conciliatory signs among Turkish and Kurd leaders).

26. See *supra* n. 23. This vulnerability also helps to explain the traditionally militant refusals of Turkey and Iraq to recognize the legitimacy of Kurdish claims. But

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 served the short-term interests of the occupiers, whereas the post-colonial regimes often viewed these borders as arbitrary and politically incendiary. This legacy provokes cross-border conflicts, as when a cohesive, strongly identified ethnic group is divided between two or more states,²⁷ or when a region's valuable natural resources are concentrated in one state to the exclusion of its neighbors.²⁸

When the Austro-Hungarian and Ottoman empires dissolved in the wake of World War I, the victorious allies established many new states whose fiercely contested borders often divided ethnic groups, forming even smaller minorities in each of the resulting states. These highly politicized and opportunistic creations sowed the seeds of insurgency, revanchism, and other sources of 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 then recurred with the fragmentation of the Soviet empire and Yugoslavia at the end of the Cold War. The long-smouldering conflicts between India and Pakistan, between China and Taiwan, between Israel and the Palestinians, and among many African states show that territorial disputes remain potent pressure points for those challenging the structure and legitimacy of fragile states.

Ethnic self-assertion seems certain to cause even more political division in the future. Literally hundreds of ethnic groups yearn to gain some measure of cultural, economic, or political autonomy from, or within, the larger polities in which they find themselves.²⁹ Human rights rhetoric and practice, including (after the bombing of Yugoslavia during the recent Kosovo war) a more credible threat of military intervention on humanitarian grounds, will also encourage such claims.

Federalism offers a possible remedy for such majority-minority conflicts, a service it has often performed in the past. But in an international order that increasingly countenances, and in principle pro-

see Kinzer, *supra* n. 25. In response to these pressures, the EU has established a Committee on the Regions in Brussels. See generally, Roht-Arriaza, "The Committee on the Regions and the Role of Regional Governments in the European Union," 20 *Hastings Int'l & Comp. L. Rev.* 413 (1997).

27. Examples include the Kurds in Turkey, Iraq, and Russia, and the Palestinians in Israel, the occupied territories, Jordan, and many other nations in the region.

28. Examples include the oil and natural gas reserves in some of the new states of Central Asia.

29. An estimated 1700 languages and 150 religions exist. *Migration News*, July 1999 <http://migration.ucdavis.edu>. India alone has 17 official languages.

fects, ethnic self-expression (if not always self-determination or autonomy), the minorities-within-minorities phenomenon complicates any federalist solution to such conflicts. Indeed, a federating polity that organizes a sub-unit around a particular mode of ethnic representation and patronage may actually exacerbate existing intra-ethnic conflicts in that sub-unit, thus encouraging new and more ardent minority claims for political recognition, greater autonomy, or even full independence.³⁰

2. *Functional advantages of devolution.* The nation-state's durability³¹ 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, after all, continues to grow — also reflects its functionality.

The nation-state enjoys certain comparative advantages over smaller political units. Some of these advantages are readily explicable by recourse to standard economic analysis. Thus, in an increasingly interdependent world in which the actions of individuals and groups both benefit and burden others with whom they cannot easily contract, only a polity as large as some nation-states can effectively “internalize” many of these “externalities.” Nation-states, moreover, can exploit some economies of scale and network effects that smaller units cannot, such as monetary, taxation, military, regulatory, and transportation systems. Indeed, some problems like cross-border pollution, epidemic diseases, refugee movements, and labor migration may yield to scale economies only at the supra-national level.³² For such problems, regulation at the sub-unit level may be ineffective — or even perverse.³³

The nation-state also enjoys comparative advantages in certain ways that may elude economic analysis. For reasons of history, ideology, and group psychology, for example, the nation-state may often be

30. For example, Peter Spiro notes that many of the indigenes in Quebec have demanded the right to secede from an independent Quebec or at least have their autonomy guaranteed within such a state. Conversation with the author, July 1999.

31. Historians often date the recognition of sovereignty in the nation-state to the Treaty of Westphalia in 1648, but recognizable, more or less unitary nation-states like England, Spain, and Holland long antedated Westphalia.

32. This helps to explain why regional groupings like the EU and NAFTA have proved attractive. Another important factor, of course, was the collective memory of two world wars fought on European soil, which inspired both NATO and the trading blocs that prefigured the EU.

33. For example, state-level regulation, together with obstacles to inter-state collective action, might trigger a “race-to-the-bottom” dynamic in which states would be worse off as competition among them for investment funds and jobs drives their standards down to that of the lowest level state. Empirical studies, however, demonstrate that this competitive dynamic is very complex, that it operates differently in different policy domains, and that races to the bottom are by no means inevitable. Much of the recent literature on this question is cited in Peter H. Schuck, *The Limits of Law: Essays on Democratic Governance* 477, nn. 232-34 (2000).

a better locus than either a smaller or a larger unit for eliciting feelings of social solidarity and liberal community,³⁴ as well as 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.³⁵ 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.³⁶

But this is hardly the entire story. The value of greater population or territorial size today may be declining in certain respects, as the economic successes of Hong Kong, Japan, and Singapore demonstrate. Moreover, 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 fractionating forces are labor migration, which may affect sub-national regions very differently, and comparative economic advantage, which often and increasingly favors decentralization to nations, regions, or even cities.³⁷

Social complexity, then, can produce scale *diseconomies* as well as scale economies. The transaction, information, and political costs of attempting to resolve issues at the national level may be much higher than doing so at a lower level.³⁸ Other things being equal (a crucial qualification in analyses like this one), centralized decision processes that must engage and govern a large, heterogeneous na-

34. See generally, Schuck, "Immigration Law and the Problem of Community," in *Clamor at the Gates: The New American Immigration* (Nathan Glazer, ed., 1985), at 285. The notion of liberal community is not an oxymoron. An interesting example is the recent proposed change in the rules governing the distribution of donated organs to determine priority according to need in the nation as a whole rather than, as in the prior system, need in smaller regions. See, Sheryl Gay Stolberg, "Agreement on Plan to Revamp Organ Distribution," *N.Y. Times*, Nov. 12, 1999, at A1.

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., 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").

35. 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 Schuck, *supra* n. 34.

36. For a fantasy, both amusing and chilling, about small-unit chauvinism, see G.K. Chesterton, *The Napoleon of Notting Hill* (1904). Peter Spiro argues, however, that the spirit of sacrifice is moving away from the state to non-state communities where loyalties are now more intensely felt. "The Citizenship Dilemma," 51 *Stan. L. Rev.* 597, 629-30 (1999). This broad claim, of course, is difficult to test empirically.

37. See, e.g., Deeg, "Economic Globalization and the Shifting Boundaries of German Federalism," 26 *Publius* 27, 28 (1996). See generally, Saskia Sassen, *Cities in a World Economy* (2000).

38. See, e.g., Schuck & 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). See also, *supra* n. 14 (subsidiarity principle).

tional 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 and thus generate more learning through shorter feedback loops.

These general tendencies, of course, are sometimes tempered or even outweighed by countervailing factors. In a larger unit, for example, the political compromises needed to accommodate greater diversity may be harder to strike.³⁹ On the other hand, decisionmakers whose constituents have more diverse interests may find it easier to logroll and compromise because more Pareto-superior trades (i.e., those in which some stand to gain and none lose) are possible. Similarly, a central decisionmaker's greater distance from a policy's true cost bearers and benefit recipients may leave her less informed, but it may also enable her to be more independent, decisive, and bold in addressing controversial issues like ethnic conflict.⁴⁰

In deciding the governmental level at which power should be exercised,⁴¹ then, it can be hard to determine precisely where the balance of advantage lies. The locus that is best for some decisions will be the worst for others, depending on the nature of the particular policy at issue and the values of those whom it will affect. Federalism is an admirably flexible tool for locating and striking this delicate balance.

3. *Public discontent with centralized governance.* Still, many citizens in the liberal democracies seem convinced that some important public policy decisions are too centralized.⁴² 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 autonomy than Congress wishes.⁴³ Congress has gone still further in some

39. See discussion and citations in Schuck, *supra* n. 33.

40. During the civil rights struggle in the U.S., for example, the federal government was far more proactive politically than the states.

41. This assumes, of course, that a prior decision has been made to allocate this power to public officials rather than leave such decisions to private actors and market processes. Such a decision is one type of what some have called "second-order decisions." See, e.g., Guido Calabresi & Philip Bobbitt, *Tragic Choices* (1978); Sunstein & Ullmann-Margalit, "Second-Order Decisions," 110 *Ethics* 5 (1999).

42. 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 are the new conventional wisdom in corporate circles, as even a cursory reading of current business publications confirms.

43. See, e.g., *Kimel v. Florida Bd. of Regents*, 2000WL14165 (U.S. Fla.) (Eleventh Amendment immunity protects states from application to them of federal age discrimination law); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999) (Eleventh Amendment immunity protects states from intellectual property infringement claims); *Alden v. Maine*, 119 S.Ct. 2240 (1999) (Eleventh Amendment immunity protects states from suits in state courts).

other areas, adopting market-based regulation and even full privatization, the ultimate form of devolution. I 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 (as distinct from administrative arms of the national government) to receive the authority.⁴⁴ Some federal states like Germany, however, also resist devolution. Although EU states have privatized many 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 including Germany, long the engine of European prosperity.⁴⁵ The crisis that this condition has engendered, moreover, seems destined to worsen as Europe's extensive, rigid, politically entrenched welfare states, whose already high costs will be magnified by rapidly aging populations, collide with the economic effects of even 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.⁴⁶

As public dissatisfaction with national policies grows and as technological changes reduce many of the center's comparative advantages, regional and local interests stand to gain in their power struggles with central authorities. As I detail in part V, recent U.S. experience illustrates this devolutionary dynamic not only in domestic policy but even in foreign trade and diplomacy, policy domains in which national control is most widely (though even here, not universally) accepted. Such developments⁴⁷ suggest a more profound, even

44. "Undoing Britain," *The Economist*, November 6, 1999, at 6 (devolution to regions in France and Spain very slow and unstable; predicting that Britain will be the same)

45. In Germany, Chancellor Gerhard Schroder's de-regulation, pro-growth, and tax reform proposals have generally provoked stiff resistance despite persistently high unemployment levels.

46. 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).

47. There are many examples, from Northern Ireland to Canada to Indonesia. An interesting one occurred recently in Brazil, where the state of Minas Gerais sought to gain domestic political leverage over the national government by withholding its federal taxes, which made international credit agencies more 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

seismic shift in the terms of political trade between the state's center and its periphery, much to the periphery's advantage. This shift is bound to be reflected in the allocation of power between them and thus in the need for federalist institutions, processes, and structures.

III. THE MULTIPLE DIMENSIONS OF CITIZENSHIP

Citizenship — as social fact, as legal status, as idea, and as ideal — is an ancient phenomenon with no agreed-upon definition, either then or now.⁴⁸ Even in a single society, citizenship has many dimensions and bears many meanings. Scholars of citizenship, of course, have analyzed the concept in a variety of ways.⁴⁹ Nevertheless, four dimensions capture the full range of citizenship's essential normative and positive meanings. For want of better terms, I call these four dimensions political, legal, psychological, and sociological. After briefly defining each of them, I shall discuss the most important policy variables or levers that states can and do deploy when they enact their collective visions of citizenship into law.

The *political* dimension of citizenship (at least in a democratic state) affirms the value of public participation in the project of self-government,⁵⁰ tempered by an exclusionary principle that certain types of political activity, notably voting,⁵¹ is properly limited to those who meet the standards for full membership in the polity, however those standards may be defined.

The *legal* dimension, the most easily defined and measured, emphasizes the positive law that creates the distinctive status of citizen, usually in a constitution or other fundamental charter, and that prescribes the specific rights and obligations attaching to citizens but 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 primarily as members of a particular state rather than as members of some other political community, by how salient this identity is for them, and by the identity that others ascribe to them. Political identity is not inconsistent with other facets of identity such as ethnicity, nor does it preclude the possibility that a

temporarily. See Diana Jean Schemo, "World Bank Cuts Off Loans to 2 Brazilian States," *N.Y. Times*, Jan. 29, 1999, at A3.

48. See Aristotle, *The Politics* (trans. T.A. Sinclair, rev. ed., 1981).

49. See discussion in Bosniak, *supra* n. 6.

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

51. As discussed *infra*, many polities permit aliens to vote in some elections (usually local) but not others. Recently, the idea of giving parents extra votes to cast for their children has aroused some academic interest. See Bennett, "Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy," 94 *Nw. U. L. Rev.* 503 (2000).

citizen may identify politically with more than one polity, as many dual and single citizens do.⁵²

The *sociological* dimension looks to how individual citizens are integrated into civil society.⁵³ This has a stronger normative resonance in public debates than the other dimensions of citizenship. A notion like “second-class citizenship” is used colloquially to criticize the effective exclusion of women, minorities, or other groups from full participation in the 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) more than in others (e.g., economic mobility).

Each state’s laws governing citizenship, immigration, and the rights of aliens⁵⁴ instantiate its particular values about how inclusive it should be, along which dimensions, and on what terms. Although immigration is the only gateway to citizenship for most foreign-born individuals,⁵⁵ few states viewed themselves as countries of immigration until very recently, and even those that did such as the U.S., Australia, Canada, and Israel had imposed certain racial, religious, or nationality barriers.⁵⁶ Italy, Ireland, and some other European states still think of themselves as countries of emigration even after they have in fact begun to experience net migratory inflows. The extreme example is Germany⁵⁷ despite almost 10% of its population now being foreign-born (a larger share than in the U.S.) and a demographic profile that ensures that this share will steadily grow. Millions of German residents were born, raised, and are permanently settled there without having gained German citizenship for themselves or even for their German-born children or grandchildren. (The German nationality law enacted in 1999, however, should gradually reverse this pattern through liberalization of the rules governing *jus sanguinis* citizenship, dual citizenship, and naturalization).⁵⁸

52. See sources cited *supra* n. 19.

53. 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.

54. This last category is sometimes referred to as “immigrant” (as distinct from “immigration”) law.

55. I say “most” rather than “all” because some foreign-born children of American parents may, under the statutory rules of *jus sanguinis*, receive U.S. citizenship automatically at birth.

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

57. On Germany, see, e.g., Bade, “From Emigration to Immigration: The German Experience in the Nineteenth and Twentieth Centuries,” in *Migration Past, Migration Future* 1 (Klaus Bade & Myron Weiner, eds., 1997).

58. See Roger Cohen, “Germany Makes Citizenship Easier for Foreigners to Get,” *N.Y. Times*, May 22, 1999, at A3.

In general, citizenship can 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, or as a result of ethno-cultural ties.⁵⁹ (Other, less common routes to citizenship include service in a state's military and incorporation through annexation.) Although these rules are generally a matter of national law, some federations legislate them at the sub-unit level.⁶⁰

The specific rules that govern each of these modes of acquiring citizenship varies from state to state. Two of the most important variables concern the scope of the *jus soli*⁶¹ and *jus sanguinis*⁶² rules. Both primarily reflect historical and political factors. England, for example, used *jus soli* to cement its subjects' perpetual allegiance to the Crown, the U.S. used it to attract immigrants,⁶³ and many European states used *jus sanguinis* to maintain emotional, political, military, and economic links to their emigrant diasporas.⁶⁴ Several other important variables also shape acquisition-of-citizenship rules — for example, the period and continuity of residence necessary to become eligible for naturalization, the availability of a shorter residence period for spouses,⁶⁵ and the permissibility of dual citizenship.⁶⁶ States' rules also differ as to whether and how a state may terminate (dena-

59. Israel's Law of Return is perhaps the purest example of ethnically-based citizenship; a newly-arrived Jew may acquire it even if his parents were not Israeli citizens. Persons of German ancestry must show a strong cultural, especially linguistic, linkage to the German nation in order to acquire immediate German citizenship. In 1993, however, Germany limited the number of such "aussiedler" who may naturalize each year. See Munz & Ohliger, "Long-Distance Citizens: Ethnic Germans and Their Immigration to Germany," in *Paths to Inclusion*, supra n. 5, at 160.

60. See Jackson, supra n. 17 (discussing variants).

61. 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," (unpublished manuscript, 1999).

62. For example, states differ as to whether, in order to transmit citizenship, one or both parents must be citizens; required periods of residence for the parents, the child, or both; the number of generations over which *jus sanguinis* transmission of citizenship can continue; and the like. Id.

63. The American states did likewise, at least until 1868 when the Citizenship Clause of the Fourteenth Amendment assigned state citizenship on the basis of mere residency. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985). The significance of state citizenship is discussed in some detail infra Part V.

64. See generally, *Reinventing Citizenship*, supra n. 17. It may also account for the kinship-based citizenship in Ancient Greece. See H.D.F. Kitto, *The Greeks* 125 (1951).

65. Weil, supra n. 61.

66. 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 n. 1, chapter 10.

tionalize or denaturalize) one's citizenship and how citizens may renounce it and expatriate themselves.⁶⁷

Citizenship's most consequential dimension, of course, is the *value* that accrues to the state granting it and to the individual receiving it, above and beyond the value that they may gain from an individual's mere legal residence without citizenship. Some commentators doubt that citizenship produces any real "value added" in a liberal democracy.⁶⁸ Others, noting that the marginal benefits of citizenship relative to legal residence have declined (at least until recently⁶⁹) while the costs have changed little, are more ambivalent about this status devaluation.⁷⁰ Citizenship's value to both state and citizen, of course, mainly depends on the value that they ascribe to the rights and duties that uniquely attach to that status. Domestic law defines the most important of these but some others are prescribed by international law⁷¹ and even by other states.⁷²

IV. CITIZENSHIP IN A FEDERAL SYSTEM

How a federation affects citizenship depends on many factors, of which four seem most important: (1) the historical and political motives for federating; (2) the value that the federation and its people assign to social and political pluralism; (3) the allocation of powers between the federation's national and sub-national levels, and among its sub-national units; and (4) the legal rights⁷³ enjoyed by the federation's citizens and by citizens of sub-national units.

Motives. The reasons for creating federations help to determine their subsequent levels of political and social coherence and cohe-

67. For a discussion of the legal rules governing loss of U.S. citizenship, see Schuck, *supra* n. 3.

68. See, e.g., Legomsky, "Why Citizenship?," 35 *Va. J. Int'l L.* 279 (1994).

69. In the U.S., this calculation changed dramatically in 1996 when Congress authorized, and in some cases mandated, federal and state governments to discriminate against non-citizens in eligibility for public benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Title IV and Sec. 742, 8 U.S.C. Sec. 1611-15, Pub.L. 104-193.

70. See, e.g., Schuck, *supra* n. 1, chapters 7 and 8.

71. 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* n. 10, the U.S. Supreme Court recently denied an alien in the U.S. any legal remedy for a violation of this consultation right. *Breard v. Greene*, 523 U.S. 371 (1998).

72. The rights of a dual citizen in one of her states, for example, may be affected by the law of her other state of citizenship, which may include treaty law between the two states.

73. I discuss rights and not duties because citizenship, at least in the U.S., entails few special legal (as distinguished from moral) duties other than jury duty and 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 in the 1970s.

sion.⁷⁴ 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.⁷⁵ The more consensual the independent polities' 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 (as in the Swiss case).⁷⁶ This contrasts with coerced federations like the former Soviet Union and the former Yugoslavia. Second, federations may be created under imperial auspices from what were colonial administrative units, in which case the de-colonization settlement determines the nature of the sovereignty that the center retains, as with Canada⁷⁷ and Australia.⁷⁸ Third, a nation-state may create sub-national units corresponding to pre-existing cultural or political entities, as with Belgium⁷⁹ and as the U.S. did with respect to its western territories. Finally, the creation or recognition of sub-national polities may reflect political, military, or administrative⁸⁰ goals of the new state's architects.⁸¹

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

75. That the American states were independent polities prior to ratification of the Constitution is evidenced in the Articles of Confederation, which treated and denominated them as such, and in the Continental Congresses and the Philadelphia convention, where their representatives voted as such. When North Carolina and Rhode Island declined for a time to ratify the Constitution, the U.S. treated them as independent states outside the Union. See, e.g., Akhil Reed Amar, "Abraham Lincoln and the American Union," 2001 *U. Ill. L. Rev.* (forthcoming 2001). Professor Larry Kramer expresses doubts on this point. Communication with the author, December 3, 1999.

76. 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* n. 17, at 156-57 (sovereignty "a fiction . . . they scrambled from one pre-state subordinate status straight into federal subjection"). A 26th canton was carved out of the territory of another in 1980. *Id.*

77. See Field, "The Differing Federalisms of Canada and the United States," 55 *Law & Contemp. Problems* 107 (1992).

78. See Rydon, "The Australian Tradition of Federalism and Federation," in *Comparative Federalism* 227.

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

80. This is not the same as administrative decentralization within a unitary state. See discussion part II *supra*.

81. 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 artificially out of postwar zones of occupation . . . yet these boundaries have proved remarkably durable.") Political motives also fueled the creation of western states in the U.S. and in Canada. See, e.g., Gibbons, "Federal Societies, Institutions, and Politics," in *Federalism and the*

Pluralism. Some federations, like the U.S., Switzerland, and Canada, were more socially heterogeneous at their inception than others, like Germany and Australia.⁸² Still, most federations are designed 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 resolve the political conflicts generated by diversity, however, for its effort to defuse them can instead deepen and harden 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,⁸³ Francophones in Flanders,⁸⁴ Russians in the Baltic states,⁸⁵ and Croats or Muslims in the rump Yugoslavia.⁸⁶

Whether a federation can ameliorate this minorities-within-minorities problem depends, among other factors, on how minorities are distributed geographically, the nature and depth of social cleavages and disparate political identities,⁸⁷ whether the system as a whole

Role of the State 15, 19 (Herman Bakvis & William M. Chandler, eds., 1987) (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).

82. See Rydon, *supra* n. 78, 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."); 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 Australia, of course, has increased its diversity. The same is true of Germany.

83. In an interesting twist on this conflict, many Francophones in New Brunswick, Canada's only officially bilingual province, oppose independence for Quebec, fearing that this would leave them and the rest of Canada's French-speakers as a much smaller minority (only 5%) in the Quebec-less Canada. See, James Brooke, "Canada's Other French-Speakers Cope," *N.Y. Times*, Sept. 6, 1999, at A6 (New England ed.)

84. See O'Neill, *supra* n. 79. Devolution of power to these cultural communities in turn reinforced and magnified their demands for further autonomy. See discussion of minorities-within-minorities problem, *supra* nn. 28-30.

85. See, e.g., Kalvaites, "Citizenship and National Identity in Baltic States," 16 *B.U. J. Int'l L.* 231 (1998).

86. See, e.g., Cairns, "Constitutional Government and the Two Faces of Ethnicity: Federalism is Not Enough," in *Rethinking Federalism* (Karen Knop et al., eds., 1995), at 15, 26-27 ("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").

87. For a discussion of how federations can influence civic identities, see, e.g., Jackson, "Federalism and the Uses and Limits of Law: Printz and Principle?," 111 *Harv. L.Rev.* 2180, 2220-22 (1998).

tends to reinforce those cleavages, as Canada does,⁸⁸ or to bridge or dampen them, as the U.S. does,⁸⁹ how gradually the power-sharing arrangements are introduced, and whether they are negotiated or imposed.⁹⁰

Allocations of Power. The significance of the dual citizenships held by individuals in a federation is shaped by the formal structures of “vertical” power-sharing among the national and sub-national levels and the group and individual actors in civil society, by the formal structures of “horizontal” power-sharing among institutions at a given level, and by the informal processes of conflict and cooperation that adapt and invigorate those structures.⁹¹ As a formal matter, of course, the fundamental law determines how power is distributed among these entities. Thus, it allocates the authority to make, implement, and enforce law in different policy domains,⁹² establishes a system for representing the sub-units (and perhaps non-governmental institutions) in the national parliament and administration,⁹³ defines the relationship between national and sub-national judiciaries⁹⁴ and the rules for resolving conflicts between and among the levels,⁹⁵

88. See Simeon, “Canada and the United States: Lessons from the North American Experience,” in *Rethinking Federalism*, supra n. 86, at 257 (Canada “entrenches, perpetuates and institutionalizes” cleavages).

89. *Id.*, at 253 (U.S. cross-cuts cleavages). The Civil War, of course, is tragic testimony to the American system’s failure to bridge the social and political divisions of that era.

90. 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 n. 79.

91. For this reason, the constitutional divisions of power are an inadequate guide to how any particular federal system actually operates. See, e.g., Bogdanor, “Forms of Autonomy and the Protection of Minorities,” 126 *Daedalus* 65 (Spring 1997).

92. See discussion in text immediately following.

93. 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 Australian and American senates, which are both powerful and directly elected by state voters, not legislatures. See Sharman, “Second Chambers,” in *Federalism and the Role of the State*, supra n. 81, at 82, 84.

94. In the U.S., for example, the national and state court systems are wholly independent, although the U.S. Constitution’s Supremacy Clause and judicial decisions may dictate a degree of comity between them. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (federal courts must apply state’s substantive law in diversity-of-citizenship cases).

95. On the importance of such arrangements in safeguarding federalism, see Derthick, “The Structural Protections of American Federalism,” in *North American and Comparative Federalism* (Schreiber ed., 1992), at 8. The German Constitutional Court, with half of its members selected by the Bundesrat, also actively protects *Länder* prerogatives. Switzerland’s Federal Tribunal can strike down cantonal, but not national, legislation. See Lenaerts, “Constitutionalism and the Many Faces of Federalism,” 38 *Am. J. Comp. L.* 205, 254 (1990).

regulates the structure of the party systems⁹⁶ and voting rules,⁹⁷ and addresses other institutional factors.⁹⁸

Because effective power flows from the integration of both formal and informal elements whose distribution varies in different federations, simple comparisons of federal systems can be misleading. For example, Canada does not give its provinces any formal representation in Parliament's upper house,⁹⁹ as most federations do, yet Canada remains perhaps the most decentralized federation of all. Canadian provinces possess more extensive independent policymaking authority than German Lander or American states do, particularly in areas like commerce, economic regulation, labor relations, and immigration.¹⁰⁰ Provincial prerogatives are also protected by the Supreme Court, the umpire of Canadian federalism. In addition, provincial legislatures that oppose the Court's constitutional rulings can sometimes override them through legislation.¹⁰¹ 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 a strong provincial role even where national policymaking authority is clear.¹⁰²

Germany's "administrative federalism" is different. The *Lander* possess the sole authority to administer laws unless the Basic Law provides for national administration. Through the Bundesrat, the *Lander* may also exercise an absolute veto over national laws affect-

96. In Australia, as in the U.S., parties are organized primarily at the state level. See Rydon, *supra* n. 78, at 230.

97. See generally, Donald L. Horowitz, *Ethnic Groups in Conflict* (1985).

98. An example of an informal institution is the practice in the U.S. of "senatorial courtesy" in connection with certain presidential appointments.

99. See 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").

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

101. Canadian Charter of Rights and Freedoms, Sec. 33. Quebec has often done so.

102. See Chapman, "Structure, Process, and the Federal Factor," in *Comparative Federalism*, *supra* n. 17, at 69. Indeed, even Ottawa's treaty-making power does not necessarily bind the provinces within their broad spheres of legislative authority. See Friesen, "The Distribution of Treaty-Implementing Powers on Constitutional Federations: Thoughts on the American and Canadian Models," 94 *Colum. L. Rev.* 1415, 1428-33 (1994). This provincial 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* n. 37, at 30-31, as has Australia's more formally centralized one. See Warhurst, "Managing Intergovernmental Relations," in *Federalism and the Role of the States*, *supra* n. 81, at 259, 261-63; Opeskin & 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.

ing their vital interests;¹⁰³ moreover, they wield power over immigration and citizenship policies¹⁰⁴ denied to Australian and American states¹⁰⁵ 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.¹⁰⁶ Despite these important examples of decentralized federalism, there is much evidence of a more general centralizing trend during the 20th century.¹⁰⁷

The nature of citizenship in a federation is influenced not only by these vertical relationships between national and sub-national governments, but also by horizontal ones, including the equality of resources and outcomes within and among the sub-national units. Indeed, the goal of equality among sub-national units is sometimes a major normative and political justification for further centralizing power within an existing federation. Accordingly, the fundamental law usually bars discrimination by one sub-national unit against the citizens of another sub-national unit.¹⁰⁸

This egalitarian justification, however, often conflicts with other federalist goals like tolerating pluralism and limiting governmental power.¹⁰⁹ When former Chancellor Helmut Kohl employed policies of massive redistribution in an effort to reintegrate the eastern Lander into the Federal Republic, he invoked a Basic Law provision requiring the national government to ensure reasonable equality between financially strong and weak *Lander*.¹¹⁰ The fiscal burdens borne by

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

104. See, e.g., 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).

105. 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 Neuman, "The Lost Century of Immigration Law (1776-1875)," 93 *Colum. L. Rev.* 1833 (1993).

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

107. See, e.g., Heugelin, "New Wine in Old Bottles? Federalism and Nation-States in the Twenty-First Century: A Conceptual Overview," in *Rethinking Federalism*, supra n. 86, at 203, 206; Merrill, *id.* See also, Schuck, supra n. 33, at 424-26 (on the U.S.).

108. 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; The evolution of Swiss law on discrimination against people from other cantons is discussed in Beaud, supra n. 17 (summarizing analysis by Rossi).

109. See, e.g., Simeon, supra n. 88, at 258 (Canada); Deeg, supra n. 37, at 49 (Germany).

110. Kammers, supra n. 81, at 90. Australia also has a system of "fiscal federalism." Rydon, supra n. 78, at 233-34. In the U.S., as discussed in part V *infra*, the Congress and the Supreme Court countenance significant inter-state inequalities.

Germans who live in the west, however, contributed to Kohl's 1998 electoral defeat. They remain highly controversial today.

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 statuses. These individual rights, together with any additional protections created by structural limits on public power, constitute citizens' legal endowment. Some of these rights, such as the right to travel from subunit to subunit or the right (discussed immediately above) to enjoy equal treatment in other subunits, pertain to or are implied by the distinctive relationships among citizens of federations.¹¹¹ Other rights have no necessary relationship to the federal form adopted by the polity that secures them.

Federations differ in the kind and amount of permissible variation between national and sub-national laws. In the U.S., for example, many state constitutions define their citizens' rights in the very same words that the federal constitution uses for U.S. citizens yet interpret those words differently. 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,¹¹² while Australia's state constitutions apparently do not serve as autonomous sources of individual rights in the same sense.¹¹³

Two final rights-oriented issues in the design of federative citizenship are (1) whether citizens of the nation enjoy greater rights than aliens, and (2) whether citizens of a sub-national unit enjoy greater rights than citizens of another sub-national unit who enter or take up residence in the first one ("federative rights," in Olivier Beaud's taxonomy¹¹⁴). 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 bewildering details and heterogeneity — in each country and across countries — of national and sub-national laws, including the variety of alien statuses defined by law. All federations bar aliens from voting in national elections and limit their access to certain public benefits and

111. Beaud calls these "federative rights." *Supra* n. 17.

112. See, e.g., 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 two provinces ban discrimination on basis of sexual orientation).

113. See 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.

114. *Supra* n. 17.

public employment, but the commonalities end there.¹¹⁵ 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;¹¹⁶ Germany's Basic Law also seems to do so.¹¹⁷ Apparently, however, Canadian provinces are permitted to discriminate against citizens of other provinces in some respects.¹¹⁸

V. CITIZENSHIP IN THE U.S.

The U.S. is perhaps the paradigmatic example of a federation providing for dual sovereignty and dual citizenship. Indeed, the Supreme Court recently reaffirmed these principles.¹¹⁹ This seems evident when one reconsiders, in the American context, the four factors just discussed — the motives animating the creation of the federation, and its social diversity, power allocations, and protection of individual rights.

The origins of the American Republic seem almost to have preordained a federative form. This despite the fact that, as the Framers knew,¹²⁰ no such system had ever been successfully implemented on so large a scale. In the American case, no imperial sovereign had imposed federalism on its colonies, nor was a unitary state fissioning.

115. The Canadian provinces and German *Länder* regulate access to many public benefits. Germany also requires residency permits that restrict non-citizens' ability to travel and work. On Switzerland, see, e.g., 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); 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 Schuck, "The Treatment of Aliens in the United States," in *Paths to Inclusion*, supra n. 5, chap. 7.

116. 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.

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

118. See 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.").

119. "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*, 526 U.S. 489, 504 n.17 (1999), quoting from *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

120. *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 (Robert Rutland, ed., 1975), at 4.

The Articles of Confederation constituted a consensual federation of polities that, as the Declaration of Independence had earlier recited, considered themselves free and independent states that were simultaneously creating a new sovereignty and retaining much of their former sovereignty.¹²¹ Having recently emerged from a long war of liberation in which disunity had brought the states perilously close to defeat, they 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 wanted the Constitution to establish an embryonic common market and monetary union.¹²²

The states' remarkable social diversity also dictated a federation. Their British heritage and English language provided only a thin veneer of commonality, concealing important differences among immigrants from disparate parts of the British Isles.¹²³ 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 infinitely more diverse and pluralistic in almost every social dimension.¹²⁴ Only a federal polity can begin to accommodate such disparate values and interests in such perpetual conflict.¹²⁵

The American federation's vertical allocation of political authority between the nation and the states was designed to structure and facilitate its remarkable diversity, but this allocation also had a second, overriding purpose: to fragment public power in order to limit the reach of government at both levels. This same power-diffusing, liberty-enlarging spirit motivated another constitutional innovation:¹²⁶ the horizontal division of authority and competence among separate branches of the national and state governments.¹²⁷

121. 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).

122. See generally, Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1998).

123. See, e.g., Bernard Bailyn, *The Peopling of British North America: An Introduction* (1986); David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (1989).

124. This refers to the degree of diversity within the U.S. and thus within the states, not to the diversity among the states, which may well have declined.

I am in the early stages of a large project, tentatively entitled "Diversity in America: The Roles of Law," which will analyze the nature and extent of this diversity (diversities would be more accurate), and how law understands, constructs, and regulates it.

125. See Schuck, *supra* n. 33, chap. 3.

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

127. Separation of powers principles are in some respects even more robust in state constitutional law. See Rossi, "Institutional Design and the Lingering Legacy of Anti-federalist Separation of Powers Ideals in the States," 52 *Vand. L. Rev.* 1167 (1999).

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, at least those not geared to war, has always been a policy 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.¹²⁸ The federal regulatory programs launched during the Progressive, New Deal, and Great Society eras and augmented since the 1970s¹²⁹ usually divide policy, fiscal, administrative, and enforcement responsibilities between the federal and state governments.¹³⁰ State and local prerogatives are even greater in federal environmental, health, education, welfare, and other social service programs.¹³¹ Pending legislation in Congress with broad, bipartisan support would make it more difficult for the federal government to legislate and regulate in ways that pre-empt the states on a wide range of issues.¹³² The shibboleth of "states' rights," moreover, is increasingly invoked on behalf of liberal or libertarian causes,¹³³ as well as traditionally conservative ones.

Congress often decentralizes policymaking even more radically by circumventing even the states and localities. Devolving federal authority to private groups rather than to state and local governments in effect privatizes public law.¹³⁴ By allowing a highly diffuse court system to shape the content and enforcement of federal law through private litigation,¹³⁵ Congress in effect renounces any realistic prospect of national uniformity. When Congress goes beyond de-

128. See Theodore A. Lowi, *The End of Liberalism* (2d ed., 1979). This was true even of the U.S. military establishment. See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982).

129. For a summary of recent developments, see Schuck, *supra* n. 33, chaps. 7 and 13.

130. An important example of this divided responsibility is federal legislation regulating occupational safety and health.

131. Some of the major exceptions are Social Security retirement, Food Stamp, Medicare, and federal tax programs, which are federally administered.

132. See, Stephen Labaton, "Anti-Federalism Measures Have Bipartisan Support," *N.Y. Times*, Sept. 6, 1999, at A8. In the hopes of heading off this legislation, President Clinton issued an executive order requiring agencies to be more conscious of the effects of federal regulations on state and localities. *Id.*

133. See, e.g., Sam Howe Verhovek, "Oregon Chafes at Measure to Stop Assisted Suicides," *N.Y. Times*, Oct. 29, 1999, at A1 (Oregon demanding right to legalize assisted suicide, marijuana use, and other practices condemned at federal level); Richard Perz-Pena, "Pataki to Impose Strict New Limits on Auto Emissions," *N.Y. Times*, Nov. 7, at 1 (New York will join California in exceeding national standards).

134. In some cases, private groups are authorized to develop and enforce government standards. See Schuck, *supra* n. 33, chap. 13 for examples.

135. See, e.g., R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (1994). Congress also allows private litigants in some federal civil rights cases to sue in the *state* courts. See, e.g., 42 U.S.C. Section 1983.

centralization to deregulate, as it has in many industries, it ordains that private contracts rather than federal or state public law will define our rights and duties. Whatever the policy or political merits of these devolutions,¹³⁶ they are redefining the meaning of U.S. citizenship by transforming the relationship between the public and private in American life.¹³⁷

Finally, the states have adopted (or in some cases retained from colonial times) quasi-federative arrangements of their own, devolving significant authority to their localities and, increasingly, to the private sector — but without thereby creating the system of multiple citizenships that is a defining element of federation.¹³⁸ For example, the fiscal systems of most states depend heavily on locally voted and administered property, school, and utility taxes — so much so that many of these systems have been challenged as unconstitutional for magnifying inequalities in local communities' ability to finance public education.¹³⁹ Moreover, the constitutions and legislation of many states contain “home rule” provisions delegating significant political and policymaking authority to municipalities. In addition, the states have traditionally decentralized many of their administrative functions to counties and other local unit, particularly in education, child welfare, and other social service programs. The extent and terms of all of these devolutions, of course, are perpetual sources of political strife between the different levels of government.¹⁴⁰

I noted in part IV that courts in the U.S. often interpret federally-created rights differently than they interpret state-created rights, even when the legal language is identical, and that these inter-state differences in legal rights are even greater in the statutory and common law contexts than they are in constitutional law. This brings us to the final pair of issues raised there but now focused on American federalism. First, as a constitutional matter, do U.S. citizens enjoy greater rights than aliens do? Second, do citizens of one state enjoy greater rights than citizens of another state who enter, or reside in, the first state?

136. For a schematic analysis of this question, see Schuck, *supra* n. 33, chap. 13.

137. Sociologist Theda Skocpol notes that federalism and decentralization historically 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* (Morris P. Fiorina & Theda Skocpol, eds., 1999).

138. In contrast, the Austrian Constitution establishes a third tier of citizenship at the communal level for certain purposes. See Jackson, *supra* n. 17, at n.15.

139. The Supreme Court rejected the challenge under the federal Equal Protection Clause in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Challenges on state constitutional grounds have been somewhat more successful. See, e.g., *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996).

140. This is evidently true in all federations. See, “Undoing Britain,” *supra* n. 44, at 6 (nations with federal or quasi-federal systems in constant tug of war over power and resources between center and regions).

The answer to the first question is “yes” if Congress decides to discriminate, and probably “no” if a state does so in an area of exercised or dormant federal authority, although the law is considerably more complex than this.¹⁴¹ Courts traditionally upheld discrimination by federal or state law against legal permanent resident aliens and aliens with lesser status with respect to public employment, access to public services, and even in some private spheres unless the discrimination was based on race rather than alienage. However, the Supreme Court’s decisions in *Takahashi v. Fish & Game Commission*,¹⁴² and *Graham v. Richardson*¹⁴³ created a strong presumption against state laws that discriminate against aliens.¹⁴⁴ According to *Graham*’s rationales, such laws involve a constitutionally suspect classification and also conflict with Congress’s plenary power over immigration. Several years after *Graham*, the Court struck down citizenship requirements for admission to a state bar.¹⁴⁵

In contrast, the Court in *Mathews v. Diaz*¹⁴⁶ recognized an even stronger presumption that favors discrimination against aliens if Congress enacts it. Congress exploited this principle in 1996 when it enacted, and a federal court upheld, welfare reforms that not only allowed states to discriminate against legal resident aliens but actually mandated it as a matter of national policy in certain situations.¹⁴⁷ After much public criticism, Congress eased this policy 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 murkier. Policy heterogeneity among the American states, always great, is further encouraged by three recent developments. 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,

141. This jurisprudence is detailed in Spiro, “The States and Immigration in an Era of Demi-Sovereignities,” 35 *Va. J. Int’l L.* 121 (1994).

142. 334 U.S. 410 (1948) (invalidating statute barring issuance of commercial fishing license to person ineligible for citizenship).

143. 403 U.S. 365 (1971) (invalidating alienage classification in state welfare law).

144. 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).

145. *In re Griffiths*, 413 U.S. 717 (1973). The same reasoning invalidated a citizenship requirement for eligibility for state-funded scholarships. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

146. 426 U.S. 67 (1976) (upholding alienage classification in federal Medicare law).

147. See discussion in Schuck, *supra* n. 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). Certain state law discriminations against undocumented aliens were struck down in *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995) and CV 94-7569 MRP (Nov. 14, 1997).

and insurance. Second, the states and even some localities are also establishing direct trade and diplomatic ties with other nations, relationships that are not only independent of national policies but sometimes in deep conflict with them.¹⁴⁸ This, despite the fact that the American states do not exercise any of the independent authority in the area of immigration and naturalization policies that sub-units in some other nation-states do, often at some cost to the value of national uniformity.¹⁴⁹ Indeed, the desire of regions within unitary European states to forge independent political links to the EU has helped to fuel the demands of some regions for outright sovereignty.¹⁵⁰

A third development affecting equality of federative citizenship is the Supreme Court's campaign of constitutional reinterpretation¹⁵¹ designed to limit Congress's power to adopt nationally uniform policies enforceable in the federal¹⁵² or state¹⁵³ courts. It remains to be seen how great an obstacle these rulings pose to congressional power as a practical matter.¹⁵⁴ It also remains to be seen whether they are best understood as a return to an earlier, only recently-abandoned Court jurisprudence, as the current Court majority maintains, or instead as a novel, even radical departure, as the dissenters claim.¹⁵⁵ In either event, the rulings in effect give the states

148. It is now increasingly common, for example, for states and cities to refuse on human rights or environmental grounds to contract with or invest in particular foreign nations with whom the U.S. has or seeks friendly relations. Although some scholars applaud this development, see, e.g., Spiro, "Foreign Relations Federalism," 70 *U. Colo. L. Rev.* 331 (1999); Spiro, *supra* n. 141; Goldsmith, "Federal Courts, Foreign Affairs, and Federalism," 83 *Va. L. Rev.* 1617 (1997), the notion that states may properly play independent roles in foreign policy remains a decidedly minority view. The Supreme Court is considering a challenge to such state diplomatic initiatives. *Natsios v. Nat'l. Foreign Trade Council*, No. 99-474, cert. granted 120 S.Ct. 525 (Nov. 29, 1999) (Massachusetts law requiring state agencies to boycott companies that do business in Myanmar).

149. See Jackson, *supra* n. 17, at 18-20 (discussing Germany and Canada).

150. "Undoing Britain," *supra* n. 44, at 18 (example of Scotland)

151. This campaign is being conducted along at least four different salients: the Commerce Clause (see, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995)); the Tenth Amendment (see, e.g., *Printz v. U.S.*, 521 U.S. 898 (1997); the Eleventh Amendment (see, e.g., *College Savings Bank*, *supra* n. 43); and the Fourteenth Amendment (see, e.g., *Kimel v. Florida Bd. of Regents*, *supra* n. 43). The Court has also accorded the states some regulatory flexibility in the sensitive, and perhaps *sui generis*, area of abortion rights. E.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

152. See, *Kimel v. Florida Bd. of Regents*, *supra* n. 43; *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, *supra* n. 43.

153. See, *Alden v. Maine*, *supra* n. 43.

154. As Larry Kramer points out, the Court's recent Tenth Amendment decisions "are essentially procedural and easily evaded (with conditional preemption and conditional spending, for example)." Communication to author, dated November 29, 1999.

155. Much may depend on the Court's impending ruling in *Brzonkala v. Virginia Polytechnic and State University*, 169 F.3d 820 (4th Cir.), cert. granted sub nom. *United States v. Morrison*, 120 S.Ct. 11 (1999), which will decide the constitutionality

more freedom to develop their own policies and to reduce legal accountability in certain domains.

Accordingly, the rights and duties of U.S. citizens and aliens alike now depend more on state law and less on federal law than at any time since the New Deal. At the same time, federal or state constitutional limits on the power of states to discriminate against citizens of other states and against aliens becomes relatively more significant. Given greater inter-state diversity in public policies, the stakes in *state* citizenship could become higher than ever before.

Yet the precise nature and significance of state citizenship remain uncertain. The 14th Amendment's Citizenship Clause made state citizenship a matter of federal constitutional law, defining it simply as residence in a state, and according to constitutional scholar Laurence Tribe, "the state has nothing to say about the matter."¹⁵⁶ But Tribe's addition seems to be a *non sequitur*. The Clause does indeed provide that people are citizens of the state "in which they reside," but a state presumably retains the power, within constitutional limits, to define what conduct constitutes "residence."¹⁵⁷

What, then, are those limits? The Supreme Court recently addressed this question and, as often occurs, raised new ones. In *Saenz v. Roe*,¹⁵⁸ 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 that they would have received in the state of previous residence.¹⁵⁹ The Court, which had previously protected U.S. citizens' "right to travel" from one state to another for any legitimate reason,¹⁶⁰ distinguished three elements of that right: the right to enter or leave a state; to be treated as a

under the Commerce Clause of the federal Violence Against Women Act of 1994, Pub.L. 103-322, 108 Stat. 1902.

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

157. 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 (explaining why immigrant-friendly states might wish to do this).

158. 526 U.S. 489 (1999).

159. 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.

160. 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).

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.¹⁶¹

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.¹⁶² The Court stunned the legal community, however, by basing this right on the latter. In so doing, the Court exhumed a moribund provision that the Court had seemingly buried in 1872, one that has been considered a dead letter ever since, and one whose meaning — and thus its implications for the meaning of state citizenship — remains exceedingly opaque.¹⁶³

One measure of this opacity is the Court majority's concession in *Saenz* that a state might justify discriminating 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."¹⁶⁴ The two dissenters pressed both possibilities. They stressed, first, that states must be allowed to "use *bona fide* residence requirements to ferret out those who intend to take the privileges and run," and second, that even welfare benefits are portable — they free up other resources and help one acquire permanent skills — and thus invite the kinds of abuse by out-of-staters that states can properly regulate.¹⁶⁵ The possible expansion of these rationales for discrimination leaves uncertain the kind of federation that the Court will permit or require. Even saying that the

161. 526 U.S. at 500-03.

162. 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 under certain circumstances 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 505.

163. See, e.g., Varat, "State Citizenship and Interstate Equality," 48 *U. Chi. L. Rev.* 487 (1981) (exploring possible meanings). On the other hand, *Saenz's* interpretation of that provision to protect interstate travel was prefigured in some earlier Court decisions. See Laurence H. Tribe, *American Constitutional Law* (3d ed., Vol. 1, Sec. 7-5, 1999) (reviewing the evolution of the doctrine).

164. *Id.* at 505. See, Hills, Jr., "Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers," 1999 *Sup. Ct. Rev.* 127 (analyzing intersection of residency and equal treatment requirements in light of *Saenz*)

165. *Id.* at 517-20. 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 524-27.

Court favors states' rights would be simplistic; after all, the same Court that protects the states' policymaking autonomy¹⁶⁶ also limits that autonomy.¹⁶⁷ What cannot be gainsaid is that the current Court majority takes the principle of a constitutionally-protected dual sovereignty far more seriously than the Court has since the advent of the New Deal.

Whether state citizenship will once again become a meaningful constitutional category, however, ultimately depends less on constitutional jurisprudence than on political factors: whether and to what extent Congress continues to devolve policymaking initiative to the states, how diverse the states' laws in different policy domains become, and how much equality those state policies accord to out-of-state Americans and to aliens. Similar factors will also affect the meaning of *federal* citizenship, albeit in different ways. Diverse policies among states, for example, reduce the equality-among-citizens value of federal citizenship. Conversely, federal permission for states to discriminate against aliens in effect enhances the distinctive status and hence the value (in that sense) of federal citizens' rights.

CONCLUSION

The forces of globalization notwithstanding, 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 regret, among friends of liberal democracy and the rule of law.¹⁶⁸ The implosion of collapsing empires and failed states has ignited an ethnic explosion whose violent and chaotic reverberations are only now beginning to be felt. Ironically, it is the more robust rhetoric of human rights and the new geopolitics of ethnic autonomy that are reinforcing ethnic demands for more self-rule. This geopolitics of ethnic autonomy is foreshadowed both by continuing conflicts in the former Yugoslavia, central Africa, central Asia, and even the British Isles and Europe, and by a growing but highly circumscribed willingness by outside powers to violate national sovereignty in the hopes of forestalling ethnic wars, mass refugee movements, rogue state nuclearization, and other vital concerns.

In this turbulent new world, federation and sub-national citizenship, in their many variants, will be increasingly attractive modalities for resolving entrenched political, legal, psychological, and sociological conflicts — while of course engendering new but hopefully more tractable ones.¹⁶⁹ Only a federal system can hope to exploit the advantages of both scale and decentralization in order to

166. See *supra* nn. 151-55.

167. In addition to *Saenz*, for example, the Court has barred states from imposing term limits in congressional elections. See Thornton, *supra* n. 119.

168. See Schuck, *supra* n. 1, at 202-05.

169. See part III, *supra*.

adjust the contending interests and perspectives of center and periphery.

As always, however, the devil will be in the details. The details in turn will depend on a number of conditions: the distinctive historical and political motives animating the federation's origins, the diversity of the civil societies in the federating populations, the formal and informal allocations of power within and among levels of government and private actors, and the distribution of rights and resources among national citizens, sub-national citizens, and the non-citizens who will be affected by each of these polities.¹⁷⁰

Because the American dual sovereignty model reflects these differentiating factors, its utility as a model for polities with very different histories, values, constitutional structures, and civil societies is limited. This American model's limited generalizability is underscored by the remarkable dynamism and adaptability of its federal system. Neither the recent devolutions of national power by the Supreme Court, Congress, and federal agencies,¹⁷¹ nor the Court's nationalizing decision in *Saenz*, was anticipated by either politicians or constitutional scholars. This humbling fact reminds us that the complexities and contradictions of American federalism defy easy comprehension, even by certified experts.

Other polities desperately searching for new forms of power-sharing to contain the centripetal forces of political, economic, cultural, and social fragmentation, and to accommodate more assertive minorities,¹⁷² may find more serviceable other federal systems like the Australian, German, Swiss, Belgian, and Canadian. Like American federalism, each of these systems is a creature of its unique history, political and social structure, ideology, legal rules, and civil society. The federating polities, however, may nonetheless draw some more general lessons from the American experience:¹⁷³ the importance of flexible institutions and pragmatic ideology, the need to nurture cross-cutting diversities capable of muting social cleavages rather than reinforcing them, the value of power-sharing arrangements between center and periphery, the virtues of generous and inclusive citizenships, and the wisdom of accomplishing all of this before fire and steel impose their own more illiberal, solutions.

170. See part IV, *supra*. For an example of informal practices that undermine formal ones, see Jackson, *supra* n. 17, at 16-17 (Russian citizenship rules).

171. Administrative agency devolution to states and private actors is most evident in the policy domains of education, health, and other social services. The contested political legitimacy of administrative agencies, however, makes their innovations in federalism more episodic and equivocal.

172. For an account of how politically difficult it is to design such arrangements, see "Undoing Britain," *supra* n. 44.

173. President Clinton recently drew on this experience in a politically extraordinary speech in Ottawa urging Canada to view a reformed federalism as the key to preserving its national unity. See, James Brooke, "Clinton Jolts Canadians With a Plea On Federalism," *N.Y. Times*, Oct. 10, 1999, at 4.