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# Formalizing Local Citizenship

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# FORMALIZING LOCAL CITIZENSHIP

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## INTRODUCTION

States and localities have had an uneasy relationship with non-citizens, or at least that is how we mostly imagine it. Before the advent of federal immigration controls in the late nineteenth century, the states were left to their own devices in restricting freedom of movement. As the federal government sought to impose control over the admission, removal, and treatment of non-citizens, state and local measures discriminating against non-citizens were brought into relief through diplomatic controversy and judicial challenge. Pathologies typically occupy a higher profile in our histories, and there were clearly many contexts in which states and localities enjoyed a benign, even close relationship with non-citizen immigrants and immigrant communities. With the zenith of federal exclusivity over immigration regulation through the mid and late twentieth century, however, state and local governments were presumed to have antagonistic tendencies towards non-citizens. The reflex, constitutional and otherwise, was to eliminate sub-federal discretion in the area.

A revision appears well under way. Although concerns persist with respect to state and local enforcement of federal immigration laws, state and local governments have demonstrated a capacity in recent years to engage constructively with those lacking national citizenship, a capacity that is now recognized in the scholarly mainstream.[1] The constructive capacities

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1. *See, e.g.*, Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581-609 (2008) (all recognizing constructive potentials to state and local participation in immigration regulation); *see also* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 27 VA. J. INT'L L. 345 (1994) [hereinafter Spiro, *States and Immigration*] (both arguing the logic of sub-federal action from an immigrant rights perspective).

of states have been (re)enabled by recent immigration and the presence of significant numbers of persistent non-citizens within particular sub-federal communities. Large-scale immigration is not a new phenomenon. State and local reception of immigrants may echo historical experiences, sometimes for the worse, but also for the better.

This essay will make the case for devising forms of state and/or local citizenship for aliens.[2] Sub-federal citizenship is already implicit in various practices that recognize aliens as members of sub-federal communities. Some of these practices relate to legally-present non-citizens only, as with non-citizen voting and permissive practices relating to non-citizen employment in the public sector. Some relate to non-citizens regardless of immigration status, including the issuance of local identity cards and eligibility for in-state tuition in public post-secondary education. These measures are not simply pro-immigrant. Rather, they reflect social solidarities and community membership among those who do not have full membership in the national community. They add up to a form of local citizenship for aliens.[3]

The solidarities evidenced by these practices could profitably be bundled into a more formal status under the citizenship label. Local citizenship decoupled from federal citizenship and immigration status would have expressive value beyond the sum of its parts. It could also have instrumental value in resolving the peculiar challenge of citizenship in this context, flowing from conflicting local and national postures towards undocumented non-citizens. Local citizenship would appear trumped by federal immigration law in the same way that sanctuary measures have been trumped by federal law. This is partially correct; the undocumented alien/local citizen would not be legally insulated from removal from the community by the national government. Formal local citizenship, however, would differ from sanctuary measures. Sanctuary is by its terms conflictual with federal regulation; as sanctuary from federal enforcement of the immigration laws, it is only actuated relative to the federal scheme. It

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*But see* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (maintaining skeptical view).

2. I am cognizant of the difference between the two, which may be material, *see, e.g.*, Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008), but the central claim of this paper is that non-national citizenship may present a consequential institutional vehicle for defining community.

3. *See* Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963, 978 (2000) (noting that various rights extended to noncitizens at the national level add up to a "citizenship of aliens").

is also expressive of universal human solidarity rather than of local solidarity. All undocumented non-citizens are beneficiaries of sanctuary measures. Local citizenship, by contrast, would be particularized and by its terms detached from federal regulation. This could make it a powerful discursive tool in defeating federal interference with local community structures. It is one thing to deport a mere resident of New York City, another to deport someone who has been formally designated as a member of the local community—one of its own.

Local citizenship would necessarily be exclusionary, as are all citizenship regimes, and the modalities of local membership would pose similar challenges to those involved with national membership. In the context of aliens,[4] however, local citizenship would act as a ratchet by expanding the boundaries of community to include those who have been excluded from (or who have opted not to join) the national community. Local citizenship might not include all non-national citizens territorially present within a sub-federal jurisdiction, but it would include some. As an instrumental matter, then, the innovation would tend in the aggregate to be rights-protective to the extent that it were effective in overcoming the caste-enforcing tendencies of national immigration and citizenship policies.

This short essay first highlights recent state and local policies relating to immigrants and the respects in which they reflect the community membership of those who do not hold national citizenship. It then makes the case for bundling measures premised on alien membership through the institutional channel of citizenship. The essay explores the modalities of a formalized local citizenship, both independent of and within a national frame. Although the exercise is provisional and offered in the way of a thought experiment, in light of recent experience the concept is politically and institutionally plausible.

## I. THE NEW GEOGRAPHY OF SUB-FEDERAL MEMBERSHIP

State and local activity relating to non-citizens has been on the rise in recent years,[5] following a period of at least half a century during which such

4. I use the term "aliens" as a term of convenience rather than one of art to avoid the awkward term "non-national citizens." *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 267 (1997) (noting "subtle social consequences" of the term "alien").

5. For recent collections of state measures, see LAUREEN LAGLAGARON ET AL., MIGRATION POL'Y INST., REGULATING IMMIGRATION AT THE STATE LEVEL: HIGHLIGHTS FROM THE DATABASE OF 2007 STATE IMMIGRATION LEGISLATION AND METHODOLOGY (2008), http://www.migrationpolicy.org/pubs/2007methodology.pdf (last visited Mar. 2, 2010); *see also* NAT'L CONFERENCE OF STATE LEGISLATORS, IMMIGRANT POLICY PROJECT: 2009 STATE

activity was suppressed, largely for functional reasons.[6] Because policies relating to immigrants inherently implicated sensitive matters of foreign relations and posed enormous downside risks, sub-federal authorities could be afforded only minimal discretion in the area.[7] This was true even when their orientation largely coincided with national policy.[8] The hair-trigger world of nineteenth and twentieth century international affairs demanded precise calibration at the same time that the externalities of state and local action created systemically higher risks of error. The concern focused on sub-federal activity that might disadvantage aliens to a greater extent than intended by the national government, with the corresponding danger of offending foreign sovereigns.[9]

There is less historically visible evidence that sub-federal actors departed upwards from a federal baseline; that is, sub-federal policy does not appear to have favored non-citizens in ways not mirroring federal policy. Through the nineteenth century, this was largely attributable to the national open-door policy. The federal government did not introduce robust immigration controls until the late nineteenth century; the federal baseline thus left little room for more favorable treatment, in relative terms. The historical experience with non-citizen voting, the one context in which the states appeared to outdo the federal government's welcoming posture, is consistent with the proposition. Non-citizen eligibility under state law was typically contingent on declarant status: non-citizens were allowed to vote only once they had declared their intention to naturalize as U.S. citizens.[10] Non-citizen voting thus tracked national policy; indeed, declarant non-citizens were enfranchised by the federal government during the nineteenth century in the territories.[11] Many states established commissions to encourage im-

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LAWS RELATED TO IMMIGRANTS AND IMMIGRATION JANUARY 1—DECEMBER 31, 2009, http://www.ncsl.org/default.aspx?tabid=19232 (last visited Mar. 2, 2010).

6. *See* Spiro, *States and Immigration*, *supra* note 1.

7. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275 (1875) (striking down California statute requiring the posting of a bond for the disembarkation of certain classes of undesirable noncitizens); Editorial Comment, *The Japanese School Question*, 1 AM. J. INT'L L. 150 (1907) (recounting diplomatic dispute provoked by segregation of Japanese students by San Francisco school board).

8. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941) (striking down state alien registration measure notwithstanding consistency with federal scheme).

9. *See* Spiro, *States and Immigration*, *supra* note 1.

10. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874); *see also* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1406-07 (1993).

11. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 64-66 (1996).

migration and assist with immigrant settlement.[12] These measures evidenced a constructive posture to non-citizens, but they did not enhance immigrant legal status in the face of the federal welcome.

Concerns today also focus on ways in which state and local policy disadvantages non-citizens. The functional case against such state and local policies has been undermined by changes in the global context and the nature of foreign relations, even where such policies have not been expressly authorized by the federal government (in which contexts the argument is eliminated altogether).[13] The rise (and non-suppression) of state and local activity can be explained in these terms: local policies largely track federal policy, at least with respect to the treatment of undocumented aliens. As the need for calibration dissipated, downside deviations at the state and local level have become tolerable. To the extent such policies allow for sorting among local preferences,[14] they may even serve aggregate non-citizen interests.

More interesting are the upside deviations. In contrast to discriminatory policies, sub-federal jurisdictions adopting measures favorable to non-citizen interests often cannot be situated as instruments of federal policy. In many cases, the upside deviations appear inconsistent with federal policy, as is true with most sub-federal policies that recognize the interests of undocumented aliens. At the same time, barriers rooted in functional foreign relations law analysis are inapplicable. Sub-federal measures favoring non-citizen interests are unlikely to offend foreign actors and complicate international relations—quite the contrary. Many sub-federal measures can be framed independent of the federal regime relating to immigration and immigrants. To the extent that they are inconsistent with the federal posture, they may require relative justification.

In the absence of the foreign relations imperative, community comes to the foreground. State and local action can be explained in terms of community predicates—who is inside and who is outside community boundaries. In some cases, sub-federal activity works from the same community predicates as does federal policy. This is the case with respect to sub-federal actions enforcing against or otherwise deterring undocumented immigration, for instance, the kind of licensing and property leasing measures

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12. During the mid-nineteenth century, states as varied as Delaware, Georgia, South Carolina, and Michigan enacted legislation encouraging immigration. *See* U.S. IMMIGRATION COMM'N, IMMIGRATION LEGISLATION, S. DOC. NO. 61-758 (3d Sess. 1911) (volume 39 of the Dillingham Commission report, reproducing state laws).

13. For an overview, see Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71-77.

14. *See* Adam Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 389-91 (2008).

associated with Hazleton, Pennsylvania, and resulting litigation.[15] In both federal and sub-federal schemes, the alien is situated outside community boundaries.[16] Likewise with respect to burdens on legal aliens sanctioned by federal policy, for instance, with respect to the ownership of real property and eligibility for certain professions in the nineteenth and early twentieth centuries:[17] the legal non-citizens in those and other contexts may be conceived as members-in-transition, a sort of partial citizenship.[18] The foreign relations effects aside, where states and localities have departed too dramatically to the downside of that conception, their authority has been ousted.[19]

Upside departures find sub-federal jurisdictions fixing community boundaries more expansively than the national government. These measures have been detailed in recent surveys of sub-federal activity.[20] The measures have included eligibility for public benefits—instances of resource redistribution of state funds being directed to non-citizens instead of other programs.[21] Some localities have issued identity cards to all residents, regardless of immigration status, with an understanding that the cards will be issued to undocumented aliens.[22] (This practice followed state laws allowing drivers licenses to be issued without regard to immigration status,

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15. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (striking down a local ordinance that required apartment dwellers to obtain occupancy permits available only to citizens or lawful residents).

16. *See* Motomura, *supra* note 1, at 2076 (noting sub-federal immigration authority "has historically been not just a story of direct or indirect enforcement of admission restrictions and expulsion rules, but also a deeper story of who belongs").

17. *See* Luis F.B. Plascencia et al., *The Decline of Barriers to Immigrant Economic and Political Rights in the American States, 1977-2001*, 37 INT'L MIGRATION REV. 5, 7-8 (2003); *see also* Terrace v. Thompson, 263 U.S. 197 (1923) (upholding state restriction on land ownership by aliens).

18. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 151-67 (2006).

19. *See, e.g.*, Truax v. Raich, 239 U.S. 33 (1915) (striking down state statute that severely limited employment of non-citizens).

20. *See, e.g.*, Rodriguez, *supra* note 1, at 581-609.

21. *See, e.g.*, MICHAEL FIX & JEFFREY S. PASSEL, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS 10-11 (2002), *available at* http://www.urban.org/Uploadedpdf/410412_discussion02-03.pdf; Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 673 (2008) (highlighting state health insurance programs benefiting undocumented youth).

22. *See* Jennifer Medina, *New Haven Welcomes a Booming Population of Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1; Mara Revkin, *Offering Noncitizens a Local Identity*, AM. PROSPECT, July 30, 2007, http://www.prospect.org/cs/articles?article=offering_noncitizens_a_local_identity (last visited Feb. 20, 2010).

measures later preempted by federal law.[23]) A growing number of localities have extended the franchise in local elections to non-citizens.[24]

Perhaps most interesting is the move to extend in-state tuition to undocumented alien students. This again implicates the redistribution of resources in the form of subsidized tuition rates at public universities. In their original form, these measures on their face favored non-citizens, including undocumented immigrants, relative to citizens/residents of other states. (In contrast to other public benefits, as a general matter states have been given discretion to discriminate against newcomers—that is, U.S. citizens who relocate from other states—with respect to post-secondary education.[25]) This aspect provoked federal legislation disallowing any post-secondary education benefit for undocumented aliens "unless a citizen or national of the United States is eligible for such benefit. . . ."[26] States persisted, reformulating eligibility schemes to make them status-neutral, pinning eligibility to residence and in-state high-school graduation.[27] The practical result has been the same, however. Undocumented immigrants may receive subsidized tuition rates where U.S. citizens from other states will not.[28]

These developments evidence the state and local membership of those who lack formal membership in the national community. Voting is often framed as constitutive of community.[29] Resource redistribution is likewise an essential element of the liberal state, comprised of equal, self-governing members. Oblique sub-federal recognition of non-citizen membership reflects social facts. Non-citizen residents, through some passage of time, may acquire the kinds of attachments that render them a part of the community, defined in manageable territorial terms.

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23. *See* Maria Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 95-96 (2005).

24. *See, e.g.*, RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 109-94 (2006); Robert F. Worth, *Push is on to Give Legal Immigrants Vote in New York*, N.Y. TIMES, Apr. 8, 2004, at A1. *See generally* DAVID C. EARNEST, OLD NATIONS, NEW VOTERS: NATIONALISM, TRANSNATIONALISM, AND DEMOCRACY IN THE ERA OF GLOBAL MIGRATION (2008) (tracking global trends towards expansion of alien voting).

25. *See* Starns v. Malkerson, 326 F. Supp. 234, 237-41 (D. Minn. 1970).

26. *See* 8 U.S.C. § 1623(a) (2006).

27. *See* Michael Olivas, *Compilation: State Legislation Allowing Undocumented College Students to Establish Residency*, 15 BENDER'S IMMIGR. BULL. 5 (Jan. 1, 2010) (listing 11 states).

28. *See* Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 498-500 (2006-2007) (attacking state measures on this basis).

29. *See, e.g.*, Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 495 (2000).

That membership may be consistent with non-membership in the larger territorial unit. In some cases, non-formal membership in the local community will be coupled with non-formal membership in the national community, the failure to naturalize notwithstanding. (This can be true even with respect to undocumented aliens who are ineligible to naturalize.) But it is possible to be a member of the local community without being a member of the national community.[30] Local community has a necessary spatial element, facilitating connection through the management of everyday life. The imagined community of the modern state is a superstructure of ideology, history, and culture more easily bypassed or resisted.

My sense is that sanctuary laws are distinguishable. Other forms of sub-federal action can stand on their own, even where they reference federal immigration status. Non-citizen voting is about allowing residents a voice in their local self-government. Welfare benefits and in-state tuition are about mutual support. Identity cards are aimed at facilitating the extension of benefits among residents. These programs involve mechanisms of local governance that would exist even in the absence of a federal immigration regime. Sanctuary, by contrast, is about defeating federal immigration enforcement. Solidarity with humanity rather than a particular community may supply the driver, a possibility evidenced by the movement's religious roots.[31] The explanation is also supported by the fact that even transient undocumented immigrants are protected by sanctuary measures. No prior connection is required. Likewise for measures prohibiting local officials from reporting immigration status to federal authorities which are instrumentally justified in the interests of the legal community (by way of facilitating immigrant cooperation with ordinary law enforcement).

Sanctuary measures may also spring from some sense of locally-delimited community, which goes a long way to explaining sanctuary measures in jurisdictions with large proportions of immigrant residents. These and other boundary markers of state and local law reflect a differentiated conception of community at the federal and sub-federal levels.

## II. DECLARING MEMBERSHIP

The sub-federal approaches described above reflect membership. As such, they constitute not just community but citizenship. Voting is described as an act of democratic citizenship, associated not only with mem-

30. *See, e.g.*, Rainer Bauböck, *Reinventing Urban Citizenship*, 7 CITIZENSHIP STUD. 139, 149-50 (2003); Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 426 (2007).

31. As well as by the connection to Central American politics of the Reagan years. *See generally* Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008).

bership but with membership status. In liberal political theory, citizens take on obligations beyond those of samaritanism.[32] In this respect, we already have a quasi-citizenship, at least, of aliens at the sub-federal level. Social membership could be reinforced under the citizenship label, even if no additional benefits or protections attached to the status. Formal citizenship at the local level for those who lack it at the national level would appear consistent with constitutional constraints.

Extension of a formal local citizenship would be expressive of community solidarity. Membership remains only an implicit predicate to a range of sub-federal policies favoring aliens. A clear statement of membership in the vocabulary of state membership would connect the dots of those scattered policies. It could have value to aliens to whom it was extended as a recognition of membership that otherwise might be overlooked or denied.

Formal local citizenship could also have material consequences. First, it could reinforce efforts to perfect inclusive community boundaries. Following the historical trajectory at the national level, citizenship would supply a powerful discursive tool in securing rights for a group historically subordinated. This presents a sequencing issue. Formal local citizenship would likely build on the extension of some of the material benefits described above. But it would not necessarily be predicated on full equality. For instance, local citizenship might be extended to aliens without voting rights. Citizenship typically demands equality. The institution might be undermined were the status extended in the face of known inequalities. On the other hand, citizenship has always included an aspirational (even honorific) element, and, of course, its bestowal has not always been grounded in equality.[33] Extending citizenship might help facilitate attainment of the franchise and other rights, even if those developments remained out of immediate reach.

Second, local citizenship could help counteract federal immigration controls. As a statement of solidarity, local citizenship status would be a formidable discursive tool against removal. Because it would be expressive of community, and because it would have autonomous and not just oppositional significance, local citizenship could be more effective than sanctuary measures at defeating federal immigration enforcement against those established as members of local communities.

This might seem counterintuitive. Sanctuary measures are regulatory and would be expected to have teeth. Citizenship by itself would be sym-

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32. *See* MICHAEL WALZER, SPHERES OF JUSTICE 33-35 (1983).

33. *See generally* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

bolic. Doctrine supplies part of the answer. As we have seen, sanctuary measures are subject to federal preemption;[34] they are not insulated from federal control. Sub-federal citizenship, by contrast, would be established within exclusive state or local authority. The *Dred Scott* decision recognized the possibility of state citizenship detached from federal citizenship, an aspect of the decision not reversed by the Fourteenth Amendment.[35] Precisely because it implicates expressive values, sub-federal citizenship might also be protected under the First Amendment.[36] On the one hand, local citizenship would not legally operate to defeat federal immigration enforcement. On the other hand, the lack of direct legal consequence would serve to insulate local citizenship from federal preemption.

So local citizenship could stand where sanctuary has been suppressed. The lack of operative effect notwithstanding, to the extent that local citizenship is expressive of community, it could work to defeat federal enforcement. Local citizenship would add a non-legal barrier (among others) to removal. It could serve as a community rallying call, a kind of focal point reminding other members of the community that "this is about us." The result would be mobilization on behalf of a subset of aliens (those with local citizenship) against federal action.

## III. MODALITIES OF LOCAL CITIZENSHIP

The efficacy of local citizenship would correlate to its acuity in drawing the lines of community. The more closely the status hewed to social membership on the ground, the more powerful a tool it would be, in both its autonomous and oppositional contexts. As a practical matter, selectivity would help to establish the institution in its fledgling stages. Exclusion would be a necessary feature of local citizenship, but that is common to all citizenship regimes.

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34. *See generally* City of New York v. United States, 179 F.3d 29 (2d Cir. 1999).

35. *See* Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 405 (1856) ("It does not by any means follow, because he [Dred Scott] has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States."); *see also* Spragins v. Houghton, 3 Ill. (2 Scam.) 377, 408 (1840) ("Now, a person may be, in the ordinary sense of the term, a citizen of this state, but still not a citizen of the United States."); NEUMAN, *supra* note 11, at 145 (noting the proposition "has survived despite its association with that tainted decision" of *Dred Scott*).

36. This might also work to insulate local initiatives against attack from the state level. *Cf.* Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech*, 35 STAN. J. INT'L L. 1 (1999).

Formal sub-federal citizenship for aliens could be extended on the basis of residency alone.[37] This would be on the model of Fourteenth Amendment state citizenship. It is also the basis on which some localities have been issuing identity cards to non-citizens.[38] This approach to local citizenship would be thin and only approximately correlate to community on the ground, insofar as it would include newcomers who have yet to develop substantial community ties.

Alternatively, local citizenship could work from a naturalization model. At a minimum, this would involve a durational residency requirement. Aliens would be eligible for local citizenship after a certain period of presence. The longer the requirement, the more likely that local citizenship would accurately reflect membership in the community, at least in the sense of reducing the incidence of false positives. Other requirements might also be contemplated, although most would be normatively problematic and/or administratively impractical. For example, localities might in theory require the acquisition of a certain knowledge set as a threshold to citizenship—the equivalent of a naturalization test. But given the shortcomings of such a knowledge requirement at the national level and the difficulties of correlating knowledge with membership,[39] a knowledge requirement would be both normatively and practically problematic (leaving administrative costs aside). More easily justified and implemented would be a bar based on criminal history. As an instrumental matter, if nothing else, it would avoid situations tainting local citizenship in the popular imagination, as has happened with sanctuary measures.[40]

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37. *See* Bauböck, *supra* note 30, at 149; Blank, *supra* note 30, at 424-25 (both noting foundation of local citizenship in residence and the principle of *jus domicili*). Bauböck proposes a formal local citizenship detached from national citizenship on that basis. *See* Bauböck, *supra* note 30, at 149.

38. *See supra* note 22 and accompanying text.

39. *See* Immigration and Nationality Act, 8 U.S.C.A. § 1423(a) (West 2006) (requiring naturalization applicants to demonstrate facility in the English language and "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States"); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 497-501 (1999) (describing origins of and problems associated with naturalization exam). It would be interesting to try to compose such a test for particular localities, in terms of the knowledge necessary to establish membership and solidarity. I suspect that familiarity with local sports teams would be a core component in many cases, as a data set that transcends socio-economic and many cultural barriers in otherwise diverse large metropolitan areas. But to make consequential citizenship contingent on knowing about ball teams poses obvious normative challenges.

40. *See, e.g.*, Maria L. La Ganga, *'Sanctuary City' No Haven for a Family and Its Grief*, L.A. TIMES, July 26, 2008, at A1 (describing how a murderer benefitted from San Francisco's sanctuary policy prior to his crime).

Finally, local citizenship could be contingent on legal permanent residence status under the federal immigration regime. This has been the usual approach with respect to non-citizen voting. This model would further reduce the incidence of false positives, although perhaps only incrementally. Its greater virtue would be to align local citizenship with federal baselines. The approach would eliminate threshold oppositionality and reduce the risk of federal legislative or judicial action to suppress the status. Extension of the status to legal resident aliens would still add value by expressing and entrenching a sense of local solidarity with those who have not secured national citizenship. It could be consequential where a local citizen/lawful permanent resident faced removal under federal immigration law.

But aligning local citizenship with federal immigration status would also be its greatest failing. A legal residence requirement would artificially exclude those who have accreted social membership in the local community. By their nature, citizenship schemes are exclusionary. If we are to accept citizenship as a normative institution (as a necessary foundation of the liberal state), we have to accept that some individuals will not qualify for citizenship status (and that there may be consequences to the exclusion). Exclusion criteria, however, must not be arbitrary. To the extent that federal immigration categories do not map onto community on the (local) ground and to the extent that federal immigration categories would be exogenous (that is, determined outside the community itself), legal residency as a threshold to eligibility for local citizenship would be normatively unsound, except perhaps as an incremental, politically pragmatic step to a more inclusive regime.

Of the three basic options, then, local citizenship centering a durational residency requirement looks most attractive insofar as it would best correlate to social membership. Extending local citizenship only where an individual has been present for some period of time would exclude those with only nascent ties to the local community. Detaching it from federal immigration status would allow those who may be deeply embedded through an extended presence to establish that formal local tie.

Any approach would need to address the question of whether local citizenship should be by application, that is, require an affirmative act on the part of the eligible individual, or be extended on an automatic basis. National citizenship schemes require individual volition,[41] which can be justified on autonomy grounds (some long-term residents will not wish to identify with the host state). Requiring aliens to step forward to secure local

41. *But see* RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 23 (2000) (proposing automatic extension of national citizenship after ten years of residence).

citizenship status would tend to increase the average level of affiliation among those holding the status to the extent it would correlate to a higher level of self-identification with the community. It would also enhance the expressive elements of the institution. Although there would be no need to replicate July 4th naturalization ceremonies, the possibility of declaring individuals to be local citizens (that is, prior to immigration enforcement activity) would reinforce the indigeneity of the status and its salience outside the federal scheme. Although this too would result in exclusions—those who would be eligible but who failed to apply—it would seem justifiable on this basis.

An application requirement would demand the establishment of an apparatus to administer the conferral of local citizenship. To the extent that local citizenship were to implicate administrative costs, the question arises as to whether the innovation would be worth the effort. The administrative cost argument would supply a strong basis for rejecting eligibility requirements beyond durational residency. As a provisional innovation, local citizenship could hardly bear the weight of an elaborate machinery. (On the applicant's side, it could hardly bear the weight of anything more than a nominal application fee, given the uncertainty of attendant material benefits.) Residency over a period of time, on the other hand, is relatively easy to demonstrate. Local jurisdictions could annex a citizenship process to other governmental services, in the way of motor-voter registration schemes. This could reduce, although not eliminate, the resources required to operate the citizenship regime.

## CONCLUSION

The resource challenge goes to whether this essay sketches a thought experiment or an agenda. The former might be useful insofar as it bundles various developments at the state and local level relating to aliens, and processes them through the optic of citizenship status. But the fact of those developments makes plausible the adoption of local citizenship regimes.

At least two factors come into play. First, local citizenship would ultimately depend on the degree of solidarity at the state and local level between members of the local community who are national citizens and those who are not. This will vary among communities. Communities that are generally hostile to aliens (translating into a tendency to reject them from social membership) will not be interested in adopting the innovation.[42]

42. The fact that local citizenship would be optional to local communities, in contrast to national citizenship and its necessary "filing" function at the global level, *see* Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 292 (1994), would magnify its expressive impact. It would also situate local citizenship closer to the liberal ideal of citizenship

This is another way of asking the resource question: Do national-citizen members of the local community feel a strong enough bond with their alien neighbors to overcome policy-making inertia and take on the administrative costs of a local citizenship regime? Perhaps in some communities. Among them would be communities which have adopted or seriously contemplated non-citizen voting (New York City included).

The second factor is the valence of citizenship generally. I have written elsewhere on the decline of citizenship at the national level.[43] The argument works from the deterritorializing tendencies of globalization, which demotes the state from its primacy relative to other forms of association. Territorial presence still counts for something, however. There is an inevitable spatial aspect to human existence. Community on a basis more focused than the modern nation-state can persist and even flourish.[44] The question is whether citizenship could work as the institutional vehicle for the representation of local community. Citizenship translates to local community because it is based on territory. We have a thin form of citizenship at the sub-national level, at least, on which to build. The local citizenship proposed in this essay would mark a radical departure from existing sub-national citizenship insofar as it is would be decoupled from and compete with national citizenship. That might pose too great a barrier, and perhaps local citizenship will remain implicit only. On the other hand, the more community reorients from the national toward the local, the more credible the case for formalizing the status.

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by mutual consent. *See, e.g.*, Peter H. Schuck, *Three Models of Citizenship*, *in* CITIZENSHIP IN AMERICA AND EUROPE 151, 155-56 (Michael S. Greve & Michael Zöller eds., 2009).

43. *See generally* PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999); Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492 (2003).

44. *See* Blank, *supra* note 30, at 420-24.