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The Immigrant City

Rick Su*

Jurists, policymakers, and legal scholars often do not consider the issue of immigration from a local perspective. As such, the intersection between immigration and local government law has largely been neglected in the legal academic literature. Instead of subscribing to the conventional belief that immigration and local governments are doctrinally distinct, this article uncovers their latent intersection, explore how competing but often unexamined concerns about local governments in legal doctrine conceal the mutual impact that immigration and local government laws have upon one another, and use this analysis to explore how legal rules can be changed to enhance the positive roles that local governments can play in our national immigration project. If we tend to consider the issue of immigration from a purely federal perspective, it is not solely because immigration implicates national interests that require the institutional judgment of the federal government. Indeed, underlying the presumption of federal exclusivity are also three competing models of the immigrant city that correspond with often unexamined fears regarding the relationship between local governments and their immigrant populations. Highlighting these concerns not only leads to a more nuanced understanding of what underlies our bias against local participation with regard to immigration, but also allows us to imagine alternative distribution of powers and responsibilities between federal and local governments. I argue that by changing the incentive structure created by the legal rules governing local governments, we can begin to reimagine our immigrant cities as being a contribution rather than an obstacle to the substantive goals of our immigration project.

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* Charles Hamilton Houston Fellow for Law Teaching, Harvard Law School; J.D. 2004, Harvard Law School. Special thanks to Jerry Frug and David Barron for their invaluable guidance and support throughout this entire project. I am also grateful to Joseph Singer and Bert Huang for their helpful comments on earlier drafts. This article is dedicated to Jessica, my fiancé and future wife.

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Introduction

We do not typically think about immigration from a local perspective, although we inevitably rely on our personal experiences with the local impacts of immigration to formulate our position in the national discourse. We also do not ordinarily conceive of local governments as having a role in immigration, although the prospects of our immigration policies often depend on how we organize the cities and towns in which immigrants settle. For the most part, the doctrinal analysis of both immigration and local government law has ascribed to the belief that no two aspects of law can be more distinct from one another. Indeed, the recent debates over the role of local governments in the enforcement of federal immigration laws highlight the widespread discomfort over the merging of these two legal frameworks: critics of local enforcement decry the adoption of a federal regulatory regime at the local level and its attendant costs on local communities, while proponents of enforcement denounce local resistance as an unacceptable intrusion of local prerogative into federal policy.¹

If the doctrinal separation of immigration law and local government law is as entrenched as it is ordinarily assumed to be, then any intersection between these two bodies of law can only be understood as legal anomalies that should promptly be reconciled. To be sure, legal scholars often do not recognize any connection between immigration and local government law at all. Those who have identified areas of overlap, however, largely tailor their analysis towards reifying the federalist division between what is local and what is national. The argument that the site of this intersection may be a legal crossroad worthy of further research has thus far failed to be fully considered.

This article attempts to offer such an analysis. Instead of ascribing to the conventional belief that no connection exists between immigration and local government law, or employing legal analysis to expediently mask the interplay between the two, this article sets out to do the opposite. It begins with the premise that a largely unnoticed but exceptionally important intersection already exists, argues that understanding this intersection exposes significant insights about how immigration and local government law organize the lives and experiences of immigrants and immigrant communities, and asserts that bringing this doctrinal intersection to light uncovers the possibility of developing alternative ways to resolve many of the ongoing debates in the immigration and local government discourse.

I refer to the site of this intersection as the immigrant city. In doing so, I am invoking not only the legal rules that organize the geographically identifiable places in which immigrants live, but also the legal doctrines that define the institutional role of our local governments and frame our conceptualization of “community” in an era of immigration. Described as such, the immigrant city is largely absent in the legal academic literature. Moreover, although judges and policymakers create many of the legal intersections that I wish to explore, they largely do so without a conscious or considered understanding of the immigrant cities they are creating.

The failure of legal scholars, jurists, and policymakers to explicitly recognize or adequately explore the interplay between this nation’s immigration and local government laws is not just a

¹ Compare, e.g., Ellen Barry, *City Vents Anger at Illegal Immigrants*, *L.A. Times*, July 14, 2006, at 1, with Juan A. Lozano, *Critics: Policy Makes Houston Haven for Immigrants*, *Houston Chron.*, July 31, 2006, at 1.

doctrinal oversight; it has considerable consequences for both our nation's immigration project and the development of our local communities. On the one hand, the doctrinal separation of these two fields conceals the fundamental impact that they have on one another. Immigration scholars, who have thus far focused primarily on the desirability and consequences of our nation's immigration policy, overlook the tremendous influence that the organization of our local spaces and the allocation of resources among communities have on this nation's ability to integrate foreign immigrants and its capacity to channel the effects of immigration to the benefit of all its residents. Similarly, local government scholars seeking to achieve a more efficient, equitable, and just allocation of municipal power and wealth neglect to account for the effect of immigration laws on the kind of communities we foster, the prospects for decentralized power, and workings of our local democratic institutions.

On the other hand, the legal divide between immigration and local government law hides the extent to which this divergence is not only due to strong federal interest, but is also a byproduct of implicit and often unexamined fears about the relationship between immigrants and local communities. In this article, I identify three stylized models of the immigrant city in legal doctrine: (1) the immigrant city as a threat to immigrants, (2) the immigrant city as a threat to the nation and the states, and (3) the immigrant city as a victim of immigrants and national immigration policy. I use these models to highlight the degree to which immigration law influences and is influenced by the legal construction of the city, is based on concerns about decentralized power, and affects our understanding of the institutional role of local governments with respect to immigration. More importantly, I argue that although these models arise out of competing concerns about the relationship between immigrants and cities, taken as a whole they all advance a disempowered and depoliticized vision of the city while perpetuating an image of immigrants as a federal population that is socially and politically outside of the local communities within which they reside.

This article proceeds in four parts. The first two parts examine how the immigrant city is currently represented. Part I focuses on the profound social, economic, and political impact of immigration on the local level. It describes the countless numbers of foreign "aliens" who now reside on our block as neighbors, work alongside us as colleagues, and may one day naturalize as fellow citizens. In addition, it focuses on the local impacts that they have wrought — from the social, economic, and physical revitalization to the fiscal and cultural pressures (and sometimes vehement and violent backlashes).

Part II reveals that notwithstanding the developments outlined in Part I, the legal academic literature has largely failed to recognize how immigration and local government law relate. To be sure, there are extensive works in other academic disciplines looking at the condition of immigrants in, and the impact of immigration on, our local spaces. Sociologists are studying the residential housing patterns of immigrants,² their position in local social and economic networks,³ and their relationship with other racial and ethnic groups;⁴ economists are engaged in

² See, e.g., Dowell Myers & Cathy Yang Liu, The Emerging Dominance of Immigrants in the US Housing Market 1970–2000, 23 *Urban Policy and Research* 347 (2005); Dowell Myers & Seong Woo Lee, Immigrant Trajectories into Homeownership: A Temporal Analysis of Residential Assimilation, 32 *Int'l Migration Rev.* 593 (1998).

³ See, e.g., Roger Waldinger & Claudia Der-Martirosian, The Immigrant Niche: Pervasive, Persistent, Diverse, in Strangers at the Gates : New Immigrants in Urban America (Roger Waldinger ed., 2001); Thomas Bailey &

a vigorous debate over the role immigrants play in regional economies⁵ and their impact on the fiscal health of local governments⁶; and urban theorists are exploring the fractured “translocal” identities⁷ that have arisen in “world” and “global cities” as a result of transnational flows of capital, culture, and people.⁸ Absent from this literature, however, is a rigorous examination of the role that legal rules play in creating or perpetuating these developments. In short, scholars who are studying immigrants and cities do not see the law, while scholars focused on the law have demonstrated little awareness of the immigrant city.

In response to the gap identified in Part II, Part III analyzes various legal and political developments in immigration and local government law to develop an analytical framework of the immigrant city as a legal concept. I argue that underneath the presumption of federal exclusivity with regard to immigration lies an undercurrent of fear about the relationship between immigrants and local communities. Expanding upon the conventional federal account of the doctrinal divergence between immigration and local government law, I will demonstrate how various legal developments at the national, state, and local level support three models of the immigrant city, each of which corresponds with different concerns about local involvement on the issue of immigration. These three models, I contend, play a significant role in structuring how we conceive of immigrants and the city in the national and local debates.

Part IV asks whether the immigrant city can be reimagined in a different light. It does so by tackling the implicit concerns about the relationship between immigrants and local communities discussed in Part III. If these concerns perpetuate the impression that local governments are ill-suited to participate in the immigration project, then readjusting the legal rules to alleviate these concerns might increase our acceptance of local involvement — especially with regard to immigration issues that the federal government is currently unable or unwilling to address. The choice, however, is not between local impotence and local autonomy; rather, depending on the substantive goals we wish to pursue, cities can be selectively empowered, disempowered, and incentivized to play a meaningful role in the immigration project. To foreground the immigrant city, therefore, is to bring these possibilities to light. Part IV will be followed by a brief conclusion.

I hope in this article to expose the legal doctrinal influence of immigration and local government law on our current understanding of the immigrant city and open the door for alternative conceptualizations. Although this article may be one of the first to address this specific topic, it is not intended to be the last. Indeed, I hope to motivate others in the legal academy to engage in

Roger Waldinger, Primary, Secondary, and Enclave Labor Markets : A Training Systems Approach, 56 **American Sociological Review** 432 (1991).

⁴ See generally **Prismatic Metropolis: Inequality in Los Angeles** (Lawrence D. Bobo et al. eds., 2000); Nelson Lim, On the Back of Blacks?: Immigrants and the Fortunes of African Americans, in **Strangers at the Gates**, *supra* note 3, at 186.

⁵ Compare **George J. Borjas, Heaven’s Gate** (1999), with **Julian L. Simon, The Economic Consequences of Immigration** (2d ed. 1999) and David Card, Is the New Immigration Really So Bad?, 115 **The Econ. J.** F300 (2005).

⁶ See Debroah L. Garvey et al., Are Immigrants a Drain on the Public Fisc?: State and Local Impacts in New Jersey, **Soc. Sci. Q.** 537 (2002).

⁷ See e.g., **Michael Peter Smith, Transnational Urbanism: Locating Globalization** 169 - 72 (2000)

⁸ See generally **John Friedmann, The World City Hypothesis** (1986); **Saskia Sassen, The Global City: New York, London, Tokyo** (1991).

a considered and conscious discussion of this issue as well. The immigrant city is far too important an institution to be left on the sidelines of our immigration and local government debates. The time has come for us to take a serious look at its legal structure and its effects on American society.

I. The Local Impact of Immigration

The history of the American city is intimately related to the history of immigration. Just as America is often described as a country of immigrants, it follows that America can also be described as a country of immigrant cities. Since the beginning of America's urbanization, almost all of the major metropolitan regions that now serve as this country's economic and cultural foundation have been built upon the ready supply of immigrant labor and molded by the social fabric of immigrant communities. Therefore, in order to understand the legal significance of the immigrant city, we must therefore begin with an analysis of the ways in which immigration is changing the demographic, economic, and political character of our local communities.

A. Demographics

We are now experiencing America's second great wave of immigration. Not since the turn of the 20th century has a larger percentage of immigrants relative to the native population landed on America's shores and poured into its cities. In contrast to the 500,000 or so immigrants who arrived in the 1930s, more than 9 million immigrants came between 1991 and 2000. At 11.7 percent of the U.S. population in 2003,⁹ the foreign-born population of over 31 million is slowly approaching the 14.8 percent peak set in the 1890s.¹⁰

These statistics are telling. But they fail to capture "one central feature of the immigration process: immigrants are geographically concentrated in their host countries."¹¹ In other words, the aggregate national statistics that dominate much of the immigration debate do not always reflect the actual living conditions of immigrants or the specific manner in which they interact with American society.

Indeed, not unlike historic patterns of immigrant settlement, almost all immigrants today live in established metropolitan regions rather than the rural fringe.¹² Moreover, immigrants are not evenly distributed. Currently, five metropolitan regions (Los Angeles, New York, San Francisco, Chicago, and Miami) are home to more than half of America's foreign born-population.¹³ This concentration has radically transformed the demographic make-up of these areas. For example, immigrants and their children constitute almost two-thirds of Miami's, "more than half of

⁹ U.S. Census Bureau, The Foreign-Born Population in the United States, at 1 (August 2004), available at <http://www.census.gov/prod/2004pubs/p20-551.pdf>.

¹⁰ **Campbell J. Gibson & Kay Jung, U.S. Census Bureau, Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000**, at 1 (2006), available at <http://www.census.gov/population/www/documentation/twps0081/twps0081.pdf>.

¹¹ **Jeannette Money, Fences and Neighbors: The Political Geography of Immigration Control** 43 (1999).

¹² See The Foreign-Born Population in the United States, *supra* note 9, at 2.

¹³ See Roger Waldinger & Jennifer Lee, New Immigrant in Urban America, in Strangers at the Gate, *supra* note 3, at 30, 43.

metropolitan Los Angeles's . . . , just under half of metro San Francisco's . . . , and two fifths of metropolitan New York's" total population.¹⁴

In addition to these cities, new immigrant "gateways" are also beginning to take shape.¹⁵ Indeed, for the last few decades, immigrants have been leaving or bypassing traditional gateways for non-traditional destinations.¹⁶ From 1980 to 2000, the metropolitan regions of Atlanta, Raleigh, and Las Vegas experienced some of the largest percentage increases of foreign-born residents in the entire country — 817%, 709%, and 637%, respectively.¹⁷ Immigrants are also increasingly moving to the suburbs: at the turn of the twenty-first century, the percentage of immigrants living in the suburbs surpassed those living in the central cities.¹⁸

Because of the racial and ethnic diversity of the most recent wave of immigration, this process has dramatically altered the demographic composition of various communities. For instance, the Los Angeles suburb of Compton — engrained in our collective cultural imagination as a quintessential black "ghetto" — has in recent years, and with substantial controversy, become a majority-Hispanic city.¹⁹ In addition, Los Angeles County, which was overwhelmingly Anglo in the 1970s (70%),²⁰ has since become a majority-minority region with Anglos accounting for less than 30% of the county's residents.²¹ As a result, the traditional image of white suburbs ringing an urban core of racial and ethnic minorities has been replaced by "islands" of Anglo enclaves "surrounded by vast ethnic or transitional communities."²²

B. Municipal Health

How has immigration affected the local communities in which they reside? For most communities, particularly major metropolitan centers, the effect has been positive. Indeed, many now believe that urban revitalization of the latter half of the twentieth century is due in large part to the liberalization of the federal immigration restrictions in 1965. As Paul Grogan and Tony Proscio explained, "[t]here is almost no question, in any case, about whether immigration is good for cities, or about whether many inner-city markets will reach their full potential without it."²³

¹⁴ John Mollenkopf, et al., Immigrant Political Participation in New York and Los Angeles, in **Governing American Cities** 17, 19 (Michael Jones-Correa ed., 2001).

¹⁵ See U.S. Census Bureau, Migration of Natives and the Foreign Born: 1995 to 2000, at 4 (August 2003), available at <http://www.census.gov/prod/2003pubs/censr-11.pdf>.

¹⁶ See id. at 4 – 9; see also William Frey, Diversity Spreads Out: Metropolitan Shifts in Hispanic, Asian, and Black Populations Since 2000, **Living Cities Census Series (Brookings Institution)**, Mar. 2006, at 1, available at http://www.brook.edu/metro/pubs/20060307_Frey.pdf.

¹⁷ See Audrey Singer, The Rise of New Immigrant Gateways, **Living Cities Census Series (Brookings Institution)**, Feb. 2004, at 21, available at http://www.brookings.edu/urban/pubs/20040301_gateways.pdf.

¹⁸ See id. at 10.

¹⁹ See generally Albert M. Camarillo, Black and Brown in Compton: Demographic Change and Ethnic/Race Relations in a South Central Los Angeles Community, 1950-2000, in **Not Just Black and White** (Nancy Foner et al. eds., 2004).

²⁰ See Edward W. Soja, Introduction to Los Angeles, in **The City: Los Angeles and Urban Theory at the End of the Twentieth Century** 14 (Allen J. Scott et al. eds., 1996)

²¹ U.S. Census Bureau, State and County QuickFacts for Los Angeles County, at <http://quickfacts.census.gov/qfd/states/06/06037.html>

²² Dale Maharidge, **The Coming White Minority** 10 (1996).

²³ Paul S. Grogan & Tony Proscio, **Comeback Cities: A Blueprint for Urban Neighborhood Revival** 139 (2000).

Echoing this sentiment, Thomas Muller deemed it “safe to say . . . that immigration by itself has sparked more neighborhood revitalization and commercial activity than even the most successful case of government intervention . . . Had immigration to central cities been a federal urban aid program, it would be rated among the most successful and cost-effective approaches for invigorating the urban core.”²⁴

To explain these positive effects, commentators have noted how immigrants fill various economic gaps and gravitate toward self-employment and entrepreneurship.²⁵ Studies show that various niches in urban economies, from low-skilled labor such as those in the garment industry²⁶ to high-skilled occupations in urban hospitals,²⁷ are disproportionately staffed by immigrants. Moreover, the human and social capital of foreign immigrants has helped many cities become critical nodes in the global exchange of capital, culture, and information — what urban scholars now refer to as “World” or “Global Cities.” Indeed, it is no coincidence that the City of Miami, which supports a large immigrant population from Central and South America, has emerged in recent years as America’s gateway to Latin America²⁸ in the same way that Los Angeles is now widely seen as the gateway to the Pacific Rim.²⁹

It is worth noting, however, that much of the positive local impact of immigration is due to their presence. The drastic decline of many urban cores and inner-ring suburbs during the mid-1900s was caused in large part by massive suburbanization and urban depopulation. This, in turn, led to a decline in the value of residential property and a corresponding fall in the municipal tax base. As a result, many residential and commercial properties were abandoned, while the declining tax base forced cities to raise taxes and lower the level and quality of municipal services. The inflow of immigrants in the 1970s and 1980s played a large role in stemming and, in some cities, reversing this decline.³⁰ Anecdotes abound of neighborhoods that have gone from being blocks of abandoned buildings to those supporting vibrant immigrant communities.³¹ Moreover, a study conducted during the 1990s found that on almost all economic and social indicators of municipal health — population growth, job creation, unemployment, per capita income, poverty, crime, and tax rate — “cities with large foreign-born populations fare better than cities with few immigrants.”³²

²⁴ **Thomas Muller, *Immigrants and the American City* 304 (1993).**

²⁵ **See generally Roger Walding, et al., *Ethnic Entrepreneurs: Immigrant Businesses in Industrial Societies* (1990).**

²⁶ **See Ivan Light et al., *Immigration Incorporation in the Garment Industry of Los Angeles*, 33 *Int’l Migration Rev.* 5, 12 – 13 (1999).**

²⁷ **See Loius Winnick, *New People in Old Neighborhoods* 42 (1990); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 262 (2003).**

²⁸ **See Jan Nijman, *Globalization to a Latin Beat: The Miami Growth Machine*, 551 *The Annals Am. Acad. Pol. & Soc. Sci.* 164, 166 – 67 (1997); Saskia Sassen & Alejandro Portes, *Miami: A New Global City?*, 22 *Contemp. Soc.* 471, 472 - 72 (1993).**

²⁹ **See Franklin J. James, et al., *The Effect of Immigration on Urban Communities*, 3 *Cityscape* 171, 182 – 83 (1998).**

³⁰ **See Muller, *supra* note 24, at 116 – 17; Winnick, *supra* note 27, at 11.**

³¹ **See, e.g., Joel Millman, *The Other Americans* 80 (1997); Robert L. Smith, *Chinese Immigrants Reshape Neighborhood in Growing Numbers, Families Build a Community in Cleveland*, *The Plain Dealer*, July 23, 2001, at A1.**

³² **Stephen Moore, Hoover Institute, *Immigration and the Rise and Decline of American Cities* 29 (1997).** The report was careful to note the data “does not prove that immigrants cause cities’ economic prosperity,” but simply “challenges the conventional belief that immigration is a leading cause of urban decline.” *Id.* at 4.

If immigration has helped to revitalize struggling, depopulated communities, the research on its fiscal costs to local government presents a more complicated story. The conventional belief is that although immigrants pay more in taxes to the federal government than they receive in federally-funded services, on average, they cost local governments more than they contribute to local coffers.³³ Of course, these findings should be understood in context. First, it is generally agreed that immigrants do not pose a higher burden on local services or pay fewer taxes than similarly-situated native residents.³⁴ Second, most municipal services are consumed collectively; even if local tax revenues collected from immigrants do not completely defray the cost of these services, often the economic burden borne by local governments would not be reduced proportionately if fewer immigrants were to arrive.³⁵ Moreover, studies on the tax burden of immigrants on local governments often fail to account for the fact that very few cities actually cover all their expenditures with local tax receipts; a large part of most urban municipal budgets, regardless of the size of their immigrant population, is made up of state and federal grants.³⁶

C. Local Reactions

Municipal issues over which local governments have traditionally exercised the most control — education, policing, the provision of local services, and spatial planning and zoning — are now being complicated by the unique needs and differing interests of immigrants and immigrant communities. How have local governments reacted to these changes?

So far, it appears that most local government officials are not proactively addressing these issues. A recent study on local governments in California found that, with the exception of cities characterized by exceptionally large immigrant populations and a strong presence of immigrant-advocacy groups, communications between immigrants and local governments are usually quite limited.³⁷ Most local government officials in cities with significant and/or growing immigrant populations ranked immigrants and ethnic organizations near the bottom of their list with regard to their influence on local policies, especially with regard to housing.³⁸ Ironically, although immigrants generally express a lack of trust for local police, local police officials demonstrated

³³ One literature review found that on average immigrant household costs local governments \$1,638 in services and generates only \$1,172 in revenues. See James, et al, *supra* note 29, at 185.

³⁴ See, e.g., Michael Fix & Jeffrey Passel, *Urban Institute, Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-97* (March 1999) (finding that when controlling for poverty and/or the presence of children, welfare use among noncitizens were lower than citizens before and significantly more so after the 1996 welfare reforms); Sarita A. Mohanty, *Unequal Access: Immigrants and U.S. Health Care, Immigration Pol'y in Focus*, July 2006, at 1, 3 – 4 (finding that per capita health care expenditures were 55% lower for immigrants than natives in 1998 (including emergency room visits paid for by local governments) and that on average immigrant children receive 77% less than native children), [available at](http://www.aifl.org/ipc/infocus/unequal_access.pdf) http://www.aifl.org/ipc/infocus/unequal_access.pdf. But see Borjas, *supra* note 5, at 113 (arguing that it matters not that “immigrant households headed by high school dropouts do not use welfare any more often than native households headed by high school dropouts — especially if high school dropouts dominate the immigrant population.”).

³⁵ See James et al., *supra* note 29, at 184.

³⁶ See, e.g., Michael Jones-Correa, *Structural Shifts and Institutional Capacity: Possibilities for Ethnic Cooperation and Conflict in Urban Settings*, in *Governing American Cities*, *supra* note 14, at 183, 191 – 194.

³⁷ S. Karthick Ramakrishnan & Paul G. Lewis, *Public Policy Institute of California, Immigrants and Local Governance: The View from City Hall* 33 – 34, 37 - 38 (2005)

³⁸ See *id.* at 49.

the highest awareness of immigrant needs and expressed the strongest interest in reaching out to establish tangible relationships with their communities.³⁹

This is not to say that some localities, especially suburban communities with little experience dealing with immigrants, have not reacted passionately to growing influx of immigrants. There are numerous accounts of community agitation with local immigrant populations — often focusing on the most visible aspects such as day-laborers and residential overcrowding. In doing so, local communities are increasingly trying to extend their control into the private sphere⁴⁰ while seeking to close off and regulate traditionally public spaces as well.⁴¹

II. The Immigrant and the City in Contemporary Legal Scholarship

But if immigration has and continues to be a significant influence on the development of our local communities, both immigration and local government scholars have largely ignored the connection. In the cities described by local government scholars, one would be hard-pressed to find any signs of immigrants. Of the immigrants described by immigration law scholars, one would assume that they had no relationship with any governmental institution other than the nation-state.

To be sure, neither the “immigrant” nor the “city” is entirely absent from the local government or immigration law literature respectively. As this Part shows, local government scholars do sometimes acknowledge immigrants just as immigration scholars occasionally note cities. The focus of this article, however, is not just the immigrant or the city as descriptive labels, but also the immigrant and the city as legal concepts. From this perspective, the gap is even more glaring. It is not simply that the immigrant and the city are not discussed together in a comprehensive manner. Rather, the manner in which they are represented in the literature often obscures the connection between the two from a legal perspective.

This Part explores how academic accounts offer an incomplete picture of the legal role of the immigrant city in both local government and immigration law. So far, the representation of the immigrant in the local government literature focuses predominately on the racial, ethnic, or socioeconomic characteristics of immigrants or their preference for specific local services. In doing so, the local government literature has largely ignored the fact that the immigrant identity, and the rights, obligations, and societal roles that flow from that identity, is structured and constructed by the federal laws concerning immigration and naturalization. At the same time, the immigration literature recognizes the city as a geographic place within which immigrants concentrate and a governmental entity that provides public services to immigrants. But in both of these portrayals, the city is either represented as an institution that is synonymous with the

³⁹ See *id.* at 75 – 76.

⁴⁰ See Stephanie McCrummen, Manassas Changes Definition Of Family: Activists Criticize New Housing Limits As Anti-Immigrant, *Wash. Post*, Dec. 28, 2005, at A1. This local ordinance was later repealed. See Stephanie McCrummen, Anti-Crowding Law Repealed: Latinos Were Focus of Manassas Ban on Extended Families in Homes, *Wash. Post*, Jan. 12, 2006, at A1.

⁴¹ See *Coalition for Humane Immigrant Rights of Los Angeles v. Burke*, No. CV 98-4863-GHK, 2000 WL 1481467, at *1, *13 (C.D.Cal. Sept. 12, 2000) (striking down a Los Angeles County Ordinance that prohibited day-laborers from soliciting work on the street for violating the First and Fourteenth Amendment).

state and therefore lacking an independent legal status, or simply a geographic space without a legal or political identity at all. I argue that the tendency of immigration and local government scholars to rely on legally-neutral categories explains why the legal construction of the immigrant city has largely gone unnoticed.

A. The Immigrant in Local Government Law

1. The Immigrant as Racial, Ethnic, or Socioeconomic Minorities

America's metropolitan regions are "now divided into districts that are so different from each other they seem to be different worlds"⁴² Thus, a central aim of local government scholars has been to excavate and explain the extent to which local government laws create and maintain such divisions. Eschewing the conventional belief that the structure of our local communities can be wholly explained by individual preferences or neutral market dynamics, local government scholars have focused on how legal rules empower certain communities and skew market incentives to favor racial and socioeconomic segregation. It is no surprise then that this focus serves as one of the primary frameworks for discussing immigrants in the local government context: local government scholars often invoke immigrants as, and therefore interchangeable with, racial, ethnic, and socioeconomic minorities.

For some scholars, this manner of discussing immigrants is rooted in history. Immigrants are often described in the local government literature as undesirable populations in the inner cities from which well-to-do residents sought escape through suburbanization. Therefore, for scholars like Professor Briffault, the influx of poor immigrants into the urban core, their ability to secure political power therein, and the association of the city with "foreigners, crime, vice and political corruption," explains the reason why the "older stock of Americans living in the outlying areas" began to resist annexation in favor of maintaining political autonomy.⁴³ Representing immigrants in this manner, Briffault quickly incorporates his brief discussion of immigrants into the broader and more conventional analysis of the role of local government law in perpetuating racial and ethnic segregation.⁴⁴ At the same time, the racial, ethnic, and socioeconomic account of immigrants is used to explain the contemporary organization of our metropolitan regions as well. For example, in describing the portrayal of Los Angeles as "Capital of the Third World," Professor Frug's focus was not so much on immigrants per se, but on how it "symboliz[es]" the fact that "issues of ethnicity, race, and class cross-cut America's metropolitan areas without stopping at jurisdictional borders."⁴⁵

To be sure, race, ethnicity, and socioeconomic status are important components of the immigration debate. The problem with this representation, however, is that immigrants are legally burdened in ways that most racial and socioeconomic minorities are not. Unlike native minorities, the marginalization of immigrants is ideologically and legally supported by the fact that they are construed by the law as outside of our political community. Indeed, not only do our immigration and naturalization laws permit discrimination in ways that would not be acceptable

⁴² Gerald E. Frug, *The Geography of Community*, 48 *Stan. L. Rev.* 1047, 1047 (1996).

⁴³ Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 364 (1990).

⁴⁴ See *id.* at 364 – 65.

⁴⁵ Gerald E. Frug, *Decentering Decentralization*, 60 *U. Chi. L. Rev.* 253, 318 (1993).

for American citizens, but the powerful rationale that supports this legal position justifies their marginality in social and economic contexts as well.

2. The Immigrant as a Proxy for Market Preferences

The second approach of local government scholars is to account for immigrant status as a proxy for a particular set of preferences for municipal services or community character. Instead of focusing on the reactions of natives to immigrants, this account focuses on the type of communities that they prefer.

The work of Professor Gillette is an example of this approach. He touches upon the issue of immigration by identifying how immigrants may possess a set of preferences different from those of native residents, which in turn affects how a community may seek to structure their services in order to either attract or deter them. He notes that even if a locality would stand to benefit from an influx of immigrants into the region, it may be inclined to free ride by not providing immigrant services and imposing those costs upon other communities, if any, that do.⁴⁶ To be sure, Gillette employs this model as an example of how background legal rules affect the willingness of localities to undertake or subsidize activities to the benefit of themselves and the region. Nevertheless, the understanding of immigrants underlying this account focuses primarily on immigrant status as a proxy for certain set of preferences.

Accounting for immigrants in this manner conforms to two broad generalizations about the relationship between immigrants and local communities. The first is that the residential choice of immigrants is predominately guided by their preferences. Thus immigrant communities are portrayed as alternative economic and social marketplaces within which immigrants have opportunities for upward mobility in similar ways as natives in the mainstream economy.⁴⁷ This view leads naturally to another commonly held belief in the local government literature: that local communities can be understood as a package of goods and services that potential residents select, much like a consumer would in a traditional marketplace. Corresponding with Tiebout's market conceptualization of local communities, immigrant communities are perceived as another example of a voluntary association established by the rational and efficient workings of the marketplace of communities.⁴⁸

Again, this account explains much of the local dynamics that produce immigrant communities. Nevertheless, focusing too much on the immigrant communities as a product of rational choice obscures the manner by which these communities, or at least the incentive structure that leads immigrants to favor them, is influenced by background legal rules. It ignores the fact, as Robert Park noted at the turn of the twentieth century, "that if the immigrant lives in a colony of his own people it is because, under ordinary circumstances, that is the only place he can live at all";⁴⁹ or

⁴⁶ Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 *J. L. & Pol.* 365, 386 - 87 (2005).

⁴⁷ See, e.g., **Richard Alba & Victor Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration*** 164 (2003); Kenneth L. Wilson & Alejandro Portes, *Immigrant Enclaves: An Analysis of the Labor Market Conditions of Cubans in Miami*, 86 *American J. of Sociology* 295, 315 (1980).

⁴⁸ Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 418 - 20 (1956); see also Gerald E. Frug, *City Services*, 73 *N.Y.U. L. Rev.* 23, 26 - 28 (1998) (describing the prevalence of Tiebout's argument in the local government literature).

⁴⁹ **Robert E. Park, *The Collected Papers of Robert Ezra Park*** __ (1974).

as Professors Frug and Barron recently noted, immigrant preferences are necessarily confined by the type of communities that the existing local government structure encourages and permits.⁵⁰ Moreover, as social scientists have discovered, although immigrant communities provide benefits to recent immigrants, they can also have a restrictive dark side. There is a growing awareness that the cultural and economic niches that these communities produce also work as socioeconomic traps for many of its members.⁵¹

In addition, the market-actor view of immigrants and immigrant communities neglects the fact that immigration laws also play a role in encouraging or perpetuating enclave development. Immigration law's family reunification policy and financial sponsorship requirement encourage concentrated living patterns in which the enforced legal dependency is easier to satisfy. It also strengthens the reliance of immigrants on enclave labor markets. Because most employers in the mainstream labor market, especially those in the low-wage sectors, are unwilling to provide the support or assurances required for the sponsorship of new immigrants, existing immigrants can often only rely on co-ethnic employers in the enclave labor market for such needs, which further strengthens the hold of ethnic employers on immigrant laborers.⁵²

3. The Normative Outlook of Local Government Law

It may be that the local government literature's failure to treat the immigrant as a legal concept is largely a result of the doctrinal divergence between immigration and local government law. However, it may also be that addressing immigrants from a non-legal perspective serves to preserve the normative framework that dominates much of the local government literature — one that focuses on the commonality of citizenship in advancing reform.

Most local government scholars start from the position that the current structure of local government law perpetuates troubling inter-local inequities and undesirable residential segregation. Underlying this conviction is the belief that notwithstanding the significant role that local boundaries play in dividing the residents of the metropolitan landscape, a meta-framework exists through which one can make an appeal to mutual obligation. It is therefore no surprise that most of the solutions that are proposed in the local government literature rest upon the assumption that a broader communal identity exists to bind the fates of all residents together. In their attempt to buttress their normative project, local government scholars often invoke the idea of "citizenship" (presumably national or state) in order to draw upon the mutual obligations that residents of different communities have toward one another in order to challenge the inequities that municipal boundaries often serve to perpetuate.⁵³ Indeed, if no such overarching framework exists to capture the legal and political interconnection between residents of one municipality to

⁵⁰ David J. Barron & Gerald E. Frug, *The Census as a Call to Action*, 29 *Fordham Urb. L.J.* 1387, 1390 (2002).

⁵¹ For example, Professor Kwong observes that the ethnic solidarity in New York's Chinese community "has increasingly been manufactured by the economic elite," most of whom do not live in the community itself, "to gain better control over their co-ethnic employees." Peter Kwong, *Manufacturing Ethnicity*, 17 *Critique of Anthropology* 365, 366 (1997).

⁵² See Peter Kwong, *Ethnic Subcontracting as an Impediment to Interethnic Coalitions: The Chinese Experience*, in *Governing American Cities*, *supra* note 14, at 71, 78.

⁵³ See Kenneth Karst, *Belonging to America* 185 (1989) (arguing that with respect to racial desegregation, "[t]he community immediately in view was the local community, but the claim to participate in that community's public life as an equal member was a claim founded on a national ideal and a body of national law.").

another, many of the redistributive prescriptions local government scholars propose would lack much of their normative force.⁵⁴

Take, for example, the reformative proposals of Professor Schragger. Like many local government scholars, Schragger deconstructs the concept of “community” by revealing the extent to which it is constructed by exclusionary and boundary-maintaining norms. Seeking an alternative, Schragger finds guidance in Saenz v. Roe,⁵⁵ a Supreme Court decision striking down a California statute limiting the welfare benefits of new residents who had just moved from another state.⁵⁶

Schragger’s invocation of Saenz is fitting in the local government context because the Supreme Court’s commitment to inter-state mobility in this case contrasts sharply with its tolerance of barriers to inter-municipal mobility in cases like Warth v. Seldon. As Schragger aptly notes, “[w]hat is quite stunning [about Saenz] is the radical disjuncture between Saenz’s rigorous attack on a statute that would make it marginally less attractive for poor residents from other states to move to California and Warth’s equally rigorous defense of an exclusionary zoning regime that makes it virtually impossible for poor residents from a nearby town to move into [the wealthy community of] Penfield.”⁵⁷

Nevertheless, what makes the bold language in Saenz useful as a counterpoint to exclusionary zoning cases like Warth is its reliance on a strong communitarian conceptualization of citizenship through its invocation of the long-neglected Privileges and Immunities Clause. Writing for the majority, Justice Stevens explained that such a right to inter-state mobility “is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States”; it is the recognition that a “citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.”⁵⁸

But if Saenz’s “construction of a national citizenship through the wholly unanticipated rebirth of the privileges or immunities clause” gives doctrinal support to challenges against exclusionary practices by suburban enclaves on the local level, it “also illustrates the perils of the citizenship project [by] appear[ing] to draw an indelible line between the rights of citizens and aliens.”⁵⁹ Immigrants, whose claim to any such overarching community are weakened by the fact that they are legally and morally understood to be outside of the national polity, threaten the normative thrust of most local government scholarship. Indeed, it is almost uniformly assumed that our nation’s obligation to noncitizen immigrants is fundamentally different from those, minority or

⁵⁴ See **David Miller, On Nationality** 72 (1995) (“It is because we have prior obligations of nationality that includes obligations to provide for the needs of members that the practice of citizenship properly includes redistributive elements of the kind that we commonly find in contemporary states.”)

⁵⁵ 526 U.S. 489 (1999)

⁵⁶ Richard C. Schragger, The Limits of Localism, 100 **Mich. L. Rev.** 371, 467 – 71 (2001).

⁵⁷ Schragger, *supra* note 56, at 468.

⁵⁸ 526 U.S. at 502, 504.

⁵⁹ **T. Alexander Aleinikoff, Semblance of Sovereignty: The Constitution, the State, and American Citizenship** 70 – 71 (2002).

otherwise, who have formal membership in our national community.⁶⁰ Thus, although mobilizing a strong conceptualization of citizenship offers ways to dismantle the pervasive local insularity that has contributed to the vast disparity between prosperous and disadvantaged local jurisdictions, it also poses the risk of excluding noncitizen immigrants from the progressive project.

B. The City in Immigration Law

1. The Myth of Unimpeded Internal Migration

Given the almost exclusive focus on the nation-state as the only relevant legal institution in the immigration discourse, it is no surprise that most accounts of the city treat it simply as a geographic place where immigrants live. That cities are also political and legal entities often escapes notice. Even more interesting, however, is the non-legal manner in which the city is portrayed in the normative theoretical debate over immigration restrictions. Indeed, in this debate, the immigration literature has managed to create and perpetuate a puzzling myth: that in opposition to transnational migration, internal migration in liberal democratic nations such as the United States is largely unrestricted.

Consider, for instance, the foundation of Michael Walzer's theoretical justification for a nation-state's right to regulate transnational migration.⁶¹ Like other scholars who have wrestled with the concept of a national community,⁶² Walzer admits early on that "few of us have any direct experience of what a country is or what it means to be a member . . . we understand it best when we compare it to other, smaller associations whose compass we can more easily grasp," such as the "neighborhood."⁶³

Nevertheless, although Walzer invokes the neighborhood, his account largely overlooks consider the complex legal regime that regulates how neighborhoods are constructed and maintained. As Walzer asserts, the neighborhood is a place without any formal admissions criteria and as such, can be understood as a "random association, 'not a selection, but rather a specimen of life as a whole.'"⁶⁴ To be fair, Walzer admits that while "strangers" cannot be formally admitted or excluded, they can be welcomed or not welcomed. Moreover, he briefly notes the role of municipal zoning in maintaining class segregation. Nevertheless, he posits that as a formal matter, neighborhoods are essentially open institutions that present no significant obstacle to inter-local mobility.⁶⁵

⁶⁰ See Nathan Glazer, Conclusion, in Clamor at the Gates 311, 314 (Nathan Glazer ed. 1985) (expressing concern that "at some point it would seem immigration must affect the opportunities of earlier minorities with longer established and more legitimate claims on American polity").

⁶¹ Other immigration scholars have also invoked the myth of unimpeded internal migration as well. See Joseph Carens, Aliens and Citizenship: the Case for Open Borders, in Theorizing Citizenship 229, 245 (Ronald Beiner ed., 1994); Brian Barry, Quest for Consistency: A Sceptical View, in Free Movement 279, 284 (Brian Barry et al. eds., 1992).

⁶² See Benedict Anderson, Imagined Communities 6 (2d ed. 1991) (arguing that the modern nation is best understood as an "imagined political community — and imagined as both inherently limited and sovereign").

⁶³ Michael Walzer, Spheres of Justice 35 – 36 (1984).

⁶⁴ See id. at 37

⁶⁵ See id. at 36 - 37

Construing the neighborhood in this manner, Walzer's defense of a state's ability to restrict, control, and regulate immigration essentially becomes a defense of his vision of localism. Rejecting claims that unimpeded immigration limits the development of the "patriotic sentiments" that make communal cohesion possible, Walzer contends that open borders would actually lead to the opposite — an intense and undesirable surge in localist sentiment and regional fragmentation. As he explains:

Neighborhoods can be open only if countries are at least potentially closed. Only if states make a selection among would-be members and guarantee the loyalty, security, and welfare of the individuals it selects, can local communities take shape as 'indifferent' associations determined solely by personal preference and market capacity. . . . To tear down the walls of the state is not . . . to create a world without walls, but rather to create a thousand petty fortresses.⁶⁶

In this defense of localism, however, Walzer's argument actually oscillates between two competing visions of local communities. On the one hand, local communities are worth protecting because they are a legally unrestricted aggregation of strangers. On the other hand, the fear that open borders on a national level will result in "a thousand petty fortresses" suggest that local communities are already empowered with the legal authority to exclude "undesirable" residents. Yet the foundation for Walzer's claim that neighborhoods are worth protecting is because they are not entitled to restrict entry through legal mechanisms.

Walzer does not wrestle with the latent contradictions in his theoretical model. Indeed, one can argue that through the use of particular labels, Walzer avoids this legal conflict altogether: he uses "neighborhood" — a geographic space that lacks any positive legal identity — when referring to what needs to be protected and only switches to talking about "cities" when discussing the dangers of internal fragmentation.⁶⁷ Therefore, even while using local communities as an analytical model for understanding national immigration policy, Walzer and others in the normative immigration literature continue to reify the invisibility of the city as a legal concept by continuing to overlook the role that local government law plays in forming and organizing such communities.

2. Immigration Federalism and the Conflation of State and Local Governments

For some immigration scholars, there is the growing recognition that the "local" is more than just a geographic place. Rather, under a broad field of inquiry known as "immigration federalism," these scholars recognize that local communities are legal and political institutions and have begun to examine policies instituted by state and local government that affect the lives of immigrants.

The legal inquiry into the role of state and local governments under the rubric of immigration federalism arose predominantly in response to two major legal developments, both of which occurred in 1996. The first was the passage of the Welfare Reform Act, which rendered legal

⁶⁶ *Id.* at 38 – 39.

⁶⁷ *See id.* at 38.

immigrants without citizenship ineligible for several federal benefit programs⁶⁸ and authorized the state to provide or deny state benefits to noncitizen immigrants.⁶⁹ The second was the passage of the 1996 Immigration Reform Act, which authorized, but did not require, state and local governments to enter into cooperative arrangements with the federal government to enforce federal immigration laws⁷⁰ while, at the same time, invalidating local government policies that prohibit employees from cooperating with federal immigration officials.⁷¹

Because contemporary immigration scholars perceive the increasing role of state and local governments as a radical departure from traditional immigration jurisprudence, the articles in this field have predominately focused on the legality and desirability of devolving the federal government's immigration powers.⁷² Nevertheless, although the recent scholarship on immigration federalism has pushed immigration scholars to consider state and local governments in immigration matters, these inquiries have yet to fully consider the body of local government law.

Indeed, it appears that most immigration scholars continue to conflate state and local governments without acknowledging the unique role of local governments relative to the state. This is slightly surprising because one of the legal developments that prompted this course of inquiry — the 1996 reform to the Immigration Act that allowed local entities to enter into cooperative contractual agreements with the federal government to enforce federal immigration laws — specifically recognizes the separate and possibly divergent interest of state and local entities. The provision allowed local institutions to negotiate and contract directly with the federal government irrespective of the views of the state within which it is located. For example, whereas neither the State of California nor the City of Los Angeles have seen fit to enter into such an agreement with federal immigration authorities, the County of Los Angeles agreed to a cooperative arrangement and independently negotiated the specific terms its enforcement would entail.⁷³ That local institutions may act independent from, and possibly in contrast with, the

⁶⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 §§ 400 – 451, 110 Stat. 2105, 2260-76 (codified in section 8 of 42 U.S.C.). Certain benefits were restored to a small subset of immigrants in the following years. See, e.g., Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-5308, 111 Stat. 251, 597-603 (codified as amended in scattered sections of 8 U.S.C.) (restoring eligibility of some legal immigrants for Supplemental Security Income (SSI) benefits); Agricultural Research, Extension and Education Reform Act of 1998 §§ 503-504, 8 U.S.C. § 1612(a)(2)(A), (F) (restoring eligibility of some legal immigrants for Food Stamps).

⁶⁹ 8 U.S.C. § 1612(b)(1); id. § 1622(a); see also id. § 1632(a) (authorizing states to “deem” income and resources of immigrant sponsors as those of the sponsored immigrant in calculating eligibility); 8 U.S.C. § 1621(d) (authorizing states to provide benefits to illegal immigrants “only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility”).

⁷⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“Immigration Reform Act”), Pub.L. No. 104-208 § 113, 110 Stat. 3009 (1996) (codified in 8 U.S.C. § 1357(g)).

⁷¹ Id. at § 642; see also 8 U.S.C. § 1644 (Supp. V 1999) (prohibiting any restrictions on state or local government entity (without mentioning officials) from exchanging information with federal immigration agencies).

⁷² Compare, e.g., Peter J. Spiro, Learning to Live With Immigration Federalism, 29 **Conn. L. Rev.** 1627 (1997), with Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 **N.Y.U. L. Rev.** 493 (2001).

⁷³ See Linton Joaquin, L.A. County to Enter Limited MOU with ICE to Permit Immigration Enforcement at County Jail, **Immigration Rights Update**, Feb. 10, 2005, available at <http://www.nilc.org/immlawpolicy/arrestdet/ad085.htm>.

policy aims of the state as a whole have not been fully explored in the literature on immigration federalism.

3. The Normative Outlook of Immigration Law

I have argued that the failure of the local government literature to consider the legal construction of immigrants might be explained by the normative outlook of most local government scholars. In many ways, the corresponding absence of the city as a legal concept in the immigration literature could be understood this way as well.

So far, the most important issue in the immigration scholarship appears to be the difference between the legal status of noncitizen immigrants and naturalized or native citizens. Thus, the normative push of most immigration scholars relies on anti-discrimination grounds. Even while some have noted the decreasing significance of citizenship,⁷⁴ immigration scholars increasingly contend that the distinction between citizens and aliens should matter less in setting the social and economic rights of immigrants who reside within the nation.⁷⁵ Therefore, it can be argued that the tendency of most immigration scholars to neglect the relevance of local political boundaries or fail to distinguish the legal and political construction of local communities from that of the state is attributed to the fact that these distinctions do not directly factor into the fault lines that motivate the antidiscrimination push of this field of scholarship.

But municipal boundaries and local residency matter. Contrary to the myth that intra-national migration is unhindered, the existing structure of local government law plays a role in determining who lives where and the consequences of local residency. So, just as immigration scholars fixate on the uneven allocation of economic resources and opportunity across the globe in assessing the moral basis for immigration controls, the organization of our local spaces necessarily defines the future impact that contemporary immigration will ultimately have. Even in the immigration federalism debates, the consequences of residing in one locality as opposed to another makes a significant difference, especially with the increasing devolution of public services down to the local level. It means very little if states decide to provide certain services or benefits, such as education, to immigrant populations if they also allocate primary responsibility for those services to local governments. Whether one locality can or will provide such services ultimately hinges on the legal framework that allocates the state's resources among the communities themselves.

III. The Immigrant City as a Legal Concept

To understand and transcend both the invisibility of the immigrant city in the legal academic literature and the wide-spread belief that local communities have very little to do with immigration, we must examine the latent intersections between immigration and local government law in legal doctrine. We must consider not only how the development of

⁷⁴ See generally Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *Geo. Immigr. L.J.* 1 (1989).

⁷⁵ See, e.g., Aleinikoff, *supra* note 59, at 174 (arguing that “once an immigrant is admitted and takes up permanent residence in the United States, discrimination on the basis of alienage alone begin to appear arbitrary.”).

immigration law has excluded the city, but also identify the legal conceptualizations of the city that have both led to and are a result of this exclusion.

To demonstrate this requires us to push beyond the legal presumption that immigration is a purely federal issue. Thus, in Part III.A., I begin with a critical reexamination of this presumption. I find that the conventional account of federal exclusivity relies upon not only the doctrinal federalization of immigration law, but also the conceptual federalization of the immigrant population. Nevertheless, by focusing almost entirely on federal government's interest over immigration in describing the need for federal exclusivity, this account ignores how legal constructions of the "local" also play a large role in advancing the doctrinal exclusion of local governments from the immigration project.

Indeed, as I argue in Part III.B., immigration is now understood as a purely federal issue not only because of the strong federal interests, but also because of largely unexamined fears harbored by judges and policymakers at the federal, state, and even local level over the relationship between immigrants and local communities. In support of this, I identify three stylized models of the immigrant city, each of which corresponds with different and competing fears of the "local" in the immigration context: (1) the immigrant city as a threat to immigrants, (2) the immigrant city as a threat to the nation and the states, and (3) the immigrant city as a victim of immigration and national immigration policy. These models illustrate the conflicting anxieties about localism underlying the presumption of federal exclusivity. In other words, we have a hard time imagining how local governments can play a role with regard to immigration because, at a fundamental level, we do not trust the institutional capacity of local governments to do so without either trouncing upon the rights of immigrants, undermining the interest of the nation or the state, or being entirely overwhelmed by immigrants and immigration policy.

Uncovering the influence of these fears on the doctrinal divergence of immigration and local government law also allows us to entertain ways in which the immigrant city can be reimagined. If an identifiable set of legal developments arising under specific historical contexts lead to the proliferation of these models of the immigrant city, another set of legal developments, hopefully more conscious and considered in its approach, could uphold a competing model that imagines local communities as valuable partners in our immigration project. Thus, in Part III.C, I explain how understanding the immigrant city as a legal concept in this manner sets the groundwork for exploring possible alternative conceptualization of the immigrant city, which we will turn to in Part IV.

A. The Conventional Account: Doctrinal Divergence

The Constitution does not expressly delegate immigration powers to the federal government.⁷⁶ Nevertheless, it is now almost universally accepted that immigration is an exclusive federal

⁷⁶ Constitutional support for federal immigration powers is usually justified with respect to a combination of related delegated powers (The Commerce Clause, Naturalization Powers, The War Power, and the Migration and Importation Clause, Foreign Affairs Power), an appeal to inherent powers (national sovereignty), or with reference the construction and structure of the Constitution (necessity, government structure, and citizenship). *See Thomas Alexander Aleinikoff, et al., Immigration and Citizenship: Process and Policy* 185 – 95 (4th ed. 1998).

issue.⁷⁷ Indeed, one can hardly dispute the federal government's strong interest in immigration. Immigration implicates not only the sovereign integrity of our nation's geographic borders, but also the democratic integrity of our national polity.

The fact that immigration is an issue of national importance, however, does not necessarily explain the relative absence of any discussion of immigration from a local perspective. In contrast, federal involvement in domestic issues such as housing, transportation, and urban economic development has produced an immense body of literature focusing on the impact of federal policies on the organization of local communities. Rather, I suggest that the striking absence of such analysis results from two peculiar features of the development of contemporary immigration regulations: the federalization of immigration law and the federalization of the immigrant population. It is the operation of both of these processes that has led immigration to be conceived of as a national issue even when we are discussing its local impacts.

1. The Federalization of Immigration Law

For almost a century after this country's founding, state, local, and federal authorities all played a role in immigration. As Professor Neuman pointed out, in absence of federal restrictions on immigration the states enacted and local governments enforced⁷⁸ a variety of legislative measures regulating the immigration of convicts, paupers, the disabled, those suspected of carrying contagious diseases, and free blacks and slaves.⁷⁹ Moreover, aside from restrictions, all levels of government took steps to recruit immigrants⁸⁰ and assist in their settlement.⁸¹ The federal government enacted laws establishing minimum health and safety requirements for steamships carrying immigrants to our shores and sought to encourage settlement by providing federal land,⁸² while "in almost every state" and "supplemented by local associations in cities and towns for the same purpose," legislations were passed to establish "bureau[s] of immigration whose purpose is the inviting of immigration and assisting immigrants in the procuring of suitable homes."⁸³

⁷⁷ See Wishnie, *supra* note 72, at 494.

⁷⁸ Moreover, financial proceeds generated from local or state enforcement often went to fund local services. See *In re Ah Fong*, 1 F.Cas. 213 (1874) (describing a California bonding requirement that was "conditioned to indemnify and save harmless every county, city and county, town and city of the state" for any relief or support provided to immigrants); *City of New York v. Miln*, 36 U.S. 102, 105 (1837) (describing a state law that permitted the mayor of New York to impose a bond on arriving immigrants intended to "save harmless the mayor, &c., of the city of New York, and the overseers of the poor of the city, from all expenses of the maintenance of such person . . .").

⁷⁹ See generally, Gerald Neuman, *The Lost Century of Immigration Law*, 93 *Colum. L. Rev.* 1833 (1993).

⁸⁰ See **Bill Ong Hing, *Defining America through Immigration Policy*** 119 (2004)

⁸¹ For example, the State of New York established a Board of Commissioners on Immigration in 1847 to work with various immigrant aid groups and the city to protect recent immigrants from fraud, help ease them into life in New York City, and recommend policies regarding immigration. One of their accomplishments was the establishment of Castle Gardens, a welcoming facility that predated Ellis Island. See **Leonard Dinnerstein & David M Reimers, *Ethnic Americans: A History of Immigration*** 31 (1977, 1999).

⁸² See e.g., Act of February 22, 1847 ("Passenger Act"), 9 Stat. 127 (one of three bills regulating the condition of ships carrying immigrants); Homestead Act of 1862, 12 Stat. 392-394 (granting ownership of undeveloped land to applicants, including immigrants, willing to develop it).

⁸³ **Our Doors are Open and Immigrants Will be Welcomed: The South's Invitation to All, *The Atlanta Constitution***, Apr. 26, 1888, at 1.

In the latter half of the nineteenth century, however, immigration doctrinally evolved into an exclusive federal issue. Noting that immigration implicated federal concerns such as foreign affairs, international trade, sovereignty, and national security, the Supreme Court proclaimed that “the passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”⁸⁴ To be sure, this proclamation preceded any substantial federal involvement in immigration. But because this reallocation of power also led several state immigration statutes to be struck down, it prompted the federal government to step in to fill the legal void, which, for the most part, simply meant replicating many of the same restrictions that had since then been imposed by states and localities.⁸⁵

The irony of this federalization lies in the fact that although the Court justified federal exclusivity on the basis of the national and transnational interests involved in immigration, the federal government’s initial forays into this field revealed a solidly local outlook. Both the renegotiation of the Burlingame Treaty with China in 1880 and the Chinese Exclusion Act that followed were largely based on the federal government’s distress at the local impact of immigration.⁸⁶ The subsequent adoption of two of the oldest immigration restrictions — the exclusion of those likely to become a public charge and the deportation of immigrant convicts — transformed state and local regulations concerning immigrant paupers and local criminal activity into a federal immigration restriction long before the federal government began to play an active role in providing welfare services to indigent residents or regulating local criminal activities.⁸⁷ Indeed, even the very first restrictive federal immigration statute, the Page Law of 1875 prohibiting the entry of Chinese women for “lewd and immoral purposes,” focused primarily on the preservation of the traditional family structures — what many consider to be “the quintessential symbol of localism.”⁸⁸

Moreover, despite the jurisprudential federalization of immigration law in the late nineteenth century, states and localities continued to enact de facto immigration regulations. They imposed restrictions on the ability of immigrants to own land,⁸⁹ work on public projects,⁹⁰ operate certain

⁸⁴ Chy Lung, 92 U.S. at 280.

⁸⁵ See **Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control In America*** 69 (2002) (noting that federal regulations “essentially nationalized state policies governing European immigration that had been struck down by the Court.”)

⁸⁶ Unlike the original Burlingame Treaty of 1868, 16 Stat. 793, T.S. No. 48, the revision added a provision that allowed the United States to regulate, limit, or suspend (but not prohibit) Chinese immigration if it “affects or threatens to affect the interests . . . of any locality within the territory thereof.” Burlingame Treaty of 1880, 22 Stat. 826, T.S. No. 49. The Chinese Exclusion Act of 1882 appeared to have invoked this renegotiated clause by declaring that exclusion was necessary because “the coming of Chinese laborers to this country endanger[ed] the good order of certain localities within the territory” of the United States. Ch. 126, 22 Stat. 58, preamble.

⁸⁷ See Neuman, supra note 79, at 1897 (“[t]he issues of crime, poverty and disease among immigrants were treated as matters of legitimate local concern. It was not until 1876 . . . that the Supreme Court puffed them up into foreign policy questions.”)

⁸⁸ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 647 (2005); see also id. at 634. Moreover, the initial supporters of this bill in Congress were primarily concerned about protecting specific local communities: “Chinese women . . . are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of these localities.” S. 971, 1188 H.R. 1588, pp. 3 – 4, reprinted in **E. P. Hutchinson, *Legislative History of American Immigration Policy 1798 – 1965***, at 65 (1981).

⁸⁹ Terrace v. Thompson, 263 U.S. 197 (1923).

⁹⁰ Crane v. New York, 239 U.S. 195 (1915).

business,⁹¹ or engage in trades that involved state resources⁹² — all of which required the Supreme Court to draw and revise countless jurisprudential lines and rebalance myriad competing interests in order to reconcile state and local police powers with the exclusive plenary power of the federal government over immigration, with no clear rule in sight. As a result, in recent years states and localities have continued to use local laws to influence the flow and incorporation of immigrant populations into their jurisdictions. The English-only movement and Proposition 187 are some of the most cited examples of anti-immigrant activities by sub-national governments.⁹³ Others, such as the efforts by some local communities to pass and enforce housing code regulations in response to the overcrowded living conditions of immigrant households and anti-loitering provisions to control or outlaw the congregation of immigrant day-laborers, are also examples of local regulatory activities that are intended as local immigration restrictions.⁹⁴

These accounts of local involvement in immigration, however, are for the most part but a footnote in the overarching narrative. Immigration law is almost universally considered a distinctly federal affair involving federal interests and national concerns. As such, the presumption of federal exclusivity tends to render the entire subject of immigration uniquely separate from local issues or local governments.

2. The Federalization of the Immigrant Population

The presumption that immigration laws are in the exclusive province of the federal government goes far in maintaining the federal/local divide with regard to immigration. But, as I noted above, it does not fully account for the almost exclusive federal orientation endemic in the contemporary immigration debates. Therefore, to excavate the reason for this peculiarity requires us to delve deeper into the evolution of contemporary immigration law — beyond the fact that immigration law was federalized, to the corresponding fact that, in many ways, the immigrants themselves were as well.

What this means is that not only do we think of immigration as a federal issue, but we also tend to think of immigrants as a federal, and ultimately hypothetical, population. Exclusionary immigration controls that regulate who may enter this country and the conditions upon which they may remain have worked to conceptually remap the nation's boundaries: instead of being limited to the geographic boundaries of this country, it now appears to be drawn around the individual immigrants themselves. As Professor Ngai suggests, it is as if the “nation's borders (the point of exclusion) collaps[ed] into and bec[ame] indistinguishable from the inner (the space of inclusion).”⁹⁵ Conceptually, as a result, where an immigrant resides, a pocket of federal jurisdiction is thought to exist.

⁹¹ *Clarke v. Deckebach* 274 U.S. 392 (1927).

⁹² *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

⁹³ See Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of the Equal Protection Doctrine*, 42 *UCLA L. Rev.* 1425, 1445 (1995); Dennis Baron, *The English-Only Question: An Official Language for Americans?* 179 (1992)

⁹⁴ See *supra* TAN 40- 41.

⁹⁵ Ngai, *supra* note 27, at 63.

Moreover, the structure of federal enforcement now primarily relies on a system of federal classification that “discriminates, surveys, and produces immigrant identities.”⁹⁶ Multiple and malleable immigrant statuses are the foundation of our immigration regime, and the flexible partition between legality and illegality has given the federal government substantial control over the political, social, and cultural identity of immigrants in this country.⁹⁷ Therefore, just as the federalization of immigration law conceptually removed immigration from local government scholar’s field of view, the federalization of immigrants rendered the immigrants themselves conceptually and, in the case of most illegal immigrations, literally invisible in the local spaces in which they reside.

Even now, the federalization of immigrants plays a significant role in distorting traditional debates over local issues when immigrants are involved. When immigrants overcrowd inadequate housing or residents flee a community experiencing an immigrant influx, too often the traditional local government concerns about affordable housing and the propensity of existing local government laws to promote metropolitan sprawl are cast aside to focus on the federal immigration policies that sanctioned, or failed to restrict, the immigrant’s entry into this country in the first place.⁹⁸ When immigrant residents burden local services, questions regarding the funding structure are frequently neglected to concentrate on the lack of federal support for “its” population.⁹⁹ When immigrants deviate from local community norms by committing crimes that are largely defined by state and local governments, the most pressing concern is too often not how they will be punished or rehabilitated pursuant to local laws, or how local policies can be adopted to make our communities safer, but whether their actions constitute cause for deportation.¹⁰⁰ Indeed, even when the cities erupt in violence as they did during the Los Angeles riots of 1992, the presence of immigrants in the midst of this chaos lead many to demand a moratorium on future immigration instead of focusing on the concentration of poverty, racial tensions, and economic dislocation that the current local legal framework has engendered.¹⁰¹

B. Three Models of the Immigrant City

Thus far, I have described the conventional account of immigration and how this account primarily relies on the federal interests to justify the presumption federal exclusivity. What has yet to be determined is whether this presumption is not only a result of interests from above, but is also influenced by concerns from below.

⁹⁶ Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* 19 (1996).

⁹⁷ See Susan Bibler Coutin, *Legalizing Moves: Salvadoran Immigrants’ Struggle for U.S. Residency* 10 – 11 (1999).

⁹⁸ See, e.g., Charisse Jones, *Crowded Houses Gaining Attention in Suburbs*, *USA Today*, Jan. 31, 2006, at A5 (describing how anger over immigration is being played out through the issue of overcrowded housing in many communities); *Blaming Immigrants*, *N.Y. Times*, Oct. 14, 2000, at A18 (describing a campaign by Federation for American Immigration Reform blaming immigration for traffic congestion and suburban sprawl).

⁹⁹ See Peter Skerry, *Many borders to cross: is immigration the exclusive responsibility of the federal government?*, *Publius*, June 22, 1995, at 71; see also *infra* TAN 202 -205.

¹⁰⁰ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and Limited Scope of Proposed Reforms*, 113 *Harv. L. Rev.* 1936, 1949 – 50 (2000).

¹⁰¹ See Jack Miles, *Blacks vs. Browns*, *Atlantic Monthly*, October 1992 (vol. 270, issue 4) at 41; Otis L. Graham Jr. & Roy Beck, *To Help Inner City, Cut Flow of Immigrants*, *L.A. Times*, May 19, 1992, at B7; Edward N. Luttwak, *The Riots: Underclass vs. Immigrants*, *NY Times*, May 15, 1992, at A29.

This section argues that although exclusive federal power over immigration is usually justified on the grounds that immigration is “a national matter[] . . . intrusted [sic] to the government of the Union,”¹⁰² concerns about “local matters” also play a substantial role in buttressing the presumption of federal exclusivity. Indeed, I find traces of three competing “models” of the immigrant city in judicial, legislative, and political developments that have contributed to our contemporary understanding of the issue of immigration. Moreover, although these models adhere to conflicting concerns about the immigrant city, they are oriented toward the same result: disengaging the city from issues of immigration and disentangling the immigrant from the local communities in which they reside.

1. The Immigrant City as a Threat to Immigrants

For those concerned about the rights of immigrants, the common wisdom is that local governments are especially threatening to immigrant residents. More so than the nation as a whole, local communities are regarded as hotbeds of intense xenophobia that are structurally inclined to adopt policies that discriminate against immigrant minorities in their midst.¹⁰³ As this section demonstrates, one can discern this view of the immigrant city in three of the most prominent doctrinal pillars of contemporary immigration law: the plenary power doctrine, Yick Wo, and the political function doctrine.

On the one hand, this fear of local oppression arises from a general distrust of municipal power.¹⁰⁴ In these cases, we see reoccurring concerns about the constitutional boundaries that restrain state and local power. On the other hand, the view that immigrants are particularly susceptible to local discrimination has also led jurists to encourage the very condition by which immigrants are made susceptible to political oppression at the hands of a local majority. In the name of protecting immigrants, jurists have advanced the assumption that the legal identity of immigrants is largely defined by the relationship between the United States and the immigrant’s country of origin. Although such an orientation provides a measure of federal protection for immigrants facing local oppression, it also pushes the immigrant population away from being seen as a part of the local communities within which they reside and towards being understood as federal wards under the direct and exclusive charge of the federal government.

a. The Plenary Power Doctrine. — No doctrine dominates the jurisprudential reasoning of immigration law more than the plenary power doctrine. At the same time, it is also one of the most heavily criticized doctrines of constitutional jurisprudence.¹⁰⁵ As the doctrine arose from

¹⁰² Chae Chan Ping v. U.S., 130 U.S. 581, 606 (1889).

¹⁰³ See Nueman, supra note 93, at 1437 – 38 (describing “several reasons for special concern about state, as opposed to federal, propensities to oppress aliens,” especially in particular local communities within those states); Wishnie, supra note 72, at 552 – 59.

¹⁰⁴ This fear of the local is, of course, neither new nor confined to the immigration context. Arguments against the decentralization of political power to local communities have long rested on the ground that such small-scale institutions are more likely to foster majoritarian factions that “concert and execute their plan of oppression . . . [and] invade the rights of other citizens.” **Federalist No. 10**, at 83 (James Madison) (Clinton Rossiter ed., 1961); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469 (Scalia, J., concurring) (“[R]acial discrimination against any group finds a more ready expression at the state and local than at the federal level.”).

¹⁰⁵ See Wishnie, supra note 72, at 503 (“The plenary power doctrine has suffered withering criticism as a shameful and racist relic.”).

disputes about the treatment of immigrants at the local level, it is worthwhile to consider how it influenced, and was influenced by, concerns about the immigrant city.

Indeed, what is striking about the early plenary power cases is how hostile the courts were to decentralized power. Consider, for example, the two cases that solidified the federal government's plenary power over immigration vis-à-vis state and local governments: Henderson v. Mayor of New York¹⁰⁶ and Chy Lung v. Freeman.¹⁰⁷ In Henderson, the Court was asked to review a uniform head tax levied against immigrants to compensate for the fiscal and social strain of supporting immigrant paupers.¹⁰⁸ In Chy Lung, the Court was presented with a similar local effort to seek payment from immigrants — a California statute that granted local customs officials broad discretionary power to demand bond or payment for landing immigrant passengers that are deemed, among other things, “likely to become a public charge, . . . or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman.”¹⁰⁹ Decided in the same term, the Supreme Court struck down both statutes for interfering with the federal government's exclusive power over immigration and foreign affairs. Nevertheless, in doing so, the Court expressed strong reservations about local power and its effects on immigrants and the interests of the nation as a whole.

First, the Court was concerned about the potential for abuse when local officials are granted broad discretionary powers. In Chy Lung, the Court criticized the state statute for “plac[ing] in the hands of a single man the power to prevent entirely vessels engaged in foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.”¹¹⁰ As the Court explained, “individual foreigners, however, distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. . . . and so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a power nation, or the loss of an equally powerful friend.”¹¹¹ Moreover, looking at the enforcement structure, the Court concluded that “[i]ts manifest purpose . . . is, not to obtain indemnity, but money.”¹¹² To be sure, in these cases, the “local” officials that the Court chastised were officials of the state and not local governments. Nevertheless, as we will see, the language employed by the Court here would be adopted and echoed even more forcefully with respect to local government officials in Yick Wo v. Hopkins.

Second, the doctrine also relied on viewing the immigrant population as an extension of the foreign sovereigns from which they immigrated. Immigrant rights were therefore understood as arising less from domestic constitutional protections and more from diplomatic obligations. As the Court explained in Henderson, striking down the state's restriction vindicated “the protection which the foreigner has a right to expect from the Federal government when he lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government.”¹¹³ In other words, the Court was concerned that although

¹⁰⁶ 92 U.S. 259 (1875).

¹⁰⁷ 92 U.S. 275 (1875).

¹⁰⁸ 92 U.S. at 266.

¹⁰⁹ 92 U.S. at 276.

¹¹⁰ Id. at 278.

¹¹¹ Id. at 279.

¹¹² Id. at 281.

¹¹³ 92 U.S. 259, 273 - 74.

aliens “have some virtual representation in Washington by means of the foreign affairs establishment,” neither state nor local governments are institutionally accountable in the same manner.¹¹⁴

Of course, as much as these cases federalized the issue of immigration, they did not overtly dismiss the sphere of local police powers over immigrants. The Supreme Court did not directly question the ability of state and local governments to exclude paupers, lunatics, and those carrying contagious diseases from their jurisdiction in the interest of local self-preservation.¹¹⁵ But the court’s decision also left state and local governments with very little room to exercise the police powers that they might have possessed. By questioning the ability of local officials to make the determination of whether an immigrant is to be categorized as an individual who can be regulated by local police powers, as the Court did with respect to the procedure outlined in Chy Lung, while at the same time questioning a state’s ability to charge a uniform fee across the board to compensate for the inevitable entry of such immigrants, as the Court did in Henderson, the Court left very little room for any residual police powers to operate.

More importantly, these early plenary power cases reveal an internal tension in this model of the immigrant city. If one of the underlying motivations of the plenary power decisions was the Court’s desire to protect immigrants from local oppression, this doctrine also simultaneously undermines immigrant participation in local politics and empowerment through the exercise of local power rather than this nation’s “foreign affairs establishment.” Thus, although these cases secured temporary relief for immigrants, it also pushed the immigrant population away from being viewed as component parts of the local political community and toward their construction as guests under the care of the federal government. It is therefore no surprise that the ascension of the plenary power doctrine and the increasing understanding of immigration as an issue entwined with foreign affairs coincided with the precipitous decline of alien suffrage in the United States.¹¹⁶

¹¹⁴ See Neuman, *supra* note 93, at 1436–37.

¹¹⁵ See Henderson, 92 U.S. at 275; Chy Lung, 92 U.S. at 280.

¹¹⁶ Jamin Raskin, Legal Aliens, Local Citizens: The Historic, Constitutional, and Theoretical Meanings of Alien Suffrage, 141 *U. Pa. L. Rev.* 1391, 1415 - 16 (1993).

b. Yick Wo v. Hopkins. — A similar distrust of local decentralization can also be seen in the well-known case of Yick Wo v. Hopkins.¹¹⁷ As any student of constitutional law would likely recount, Yick Wo is not only one of the first cases to apply the Equal Protection Clause of the Fourteenth Amendment to governmental acts of racial discrimination, but it also set the legal precedent for proving such a violation when laws that are neutral on its face are applied by government officials in a discriminatory manner. As the Court held, although the ordinance passed by the City of San Francisco in this case merely required all laundry businesses that operated out of wooden facilities to apply for a license in order to continue their operations, the fact that almost all non-Chinese applicants were able to secure a license while Chinese applicants were almost uniformly denied constituted an application of law “with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of laws” secured by the Fourteenth Amendment.¹¹⁸

For immigration scholars, Yick Wo also established an equally significant precedent with regard to the constitutional status of immigrant aliens. Noting that the Fourteenth Amendment conspicuously referred to “peoples” and not “citizens,” the Court proclaimed that its “provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”¹¹⁹

These two lines of argument dominate much of the discussion of Yick Wo. Nevertheless, this conventional analysis overlooks a substantial portion of the opinion regarding the municipal power of the City of San Francisco to enact or implement its ordinance. Indeed, the Supreme Court in Yick Wo was not merely troubled by the fact that the City of San Francisco applied its regulatory regime with an “evil eye and unequal hand” against its Chinese residents. The Court was also concerned about the governing principles regulating “the quasi legislative acts of inferior municipal bodies” and the responsibility of “judicial tribunals [to] pronounce upon the reasonableness and consequent validity of their by-laws.”¹²⁰

That municipal power was a central focus of the Court’s analysis is hardly surprising when one takes note of the manner in which this case was presented to the Court. The primary arguments did not focus on whether aliens were entitled to the protections of the Fourteenth Amendment. In fact, notwithstanding the Court’s memorable pronouncement that the Fourteenth Amendment protects aliens and native citizens alike, the City of San Francisco never asserted otherwise. Rather, the arguments centered on the powers delegated by the California Constitution to the city. Whereas counsel for the city described San Francisco as an “Imperial City” and repeatedly asserted that California’s Home Rule provisions imbued the city with “general legislative power” equal to that of the state and which “ordinary municipalities did not possess,”¹²¹ the petitioner’s brief began with the assertion that “it is against natural right to make [operating laundries] dependent upon the arbitrary will of the [city’s] Board of Supervisors” and cited Dillon’s Treatise on Municipal Corporations to argue that municipalities do not have the power to define

¹¹⁷ 118 U.S. 356 (1886).

¹¹⁸ Id. at 373.

¹¹⁹ Id. at 369.

¹²⁰ 118 U.S. at 371 (emphasis added).

¹²¹ Brief of the City of San Francisco at *15 – 16, Yick Wo, 118 U.S. 356.

what constitutes a nuisance through local legislation.¹²² In other words, although the race and alienage of the Chinese laundrymen were important to the determination of the case, the general municipal powers of the city was also a central issue in the case.

It is therefore fitting that in the sections preceding the Supreme Court's penultimate conclusion about the constitutionality of San Francisco's enforcement of its local ordinance, the Court's discussion was focused predominately on the scope of the city's power to regulate local laundries. Invoking two state court cases, neither of which implicated the Fourteenth Amendment nor involved any allegations of racial or alienage discrimination, Justice Matthews cautioned that courts must be wary of situations in which an "ordinance, passed under grants of power [from the state] . . . is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the [state] legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority."¹²³ Therefore, just as it was deemed unreasonable for the City of Cincinnati in State v. Cincinnati Gas-Light & Coke Co. to fix the price of gas to force a local gas company to submit to an unfair appraisal of their work,¹²⁴ or for the City of Baltimore in City of Baltimore v. Radecke to give the mayor the power to grant and revoke licenses for the use of steam-engines within the city,¹²⁵ the Court explained that "ordinance[s] which clothe[] a single individual" with the discretion to permit or exclude a particular business, "hardly falls within the domain of law, and [the courts] are constrained to pronounce it inoperative and void."¹²⁶

It is interesting to note that although the Court's discussion repeatedly questioned the legitimacy of imbuing an individual with "personal and arbitrary power," in none of these cases did the municipal governments delegate administrative power to anyone other than an elected official. The "individuals" that the Court spoke of were none other than the municipal officials involved in either drafting (the Board of Supervisors in Yick Wo and the City Council in Cincinnati Gas-Light & coke Co.) or enforcing (The Mayor in City of Baltimore) the ordinances in question. In this manner, the Court's critique replicates much of the same distrust of local discretion set forth in the Court's earlier plenary power cases. Yet, instead of confining its criticism to administrative officials charged with the enforcement of a particular statute or ordinance, it extends the same critique to government officials that constitute the core of a locality's democratic institution.

This perspective also casts light on the Court's citation to Dillon's Treatise on Municipal Corporations at the beginning of its constitutional analysis. Notwithstanding the fact that the city of San Francisco claimed to possess broad and inherent powers to regulate businesses and local activity to serve the public interest — an interpretation that received the support of the California Supreme Court¹²⁷ — the Court in this case started with Dillon's doctrinal presumption that "every [local] by-law must be reasonable, not inconstant with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land,

¹²² Brief of Appellant-Plaintiff at *3 - 5, Yick Wo, 118 U.S. 356.

¹²³ 118 U.S. at 372.

¹²⁴ 18 Ohio St. 262, 300 (1868).

¹²⁵ 49 Md. 217 (1878).

¹²⁶ 118 U.S. at 372.

¹²⁷ See In re Yick Wo, 68 Cal. 294, 297 – 98 (1885).

particularly those having relation to the liberty of the subject, or the rights of private property.”¹²⁸ It is well known that Dillon’s fear of municipal power was founded primarily upon his conviction that local governments often distort the workings of the private market by participating in the private sector or enacting municipal regulations to favor certain forms of private activity over others.¹²⁹ Similarly, the Court’s analysis in this case evinces a similar sentiment. As the Court explained, the potential for abuse lies in the fact that municipal corporations

may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest on comment upon the injustice capable of being wrought under cover of such a power.¹³⁰

In the end, because the actual administration of the ordinance sufficiently demonstrated irrational discrimination against Chinese residents, the Supreme Court found that it did not need to pass upon the validity of the San Francisco ordinance in the abstract. There was no indication, however, that the exceptional circumstances in this case negated the underlying basis for its concern. Indeed, the Court never disclaimed its municipal power analysis as being irrelevant. In contrast, it simply held that because of the facts presented in this case, it needs not “reason from the probable to the actual” in deciding the validity of the statute. In other words, in addition to being a case about protecting racial minorities or immigrant rights, Yick Wo also appears to be an affirmation of the limited and constrained role of local governments in its vision of the constitutional order.¹³¹

I do not mean to argue that the conventional understanding of Yick Wo is incorrect. I do suggest, however, that it may be incomplete. I present this alternative reading of Yick Wo as a challenge to the conventional belief that alienage cases in immigration doctrine turn entirely on the Court’s assessment of the position of noncitizen aliens relative to citizens. Its perception of the appropriate scope of local government powers also affects how it weighed the legitimacy of a city’s regulatory activity against immigrant aliens. In other words, what was at stake was not simply immigrants rights, but also the boundaries of local power with respect to immigrants in our constitutional order.

c. Discrete and Insular Minority and the Political Function Doctrine. — As we have seen, concerns about the immigrant city as a threat to immigrants have, on the one hand, compelled the courts to construe immigrants as a federal population in order to justify their protection from local oppression while, on the other hand, pushed for further federalization of alienage regulations because of fears that immigrants are susceptible to local oppression. In seeking to

¹²⁸ Id. at 371.

¹²⁹ See Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057, 1111 – 12 (1980).

¹³⁰ 118 U.S. at 373. But see Yick Wo, 68 Cal. at 298 – 99.

¹³¹ But see Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (deferring to the City of Cincinnati’s decision to prohibit aliens from acquiring a license to operate pool and billiard halls).

protect the immigrant in this manner, however, the Court seems to promote the very conditions that generated the need for judicial intervention in the first place. Here, we see traces of this development in the contemporary intersection of the plenary power doctrine and Yick Wo: the political function doctrine.

The political function doctrine arose from concerns about local discrimination against noncitizen immigrants, but eventually evolved into a general statement on the membership of immigrants in local communities. Following the principles outlined in Yick Wo, the Court had declared that because of their inability to participate in the political process, “[a]liens as a class are a prime example of a ‘discrete and insular’ minority” and therefore regulations discriminating against them are subject to “close judicial scrutiny.”¹³² At the same time, adopting the perspective that immigrants are inherently a federal population, the federal status of immigrants with regard to the national polity became all the more important in determining the membership of immigrants in the local political community. Thus, although most alienage discrimination at the local level is subject to strict scrutiny, the public function doctrine carved out an exception for discrimination that is “employed in defining [the] ‘political community.’”¹³³

The basic premise of the public function doctrine is that “persons holding state elective or important nonelective executive, legislative, and judicial positions . . . [who] perform functions that go to the heart of representative government” can be required by state and local governments to have federal citizenship.¹³⁴ As a result, the central question in these cases is whether the position at issue “go[es] to the heart of representative government.” Without an apparent bright-line rule, the Court has applied this exception to teachers,¹³⁵ policemen,¹³⁶ and probation officers,¹³⁷ but not to lawyers,¹³⁸ notary publics,¹³⁹ or general civil service positions.¹⁴⁰

To be sure, our federalist system gives states and localities broad discretion to define the membership of its polity without regard to membership in the national community.¹⁴¹ Nevertheless, instead of justifying the political function doctrine on the ground that states and localities have discretion in this regard, the Court’s rationale continued to construe immigrants as a federal population by relying on the federal consequences of alienage and applying it across the

¹³² Graham v. Richardson, 403 U.S. 365, 372 (1971)

¹³³ Sugarman v. Dougall, 413 U.S. 634, 648 (1973). This did not need to have been the case. As Professor Aleinikoff noted, even when Justice Blackmun described immigrants as the quintessential discrete and insular minority in Graham, he also articulated another reason for striking down the state’s discriminatory statute — that immigrants “are indistinguishable from other residents of the state” and “the state can offer no legitimate reason for singling them out.” Aleinikoff, supra note 59, at 174.

¹³⁴ Sugarman, 413 U.S. at 647.

¹³⁵ 441 U.S. 68,

¹³⁶ 435 U.S. 291 (1978).

¹³⁷ 454 U.S. 432 (1982)

¹³⁸ 413 U.S. 717 (1973)

¹³⁹ 467 U.S. 216

¹⁴⁰ 413 U.S. 634

¹⁴¹ See, e.g., In Re Wehlitz 16 Wis. 443, 478 (1863) (arguing that “previous to the adoption of the constitution of the United States” and not surrendered afterwards, “every state had the undoubted right to confer upon whomsoever it pleased the character of a citizen, and to endow him with all its rights” (citing Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 405 (1856), superceded in part by United States Const. amend XIV). But see Saenz v. Roe, 526 U.S. 489, 504, 511 (1999) (holding that the Constitution restricts the ability of States to “select their citizens”).

board. As the Court explained, “[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition . . . Aliens are by definition those outside of this community.”¹⁴² As such, the federal definition of “aliens” with regard to their membership in the national community is here employed as the baseline for state and local governments as well.

Yet, by championing immigrant exclusion from the local political community, this doctrine tends toward a vision of local communities as those in which immigrants are not a part, and solidifies the role of the court as the final arbiter of the manner in which local communities can consider alienage when enacting local policies. Thus, by implicitly endorsing the exclusion of immigrants from the local polity, the Court entrenches the view of the immigrant city as an ever looming threat to immigrants at the same time it attempts to provide cities with a measure of institutional discretion.

2. The Immigrant City as a Threat to the Nation and the States

The model of the immigrant city as a threat to immigrants comports with the Madisonian view of local governments as vehicles for majoritarian oppression.¹⁴³ But if much of this concern arises from the political impotence of noncitizen immigrants, could local governments not also serve as a democratic tool by which their interest could be mobilized, represented, and put into action? Although local governments are often defended as conducive to democratic participation, when it comes to immigrant cities, these ideals are often contested. Indeed, the legal developments explored in this section reveal that immigrant political participation at the local level often raises fears that cities are too easily co-opted by immigrant interests. As a result, not only is the immigrant city perceived as a threat to the immigrants, but the immigrant city is also often simultaneously construed as a threat to the integrity and interests of the nation and its constitutive states.

The writings of DeTocqueville, which are often employed as a counterpoint to the Madisonian account, aptly illustrate this concern. On the one hand, DeTocqueville wrote strongly and passionately about the contributions of local governments.¹⁴⁴ On the other hand, his writing reveals a deep-seated concern about large city governments and their immigrant populations:

The lower orders which inhabit [America's largest] cities constitute a rabble even more formidable than the populace of European towns. They consist of free blacks . . . [and] a multitude of Europeans who have been driven to the shores of the New World by their misfortunes or their misconduct I look upon the size of certain American cities, and especially on the nature of their population, as a real danger which threatens the future security of the democratic republics of the New World; and I venture to predict that they will perish from this circumstance unless the Government succeeds in creating an armed force, which, while it remains under the control of the majority of the nation, will be independent of the town population, and able to repress its excesses.¹⁴⁵

¹⁴² Cabell v. Chavez-Salido, 454 U.S. 432, 440 – 41 (1982).

¹⁴³ See *supra* note 104.

¹⁴⁴ See generally, Alexis de Tocqueville, *Democracy in America Vol. I* (Henry Reeve trans., 1904).

¹⁴⁵ *Id.* at 356 - 57 n.1; see also Aristide R. Zolberg, *A Nation by Design* 125 – 26 (2006).

It is ironic that DeTocqueville, in a treatise espousing the importance of decentralized power and writing during a time when immigration regulations were largely in the hands of state and local governments, would anticipate the federalization of immigration and the mobilization of federal officials to police the urban immigrant population — predicting that “armed force,” accountable solely to the nation and not the local communities, “was to be the hope not only for city government but of the nation itself in face of the threat that comes from large cities.”¹⁴⁶

In some respect, the concerns that immigrants and cities would concert to frustrate the interests and goals of the nation and the states arise from the cultural heterogeneity of the immigrant city.¹⁴⁷ But this fear is also, more importantly, based on the legal framework of municipal governance and political decentralization in the United States. Instead of seeing the city as being controlled by native contingents bent on frustrating the rights and privileges of immigrants, however, this model posits just the opposite: immigrant cities are prone to being co-opted by immigrant interests, which in turn poses unique threats to national- and state-level policies.¹⁴⁸

Moreover, as we proceed in this section, we should take note of the degree to which state and local interests diverge. As we have seen, most accounts of the “local” do not distinguish between state and municipal governments. This section, however, reveals that this distinction is critical. In many instances, the states feel just as, if not more, threatened by their immigrant cities than the nation as a whole.

a. The Municipal Reform Movement and Local Political Participation. — For immigration and local government scholars, the decades surrounding the turn of the twentieth century were a pivotal era. Not only did this period mark one of the most significant and contentious influx of immigrants in American history, but it also witnessed a fundamental transformation of American society from an agrarian to a largely urbanized society.¹⁴⁹ America was becoming an immigrant country at the same time it was realizing that “the twentieth century city [would] be decisive of national destiny.”¹⁵⁰

At the same time commentators were beginning to realize the transformative impact of immigration and urbanization, there was also widespread alarm over these developments. More importantly, concerns about immigration and cities were essentially intertwined. Many believed that the physical and political ills of the American city were the result of its immigrant residents. Not surprisingly, advocates for municipal reform and immigration restrictions found a lot of

¹⁴⁶ William Anderson & Edward W. Weidner, *American City Government* 4 (revised ed., 1950).

¹⁴⁷ Jon C. Teaford, *The Twentieth-Century American City* 2 (2d ed., 1993) (“The jumble of immigrants who congregated in the cities, speaking foreign tongues, practicing strange customs, and adhering to alien religions appear[] to threaten the very unity of the nation.”).

¹⁴⁸ Josiah Strong, *The Twentieth Century City* 101 (1970) (1898) (“[Immigrants], as they come to us, are clay in the hands of the political potter. If they remain uninstructed as to good citizenship, and incapable of forming individual judgments concerning public questions, the boss will certainly rule the city when the city rules the nation.”).

¹⁴⁹ See generally Arthur Schlesinger, *The Rise of the City: 1878 – 1898* (1933).

¹⁵⁰ Strong, *supra* note 148, at 32; see also Delos F. Wilcox, *The American City: A Problem in Democracy* 22 (1911) (“The city problem is a national problem, and there is no excuse for indifference in regard to it on the part of any citizen.”).

common ground and often worked hand-in-hand: in cities like Boston, “many leaders of [municipal] reform were leaders of the Immigration Restriction League.”¹⁵¹

Indeed, the “political machines,” which for many signified the failings of city governments, were inextricably tied to the intellectual inaptitude or political deviance of the immigrant “masses.”¹⁵² Many municipal reformers who were theoretically committed to political decentralization were wary of the capacity that immigrants and their children, who made up the vast majority of the urban population, had for democratic self-rule. For example, Wilcox, who was at times a strong advocate of municipal power, cautiously warned of the corrupting influence of these foreign elements: “America’s condition is analogous to that of a club originally composed of more or less select class brought together by a common experience and a common intelligence for furtherance of certain great ends, but later well-nigh swamped by the influx of strangers with little notion of the original purposes of the club and meager training for membership in it.”¹⁵³ Rather than attributing the rise of machine politics to ignorance, other municipal reformers believed that immigrants were “deliberately vot[ing] in support of the theory that government is for the benefit of those who govern” and “stolidly submitting to the band of pirates who have cast its municipal institutions into the quicksand of corruption.”¹⁵⁴

As a result, at the same time municipal reformers were pushing for local governments to assume a more prominent role in American politics,¹⁵⁵ anti-immigrant forces joined up with municipal reformers to disentangle immigrant residents from local governments. Their goal was to depoliticize the city by removing politics from urban government and restructuring local governments into efficient administrative apparatuses, either through a government of independent boards and commissions that would govern at a distance from neighborhood-level demands and concerns, or a city-manager structure in which an executive would run the day-to-day affairs of the city without undue intrusion by the political process.¹⁵⁶ In each of these, the ultimate, and in many cases, intended effect was the disentanglement of immigrants and other “undesirable” municipal residents from the day-to-day operations of the city.¹⁵⁷

Although the municipal reform movement generated substantial interest among political and business elites in the Northeast, cities in the Southwestern states actually adopted municipal reform much more readily than their New England counterparts.¹⁵⁸ Political scientists and urban scholars have long debated why this regional variation occurred. The dominant “class theory” posits that municipal reform was largely a middle-class movement with support from local business elites.¹⁵⁹ Nevertheless, noting the largely inconclusive nature of these endeavors, some

¹⁵¹ Edward C. Banfield & James Q. Wilson, *City Politics* 141 (1963).

¹⁵² See Dinnerstein & Reimers, *supra* note 81, at 80.

¹⁵³ Wilcox, *supra* note 150, at 5 - 6.

¹⁵⁴ ___; see also Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 120 – 23 (2000) (describing resistance against alien suffrage on the ground that they “lack[ed] the judgment, knowledge, and commitment to American values necessary for salutary participation in elections,” “their apparent inclination toward radicalism,” and their support for political machines and “so-called boss rule.”).

¹⁵⁵ See generally, David Barron, *Reclaiming Home Rule*, 116 *Harv L. Rev.* 2255, 2277 – 2321 (2004).

¹⁵⁶ See e.g., Teaford, *supra* note 147, at 39.

¹⁵⁷ See Banfield, *supra* note 151, at 171 (“[municipal reform] appealed to a good many people as a convenient means of putting Catholics, the Irish, the Italians, the labor unions, and all other ‘underdogs’ in their places.”).

¹⁵⁸ See Amy Bridges, *Morning Glories: Municipal Reform in the Southwest* 3 (1997).

¹⁵⁹ See Amy Bridges & Richard Kronick, *Writing the Rules to Win the Game*, 34 *Urb. Aff. Rev.* 691, 692 (1999).

scholars have sought to find alternative explanations.¹⁶⁰ For example, Professor Bridges and Kronick point out that the success of the municipal reform movement in the Southern and Western states might be better explained by concurrent state efforts to disenfranchise immigrant and minority voters. In other words, “reformers were able to win where they could shape the electorate by disfranchising their opponents and were most successful where their opponents were weak at the polls.”¹⁶¹ In other words, the cities in which municipal reform was most successful were also ones in which the state stepped in to suppress, and therefore redefine, the local electorate.¹⁶²

That last point is worth repeating: legal reforms of local governments at the state level were crucial to the success of municipal reform in many communities because it shaped the local electorate in ways that made these structural reforms possible. Underlying this intrusion by the state was a fundamental distrust of local governments because they were perceived as being unduly and easily influenced by working-class minority and immigrant elements.¹⁶³

Moreover, in seeking to fix the city, the reform movement also drastically altered the institutional role of the city relative to its most needy and vulnerable residents. Notwithstanding the fact that in the beginning, a noteworthy faction in the municipal reform movement believed that machine politics “would disappear once the city itself provided the services currently offered by the boss,” the National Municipal League, which led the reform movement, “diagnosed municipal ills ‘as a problem of institutional structure and governmental machinery.’”¹⁶⁴ As a result, the reform model “not only endorsed political and administrative arrangements, but also a very limited sphere of local government.”¹⁶⁵

Even today, immigrant communities are wrestling with the effects of state mandated or state facilitated reform and its effect on immigrant representation in local governments. To be sure, a few municipalities currently allow immigrants to vote in specific or general local elections.¹⁶⁶ Nevertheless, other cities that have sought to join that group have been unable to secure state approval even after garnering local support for that proposition.¹⁶⁷ Moreover, studies have found that the municipal organization of local governments continues to have measurable effects on the political participation of immigrant groups who, having naturalized, are entitled to vote.¹⁶⁸

¹⁶⁰ See *id.* at 696.

¹⁶¹ *Id.* at 693.

¹⁶² See **Bridges**, *supra* note 158, at 66.

¹⁶³ It was no secret that in many states, literacy and educational requirements for suffrage were specifically targeted at Mexican immigrants, who were thought to be unfit to exercise the franchise. See **Bridges et al.**, *supra* note 159, at 698. Discrimination against Asian immigrants at the polls was more overt: in all of the 11 western states Asians were entirely forbidden to vote. See *id.*

¹⁶⁴ **Bridges**, *supra* note 158, at 8.

¹⁶⁵ *Id.*

¹⁶⁶ See **Raskin**, *supra* note 116, at 1465 & n.387.

¹⁶⁷ See **Matt Viser**, *Proposal Would Let Noncitizens Vote*, **Boston Globe**, Nov. 25, 2004, at 1 (noting that two cities in Massachusetts have voted to grant alien suffrage, but cannot implement it because the state has not granted their “home rule” petitions).

¹⁶⁸ See *e.g.*, **John Mollenkopf et al.**, *supra* note 14, at 36 (arguing that the different political structure of local government affect immigrant political incorporation).

b. City of Pasadena v. Charlesville. — The preceding section illustrates that notwithstanding the tendency of most immigration scholars to conflate state and local governments, the two often have divergent interests with regard to immigrants. It is therefore no surprise that concerns about municipal entanglements with immigrants would also arise as an important site of legal contention about the contours of municipal home rule in the following decades. In this vein, the California Supreme Court’s decision in City of Pasadena v. Charlesville¹⁶⁹ presents a fascinating look into how divergent interests between state and local governments can lead to incongruous results on related issues. As we see, even when cities are granted broad discretion to handle local issues, introducing immigrants into the judicial equation radically alters the balance.

In Charlesville, the City of Pasadena “petition[ed] for a writ of mandate to compel the respondent as city manager of the city . . . to sign a contract authorized by the board of directors of said city for the construction of a galvanized fence around the Allen reservoir, a property owned and used by said city as part of its municipally owned and operated water supply and distributive system.”¹⁷⁰ The city manager’s refusal to sign the contract was based upon his belief that it violated state law. First, he contends, the contract did not contain a specification of the “prevailing rate of per diem wages as required by the Public Wage Act of 1931,” and second, it failed to include “a provision forbidding the employment of noncitizen immigrants as provided by the Public Works Alien Employment Act of 1931.”¹⁷¹ The city does not dispute its noncompliance with these regulations. Rather, Pasadena argues that as a city with a “freeholder” charter (more commonly known as a “home rule” charter), it need not comply with the state’s public works requirement because the project was a “municipal affair.”¹⁷²

On its face, Charlesville presents a fairly straightforward legal question. It was well-accepted that municipalities were exempt from compliance with state laws with regard to municipal affairs. The only question was whether the exception applied.¹⁷³ From this perspective, there appears to be two ways that this case can be resolved. On the one hand, if one focuses on the nature of the project itself — the construction of a fence around a municipal water source — the municipal affairs exception seems appropriate. The city appears to be acting in its most private capacity: it was entering into a contract and paying with municipal funds to complete a project for the sole benefit of local residents. On the other hand, if one focuses on the manner by which the project was to be completed — through the use of laborers who may not be paid a prevailing wage or possess citizenship — there is a strong argument that Pasadena transgressed the boundaries of its municipal powers. Unlike the municipal project in question, the effect of its activities on wages and hiring cannot be easily confined to the boundaries of the municipality.

In theory, these two approaches are mutually exclusive. Moreover, they should dictate the same result with respect to both the prevailing wage and citizenship requirements. In a unanimous decision, however, the Charlesville court adopted analytical elements from both to reach different conclusions on the propriety of the city’s noncompliance. In doing so, the court’s

¹⁶⁹ 215 Cal. 384 (1932), overruled in part by Purdy and Fitzpatrick v. State, 71 Cal.2d 566, 585 – 86 (1969) (finding the state statute implicated in Charlesville unconstitutional).

¹⁷⁰ Id. at 387.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ See id.

reasoning exposed how legal regulations relating to immigrants often drastically affect court's conception of municipal power even when cities are granted significant local control over their affairs.

With respect to the prevailing wage requirement, the court focused almost entirely on the project itself to conclude that, notwithstanding any extra-municipal impacts the city's noncompliance may have on the state's labor market, its activity was a "municipal affair." As the court explained, all the component parts of the project were municipal affairs: "the improvement contemplated by the contract . . . [whose] sole purpose . . . is the construction of a wire fence around a reservoir which is part of the city's municipal system," "the control of [local] expenditure," and the "hiring of employees generally by the city to perform labor and services in connection with its municipal affairs and the payment of the city's funds for services rendered to the city by its employees in the administration of its municipal affairs" are all themselves municipal affairs.¹⁷⁴

In contrast, the court's analysis of noncitizen immigrant employment on municipal works took a dramatic about-turn. First, the court did not center its inquiry on the project itself. Instead, it focused more specifically on the city's actions by framing the legal question as one over whether "the employment of aliens on public works [was] one of local concern and a municipal affair."¹⁷⁵ Second, and most important, the court subverted its previous municipal affairs analysis by declaring that municipal property was essentially state property. It did this by redefining the state and all its "agencies" as trustees for the citizens of the state: "All public works and all public property in the state in a broad sense belong to all the people of the state. Whether the ownership or title thereof be in the state or in a municipality . . . such ownership and title are held in trust for the people of the state."¹⁷⁶ Having done so, the court was quick to conclude that the employment of noncitizen immigrants on municipal works implicated state sovereignty, and as such "constitute the subject-matter thereof of general state concern as distinguished from local or municipal affair."¹⁷⁷ Moreover, the court emphasized that as creatures of the state, municipalities had an obligation to protect municipal property qua state property: "since the property and funds of the state and its agencies, in a broad sense, belong to its citizens, it would seem to be a wise and beneficent state policy so to conduct its affairs that its funds be available to its citizens for services rendered on public works."¹⁷⁸

Note the court's conceptual moves here. When it was assumed that all the individuals involved were citizens, the court was willing to construe the city as essentially a private entity representing the interests of its residents. The introduction of noncitizen immigrants, however, drastically changed the overall equation. Because, from the court's perspective, the most significant dichotomy was no longer between the city and the state, but between citizens and noncitizens, the court's earlier municipal affairs analysis did not factor into its assessment of noncitizen employment at all. The role of the city also changed accordingly. It was construed as an organ of the state, and therefore its property and funds were essentially state resources held in

¹⁷⁴ Id. at 390

¹⁷⁵ Id. at 398 (emphasis added).

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id. at 399.

trust. The independent municipal ownership that factored so prominently in the court's earlier assessment no longer remained. In short, as the immigrant gained in legal prominence, the city — as a legal, political, or economic entity — seemed to disappear entirely from view.

c. Local Sanctuary Policies and City of New York v. U.S. — The recent controversy over local enforcement of immigration laws suggests that fears of the immigrant city as a threat to the nation and the states continue to be pertinent in today's immigration debates. Already, a wide range of legal disagreements over this issue have placed localities in an awkward position. On the one hand, a vigorous debate rages over whether local police officials even have the power to enforce federal immigration laws¹⁷⁹ or whether such power is reserved exclusively for federal officials by nature of federal preemption.¹⁸⁰ On the other hand, assuming local enforcement is permitted, others disagree over whether federal immigration laws require local officials to cooperate with the federal government¹⁸¹ or whether cooperation must be at the discretion of local communities.¹⁸²

At the center of this debate are the well-known inadequacies of immigration enforcement. As efforts to physically secure the nation's boundaries are increasingly exposed as both inefficient and insufficient, proponents of enforcement have begun looking to local government officials to assist in its patrol of the country's interior. Yet, as the growing need for local support in immigration enforcement becomes more pervasive and local surveillance more necessary, cities are also becoming aware of their ability to challenge and redefine immigration categories through local policy.

Indeed, in recent decades many cities have taken steps to restrict local law enforcement and administrative officials from cooperating with federal enforcement by adopting so-called sanctuary policies. Currently, there are at least 35 state and local governments, including the cities of New York, Los Angeles, Chicago, Houston, San Diego, Portland, Seattle, and Washington D.C., that have taken steps to limit the ability of their officials to enforce federal immigration laws or cooperate with federal immigration officials.¹⁸³ These jurisdictions often defend their policies on the ground that local immigration enforcement strains the relationship between police and immigrants, promotes the socio-political isolation of immigrant communities, endangers the health and safety of immigrant and native residents, and puts

¹⁷⁹ See Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 *Alb. L. Rev.* 179, 199 – 201 (2005); Michael M. Hethmon, The Chimera and the Cop: Local Enforcement of Federal Immigration Law, 8 *U. D.C. L. Rev.* 83, 84 – 96 (2004).

¹⁸⁰ Michael J. Wishnie, State and Local Police Enforcement of Immigration Laws, 6 *U. Pa. J. Const. L.* 1084, 1091 – 95 (2004).

¹⁸¹ See Jorge L. Carro, Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?, 16 *Pepp. L. Rev.* 297, 316 – 20 (1989).

¹⁸² See Ignatius Bau, Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS, 7 *La Raza L.J.* 50, 61 (1994).

¹⁸³ See e.g., Lisa M. Seghetti, Enforcing Immigration Law: The Role of State and Local Law Enforcement, Congressional Research Service Report for Congress, Oct. 13, 2005 (updated), at 23 n.26; National Immigration Law Center, Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by Local Authorities, July 2004, at http://www.friendsoftheborderpatrol.com/Local_Enforcement.pdf.

substantial fiscal strain on already taxed police departments tasked with dealing with more pressing local issues.¹⁸⁴

The manner in which localities are experimenting with different levels of immigration enforcement based on local priorities, however, has not gone unnoticed. Because sanctuary cities are often those with large immigrant populations that are “able to exert domestic political pressure against INS enforcement . . . [or] facilitate illegal migrants’ ability to melt into the community,”¹⁸⁵ many have questioned whether these communities are more aligned with immigrants than national interests in resisting cooperation with federal authorities. As a result, steps have been taken by both states¹⁸⁶ and the federal government to limit local sanctuary policies.¹⁸⁷

Again, at the heart of this controversy is how we understand the proper institutional role of local governments with respect to their residents and the larger governmental bodies within which they are situated. Although facially described as an immigration issue, the controversy over local sanctuary policies raises deeper concerns about what constitutes the relevant community when the issue of immigration is raised. Consider, for example, the Second Circuit case of City of New York v. U.S.¹⁸⁸ At issue in the case was a series of executive orders issued by successive mayors of New York since 1989 that limit the ability of “any City officer or employee [to] transmit[] information regarding the immigration status of any individual to federal immigration authorities.”¹⁸⁹ Because provisions of the 1996 Welfare and Immigration Act threatened the validity of this policy by prohibiting any state or local regulation that restricted their employees from reporting immigrant-statuses to federal authorities, the city under Mayor Giuliani filed a facial constitutional challenge.¹⁹⁰

From the city’s perspective, the challenged provisions “strike at the heart of local government autonomy.”¹⁹¹ Relying on the new federalist interpretation of the Tenth Amendment set forth in Printz v. U.S.¹⁹² and State of New York v. U.S.,¹⁹³ the city advanced two arguments. First, it argued that “state sovereignty under the Amendment includes the power to choose not to

¹⁸⁴ See National Immigration Forum, State and Local Police Enforcing Immigration Laws: Stories from Around the Nation, at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=573>.

¹⁸⁵ Peter H. Schuck, The Law and Study of Migration, in **Migration Theory: Talking Across the Disciplines** 187, 195 (Caroline Brettell et al. eds., 2000).

¹⁸⁶ See Colorado SB 90 (signed May 1, 2006) (prohibiting state and local governments from impeding local cooperation with federal officials concerning an arrestee suspected to be illegal; rendering non-complying local governments ineligible for state grants).

¹⁸⁷ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105, § 434 (1996) (prohibiting state and local governments from restricting government employees from who wish to provide immigration information to federal authorities); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 § 642 (1996) (same); see also Matt Stiles et al., House Puts Pressure on “Sanctuary Cities”, **Houston Chron.**, June 30, 2006, at A1 (describing the passage of an amendment in the House spending bill denying federal money to cities and towns with sanctuary policies).

¹⁸⁸ 179 F.3d 29 (1999).

¹⁸⁹ Id. at 31 – 32.

¹⁹⁰ Id. at 31; see also supra note 187.

¹⁹¹ Brief of the City of New York, id., 1997 WL 33546932, at *17 (quoting Amicus Brief of The Legal Aid Society, at *4).

¹⁹² 521 U.S. 898 (1997).

¹⁹³ 505 U.S. 144 (1992).

participate in federal regulatory programs and that such power in turn includes the authority to forbid state or local agencies, officials, and employees from aiding such a program even on a voluntary basis.”¹⁹⁴ Second, the city contends that the Tenth Amendment prevents the federal government from intruding on the “actual operation of state and local government by, for example, regulating the use of state and local resources — here officially-acquired information — and/or the duties or responsibilities of state and local employees.”¹⁹⁵

The Second Circuit acknowledged that Printz and State of New York bar the federal government from directly compelling state or local governments to participate in a federal regulatory program or “circumvent[ing] th[is] prohibition by conscripting the State’s officers directly.”¹⁹⁶ The court held, however, that the Congressional regulations in this case neither force the city to enforce federal immigration laws nor directly conscript local officials to do the same. “Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.” As the court explained, allowing state or local governments to foreclose such voluntary participation by its employees would “turn the Tenth Amendment’s shield” against federal intrusion of state and local sovereignty “into a sword allowing states and localities to engage in passive resistance that frustrates federal programs.”¹⁹⁷

The holding in City of New York is often championed by opponents of local sanctuary policies. On the basis of the court’s reasoning, however, it is not entirely clear that its conclusion, though intuitive, follows existing constitutional jurisprudence. Indeed, it appears that the court’s “voluntary exchange” rationale only works when we dismiss the legal significance of local governments either as political institutions or as private employers. In other words, the court’s reasoning seems to work best when we privilege the identity of local government officials as American citizens over their concurrent roles as municipal employees or municipal residents.

To see this, we must begin by examining the court’s rationale. First, was the court correct in distinguishing the challenged provisions in this case from those involved in Printz or State of New York? To be sure, Congress did not explicitly require New York City to enforce federal immigration law or conscript local officials to become federal immigration officers. Nevertheless, the law left cities with no option other than to tolerate the discretionary cooperation of individual local officials. In other words, the city is essentially being forced to participate in federal immigration enforcement and accept de facto conscription of its employees if its employees independently choose to cooperate. It is not entirely clear that a constitutionally significant distinction between being forced to participate in a federal regulatory program and being prohibited from choosing not to cooperate exists. Moreover, the ruling seems to raise a central concern in both the plenary power cases and Yick Wo about how delegation of discretionary power to local officials raises the potential for abuse.¹⁹⁸ By upholding the federal restriction in the manner that it did, the Second Circuit essentially requires cities to grant local

¹⁹⁴ 179 F.3d at 34.

¹⁹⁵ Id.

¹⁹⁶ Id. at 33 – 34 (citing and quoting State of New York, 505 U.S. at 157, and Printz, 521 U.S. at 935).

¹⁹⁷ Id. at 35; see also Hethmon, supra note 179, at 85 (“To turn an official blind eye to violations of federal immigration law in such circumstances is not an exercise of sovereignty, but rather impermissible passive resistance to federal law.”).

¹⁹⁸ See supra, TAN 110 - 112, 126.

officials far-reaching discretion over their treatment of immigrants without the ability to reign in or regulate that discretion.¹⁹⁹

To be sure, one can argue that the court’s reasoning is actually less concerned about the operations of the Tenth Amendment than upholding federal plenary power over immigration enforcement. Recall that the court’s primary reason for refusing to apply the “Tenth Amendment shield” was because the court believed that cities like New York would use it as a “sword” to frustrate federal programs. But the city’s policy did nothing to prevent federal immigration officials from enforcing federal immigration laws. To be sure, federal immigration enforcement is certainly more difficult without local support. Yet it is hardly distinguishable from the situation in either Printz or State of New York.

Last, the court’s technical parsing of Printz and State of New York appears to do a disservice to the substantive constitutional considerations underlying the Tenth Amendment test. As the Court explained, the primary need for the Tenth Amendment “shield” is to preserve the constitutional structure of dual sovereignty and ensure that individuals affected by the regulatory regime could properly assign political accountability to the government that is responsible.²⁰⁰ From this perspective, the challenged federal provisions in City of New York were exceptionally problematic. The city and amicas went to great lengths to note how permitting local government officials to essentially become rogue agents of the federal government would strain the relationship between the local government and immigrant residents because they would likely see the cooperation as an official policy of the city.

If the court’s reasoning is so vulnerable to criticism, then why is it that City of New York has largely been exempt from such even while local enforcement of immigration laws remains a hot topic of discussion? One explanation might be the fact that the court’s reasoning, although problematic, taps into an underlying concern about immigrant cities like New York becoming too influenced by local pro-immigrant interest at the expense of federal considerations. Another is that it successfully presents local government officials as members of the national polity irrespective of their professional responsibilities to, or membership in, the local communities of which they are a part. Indeed, support for this reading can be gleaned from the court’s emphasis on the need for “informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system” in the preservation of a system of dual sovereignties. It is difficult to understand how cooperative interactions of a voluntary nature are increased by the challenged provision when state and local communities were free to cooperate with the federal government before its enactment, but were foreclosed from choosing otherwise after its enactment. It would appear that the challenged provision can only be understood to promote voluntary cooperation if the discretion of local government officials is privileged over that of the representative government that employs them.

¹⁹⁹ This is not merely a hypothetical concern. The infamous Rampart scandal in Los Angeles, in which members of the police department’s anti-gang task force were revealed to have engaged in a far-reaching conspiracy of corruption, excessive force, and police abuse, illustrates how local officials can rely on the persistent and looming threat of deportation to coerce and threaten local immigrant communities in furtherance of personal, as opposed to municipal, objectives. See Elana Zilberg, Fools Banished from the Kingdom: Remapping Geographies of Gang Violence between the Americas (Los Angeles and San Salvador), 56 Am. Q. 759, 759 – 60 (2004).

²⁰⁰ See Printz, 521 U.S. at 920, 929 – 30.

3. The Immigrant City as a Victim of Immigration

Thus far, I have argued that the immigrant city is often construed as a threat to immigrants, the states, or the nation. Coexisting alongside these accounts of the city, however, is also a more benign and sympathetic view of the immigrant city. Local communities are also thought of as being especially vulnerable to the impact of immigrants. As such, the city is often-times perceived as the ultimate victim of immigrants and immigration policy.

Like the models of the immigrant city explored above, this model of the immigrant city structures the legal powers of local governments in the immigration framework. Unlike the previous models, however, this perception of the immigrant city is not only perpetuated by federal actors, but embraced by state and local officials as well. As we will see, even while seeking to assist local communities, federal policy continues to neglect the role of local governments and relegate them to the sidelines of immigration policy. At the same time, instead of exploring ways in which local government laws can be reformed to better enable local communities to adjust to the needs of immigrant residents or the burdens occasioned by population influxes in general, state and local officials often scapegoat immigrants for local ills while throwing their hands up in frustration by attributing their problems to federal policy.

a. Seeking Federal Reimbursement. — The impact of immigration on contemporary American cities is both pragmatically irrelevant and discursively crucial. On the one hand, neither immigration nor immigrant status seems to play a significant part in structuring the daily routines and prosaic rituals of urban and suburban life. Their demands of local governments are often no different than that of anyone else, and the impact of their entry into the community are often difficult to differentiate from natives returning from a foreign country, relocating from a different state, or moving from a neighboring locality.²⁰¹ On the other hand, immigration and immigrant status play a crucial role in how we legally and politically conceptualize the function of local governments, the value of local communities, and the purpose of local services. In distributing limited resources and political power, efforts are often made to maintain a distinction between immigrants and non-immigrants. From this perspective, immigrants — both legal and undocumented — are carved out of the local community and reconstituted as a federal ward.

Although the doctrine of federal exclusivity has often been employed to support the former, in doing so, it has also fueled support for the latter. Indeed, much of our inclination toward seeing immigrants as a federal population is the result of state and local officials relying on the distinction between immigrant and native residents to argue that they are disproportionately and unfairly burdened by immigrants living in their community.

The argument of state and local officials in a series of cases seeking federal reimbursement for local costs incurred as a result of immigration aptly demonstrates this point. During the mid-1990s, state and local officials from New York, New Jersey, Florida, Arizona, California, and Texas filed nearly identical claims alleging that the federal government's failure to internalize the costs associated with immigration at the local level violated, among other things, the

²⁰¹ See Raskin, *supra* note 116, at 1451 (“While my Canadian or Brazilian neighbors and I may have different interests or approaches on international issues like acid rain or regional trade, we presumably have identical interests in efficient garbage collection, good public schools, speedy road repair, and so on.”).

Naturalization Clause, the Invasion Clause, the Guarantee Clause, and the Tenth Amendment.²⁰² Although these cases were all rejected at the circuit court level (either on the merits or as a non-judicial political question), the arguments in support of these claims provide substantial insight into the prevalence of this victim model of the immigrant city.

Consider, for example, the case brought by representatives of the state and counties of New York. Noting that New York absorbs a significant number of legal and illegal immigrants, it claimed to be “disproportionately affected and . . . burdened by the federal government’s immigration policy,” and, as such, has become “the victim of an ongoing immigrant emergency.”²⁰³ Indeed, its particular conceptualization of immigrant residents cannot be made more clear than when the plaintiffs claimed that the “costs associated with providing services to immigrants” were essentially “costs . . . paid by plaintiffs and the State of New York on behalf of [the federal government].”²⁰⁴

Indeed, notwithstanding the longstanding responsibility of state and local actors to provide local services and regulate local economic growth, in all these cases the complaint is that they are powerless to effectively address the economic problems caused by the “invasion” of legal and illegal immigrants.²⁰⁵ Why alienage or legal status present insolvable dilemmas that are fundamentally different from other population influxes, which almost all of these states experienced throughout the twentieth century, is never explained except with repeated claims that the immigrant population should properly be understood as a federal population and thus a federal responsibility.

The fact that none of these claims were given much credit by the judges who heard these cases does not undermine the prevalence of this attitude among state and local actors today. If the immigration issue is increasingly becoming a local concern, much of it is due to the fact that local communities conceive of immigrants as convenient scapegoats upon which to blame their inability to adequately handle growth or unwillingness to accommodate demographic change, and the federal government’s perception that their obligation over immigration justifies periodic and targeted readjustments of that responsibility. The immigrant city is understood to be under siege by the immigrant masses, and only the federal government is empowered, if it so wishes, to provide reinforcements. As such, this distinction not only supports, but is also a product of, the presumption of federal exclusivity that dominates so much of the immigration discussion.

b. Plyler v. Doe. — The victim model of the immigrant city can also be seen in the well known case of Plyler v. Doe.²⁰⁶ Although usually read as a case about immigrant rights, the manner in which it was argued before the court reveals how the issue of immigration raises concerns about

²⁰² See Padavan v. U.S., 82 F.3d 23 (2d Cir. 1996); New Jersey v. U.S., 91 F.3d 463 (3d Cir. 1996); Chiles v. U.S., 69 F.3d 1094 (11th Cir. 1995); Arizona v. U.S., 104 F.3d 1095 (9th Cir. 1997); California v. U.S., 104 F.3d 1086 (9th Cir. 1997); Texas v. U.S., 106 F.3d 661 (5th Cir. 1997).

²⁰³ Brief of the State and Counties of New York at *4, Padavan, 82 F.3d 23.

²⁰⁴ Id.; see also New Jersey, 91 F.3d at 467 (describing New Jersey’s argument that that deficiencies in federal immigration enforcement has “forced” it to “bear the burden of a responsibility which is that of the Nation as a whole”).

²⁰⁵ See id.

²⁰⁶ 457 US 202 (1982).

local problems faced by the immigrant population while at the same time conceals the effect that local government laws have in creating or perpetuating these problems.

In Plyler, the court was asked to decide whether the Equal Protection Clause prevents the State of Texas from denying undocumented immigrants the right to obtain a free public education in its local schools. In a divided 5-4 opinion, the Court held that the relative innocence of the undocumented students and concerns about the creation of a permanent uneducated under-class counsel in favor of applying heightened scrutiny, which lead it to declare the state statute unconstitutional.²⁰⁷

As such, Plyler is predominantly read as an immigration decision. It is important to note, however, that it is also a case about the state's organization of local governments: not simply because the named party in this case is a local school district or that the Supreme Court has recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools,"²⁰⁸ but also because at the heart of the case is the inequitable educational funding structure challenged and upheld years earlier in the name of local control in Rodriguez v. San Antonio School District.²⁰⁹

In order to see this, we need to take note of two points that are usually neglected. First is the actual statute at issue in this case: Section 21.031 of Texas's Education Code. Contrary to most conventional accounts of Plyler, § 21.031 did not directly prohibit undocumented children from receiving free public education in its schools. The deprivation at issue was precipitated by two distinct and separate provisions. On the one hand, the Texas statute readjusted how the state distributes its educational grants by excluding children who were unable to prove their legal status in the country from its calculation.²¹⁰ To be sure, school districts that served undocumented students would be left with less resources overall to educate its student population. Not unlike the Court's findings in Rodriguez,²¹¹ however, there was nothing to suggest that any given school district would be rendered incapable of providing an adequate education to all its children. On the other hand, the Texas statute authorized, but did not command, local school districts to deny free public education to children who were not a legally admitted into the United States.²¹² Of course, the deprivation of state funding for undocumented students gave struggling local school districts incredible incentive to preclude illegal students from attending their schools.²¹³ On its face, however, the Texas statute gives local school districts the final say on whether or not to exclude. In this regard, the statute seems to confirm Rodriguez's contention that inequitable distribution of educational funds precipitated by state law is permissible if, at its heart, it also serves to (however superficially) enhance local control over education.²¹⁴

²⁰⁷ See id. at 219 – 20, 223.

²⁰⁸ Milliken v. Bradley, 418 U.S. 717, 719 (1974).

²⁰⁹ 411 U.S. 1 (1973).

²¹⁰ See Plyler, 457 U.S. at 205.

²¹¹ 411 U.S. at 11 – 12, 23 – 24.

²¹² See Plyler, 457 U.S. at 205.

²¹³ See In re Alien Children Ed. Litigation, 501 F.Supp. 544, 555 (D.C.Tex. 1980).

²¹⁴ 411 U.S. at 50 – 53.

Second, we should note the state's use of the local victimization rationale in defense of its regulation. In defending the rationality of the state's educational restrictions at the trial court level, the state employed much of the same evidence about inequitable funding raised by disadvantaged Hispanic students against the state in Rodriguez. It argued that the poor school districts, whose fiscal problems were being exacerbated by both legal and illegal immigration and their special needs, were the ultimate and intended beneficiaries of the state's educational reforms.²¹⁵ Indeed, the state claimed early on that the fiscal health of the state was not the issue.²¹⁶ What was at stake, was protecting financially strapped local school districts saddled with the cost of educating undocumented immigrants by stemming the influx, and empowering localities to exclude, undocumented students.

Of course, the irony of the state's position in relation to Rodriguez was not lost upon the district court: it "note[d] . . . that any spectator watching the state's presentation of evidence might easily have mistaken it for a retrial of the Rodriguez case, with the State of Texas acting as Amicus curiae for plaintiffs, emphasizing the plight of the property-poor border school districts under the state's educational financing scheme."²¹⁷ Moreover, it was from the perspective of Rodriguez that the district court struck down the state statute as unconstitutional under rational basis review. Noting that the root of the problems identified by the state could be better addressed by changing the state's educational funding structure, and was only minimally due to the presence of undocumented students, the court held that, "excluding illegal immigrant children because of these problems is both irrational, because the undocumented children as a class are basically indistinguishable from the legally resident alien children in terms of their needs, and ineffectual, because the dominant problem remains unsolved."²¹⁸

Interestingly, despite these points, the Supreme Court never directly approached the issue in this case from a local perspective. Why was this the case? First, it could be that the Court recognized that the decision of local school districts to exclude undocumented students was essentially a false choice in light of the state's deprivation of the educational grants, especially when the state-sanctioned educational funding structure compels most local school districts to become dependent on state assistance that are constantly subject to change. Alternatively, it could be that delving too deeply into the relationship between the state and the local government in the educational context would generate too much tension between Plyler and Rodriguez. As the dissent noted, it is difficult to reconcile the Court's belief that the undocumented student's "lack of responsibility" for being in the United States in this case counseled in favor of not penalizing them with regard to education when the same "lack of responsibility" of the plaintiff's children in Rodriguez with regard to their residency in property-poor school districts had no noticeable influence on the Court determination that inequitable funding for public education is constitutionally permissible.²¹⁹ Indeed, if the Court had separated the local decision to exclude and focused entirely on the state's deprivation of funds, as would have been the case if a local school district like Edgewood had challenged the state funding structure without exercising the

²¹⁵ See In re Alien Children Ed. Litigation, 501 F.Supp. at 580 – 81.

²¹⁶ Id. at 579 ("There is no place in this pre-trial order that the State has said the State of Texas doesn't have enough money. Not one place. Texas can come up with the money.").

²¹⁷ Plyler, 458 F.Supp. at 589.

²¹⁸ Id.

²¹⁹ Plyler, 457 U.S. at 245 n.5 (Burger, C.J., dissenting).

authority to deny admission to illegal immigrant children altogether,²²⁰ the Court may have found itself uncomfortably bound with increasing irony to defend the state funding structure on the ground that it preserved local discretion to supplement state funds with local resources.²²¹

Moreover, when Plyler is considered from a local perspective, it raises complicated questions about the relationship between immigrants and local communities. Recall that the in defending the political function doctrine, the Court applied a federal conceptualization of alienage as the baseline for determining the membership of immigrants in all levels of government by stating that aliens are “by definition” those outside of the political community.²²² In this case, however, when the state sought to defend its regulation on the ground that it was simply establishing a requirement for municipal residency — the traditional hallmark of municipal membership — the Court balked at the idea that “illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools.”²²³ Instead, the Court maintained that the state must adhere to the conventional understanding of municipal residency — one based on physical residence within a particular locality.²²⁴ In contrast to the baseline presumption that immigrants, especially illegal immigrants, are nonmembers as a result of federal classifications, the Court found itself inclined here to adopt the opposite baseline presumption, one that suggests the irrelevance of federal alienage classification in the sub-national sphere.

c. Immigrant Dispersal and Refugee Resettlement. — State and local actors have not been the only ones concerned about cities being too weak to deal with immigration without substantial federal support. Historically, much of federal immigration policy has been concerned about the impact of immigration on local communities, especially when such impacts are concentrated in specific cities or geographic regions.

One of the reasons why the spatial residency of immigrant groups has proved to be crucial site in the immigration debates is because spatial concentration of immigrants raises the most intense fears associated with immigration: territorial separatism and demographic balkanization. To be sure, cultural and ethnic differences presented by immigrant groups have long been considered to

²²⁰ Cf. Amicus Brief of Edgewood Independent School District at *4, Plyler, 457 U.S. 202 (noting that “the decision of this court on the constitutionality of Section 21.031, which would have its greatest impact on poor, urban and predominantly Mexican American school districts, is of extreme significance” to the Edgewood Independent School District, the district from which the Rodriguez litigation arose)

²²¹ To be sure, as Justice Powell’s concurrence argued, the complete deprivation of funding in Plyler differed in important ways from the equal threshold funding the state provided for all students at issue in Rodriguez. Plyler, 457 U.S. at 239 n.3 (Powell, J., concurring). But considering that educational funding through local property tax receipts was as much a part of the state funding structure as its decision to provide state aid to local school districts, it is not entirely clear that a state regime that would provide less state aid to schools with undocumented schoolchildren differs that dramatically from one that gave impoverished school districts less ability to provide the same amount of educational resources as prosperous communities. Only when this funding deprivation is complemented by independent local discretion does the possibility of total deprivation of free education occur.

²²² See Cabell v. Chavez-Salido, 454 U.S. 432, 440 – 41 (1982).

²²³ Plyler, 457 U.S. at 227 n.22.

²²⁴ See id.

be sources of discomfort and threat. When this “diversity” is grafted upon demarcated spaces, however, fear about national disintegration begins to form.²²⁵

It is also for this reason that residential mobility in the metropolitan landscape takes on additional meaning with regard to immigrants. Since Burgess of the Chicago school of urban sociology linked cultural and social assimilation to the physical and spatial movement of immigrant groups across the metropolitan landscape,²²⁶ residential mobility, and, more often than not, residential mobility into Anglo suburbs continue to serve as a significant measure of immigrant assimilation.²²⁷

In order to influence the residential decisions of incoming immigrants, federal agencies initially sought to use immigration restrictions to exclude immigrants that were intended for an “overcrowded” local labor market. Nevertheless, in *Gegiow v. Uhl*,²²⁸ Justice Holmes, writing for a unanimous court, rejected this approach. Analyzing the statutory language, the Court held that the concern is with the personal attributes of the immigrant, and not the local economic or geographic conditions of any particular place within the United States: “The persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions.”²²⁹

Without the ability to use the regulatory regime to shape immigrant destinations, federal agencies turned to other methods. Noting that the “evils” of immigration are caused primarily by the “congestion of immigrants in the cities,” then-commissioner of immigration Frederick A. Wallis proposed disbursing information about labor needs in the rural countryside and building stronger collaborations between state authorities so as to “better distribute[e] . . . aliens, so that both the country and the immigrants might benefit.”²³⁰ For the most part, however, these efforts achieved limited results.

Our national immigration policy now appears to have largely abandoned any large-scale effort to control the residential decisions of immigrant in general. Yet similar efforts continue with respect to the settlement of refugees. Indeed, refugee settlement now involves an “intriguingly complex system whose centerpiece is a weekly meeting at the Refugee Processing Center in Arlington, Va.”²³¹ During these meetings, voluntary resettlement agencies, known as “volags,” who represent local sponsors, allocate refugees in specific local communities around the country.

²²⁵ Indeed, as some commentators have noted, often the only thing separating an ethnic group from a nation is that along with asserting claims of cultural affinity, nations also make territorial claims. **Jeff Spinner, *The Boundaries of Citizenship*** 28 (1994). It is therefore no surprise that the recent wave of Mexican immigration to the Southwest have led many to see the trend as a “Reconquista” — an effort by Mexico or Mexican nationals to “reconquer” Mexican territories that were either annexed or lost to America during the mid nineteenth century. See e.g., Samuel P. Huntington, *Who Are We: The Challenges to America's National Identity* 29 – 30 (2004).

²²⁶ Ernest W. Burgess, *The Growth of the City: An Introduction to a Research Project*, in *The City* 47 (1984, 1925).

²²⁷ See Richard Wright & Mark Ellis, *Race, Region and the Territorial Politics of Immigration in the US*, 6 *Int'l J. Population Geography* 197, 205 (2000).

²²⁸ 239 US 3 (1915).

²²⁹ *Id.* at 4.

²³⁰ *Form New Bureau to Handle Aliens*, *N.Y. Times*, Oct 13, 1920, at 27.

²³¹ **David A. Martin, U.S. Department of State, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement*** 128 (July 8, 2004), available at <http://www.state.gov/documents/organization/36495.pdf>.

Moreover, because of persistent concerns about immigrant concentration and their impact on local communities, the process generally embraces a policy of dispersal.²³²

Although the process recognizes the profound local impact in settling refugees, local government involvement is surprisingly limited. Following the precedent set by the Refugee relief Act of 1953,²³³ the resettlement program relies primarily on the non-governmental sector to guide local resettlement efforts and provide initial financial and social support.²³⁴ To be sure, federal funds are often allocated to aid such resettlement efforts. But for the most part federal support is limited and often they are turned directly over to charitable organizations willing to take on the responsibility.

At the same time, settlement decisions by volags have profound impacts on the developing of immigrant communities. In many instances, the planting of these immigrant seed have resulted in massive secondary migration.²³⁵ In addition, the selection process is often shaped by the inequitable effects of existing local government policies. The decision to settle Somali refugees in the City of Holyoke, one of the poorest communities in Massachusetts, demonstrates this point. After initially entering into an agreement with a local religious organization to settle Somali refugees with federal support, the city council sought to back out because it believed the federal grants were insufficient to counteract its extensive financial problems and struggling school system.²³⁶ Because consent by local governments is not required in the settlement process, however, the federal government initially refused to reconsider its decision.²³⁷ The irony, however, was that it was precisely because Holyoke was an impoverished city that it was considered a prime candidate by federal and charitable groups for this type of settlement. Unlike more prosperous suburbs in the surrounding region, Holyoke had an ample supply of affordable housing, which, although not conducive to providing substantial taxable revenue, made it an ideal place to settle poor immigrants.²³⁸ As a result, like the case in Plyler where poor school districts were disproportionately shouldered with the burden of educating a disproportionate number of immigrant students, local government policies that have produced vastly different communities end up guiding refugee settlement to some degree as well.

C. The Three Models and its Consequences

The fact that immigration is largely considered a federal issue cannot be entirely understood without accounting for the latent fears over local involvement in this issue. I have sought to demonstrate that neither strong federal interests with regard to immigration, nor the questionable

²³² See Jacqueline Desbarats, Indochinese Resettlement in the United States, 75 **Ann. of the Assoc. of Am. Geographers** 522, 526 (1985).

²³³ See **Barbara M. Yarnold, Refugees Without Refuge** 13 (1990).

²³⁴ See Martin, supra note 231, at 128.

²³⁵ See e.g., Roy Beck, The Ordeal of Immigration in Wausau, **Atlantic Monthly**, April 1994, at 84.

²³⁶ See Farah Stockman, Holyoke Disowns an Invitation: Officials Fight Grant for Somali Refugees, **Boston Globe**, Oct. 14, 2002, at B1.

²³⁷ See id. Ultimately, the charitable organization chose to settle the Somali refugees in the nearby city of Springfield instead. See Jennifer Graham, Somali Influx Gets Mixed Carolina Welcome: Despite Plight, Bantu Refugees aren't Embraced, **Boston Globe**, July 13, 2003, at A6.

²³⁸ See Stockman, supra note 236 (noting that many residents felt that Holyoke "was chosen precisely because it has social and economic problems," and that the charities involved recognized that although other communities were willing to welcome the refugees, they "don't have the low-priced housing to accommodate them").

belief that only the federal government can solve the problems that immigration produces, completely explains our aversion to looking to the “local” for solutions to our immigration dilemmas. We seek to disengage local governments from participating in the immigration project because we feel they are either too powerful (and thus a threat to immigrants or the nation and the states) or too weak (and therefore vulnerable to immigrant influxes) to assume a meaningful role.

To be sure, disempowering and depoliticizing the immigrant city in this manner serves to alleviate the underlying, but often unstated, concerns that we have about local participation with respect to the issue of immigration. Yet by perpetuating these models, we not only conceal the valuable and unique role that local government can play in the immigration project, but also how the legal structure can be changed to realize these benefits. If we can get past the presumption that immigration is a federal issue, we may begin to realize that local governments are often well positioned to address a lot of the domestic problems attributed to immigrants while magnifying the benefits that they provide to this country. If we can get beyond the belief that until they naturalize, immigrants are a federal population that is by definition outside of all political communities, then we can begin to realize that potential that local government have for fostering civic participation and promoting tolerance and immigrant incorporation.

In other words, we need not believe that the current conceptualization of the “local” with respect to immigration is either desirable or inevitable. If the immigrant city is understood as not only a geographic place, but also a legal construction, we can begin to imagine ways in which power and incentives can be changed to enable us to see the potential of looking beyond federal exclusivity and seeing immigration as a critical local issue as well.

IV. Reimagining the Immigrant City

The preceding Part demonstrates that differing concerns about decentralized power has led to the development of three competing models of the immigrant city. In each of these models, the city is presented as a problem; in none do we see it being considered as a possible solution to our immigration dilemmas. There is, however, nothing inherent in either the structure or the concept of local governments that make the immigrant city either a threat to immigrants, a threat to the nation and the states, or a victim of immigration policy. If local government participation in the immigration project raises the concerns highlighted by these models, it is due in large part to not only how immigration laws and doctrine structure the relationship between the local and the federal through immigration law, but also how local government laws allocates power and incentives to our local political institutions. Realizing this possibility and recognizing the unique role that local communities can play, we might see a reason to temper or abandon the unquestioned presumption of federal exclusivity in the immigration context.

It is important to note that in reimagining the immigrant city, the choice is not between federal exclusivity and unhindered local autonomy. No matter how much we assert the presumption of federal exclusivity, it is unlikely that federal government will be able to address every issue affecting immigrants, or that the effect of laws governing local communities will be insulated from the prospects of our immigration regime. Similarly, it would be shortsighted to simply empower local communities so that it can be mobilized as another vehicle in the acrimonious

conflict over our normative and cultural anxieties over immigration. Such blind empowerment would likely produce no more than the insular and isolated drifts of local communities toward opposite extremes that we are beginning to witness today. Indeed, presented with a choice of these extremes, I believe that most of us will likely dismiss both approaches as either undesirable or impractical. Thus, instead of distilling the issue down to these two choices, we might be better off considering how cities should and can be empowered and disempowered in order to accomplish the substantive goals of the immigrant project — from both the national and local perspective.

Accordingly, this Part sets out to do two things. Section III.A sets out to reorient the terms of the debate by proposing a more nuanced approach to understanding the dilemmas that underlie the models of the immigrant city. On the one hand, it argues that the traditional models of the immigrant city do not adequately highlight the degree to which successful immigration or local government programs are contingent upon the operations of the other. On the other hand, it asserts that although we can benefit from foregrounding the intersection between immigration and local government law in the manner described above, we must simultaneously be cautious of over-attributing local problems to the immigrant influx.

Section III.B then outlines a few possibilities of how we can reconceptualize the institutional role of local governments in an era of immigration as an alternative resource upon which to achieve, and possibly reframe, the goals of our national immigration policy. I do not intend for this to be an exhaustive list. Indeed, there is no reason to believe that more cannot be developed once we accept the possibilities of the local that are available to us.

A. Reorienting the Debate: Clarifying the Intersection between Immigration and Local Government Law

1. How Immigration Law Influence Local Community Development

First, we should recognize that immigration laws do not just operate to define the national community; it is also a tool by which we construct our local ones. This is not to say that the effect of immigration laws on community-building at the local level should be the sole determinant of how we structure our national immigration policies. It does suggest, however, that as we move forward in reforming our immigration laws, we should do so with a serious and considered understanding of its effect on our local communities.

It is important to note that this effect is not limited to the subset of “alienage” regulations that regulate the lives of immigrants who have already arrived; it extends to even the most basic immigration questions of all, such as those concerning who, if anyone is permitted to enter our country.

For example, if our immigration policy continued to emphasize family reunification and binding financial sponsorship, we would likely see a tendency toward the establishment of immigrant enclaves by encouraging familial dependence among the immigrant population. At the same time, allowing immigrants to reunite with family members in American may also promote immigrants to develop long-term interests in their communities and invest in local community-building efforts accordingly.

Alternative, if we begin to move our immigration policy toward one that emphasized the admission of temporary foreign workers to satisfy the immediate low-skilled employment needs of domestic businesses, like the Bracero program of the early 1900s²³⁹ or the guest worker program currently being debated by Congress,²⁴⁰ we would likely encourage the development of immigrant cities populated by sojourners with limited social or political ties to the neighborhoods within which they reside. Of course, from a purely federal perspective, one may wish to forestall the development of these ties to better ensure that these workers return to their country of origin at the end of their designated tenure. But even if this is an aim that American society is willing to embrace, the prospect of building local communities in which an ever-present proportion of residents conceives of themselves, and is treated by others, as a floating population²⁴¹ outside of the social and political networks that make communal life possible should not be dismissed lightly, especially without an honest acknowledgement this impact in considering such a policy.

Indeed, the more we probe how our immigration policy addresses the question of immigrant admissions, the more it becomes obvious that the future of our local communities lies in these national debates. Even today, one can argue that the current system, which has led to the growth of an underground population and unregulated economy of illegal workers, promotes insular “protective” enclaves that frustrate broader efforts at local integration. At the same time, local communities are encouraged by current laws to fixate, wrongly or rightly, on illegal immigrants as scapegoats for their social or economic troubles without honestly facing up to and addressing the realities of ethnic and cultural heterogeneity without the specter of illegality dominating the discussion.

In short, our immigration debates should begin to note that federal immigration policy does not operate solely at the borders or exclusively on immigrants. We must be attuned to how immigration policies will affect the type of local communities that we foster in this country. As long as immigrants live alongside us as fellow residents, the immigration laws that affect their lives will also have an impact on all those who live within our communities

2. How Local Government Laws Impact Immigration Policy

Similarly, the legal structure of our local government laws affects more than what are normally considered local affairs; the type of communities that our local government structure promotes also has significant impact on the success of our immigration policies. Although America has a long tradition of crafting our immigration policy by looking to the local living conditions of the existing immigrant population, we must begin to understand that much of this not simply a result

²³⁹ See Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* 42 – 72 (1992).

²⁴⁰ Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005); see also Alexandra Villarreal O'Rourke, Recent Developments, *Embracing Reality: The Guest Worker Program Revisited*, 9 *Harv. Latino L. Rev.* 179, 185 - 90 (2006).

²⁴¹ Cf. generally, Li Zhang, *Strangers in the City: Reconfigurations of Space, Power, and Social Networks within China's Floating Population* (2001) (describing the lives of the “floating population” of the registered rural population living as unregistered residents in major cities).

of the cultural characteristics or socioeconomic status of the immigrants that we formally or tacitly accept, but is also determined by how local government laws operate on the ground.²⁴²

For example, while integration appears to be a major component of our immigration project, we should realize that it is dictated to a large degree by local government policies that are too often thought of as outside of the realm of the immigration debate or assumed to be unquestionable fact of society. In a pluralistic society in which the end-goal of assimilation is always a relative, shifting, and contentious target, an immigrant's "fit" will almost always come down to personal and social connectedness. Thus, the degree to which immigrants are able to interact with and share in the communal lives of American society as a whole play a substantial role in determining whether and when newly-arrived immigrants will eventually become a part of the mainstream.²⁴³

But if the local is significant in determining immigrant incorporation into American society, it is not something that is, or can be solely addressed by our nation's immigration laws. The local government structure that promotes certain community organizations over others will have to be considered as well. For example, if we continue to adhere to legal policies that segregate our lived environments along lines of race, ethnicity, and class, how can we expect the type of social and physical connections between immigrants and native residents that would lead to their eventual integration into mainstream society?²⁴⁴

Moreover, if we wish to promote a culture of racial and ethnic tolerance, then how can we continue to uphold the norms of white middle-class Americans as the model of assimilation when their communal existence thus far seems to be premised on racial, ethnic, and socioeconomic homogeneity? Already, there are increasing concerns about racial tensions between immigrants and native minorities.²⁴⁵ But if communal living, social integration, and examples of racial and ethnic tolerance are the most promising tools for eroding these stereotypes, the segregation between blacks and whites so prominently featured by the current organization of local governments does very little to acculturate our newly-arrived immigrants to this ideal.²⁴⁶

²⁴² See Mark Ellis, A Tale of Five Cities?: Trends in Immigrant and Native-Born Wages, in **Strangers at the Gates**, *supra* note 3, at 117, 118 (noting that "the literature provides convincing evidence that the ability of immigrants to make economic gains depends on conditions in the places where they settle, not just on the individual characteristics they bring with them or acquire while in the United States.")

²⁴³ See **Robert Park and Ernest Burgess, Introduction to the Science of Sociology** 739 (1921, 1924) ("The rapidity and completeness of assimilation depends directly upon the intimacy of social contact.")

²⁴⁴ See *id.* Indeed, one can see this dilemma in the aftermath of the English Immersion movement that sought to better integrate students with limited English proficiency by "immersing" them in English-only classrooms. Even if we accept, for the sake of argument, the pedagogical validity of this method, it is certainly hampered by the fact that Hispanic students, especially those who are learning English, are increasingly being educated in segregated schools with little chance of interacting with native-English speakers, a vital a component of the immersion process. See Russell W. Rumberger & Patricia Gándara, Seeking Equity in the Education of California's English Learners, 106 **Teachers College Rec.** 2032, 2048 – 49 (2004).

²⁴⁵ See e.g., **Jennifer Lee, Civility in the City: Blacks, Jews, and Koreans in Urban America** 1-5 (2002)(noting the accounts of inter-ethnic conflict between blacks and immigrant newcomers in urban neighborhoods).

²⁴⁶ See Lawrence Bobo & Camille L. Zubrinsky, Attitudes on Residential Integration: Perceived Status Difference, Mere In-Group Preference, or Racial Prejudice?, 74 **Soc. Forces** 883, 903 – 04 (1996) (finding a distinct racial hierarchy with respect to residential choice among all ethnic groups and hypothesizing that Asians and Hispanics are internalizing the traditional racial divide in their effort to integrate into American society); cf. **Alba & Nee**, *supra*

Last, if one of the goals of the immigration project is to ensure that today's immigrants and their children participate meaningfully in American society instead of being entrenched in the cycle of poverty and disenfranchisement that afflicts so many of our fellow residents, then how can we continue to leave unquestioned the local government policies that relegate so many immigrants and their children to these neighborhoods and imposes so many obstacles in the way of residential, and thus, social mobility?²⁴⁷ By continuing to allocate vital public services inequitably according to municipal boundaries, the opportunities and life chances of immigrants and their children will likely be guided less by what the nation the immigrants are from, and more by the resources and environment they find once they arrive. Many different forms of assimilation are possible,²⁴⁸ and whether immigrants assimilate into one as opposed to another will depend a lot on environmental factors within the United States.²⁴⁹

3. Immigrants as the Miner's Canary and the Disempowered City

Debates over immigration often bring local issues to the national stage, but, having done so, frequently distorts these issues by presenting them solely as immigration questions. Thus, in contemporary political discourse, immigrants often serve as the miner's canary that propels problems faced by local communities to national prominence, while, at the same time, concealing or distorting many of the underlying causes of these problems.

The common complaint that immigration overcrowds and overburdens local schools is a good example. On the one hand, the immigration influx into cities like Los Angeles appears to have placed an immense strain on local educational facilities and funding. On the other hand, the numbers of students that are now being overcrowded into schools in Los Angeles are still a smaller percentage of the overall population than the record set in the late 1960s before the modern immigration influx took place.²⁵⁰ Moreover, recent reports show that school districts in California are now suffering from declining enrollment and the consequent reduction in state aid.²⁵¹ To be sure, these findings offer little consolation for children and teachers in overcrowded

note 47, at 45 (describing how early Irish immigrants, who were considered racially inferior and analogized to African-Americans, "socially distanced themselves from Africa-Americans as a group strategy to gain acceptance from Anglo-Americans").

²⁴⁷ See Peter H. Schuck, *Citizens, Strangers, and In-Betweens* 345 (1998) (noting that inner-city residents, who suffer from prejudice and other disadvantages "can powerfully influence — and contaminate — the values of the new immigrants' children" who live in the same communities.)

²⁴⁸ See Min Zhou, *Segmented Assimilation: Issues, Controversies, and Recent Research on the Second Generation*, 31 *Int'l Migration Rev.* 975 (1997) (summarizing and reviewing the segmented assimilation literature).

²⁴⁹ Indeed, many of the social ills we associate with immigration are often not imports from other countries, but domestic products arising from local conditions. See Ana Arana, *How the Street Gangs Took Central America*, *Foreign Affairs*, vol. 84, issue 3, at 98 (2005).

²⁵⁰ A study of Los Angeles Unified School District found that notwithstanding massive waves of immigration into Los Angeles during the latter part of the twentieth century, it was not until 1996 that student enrollment surpassed the record-breaking peak set in 1969. Moreover, because the population of Los Angeles grew steadily during this entire time, the proportion of school children relative to the general population was still less in 1998 (18.7%) than it was in 1969 (23.2%). Center for the Study of Latino Health & Culture, *LAUSD Enrollments, 1966–1998: Shrinkage, Then Recovery, While the City Grew* (2001).

²⁵¹ Indeed, the current crisis in California's school system appears to be the adverse effect of declining student enrollment and its effect on state aid. See Catherine Saillant, *Fewer Pupils Create More Worries*, *L.A. Times*, July

schools. But we should be ready to acknowledge that although immigration may have raised the prominence of this issue, the root problems may actually lie in how local schools are funded or their ability to deal with enrollment fluctuations and the negative externalities associated with neighborhood segregation and concentrated poverty.

This is all not to say that immigrants do not sometimes present unique challenges to local communities, especially when it comes to English education and language assistance. Indeed, one of the points of this article is that they do. Nevertheless, many of the pressures that cities currently face are ones that cities have historically faced with or without immigration. Indeed, in our effort to curb the excesses of local governments, it appears that we have increasingly constructed them as political institutions that can do very little to influence their future or adapt to changing circumstances. The fact that this, and not immigration per se, may be an issue worth considering is all but concealed by the limited scope of policy debates when immigration is implicated.

4. Reorienting Localism

Last, we may also need to reorient the ideological foundation of localism itself. Too often, we take it as a given that the ultimate purpose of local governments is confined to representing the interests and well-being of its current residents. We should consider how this orientation affects a local community's ability or willingness to anticipate and account for the interests of future residents.

Notwithstanding the widely-held belief that the local is the most stable social and political space in our lives, almost no community has been able to resist transformations brought about by shifting patterns of residency and the changing needs that arise as a result.²⁵² Indeed, irrespective of whether the community is a large established urban center or a developing residential suburb, it is almost certain that both its population and economic infrastructure will undergo a tremendous amount of cycling and transformation in any given amount of time.²⁵³

As a result, we must recognize that any decision made today to serve the interests of the present city will ultimately have its most direct and profound effect on a future population.²⁵⁴ With regard to the immigrant city, this means that steps should be taken to promote a forward-looking orientation of localism that is not simply concerned about the welfare of existing residents, but has the foresight and public will to realize that notwithstanding nostalgic ideals usually associated with the local, local communities of all sorts are inherently spatial nodes of dynamism, fluidity, and change.

31, 2006, at 1; Joel Rubin, L.A. Unified to Lose Millions From Drop in Enrollment, **L.A. Times**, June 14, 2006, at 3.

²⁵² See Frug, *supra* note 45, at 320 – 22, 332.

²⁵³ For example, a survey of Los Angeles residents who were over 25 years old found that only 27.5 percent were born in California; 30.1 percent had migrated from a foreign country and 42.2 percent had migrated from another state. See Dowell Myers, Demographic Dynamism and Metropolitan Change: Comparing Los Angeles, New York, Chicago, and Washington, D.C., 10 **Housing Policy Debate** 919, 934 (1999).

²⁵⁴ Schragger, *supra* note 56, at 423 (“Future residents of a locality are affected by any number of policies pursued by current residents, including those policies made in the recent and not-so-recent past by residents who many no longer live in the jurisdiction but that have adversely affected newer entrants.”).

B. Expanding the Scope of the Immigrant City

Having set forth a more nuanced account of the intersection between immigration and local government law, we can begin to consider how we can restructure the immigrant city to alleviate the concerns outlined in Part III and expand its role in our immigrant project. Accordingly, this section proposes some alternative ways of conceptualizing the immigrant city to address these concerns. I argue that (1) instead of construing immigrants as a federal ward and relying on “virtual representation” at the federal level for their protection, we can more effectively achieve the same ends by severing the relationship between national and local membership and folding immigrants into the local polity, (2) we can address the fear of local governments being easily co-opted by immigrant interest by exploring ways in which local, immigrant, and national interests converge and the role that local governments can play in furthering these joint objectives, and (3) instead of fixating on the financial and social costs of immigration on local communities, local governments can act to promote the potential benefits that immigrant residents can bring.

No doubt that while some cities would benefit by adopting all, some, or a combination of these proposals, others will likely seek alternatives not set forth below. The benefit of political decentralization, however, is that with the proper institutional structure, communities can collectively reach their own decisions on how to solve their problems and hopefully, in the process, generate stronger civic ties between its residents. We may not know exactly what legal shape an immigrant city would need to take in order to better serve national and local interests with respect to immigration. But we can and should begin the process of orienting the debate in such a manner so as to allow for such reform to take place.

1. Addressing the Immigrant City as a Threat to Immigrants: Severing the Relationship between National and Local Membership

Normative and legal principles of equal protection and immigrant rights have gone a long way in protecting immigrant residents from the sometimes oppressive inclinations of local governments. But a more long-term and effective way to address our fears about immigrant cities being a threat to immigrants might require us to adopt broader institutional reforms at the local level that folds immigrant residents into the local political community irrespective of national citizenship. In addition, as Bainer Baubock explains, “[n]ew forms of urban citizenship might promote a cosmopolitan transformation of national conceptions of membership from below and from within.”²⁵⁵ Thus, broader efforts should be made to sever the connection between national and local membership generally, and permit noncitizen immigrants the ability to vote and participate in local elections specifically.²⁵⁶

On the one hand, fostering such a conceptualization of local membership serves pragmatic functions with respect to the effective and efficient operations of local governance. Already, the

²⁵⁵ Rainer Baubock, *Reinventing Urban Citizenship*, 7 *Citizenship Studies* 139, 142 (2003).

²⁵⁶ To be sure, alien suffrage, especially at the local level, is not a unique or novel proposition. See **Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Laws*** 64 – 66 (1996); Raskin, *supra* note 116, at 1403 (“Although aliens . . . voted feely in state, federal and territorial elections in many places, their participation in local government was even more common.”).

concentration of immigrant noncitizens in many communities is beginning to approach numbers that just cannot be ignored.²⁵⁷ As the franchise is the primary mechanism by which the interests and needs of municipal residents are conveyed to local leaders, and, in turn, channeled to state and federal authorities, ignoring the political concerns of noncitizen immigrants at the local level does a disservice to the effectiveness of representative democracy.

On the other hand, local citizenship manifested through local franchises also serve an important symbolic function: “immigrants . . . would be made aware that they are now full members of the polity and are also expected to use their rights of participation; the native population would be made aware that they share a common membership in the city with the immigrant population; and the city would formally assert its distinct character as a local polity vis-à-vis the national government.” That such an effect may be labeled as symbolic does not mean that it is insignificant. Local citizenship could serve as a fertile ground for training immigrants to become future citizens by participating in local politics and, in doing so, bolstering their civic identity and loyalty to America’s democratic foundations. Because “the process of becoming a citizen [in the United States] emphasizes a (necessary) legal formalism, [and] not socialization into the means and meanings of active citizenry in a democratic society,”²⁵⁸ experience with the democratic process in this manner could be an invaluable civic education tool. Immigrant participation could also temper exclusionary tendencies at the local level by channeling concerns from both sides into the public realm.

But why should we believe that adopting a broader conceptualization of local citizenship would necessarily protect immigrants much more effectively than federal efforts? First, history has shown that local political power has done more to protect immigrants from oppression and promote their involvement in American politics than protections instituted at the federal level. It is no coincidence that the vast majority of the cases in which the courts have stepped in to protect immigrants either occurred before a particular immigrant population was able to gain a significant foothold in local politics (the European immigrants in New York and Boston), or because federal restrictions on naturalization and the convergence of national and local citizenship prevented other groups from participating in the local political process at all (the Chinese and the Japanese on the West Coast). Moreover, local political participation promotes assimilation of immigrant groups in ways that assimilation mandates do not. Public sector jobs have historically allowed many immigrant (and minority) groups to secure a solid economic foothold in American society.²⁵⁹ Moreover, experience with politics at the local level has also given many immigrant groups a conveyer belt to higher levels of government.²⁶⁰

²⁵⁷ For example, a recent study found that nearly one-fifth of California’s adult population are noncitizens and that they form a majority in 12 cities and constitute more than a quarter of the population in 73 others. See Joaquin Avila, Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population, Latino Policy and Issues Brief no. 9 (UCLA Chicano Studies Research Center), Dec. 2003, at 2; see also **Keyssar**, supra note 154, at 309 (“Felons may have been the largest single group of disenfranchised citizens, but aliens by far were the largest group of adults barred from participation in American politics.”).

²⁵⁸ Xavier de Souza Briggs, Civilization in Color: The Multicultural City in Three Millennia, 3 **City and Community** 311, 332 (2004).

²⁵⁹ See **Roger Waldinger**, Still the Promised City? __ (1996).

²⁶⁰ See e.g., **Alejandro Portes & Ruben G. Rumbaut**, Immigrant America: A Portrait 141 (“Before Irish, Italian, or Greek politicians entered the mainstream as interpreters of national values and aspirations, their predecessors spent much time in ward politics fighting for their own group’s interests.”).

Second, it is not clear that immigrants' "virtual representation" at the federal level through the foreign affairs establishment accurately reflects their interests.²⁶¹ On the one hand, such representation will likely offer very little protection for immigrants whose country-of-origin is not on good terms with America. Indeed, with regard to immigrants from countries in the middle-east, the foreign affairs establishment has probably done more to marginalize these groups than protect them. On the other hand, the interests that foreign nations voice in Washington will likely diverge to some degree from those of the immigrants themselves.²⁶² Because immigration provides important economic benefits to sending countries, those countries may tolerate or even promote certain exclusionary activities in order to ensure that immigrants maintain loyalties to their country-of-origin or encourage their eventual return.²⁶³

In short, with the proper institutional reforms, local communities may serve as a better "direct" representative of immigrant interests than the nation as a whole. Moreover, the decentralization of local governments ensures that the diversity of immigrant groups and local community needs are properly reflected.

2. Addressing the Immigrant City as a Threat to the Nation or the States: Reconsidering National Interests and Finding a Local Role

Severing national and local membership may temper the inclination of local governments to discriminate against its immigrant residents, but it also exacerbates fears of immigrant cities becoming political bastions of immigrant power. But we need not believe that local involvement in the immigration project always poses a threat to national objectives.

On the one hand, it is possible that when federal interests are considered from a local perspective, we will reach a different consensus on what kind of federal interests we wish promote. Consider the increasing appeal of skill- or need-based immigration tied to labor sectors or employers that have particular needs that are unmet by the native labor force.²⁶⁴ In the national forum, where business and industry lobbies have the loudest voice, such a policy appears to be the best way to promote American interests. From a local perspective, however, it is not clear that the economic benefits of immigration lie solely in filling the gaps in existing industries. Historically, immigration has also led to the creation and proliferation of unanticipated industries and services that reinvigorate local economies, and in the aggregate, provide substantial contributions to the national economy and expand our global economic reach.

²⁶¹ See Neuman, *supra* note 93, at 1436–37.

²⁶² For a summary of the complexities of sending country's view of their diasporas, see Yossi Shain, *The Mexican American Diaspora's Impact on Mexico*, 114 *Pol. Sci. Q.* 661, 662 – 69 (1999).

²⁶³ See *id.* at 674 (noting that although the Mexican consulate lobbied on behalf of Mexican immigrants in America, it also "collaborat[ed] with the United States in the repatriations of its kindred communities when it served its needs")

²⁶⁴ See, e.g. Andorra Bruno, *Immigration: Policy Considerations Related to guest Worker Programs*, Congressional Research Service Report for Congress, April 6, 2006, at 28 (describing the Bush Administration proposal "to match willing foreign workers with willing U.S. employers"). Indeed, even the current process for employment-based immigration, which many feel should be expanded, depends significantly on immigrants being able to secure an employer-sponsor or demonstrate that they intend to work in an existing domestic industry that is experiencing a shortage. See Immigration and Naturalization Act § 203(b).

Thus, expanding the scope with which we ordinarily use to judge immigration to include local developments on the ground may influence how we define what kind of immigration is in fact in the best interests of this nation.

On the other hand, local participation in the immigration project could transform elusive federal interests into tangible objectives. In other words, political decentralization need not be something that we fear with regard to immigration. Structured in the correct manner, it can have a profound impact in filling in many of the gaps that centralized, federal regulations have not adequately addressed.

For example, although most would agree that immigrant assimilation is just as important of a federal interest as immigration enforcement, very few policies have been crafted to serve the former. Nevertheless, local governments can be an important tool in this regard. First, recognizing the immigrant city as a partner in the immigration project could counsel in favor of giving certain local communities more power and incentives to structure their land-use and housing policies to account for their role as immigrant receiving centers. Cities can be empowered to either acquire property to build affordable housing options tailored to the needs of newly-arrived immigrants,²⁶⁵ or encourage the development of the same through inclusive zoning regulations. In order to accommodate many of the lone sojourners that come to work, cities could develop or promote smaller housing units with communal shared spaces. Similarly, to meet the needs of extended families of immigrants who band together for social and financial support, cities may wish to promote living facilities that provide more segmented living quarters and amenities for multi-generational residency.²⁶⁶ Indeed, depending on present needs, anticipated demands, or other normative consideration, a local community can vary this efforts in a number of ways: housing can built specifically for immigrants or provided for a diverse range of municipal residents; they can be provided as permanent dwellings for several years or as temporary housing units aimed at accommodating recently-arrived immigrants for a short period of time; and they could be organized to be self-sustaining or could be offered as a subsidized service in hopes of offsetting social service costs down the road that affordable housing in the early years might alleviate.

Second, just as municipal-supported affordable housing can be used to help immigrants settle in America by providing residential options that meet their specific needs, cities may also wish to develop dedicated welcoming centers to help immigrant learn and adjust to American society. During the first wave of immigration to the United States, receiving centers such as New York's Castle Gardens and its federal successor, Ellis Island, served as facilities where immigrants were not only inspected, but also provided with a wealth of information and services to facilitate their

²⁶⁵ See **Wilcox**, *supra* note 150, at 95 (noting that although cities like New York has established departments to “inspect tenements and enforce the laws governing their construction and management . . . no American city has gone so far as to copy the British cities in establishing municipal model tenement-houses.”). Studies have demonstrated that immigrants in cities with large amounts of government sponsored social housing are less segregated and have more interactions with natives than those who reside in cities with largely private housing and few social housing options. See Christian Kesteloot Cees Cortie, *Housing Turks and Moroccans in Brussels and Amsterdam: The Difference between Private and Public Markets*, 35 *Urban Studies* 1835, 1850 - 51 (1998).

²⁶⁶ See Alvin James, *Demographic Shifts and the Challenge for Planners*, in *Urban Planning in the Multicultural Society* 15, 33 (Michael A. Burayidi ed., 2000).

settlement.²⁶⁷ Although for the vast majority of immigrants today the journey to American no longer involves sailing past the Statue of Liberty and into New York harbor, many distinct cities still serve as important points of entry for newly-arrived immigrants. Cities in these positions could therefore (re)establish formal receiving centers to assist in local resettlement efforts: immigrants can receive information about available job prospects, learn how to apply for driver's licenses and other registrations, be provided with assistance regarding naturalization and their legal rights in this country,²⁶⁸ find out about housing and transportation options, or even enroll in English language or job training course. To be sure, some cities and non-profit organizations have already taken the initiative to offer some of these services. A centralized location, however, can effectively provide a number of immigrant-related services from several different governmental and non-profit organizations while encouraging these organizations to cooperate in more efficient ways to streamline their operations.

Providing welcoming facilities or similar services at the local level could also be used to better disperse the immigrant population into different parts of the country. While many popular immigrant destinations complain about the disproportionate burden they shoulder with regard to immigrant needs, others, such as the cities of Baltimore, Philadelphia, Pittsburg, and Louisville have started to look into actively recruiting immigrants into their community.²⁶⁹ Considering the large numbers of immigrants already arriving into established gateway communities, collaborating with municipal receiving centers in these areas to provide information about and advertise specific resettlement programs offered by these recruiting communities may actually be a more effective and efficient means of attracting immigrants. Informal information exchanges among co-ethnic networks already play a large part in guiding residential decisions among immigrant populations — sometimes leading to massive resettlement.²⁷⁰ Formalizing the process through a collaborative inter-local effort would better channel such movements to serve the interests of immigrants and communities across the country. To be sure, local governments in traditional gateway cities may be concerned about expending valuable local resources to train, educate, and assimilate immigrants that will eventually leave for other communities.²⁷¹ There is no reason to believe, however, that implementing a successful local settlement program combined with an active national resettlement effort would not lead to greater cross regional

²⁶⁷ See *supra* note 81. Other immigrant-receiving cities had similar facilities as well. See e.g., First Annual Report, Massachusetts Bureau of Immigration, Massachusetts Public Documents No. 121 (1919), reprinted in **Edith Abbott, Immigration: Selected Documents and Case Records** 580, 580 – 587 (1924) (describing Massachusetts' Bureau of Immigration, which established offices in Boston with branch offices in New Bedford and Springfield to assist immigrants with advise, information, and to combat fraud and handle wage claims).

²⁶⁸ This may be especially important in light of the alarming rate of fraudulent legal services being pandered to legal and illegal immigrants. See Gary Rivlin, Dollars and Dreams: Immigrants as Prey, **N.Y. Times**, June 11, 2006, at Section 3, p. 1.

²⁶⁹ See Bill Ong Hing, Answering Challenges to the New Immigrant-Driven Diversity, 40 **Brandeis L.J.** 861, 869 - 74 (2002).

²⁷⁰ See Susan Taylor Martin, A Collision of Cultures Leads to Building Bridges in Maine: Somali Immigrants are Finding a Haven in a Previously Homogenous Enclave of Maine, **St Petersburg Times**, Mar. 13, 2005, at A1.

²⁷¹ See Lovelace, et al. Immigration and its Impact on American Cities 144 (1996) (“As . . . immigrants become established economically and socially, they move to other, more prosperous jurisdictions and are replaced by a new set of arriving immigrants. Therefore, the jurisdictions with a disproportionate share of new immigrants bear the initial socialization and conditioning costs without the benefit of subsequent increasing revenue and community development.”).

cooperation among various communities across the country that would also produce additional means of financing these programs.²⁷²

These two proposals offer some immediate possibilities that can be effectuated largely within the current structure of local government laws. But if the federal government is serious about its effort to integrate immigrants into American society and ensure that they, along with their children, make long-lasting contributions to our nation, then the immigration debates must also be attuned to how the existing structure of local government laws organize our local communities. As I explained above, existing local government policies have a tremendous impact on our country's ability to bring immigrants into the fold of mainstream America and promote acceptance and tolerance of their presence. The fully benefits of immigration will never be truly realized if federal, state, and local governments do not take steps to dismantle the inequitable and segregated communities that plague our metropolitan regions. In this and many other respects, local government law is not just a local issue — it should be considered a national one as well.

Of course, neither a strong commitment to community building, nor any of the proposals outlined above, will guarantee the disintegration of immigrant enclaves or complete and total dissolution of recent immigrants and their children into “mainstream” (i.e. middle-class Anglo) American society. But ultimately, this may not be something that we want. We should certainly take steps to dismantle the legal and social forces that artificially limit the residential options of immigrant families along the lines of race, ethnicity, socioeconomic status, or alienage. But we need not believe that replacing one form of uniformity (e.g. white suburbs, ethnic inner-cities) with another (perfect demographic distribution across the entire region) is the best possible outcome.²⁷³ What makes city-life, if not life in American society as a whole, interesting and exciting is the fact that there are physical spaces in which neighborhoods of character can arise. Moreover, without artificial legal impediments to residential mobility or the building of a cohesive political community, we would likely see more people of all walks of life being able to live in and enjoy these distinct communities instead of feeling that eradicating them would be the only way to prevent widespread balkanization and ethnic separatism.

3. Addressing the Immigrant City as a Victim of Immigration: Facilitating Local Development and Promoting Global Competitiveness

Last, local communities need not refrain from being actively involved in the broader immigration project because they believe themselves to be the ultimate victim of immigration and immigration policy generally. Instead of focusing on accounting techniques that discount the benefits of immigration and construes local services as private commodities that are “purchased” by immigrants through their tax contributions, steps should be taken to address the local funding

²⁷² This type of cooperation is not without historical precedence. See To Distribute Immigrants: Nine Governors and Many Mayors in League to Care for Newcomers, **N.Y. Times**, Mar. 3, 1912, at 9; Our Doors are Open, *supra* note 83 (describing southern convention in which state and local leaders agreed to contribute to the establishment of an office in New York City to attract immigrants to the south).

²⁷³ See Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 **Harv. L. Rev.** 1841, 1913 – 15 (1994).

system as a whole. Indeed, we should acknowledge that the beneficiaries of these services are not limited to the immigrant who receive them: proactive and preventative medical assistance to immigrants or their children has health and fiscal benefits for the entire community as a whole, and funding education for first and second generation immigrants, as opposed to being a windfall for their parents, are the means by which we determine how much they will be able to contribute to American society in the future.

Similarly, local communities need not be paralyzed by the demographic challenges brought about by immigration, especially when local governments can take affirmative steps to promote positive developments. This effort can be largely local in scope. For example, cities could work with immigrant entrepreneurs to encourage businesses in distressed neighborhoods. This would help many immigrants to achieve an economic foothold in American society while channeling the positive effects of immigration to neighborhoods that are in need of economic revitalization. Local communities can also promote immigrant entrepreneurship by providing training, financial services, and other incentives. This could be a good alternative to the raze-and-reconstruct techniques employed in urban renewal movement of the mid-1990s by providing for necessary redevelopment while also promoting communities of character that may become a strong cultural asset for the city. Vibrant commercial and residential neighborhoods not only reduce many of the ills associated with economic and social isolation, but it also cultivates a culture of investment by local residents and business owners.

Local governments can also formulate ways to regulate or formalize labor markets in which immigrants are disproportionately represented to ensure that employers comply with labor and wage requirements and minimize any effect that immigrant labor may have on the wages of other disadvantaged groups. For instance, local communities may be encouraged to either independently, or with the assistance of private or charitable groups,²⁷⁴ establish formal hiring centers for day-laborers.²⁷⁵ Day-laborer hiring centers would not only alleviate local opposition to immigrant workers by reducing their presence on street corners and other public and semi-public locations, such centers can also establish efficient and uniform requirements regarding how workers are assigned, minimum wages for different types of tasks, and working conditions at job sites. In a largely non-unionized sector of the job market, day-laborer centers can facilitate the type of collective action necessary to keep wages from plummeting and ensure safe working conditions. Moreover, there is no reason to believe that day-laborer centers would serve to only help the immigrant population in a given community. Regulated centers could also provide another form of employment for low-skilled native workers who have difficulties finding full-time employment. A formalized structure for dispersing such work could reduce employer reliance on co-ethnic referrals and give opportunities to other local residents as well.

²⁷⁴ See Richard Simon, Day Labor Site Mandate Riles D.C., L.A. Times, Apr. 23, 2006, at 8 (describing cities that have conditioned the construction of home improvement stores on the store's willingness to construct and operate day-laborer centers and a proposal in Congress to forbid such requirements); Christina Bellantoni, Fairfax County, Va., Day-Laborer Center at Issue, **Wash. Times**, Aug. 22, 2005, at ___ (describing a proposed day-laborer center to be funded by the county and managed by "Project Hope and Harmony, a group of churches and community leaders").

²⁷⁵ This would require some states to repeal or amend current laws. See, e.g., Arizona HB 2592 (2005) (Prohibiting cities, towns, and counties from constructing or maintaining day-laborer centers if any part facilitates the hiring of undocumented immigrants).

At the same time, embracing the benefits of immigration may require immigrant cities to adopt a more transnational outlook. As America becomes increasingly entrenched in a globalized network of economic, political, and cultural relationships, the immigrant city is also extending outwards: it is progressively being thought of as vital nodes of connection between the United States and the world. Indeed, if the focus of the first two alternatives of the immigrant city emphasizes its capacity of the local to serve as a representative of the nation in bringing immigrants into America's social, economic, and cultural mainstream, in a world of increased transnational connectivity, might we also see the immigrant city as a representative of the United States to the world, with the immigrant acting as a vital link in the process.

If certain cities may wish to develop in the direction of being a global city, how could the legal presumptions about the goals of our immigration project or the role that local government play be altered to accommodate these interests? For one, it may be necessary to further decentralize power over immigrant education to local authorities. Cities seeking to become world or global cities may have educational priorities different from that of the state or the nation for their immigrant and native residents. Indeed, notwithstanding the national and state trends favoring rapid and uniform linguistic assimilation through policies designed to enshrine English as the "official" language, aspiring global cities like the City of Miami are already deviating somewhat by upholding the Spanish proficiency of its immigrant population in support of claim as the "Gateway to Latin America."²⁷⁶ Instead of fostering state or national English Only initiatives that threaten to foreclose local discretion with regard to local language education, cities like Miami should be given the leeway to adopt educational programs that promote true bilingualism — not only for the second and third generation Hispanic immigrants, but also native-born whites and blacks as well — to better prepare its residents to participate in Miami's unique economic climate.²⁷⁷

A shift toward seeing immigrant cities as embedded in the transnational marketplace may also spur cities to participate more fully in the development of local economic policies with an eye to reducing local inequalities. The economic expansion based on manufacturing and other unionized labor during the early to mid-twentieth century is believed to have helped create a sizable middle-class. But, at the same time, it also led to the suburban exodus of many metropolitan residents at the expense of the inner-city. The new urban economy has propelled many residents and businesses to relocate back into the central cities. But its emphasis on financial services and high-technology has led to increased socioeconomic inequalities and a deepening divide between the rich and the working poor.²⁷⁸ To be sure, local governments would likely tread lightly with regard to local inequalities lest they lose their competitive edge to competing cities in America and around the world. Nevertheless, as a political institution with jurisdiction over these vital nodes of global trade, local governments in global cities are also in a

²⁷⁶ Florida FTAA, Miami's bid proposal to host the Free Trade Areas of the Americas (FTAA) Permanent Secretariat, at 5 – 6, available at <http://www.floridaftaa.org/web/official/english/index.html>.

²⁷⁷ See generally Creating Florida's Multilingual Global Workforce: Educational Political Practices for Students Learning English as a New Language (Sandra H. Fradd et al., eds. 1998), available at <http://www.ncela.gwu.edu/pubs/florida/workforce99/index.htm>. There are already indications that Miami is starting to promote bilingualism more broadly among its student population. See Cristina M. Rodríguez, Language and Participation, 94 Cal. L. Rev. 687, 765 (2006).

²⁷⁸ See Saskia Sassen, Cities in a World Economy 117 (2d ed. 2000).

good position to channel much of the surplus capital generated within its jurisdiction toward progressive programs aimed at raising the standard of living for all its residents.²⁷⁹

In the end, it may be that the increasing interdependence and interrelationship between global cities across the world could counsel in favor of devolving some control over immigration inflows from the federal government down to the local level altogether. As cities are beginning to play a larger role in the global marketplace, they are already beginning to take informal stances on issues relating to immigration and foreign affairs, including strengthening their independent relationship with cities across the world.²⁸⁰ It is possible to imagine a time when it may be deemed appropriate to exempt cities from the national monopoly on issues such as immigration altogether. There is no reason to believe that the interests of global cities will always or necessarily coincide with those of the nation as a whole. Moreover, as Baubock argues, such liberation may be especially beneficial to cities that are already linked with transnational counterparts in other countries: “Instead of being confined within sovereign states where they merely form the smallest self-governing territorial units, city polities would in this way be connected to each other in transnational relations.”²⁸¹ Of course, I offer this last proposal tentatively; it certainly introduces a lot of complications — from broad normative concerns about national unity to pragmatic considerations such as how to control the inflows of immigrant into one community from moving to other communities that seeks to restrict immigration — at the same time that it promises a more flexible system of immigration that takes into account local needs and interests.

Conclusion

The fate of American society is too intricately tied to the health and vitality of our cities for us to continue to disregard the role of local governments in this nation’s immigration project. The intersection between immigration and local government law is too entrenched in the doctrinal framework for us to continue to ignore the mutual impact of these two bodies of law upon one another. As this article has demonstrated, the current state of the immigrant city simply cannot be dismissed as an inevitable consequence of social and economic forces outside of our control. Nor should we persist in writing off the legal space within which it stands — at the legal juncture of immigration and local government law — as an unintended doctrinal anomaly. As a significant geo-social institution in our lives and a vital ideological component of our national narrative, we must begin to understand and study the immigrant city as a legal concept. We can maintain the immigrant city as it stands now by continuing the legal foundation upon which it rests. But as a product of our legal structure, we are also free to transform it to serve different purposes and, ultimately, to pursue different normative objectives. The immigrant city can be a

²⁷⁹ Cf. David Barron, Boxed Out: Big-Box Retailers Like Wal-mart are Looking to Expand into Urban Markets, **Boston Globe**, August 13, 2006, at D1 (describing the City of Chicago’s efforts to regulate employee benefits of big-box retailers as evidence that cities “emerg[ing] from decades of decline with newfound financial strength . . . are now beginning to assert their public powers to decide the kind of cities they want to be”).

²⁸⁰ See Gerald E. Frug & David Barron, International Local Government Law, at _ (forthcoming); Baubock, Reinventing Urban Citizenship, supra note 255, at 139, 149; see also **Smith**, supra note 7, at 185 – 86, 189 - 91 (describing how local American and foreign leaders are campaigning in other countries to appeal to the transnational residents within their community).

²⁸¹ See Baubock, supra note 255, at 149.

valuable tool in the national immigration project, if only we are willing to accept it as such and legally shape it to advance certain normative goals as opposed to others.

It is admittedly far too early to predict exactly what shape an alternative model of the immigrant city might take or what solutions or problems such an alternative model might bring. What is becoming more evident, however, is that the current models of the immigrant city are too limited, even in their varied forms, to serve the national immigration interests or the local interests with regard to immigrant incorporation into our local communities. We should certainly proceed with caution in exploring ways to reform the existing legal structure as it pertains to the role of local governments in the immigration debates. But lest we lose sight of the fact that the current models of the immigrant city have hardly arisen through conscious deliberation, we should seize this opportunity to explore the myriad possibilities that the immigrant city might hold.