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Publication Date

2007-05-10

ISSC WORKING PAPER SERIES 2003-2004.10

**Cities, Citizenship, and Undocumented Aliens:
Dilemmas of Law and Political Community in
Contemporary America**

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May 10, 2007



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THE STUDY OF
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This paper argues that cities are important political and legal communities that construct and govern the “rights in action” of undocumented aliens in the United States today. However, it also challenges the proposition that large U.S. cities are likely to be sites for expansive citizenship for all non-citizens. Through close examination of case law and publicly available documents related to New York City's changing police department policies concerning the immigration statuses of its residents, the paper reveals how limited U.S. cities may actually be in attempts to formulate positive laws expanding the “rights” or “citizenship” of undocumented aliens in particular. On a theoretical level, this paper argues that attention must be given to the prominent role of positive law in U.S. immigration and alienage law as well as to the complexities created for positive law by overlapping jurisdictions and modern administrative modes of governance. While this paper concedes that a formal, legal conception of citizenship need not dominate all discussions of citizenship, it nonetheless seeks to build a particularly sociolegal framework for institutional analysis of cities, citizenship, and alienage in the U.S. today.

The ideal type of republic may be a small unitary state with no crime, no physical or mental illness, and no children. The United States, however, is a large federal state with crime, illness, children—and resident aliens.

-Gerald Neuman, *Strangers to the Constitution*¹

Men do not wield or submit to sovereignty. They wield or submit to authority or power. Authority and power are facts . . . sovereignty is not a fact.

-F.H. Hinsley, *Sovereignty*²

He who would inquire into the essence and attributes of various kinds of governments must first of all determine, What is a state? At present, this is a disputed question. . . . But a state is composite, like any other whole made up of many parts; these are the citizens, who compose it. It is evident, therefore, that we must begin by asking, Who is a citizen, and what is the meaning of the term? For here again there may be a difference of opinion.

-Aristotle, *Politics*³

Introduction⁴

This paper argues that cities are important political and legal communities that construct and govern the “rights in action” of undocumented aliens in the United States today.⁵ As such, it contends that cities deserve attention as unique sites of immigration and alienage law “in action.” At the same time, this paper also critically evaluates recent scholarship that suggests that large cities in federal states such as the U.S. either already are, or are likely to be, sites for expansive contemporary rearticulations of citizenship for all non-citizens. Through close examination of

¹ Neuman 1996, 142.

² Hinsley 1966, 1.

³ Aristotle 1958, 296.

⁴ This paper presents ideas that will be more thoroughly examined in a forthcoming dissertation. Thanks to ISSC for traineeship support and to Deborah Barron and Christine Trost of ISSC for comments and suggestions on this paper. Thanks also to Leti Volpp for comments on a presentation that contained preliminary formulations of some of the points explored in this paper.

⁵ Following Ngai (2004, xix-xx), this paper uses the terms “alienage” and “alien,” and sometimes “illegal alien.” It does so not to be pejorative or to express any unfavorable normative position. Rather, as in Ngai’s book, the use of the terms is meant to call attention to these specifically legal designations and terminology as well as the tension these terms bear in contemporary legal and political discourse on immigration and alienage. On this last point, see Nunberg (2006).

case law and publicly available documents related to New York City's changing police department policies concerning the immigration statuses of city residents, the paper reveals how limited U.S. cities may actually be in attempts to formulate laws expanding the rights or privileges of undocumented aliens in particular.⁶ As such, while this paper concedes that a formal, legal conception of citizenship need not dominate all discussions of citizenship, it nonetheless urges caution with respect to the argument that U.S. cities are likely to be expansive sites of political belonging for all aliens to the nation-state.⁷

Three sections comprise this paper. The first of these sections sets the stage by briefly reviewing recent sociological findings that support the point that cities are particularly important sites for studying the governance of non-citizens in the U.S. today. Next, this section critiques two works – one primarily sociological and the other primarily political theoretical – that posit optimism about the ability of cities to rearticulate citizenship in expansive ways, perhaps in light of the sociological prevalence of immigrants in cities. As a response to these works, this section draws attention to the details of the legal framework for relationships between city governments and the federal government in the U.S. It suggests finally that paying attention to the limits and possibilities of this framework is necessary for understanding the citizenship and alienage of undocumented aliens in U.S. cities today.

⁶ The more prevalent site of analysis for scholars interested in the possible local expansion of alien citizenship is the phenomenon of non-citizen voting in local elections. On experiences with non-citizen suffrage in the U.S. as well as arguments for its extension, see Raskin (1993) and Newman (1992). With its focus on city policing policies, this paper opts for a less discussed, less officially juridical, and arguably more basic possible reconstitution of alien citizenship.

⁷ As a matter of methodology, this paper pays careful attention to the mediation of law through language. As a work influenced by both the sociology of law and the rhetoric of law, this paper seeks to complicate conventional portraits of “law in action” found in the field of sociology of law. It does so in so far as it pays close attention to written law and to law's forms and effects as speech. The paper thus challenges the distinction between “law on the books” and “law in action” found in much sociology of law literature. Specifically, it does not treat written law as “just on the books” or epiphenomenal, as much sociology of law and social science more generally are likely to do. Rather, it heeds the insight that “legal language is a creative speech which brings into existence that which it utters” (Bourdieu 1991, 42). This insight that legal language has a peculiar and important performative quality was noted by Austin (1962) and expanded upon by Constable (2005, 14-28), who details the kinds of things that a uniquely rhetorical approach to law can show.

The second section of the paper switches to a more jurisprudential and political theoretical register as well as to the level of the nation-state. It does so in so far as the nation-state is the most salient site for modern citizenship and alienage discourse. This section develops the argument that the undocumented alien is both a product of and a problem for the sovereignty and the positive law of the U.S. nation-state. It fleshes out some of the defining characteristics and paradoxes of both sovereignty and positive law, and it draws out the close relations between these two concepts in the canon of U.S. immigration and alienage law. It then shows how Hannah Arendt's famous formulation of citizenship as "the right to have rights" holds within it a critique of the role of positive law in determining modern political community (Arendt 1951, 296-7). Finally, it shows how Arendt's critique has been occluded by subsequent legal commentators, and it draws out the relevance of Arendt's critique for contemporary questions of citizenship and alienage in settings other than nation-states.

The third section of this paper moves from the nation-state back to the city level of government in light of the theoretical points made in the second section. It presents the case study that is meant to serve as a U.S. based, empirically grounded counterpoint to the optimistic arguments about citizenship in cities reviewed in the first section of the paper. It takes up the leading legal case on the issue of city-based police department "sanctuary" policies for

undocumented aliens, *City of New York v. United States*.⁸ This 1999 Second Circuit Court of Appeals case arose out of New York City's attempt to defend its 1989 "sanctuary" law for undocumented aliens in the wake of 1996 federal legislation that seemingly prohibited such a law.⁹ The case initiated a series of events that transformed a New York City executive order from a specific command about the governance (or rather non-governance) of undocumented alienage at the city level, to a more general policy of privacy for all city residents. Through a close examination of the case and other related documents, this section considers the sociolegal and political theoretical ramifications for questions of cities and citizenship created by the development and transformation of New York City's "sanctuary" policy into one of "privacy."

Taken as a whole, this paper seeks to develop a new framework for studying undocumented alienage "in action" in the U.S today. This framework points to the importance of taking into account the particularities of law as language (Constable 2005), as well as the often conflicting workings of the multiple "street level bureaucracies" (Lipsky 1980) that

⁸ 179 F. 3d 29 (1999). The word "sanctuary" appears in quotation marks because jurisdictions that have such policies often steadfastly refuse the word "sanctuary." See, for example, the statement of John Feinblatt, Criminal Justice Coordinator for the City of New York, at the February 27, 2003 Hearing Before the House Subcommittee on Immigration, Border Security, and Claims. Feinblatt began by stating, "Let me begin by making one thing crystal clear: New York City has no sanctuary policy for undocumented aliens." See Transcript of House of Representatives Subcommittee on Immigration, Border Security, and Claims Hearing, February 23, 2003; <http://commdocs.house.gov/committees/judiciary/hju85287>. Feinblatt may be correct at least as a matter of semantics in so far as "sanctuary" conveys an ecclesiastical character. The term is likely a holdover from the "sanctuary movement" of the early and mid-1980s, during which city councils passed resolution or ordinances lending support to churches within their jurisdictions offering "sanctuary" to refugees from primarily El Salvador and Guatemala. See Carro (1989) for the argument that the municipal ordinances of the sanctuary movement were legally proscribed. For an ethnographic account of the playing out of the sanctuary movement in U.S. churches, see Coutin (1993). The migration of the term "sanctuary" from a religious to a strictly governmental context as well as the broadening of the scope of the possible beneficiaries beyond El Salvadorian or Guatemalan undocumented aliens raises interesting historical and theoretical questions that will be addressed in the forthcoming dissertation.

⁹ The federal legislation at issue is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, 110 Stat. 2105 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

comprise the modern federal administrative state.¹⁰ Ultimately, this paper suggests that fraught contemporary dilemmas about undocumented aliens give rise not only to persistent questions about citizenship and alienage in the nation-state and in cities, but also to more fundamental questions about the limits and the justice of modern American conceptions of political community and of law.

I. Aliens, Cities, and Citizenship: A First Take

That political and sociolegal questions of immigration and alienage “in action” demand to be studied at the city level seems relatively uncontroversial. Sociologist Roger Waldinger has recently argued, for example, that immigration to the United States is “now, as in the past, a quintessentially urban phenomenon” (Waldinger 2001, 1). As he and Jennifer Lee have found through analysis of U.S. Census data and the Current Population Survey, Los Angeles and New York City together are home to approximately 40% of the U.S.’s immigrant population (Waldinger and Lee 2001, 43). Miami, San Francisco, and Chicago together account for an additional 16% (6%, 6% and 4%, respectively), while Boston, Dallas, San Diego, Washington, and Houston account for an additional 11% (2%, 2%, 2%, 2%, and 3%, respectively). These sociological findings suggest that legal and undocumented alienage, though nominally designations of the U.S. nation-state, are nonetheless sociolegal problems that manifest themselves disproportionately in U.S. cities.¹¹

¹⁰ The study of undocumented alienage as a sociolegal problem of the modern administrative state in particular is an important part of the dissertation project which further examines many of the questions raised in this paper. On the political theoretical and jurisprudential conundrums posed by the administrative state, see Mashaw (1985). For a history of the early and important relationship between regulation of immigration and the rise of the administrative state in the U.S., see Salyer (1995).

¹¹ This of course presumes that if the cities listed above were home in 2000 to approximately 67% of the U.S. total immigrant population, they were also home to at least roughly the same (if not a greater) percentage of the U.S.’s illegal alien population.

Less clear, however, is the proposition that because immigrants may be disproportionately present in cities, cities are likely to be sites for destabilizations of nation-state power and necessarily the space of expanded local citizenship rights for non-citizens. This presumption may have underwritten to some degree the claims of anthropologists James Holston and Arjun Appadurai who have written in an edited volume, *Cities and Citizenship*, that cities “experience today an unsettling of national citizenship that presents unprecedented change” (Holston and Appadurai 1999, 2). They note further that, “in some places, the nation itself is no longer a successful arbiter of citizenship” and that “in other places, the nation may maintain the envelope of citizenship, but the substance has been changed or at least challenged [so] that the emerging social morphologies are radically unfamiliar and force a reconsideration of the basic principles of membership” (Holston and Appadurai 1999, 2).

Holston and Appadurai are careful to remain officially agnostic as to whether this presumed withering of the power of the nation-state has led to more or less inclusive citizenship (Holston and Appadurai 1999, 5, 13). And they are careful, as ethnographers, to maintain distinctions between particular contexts and places. On a cautious note, Holston and Appadurai write, “Our point is not to argue that the transnational flow of ideas, goods, images, and persons — intensified by recent developments in the globalization of capital — is obliterating the salience of the nation-state. Rather, it is to suggest that this flow tends to drive a deeper wedge between national space and its urban centers” (Holston and Appadurai 1999, 3).

Nevertheless, a sense of optimism about the ability of “the world’s major cities” to “make manifest . . . reconstitutions of citizenship” (Holston and Appadurai 1999, 9) pervades their text. This optimism derives perhaps from their reliance on a “conventional distinction between formal and substantive aspects of citizenship” (Holston and Appadurai 1999, 4), and a corresponding focus on identity politics, social movements and civil society, rather than on the mutually constitutive relations between formal and substantive citizenship, or on the workings of everyday local governmental institutions.

While Holston and Appadurai may be approaching their study of citizenship in cities from an intentionally non-judicial, non-governmental angle, and even a mainly non-U.S. angle, their claims nonetheless beg the empirical question of whether U.S. cities are sites for the urban reconstitutions of citizenship that they point to, in light of the transnational reach of processes such as globalization, in light of the prevalence of immigrants in U.S. cities, and in light of the inescapable rights-related cadence of the word “citizenship.” Further, Holston and Appadurai’s claims also beg the theoretical question of what possible blind spots emerge for scholars of citizenship when they insist upon bifurcating formal (or judicial) and substantive (or sociological) aspects of citizenship.¹²

¹² While it is beyond the scope of this paper to address this issue definitively, a sociolegal perspective moves in the direction of challenging this bifurcation, in so far as it construes legal institutions and outcomes as themselves a product of social processes, rather than opposed to social processes or irrelevant in the face of social processes.

Seen in light of these points, even Holston and Appadurai's more cautious statements about cities and citizenship appear problematic in the U.S. context. The legal case discussed in the third section of this paper, for example, evinces a complex and continuing legal history as well as a sociolegal reality of nation-state supremacy over cities and states in the U.S., despite contemporary transnational flows of capital and labor into large U.S. cities. This hierarchical relationship between the federal government and cities (which are considered to be more or less administrative subsidiaries of states in U.S. law) is underwritten by the Supremacy Clause of the U.S. Constitution. The Supremacy Clause posits that the laws made under the authority of the U.S. shall be "the supreme Law of the land," notwithstanding state or local laws to the contrary.¹³

¹³ See U.S. Const. art. VI, § 1, cl. 2.

Further, the doctrine of federal preemption, which derives from the Supremacy Clause, has figured prominently in modern alienage law. It suggests that when states or localities discriminate against, or even to the benefit of aliens, the constitutional wrongness of the actions of a subfederal jurisdiction lies not so much in the discrimination per se, but rather in encroachment on the federal government's ability to be the sole discriminator, or rather the sole arbiter of citizenship and alienage within the nation-state.¹⁴ In sum, while it is not the case that the existence of the constitutional principle of federal supremacy and legal doctrines related to this principle necessarily makes impossible any "wedge between national space and its urban centers," it does make important attention to law and legal institutions "in action" when contemporary questions of cities, citizenship, and aliens (both lawfully admitted and undocumented) are broached in the U.S. context.¹⁵

¹⁴ See, for example, *Toll v. Moreno*, 458 U.S. 1 (1982), which held that the State of Maryland's policy of barring nonimmigrant aliens with G-4 visas from acquiring in-state residency status violated the Supremacy Clause. See also *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (1997), which permanently enjoined provisions of California's Anti-Immigrant Prop 187 on grounds of federal preemption of issues of immigration and alienage. On the other hand, the U.S. Supreme Court has also held that states may legislate matters having to do with alienage, as long as the primary purpose of the state legislation is not to contravene federal law. For example, in *DeCanus v. Bica*, 424 U.S. 351 (1976), the Court upheld a California law that prohibited an employer from knowingly hiring undocumented aliens at the expense of lawfully resident workers. The Court reasoned that the California law had primarily to do with labor and only indirectly affected immigration and alienage.

¹⁵ The Tenth Amendment to the U.S. Constitution of course further complicates matters having to do with the supremacy of federal law over state and local law. The Tenth Amendment, on which the City of New York relies to defend its original executive order regarding immigration status (See Section III infra.), reserves for "the states," or for "the people," the powers not delegated to the federal government by the Constitution. For the purpose of this paper, what is important is the point that the Supremacy Clause, the Tenth Amendment, and indeed the existence of many relevant federal, state, and local agencies (all creatures of the modern administrative state) complicate the law in action in cities where questions of aliens and new forms of citizenship are concerned. The complexity of legal relationships between the federal government and cities in the U.S. makes problematic the expectation of "a wedge between national space and its urban centers" in the face of globalization. As far as the question of whether states, which are far more powerful than cities in the U.S. Constitutional scheme, retain the ability to grant state citizenship to those whom the nation-state considers legally resident aliens, Spiro (1999, 619), drawing upon Neuman (1992, 293), argues that recent trends toward the devolution of various powers to the states make this less far-fetched than it may seem. Nonetheless, the post-9/11 governmental landscape, inescapable questions of federal preemption, the Citizenship Clause of the Fourteenth Amendment which asserts the primacy of federal citizenship, and the staying power of the concept of nation-state sovereignty make this unlikely.

In contrast to Holston and Appadurai, Baubock (2003, 141) explicitly addresses legal relations between federal and city governments, at least in the abstract. He argues normatively for “strengthening city autonomy vis-à-vis the state by challenging national monopolies in immigration, trade, and foreign policy” (Baubock 2003, 142). Further, he argues for “automatic *ius domicili* (membership through residence) as the basic rule for allocating membership in the city. . .” (Baubock 2003, 150). Noting that municipalities, unlike national governments, “have no immigration control that distinguishes between citizens and non-citizens,” Baubock (2003, 150) writes:

Cities are political communities of a different kind and they can assert this by granting full local citizenship to all residents within their jurisdiction. This could be achieved through a simple non-discrimination clause that would prevent any nationality-based exclusion from local rights and benefits. Such a clause could still allow for a reasonable grading of rights according to length of residence. For example, a certain period of residence may be required for access to certain social services or to voting rights. I believe that it would make sense to go beyond non-discrimination by introducing a formal status of local citizenship. Acquisition and loss would remain automatic rather than based on consent, so formalization would not offer a pretext for restricting access. The status need not be purely symbolic but could be tied to the local franchise. Still, the most significant effects would be symbolic ones: immigrants from other parts of the country as well as from abroad 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 also 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.

Baubock's proposals do not appear to be limited to non-citizen legal permanent residents of the nation-state, as are many existing policies for immigrant incorporation into municipal political communities, particularly in the realm of voting.¹⁶ As such, Baubock's reinvigorated city-based citizenship appears to include undocumented residents within its purview, in so far as he argues that cities should refrain from "*any* nationality-based exclusion" (emphasis added).

Baubock's proposals are thus relatively modest and yet also provocative in so far as they appear to include undocumented aliens within their purview. They are no doubt premised upon significant altering of the background legal relationships between federal governments and cities, and as such, perhaps ought not to be criticized with respect to extant law. But as a theoretical matter, it is important to note that Baubock's proposals curiously presume that city governments can simply opt out of bothering with legal designations of national alienage status because they, unlike nation-states, do not have border controls. This in turn presumes that the national border can fully end at the national border so to speak, or in other words, that alienage can completely cease to matter for the allocation of rights inside the national border.

Interestingly, conflict and confusion over this very proposition is constantly at the heart of U.S. immigration and alienage law, as Linda Bosniak (2006) has recently noted. The U.S. government's immigration power is, on the one hand, the power to decide at the border whom to admit and whom to exclude. But as a matter of U.S. law, the immigration power also extends inside U.S. territory and as such underwrites the U.S. government's power to arrest and to deport aliens as well as its power to prohibit employers from hiring undocumented aliens within the national border (Bosniak 2006, 50).

¹⁶ Baubock (2003, 151) himself later notes in a description of already existing policies that give non-nationals some local citizenship that Sweden initiated in 1975 a policy of local and regional voting rights for all non-citizens after three years of *legal* (emphasis added) residence. Similarly, a recent New York City proposal to allow non-citizens to vote in municipal elections limits itself to legal residents. See Chan (2007).

The U.S. government's immigration power, underwritten by certain conceptions of law and of nation-state sovereignty (discussed in the second section), and operating *within* the territory of the U.S., limits how cities can expand the rights or privileges of undocumented aliens. As such, in the U.S. context, even "a simple non-discrimination clause that would prevent any nationality-based exclusion from local rights and benefits" (Baubock 2003, 150) is harder to achieve than meets the eye, as the ensuing analysis of New York City's changing policies regarding policing and non-citizens reveals.

In sum, what can be said with some certainty at this point is that the large U.S. city is indeed an important jurisdiction where a battle over the nation-state's power to determine citizenship and alienage exclusively is being fought. The very existence of city-level "sanctuary" ordinances for undocumented aliens as well as the legal and political debates surrounding these city policies evinces this point.¹⁷ However, it is not clear that the outcome of this battle is currently as progressive, expansive, or even destabilizing to nation-states as Holston and Appadurai suggest.

Further, normative proposals for increasing city autonomy vis-à-vis immigrants must take into account the realities of the extension of national immigration power beyond the national border and into the interior of national territory, in the name of "nation-state sovereignty." Such proposals must grapple with the co-existence of nation-state and city law within the space of cities. Thus, seen anew through a lens of a sociolegal framework that takes as its starting point the law "in action," extant questions about aliens, cities, and citizenship become more complicated questions of reconciling federal and subfederal conceptions of sovereignty, political community, law, and language in the modern U.S. administrative state.

¹⁷ See McKinley (2006) for a recent *New York Times* account of the continued existence and prevalence of such policies.

II. The Alien, Positive Law, and Nation-State Sovereignty

Historian Mae Ngai has recently written:

. . . illegal alienage is not a natural or fixed condition but the product of positive law; it is contingent and at times unstable. The line between legal and illegal status can be crossed in both directions. An illegal alien can, under certain conditions, adjust his or her status and become legal and hence eligible for citizenship. And legal aliens who violate certain laws can become illegal and hence expelled, and in some cases, forever barred from reentry and the possibility of citizenship (Ngai 2004, 6).

For Ngai, the notion that “illegal alienage” is “a product of positive law” appears to mean that the category is the result of legal declaration, and that there is nothing essentially fixed or existentially true about one’s status at the altars of immigration and alienage law. Ngai argues that changes in the legal construction of the “illegal alien” reveal historical changes in a nation’s sense of its racial and ethnic identity. While this is an important insight, there are further implications of the derivation of modern alienage statuses from positive law that remain to be examined. This section argues that these further implications include the mutually constitutive relationships between positive law, nation-state sovereignty and alienage in the U.S.

Positive law has curiously but necessarily little to say about justice, as Marianne Constable has noted (Constable 2005, 9-10, 17-18). Positive law is man-made law that has no ground in anything other than itself. It has the characteristic of being writable as a set of propositional rules. These rules are then presumed to be grounded in a source external to the rules. Positive law is law on account of some “factual, nonmoral criteria,” not because it has any necessary connection with justice, morality, or practice (Constable 2005, 9-10, 17-18).

With respect to U.S. immigration law and alienage law, the “factual, non moral criteria” for determining law has been in large part the “sovereignty of the nation-state,” itself ironically

not an a priori empirical fact.¹⁸ In other words, the “fact of sovereignty” is itself constantly constructed and reconstructed through the very positing of immigration and alienage law it ostensibly merely grounds. The act of positing the law draws the boundaries of the political community, whose seemingly already existing sovereignty as a Westphalian and democratic political community ostensibly grounded the law that was just posited.

Jacques Derrida (1986, 10) has made a similar point about the performative aspects of certain similarly declarative legal moments in his essay on the U.S. Declaration of Independence. Derrida notes, “The ‘we’ of the declaration speaks ‘in the name of the people.’ But this people does not yet exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not *as such*. . . The signature invents the signer.”

Unlike the founding of the American republic, the performative moments of immigration and alienage law have not to do with the constitution of a newly wrought and suddenly speaking, equal (in theory) group of citizens, as in “we the people.” Rather, in immigration law, what is at stake is the construction of an already existing community’s “sovereignty” in positive law against a changing but always necessarily outside set of foreigners. This sovereignty, like the people of “we the people,” is at once ostensibly the source of the emanating propositions, or judgment, and yet also a product of this judgment. This construction implicates a particularly positivist conception of law, as analysis of the deployment of the concept of sovereignty in foundational U.S. immigration and alienage case law reveals.

Defending Congressional statutes passed in 1882 and 1888 that severely restricted the immigration of Chinese nationals, the U.S. Supreme Court declared in 1889 in a case referred to by one recent commentator as “the granddaddy of all immigration cases,” (Legomsky 2002, 13):

¹⁸ See Hinsley (1966, 1) and Ngai (2004, 12), who notes that a goal of her historical monograph about illegal aliens in U.S. law is to “. . . detach sovereignty and its master, the nation-state, from their claims of transcendence and to critique them as products of history.”

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.¹⁹

The *Chae Chan Ping* Court's language, delivered in the face of silence on the part of the U.S. Constitution as to Congress's authority to regulate immigration,²⁰ depends on the notion of intrinsic nation-state sovereignty to overcome the lack of an enumerated immigration power in the U.S. Constitution.²¹ The Court uses the word "sovereign" to claim first that exclusion of foreigners is a prerogative of Westphalian style nation-state sovereignty, as in "sovereign power delegated . . ." The power is of course literally and precisely *not* delegated, hence the Court's recourse to the word "sovereign" to modify the word "power." This then nullifies the literal meaning of "delegated."

Further, the Court claims that the "judgment of the government," as to the "interests of the country" is the sole relevant consideration where the foreigner is a subject of law and where exercise of nation-state sovereignty against the foreigner is at issue. The Court thus finds no necessary link between immigration law on the one hand, and justice on the other. Law and justice for the foreigner are what Congress declares them to be. If it were to be otherwise, both

¹⁹ *Chae Chan Ping v. United States*, 130 U.S. 581, 583 (1889). The specific question presented to the Court was the constitutionality of the 1888 Congressional statute that prohibited the return of Chinese laborers who had immigrated to the U.S. before the passage of the 1882 Chinese Exclusion Act. The Court, as noted above, decided that the 1888 statute was not beyond the scope of Congressional power, but merely a reflection of the nation's sovereignty.

²⁰ See Legomsky (2002, 10-14) who notes that the U.S. Constitution, which gives the federal government only the powers enumerated within its text plus powers that are "necessary and proper" for carrying out enumerated powers, does not expressly authorize the federal government to regulate immigration.

²¹ In the terms of U.S. Constitutional law, the *Chae Chan Ping* case evinces the Court's recognition of Congress's "plenary power" in the field of immigration. For a historical overview of the development of the "plenary power" doctrine, see Cleveland (2002). For the purpose of this analysis, what is striking about the "plenary power," in the field of immigration law is that it is literally "unqualified or absolute" and yet it derives from the fundamental silence of the U.S. Constitution on the matter of regulating immigration. So while immigration and alienage law are particular strongholds of positive law because they have to do with entirely legally constructed (as opposed to socially constructed or even possibly biologically constructed) designations, they are also strongholds of positive law because they are grounded in a theory of authority that whatever is said by a particular source (Congress) is necessarily both law and justice on the matter.

the Westphalian sovereignty of the nation-state and the popular sovereignty of the people, represented by Congress, would not be adequately reflected in U.S. law, the text of the *Chae Chan Ping* case suggests.

Scholars of U.S. immigration and alienage law have usefully considered and critiqued the trope of nation-state sovereignty in these bodies of law, particularly in light of important foundational cases such as *Chae Chan Ping*. For example, T. Alexander Aleinikoff (2004, 183) has argued in a normative tenor that “both sovereignty and membership need to be reconceptualized in less rigid terms if we are to establish a political regime . . . that justly rules over the territory and inhabitants of the United States.” For Aleinikoff, a certain strong conception of the sovereignty of the nation-state appears to be the anachronistic obstacle obstructing the path to more legal rights for aliens on U.S. territory. Aleinikoff thus appears to suggest the replacement of national sovereignty with national territoriality as a normative engine for immigration and alienage law.

Linda Bosniak has recently pointed out that alienage law, as distinct from immigration law, does offer relatively more rights for the foreigner. Alienage law, she notes:

. . . lies at the nexus of two legal and moral worlds. On the one hand, it lies within the world of borders, sovereignty and national community membership. This is the world of the government’s immigration power, which regulates decisions about the admission and exclusion of outsiders and places conditions on their entry and residence. . . . Yet alienage as a legal category lies in the world of social relationships among territorially present persons. In this world, government power to impose disabilities on people based on their status is substantially constrained (Bosniak 2006, 38).

Bosniak in particular has carefully attended to the tension between the lack of relief for the foreigner at the border in the *Chae Chan Ping* case, and the more foreigner friendly holdings of *Yick Wo*, *Wong Wing*, and *Plyler v. Doe*, where the rights of territorially present aliens are at

issue.²² The three latter cases stand for the proposition that particular constitutional guarantees can apply to aliens, even undocumented ones, in light of their presence within national territory. Bosniak argues that taken together, these cases demonstrate “a separate sphere of constitutional rights and obligations available to all persons who are present within the United States territory, or some part thereof” (Bosniak 2006, 55).

While this is likely true, these important victories for alien plaintiffs nevertheless share in common with *Chae Chan Ping* a recourse to (and further construction of) the positive law of alienage of the nation-state, albeit in the language of national territory rather than national sovereignty. In other words, regardless of whether a case turns on Congressional power to declare unilaterally the law of foreigners, or alternately on judicial ability (or willingness) to apply constitutional amendments to aliens on account of the existence of the words “person” and “territorial” in particular constitutional amendments, the scale of the relevant political community in the modern U.S. law of immigration and alienage is generally presumed to be a national one. Important alienage law judgments that turn on territorial presence and grant rights to undocumented aliens thus nonetheless preserve and even reify the sovereignty of the nation-state in so far as the nation-state is *the* source of propositional rights for the foreigner in one way or another. It has come to seem rather strange to think outside the contexts of the nation-state and positive law where citizenship and alienage are concerned.

As such, examining the work of Hannah Arendt is helpful for understanding the implications of the rise of nation-states as the most fundamental of political communities, and of positive law as the most fundamental form of law. Although they appear natural or transcendent,

²² See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment proscribed San Francisco’s discrimination against Chinese laundry operators), *Wong Wing v. U.S.*, 163 U.S. 228 (1896) (holding that the Fifth and Sixth Amendments applied to territorially present foreigners), and *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the State of Texas could not deny public education to the children of undocumented aliens).

Arendt historicized modern relations between foreigners, nation-states, law, and rights. She suggested that when political communities came to depend on positive law or propositional rules for their constitution as political communities, something valuable about political life had been lost.²³ Arendt noted and lamented that by the early 20th century, the positive law of nation-states had curiously come to occupy fully the category of the “the rights of man.” In 1951, in *Origins of Totalitarianism*, Arendt famously wrote:

We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who have lost and could not regain these rights because of the new global political situation (296-7).

For Arendt, the French Declaration of the Rights of Man marked the moment in which “man, and not God’s command or the customs of history,” became “the source of Law” (290). Ironically, as quickly as man emerged as the source and speaker of law unto himself with certain inalienable rights, “he disappeared again into a member of a people” (291). Arendt thus eulogized the “rights of man” as man. She illuminated the tragic fact that man, by the end of World War I, had to have his belonging confirmed by the positive law of the nation-state in order to be assured of any rights at all, despite his emergence as a lawgiver during the French Revolution. For Arendt, the nation-state and its monopolistic ability to declare a priori the “rights” of citizenship had come to efface not only man, as the ostensibly liberated source of law, but also the loss of other important forms of politics and political community – engendered, organized and maintained by man’s own speech and actions rather than by prior declarations (297).

²³ This point is related to the point that Honig (1991, 102-3) has made about Arendt’s concern about a “nihilistic craving for a law of laws, for a source of authority that is transcendent or self-evident.” The positive law of “the right to have rights” that Arendt seems to be critiquing is just this kind of law of laws.

Perhaps echoing Arendt, though not directly citing her, then U.S. Supreme Court Chief Justice Earl Warren wrote in the 1958 case *Perez v. Brownell* that “Citizenship *is* man’s basic right for it is nothing less than the right to have rights.”²⁴ Warren, writing in a denaturalization case, was addressing the question of whether the federal government had the right to take away the U.S. citizenship of the petitioner Perez, who was born in Texas in 1909 but subsequently voted in a Mexican election. At issue in the case was the constitutionality of Section 401 of the Nationality Act of 1940, which stipulated “that a person who is a national of the United States, whether by birth or by naturalization, shall lose his nationality by . . . voting in a political election in a foreign state . . .”²⁵

In a decision reminiscent of *Chae Chan Ping*, a majority of the Supreme Court in *Perez* held that Congress did in fact have the power to pass such a statute and thereby to take away the U.S. citizenship of those who chose to vote in elections in other countries.²⁶ In this context, Warren wrote a dissent in the tradition of *Yick Wo*, in which he argued that the Fourteenth Amendment proscribed precisely such denaturalization.²⁷ According to Warren, Congress lacked the power to “alter this effect of birth in the United States,”²⁸ or in other words, to override on account of Perez’s subsequent actions the Fourteenth Amendment’s seemingly straightforward declaration about his birthright citizenship.

What is most important about the *Perez* case for the present analysis is how the then dissenting Warren conceived of national citizenship as *obviously* the right to have rights. For Warren, the recognition that the nation and specifically its positive law-based citizenship were

²⁴ *Perez v. Brownell*, 365 U.S. 44, 64-65 (1958) Dissent.

²⁵ *Id.* at 45.

²⁶ *Id.* at 62.

²⁷ *Id.* at 65-66.

²⁸ *Id.* at 66. In *Afroyim v. Rusk*, 387 U.S. 253 (1967), the Supreme Court overruled *Perez* on the ground that the Fourteenth Amendment does in fact proscribe the involuntary stripping of U.S. citizenship by Congress. Again, what is important to this analysis is not the status of *Perez* as law, but rather Warren’s language on the concept of citizenship.

necessary for “the right to have rights” occurred also at a moment of loss of citizenship, but the sense of unease about the nation and legal positivism’s reach in the realm of citizenship that occupied Arendt is nowhere to be found in Warren’s dissenting opinion.

While Arendt noted, “We became aware of the existence of a right to have rights” Warren wrote declaratively, “Citizenship *is* man’s basic right . . .” It is striking to note that Arendt did not use the word “citizenship.” Arendt historicized the emergence of the phenomenon of nation-state citizenship, thereby opening up or leaving open other possibilities. Warren naturalized and essentialized nation-state citizenship, precisely contra Arendt. Arendt suggested that nation-state citizenship had not always been and therefore does not necessarily always have to be the “right to have rights.” For Warren seven years later, himself a judge who posited the law of the nation-state, nation-state citizenship simply was, and also presumably ought to be, the “right to have rights.”

Perhaps because they have come to see Arendt’s text through Warren’s famous dissent, or perhaps because they are immediately concerned with arguing in a normative tenor against particular deprivations of nation-state citizenship, U.S. legal commentators have generally deemphasized Arendt’s historicizing critique of nation-state citizenship as the “right to have rights.”²⁹ For the purposes of this paper, however, reinvigorating this critical aspect of Arendt’s text usefully opens up the question of how a city – a form of political community less “imagined,”³⁰ and more tangibly relationship- and action-based than the nation-state – contends with and contextualizes the presence (the residence, if not the “citizenship”) of undocumented aliens.

²⁹ See, for example, Aleinikoff (1986, Note 42).

³⁰ The concept of the nation as an “imagined” community is from Anderson (1987).

A set of new questions emerges. If the nation-state has a monopoly on the declaration of the status and rights of undocumented aliens through its own positive laws of citizenship, immigration and alienage, through what other forms of law, or rather administrative social policy, do these smaller political communities govern the undocumented alien? Do they govern the undocumented alien as perhaps a different kind of political subject than the nation-state would have it? Can cities incorporate undocumented aliens into their political or social communities through positive law and its characteristic propositional rules, or must they do so outside of positive law, perhaps through silence, or perhaps even through languages and practices other than that of “rights” and “citizenship?”

The next section will take up these questions through close examination of the text of the leading U.S. legal case on police “sanctuary” policies in cities. The next section thus moves again to the level of the U.S. city, with the caveat that even the modern U.S. city that would expand citizenship for non-citizens necessarily exists in the shadow of the nation-state, and more specifically in the shadow of its positive law of citizenship and alienage.

III. Aliens, Cities, and Citizenship Revisited:

On the Not-So-Positive Law of City “Sanctuary” for Undocumented Aliens

In 1989³¹, Edward Koch, then Mayor of New York City, issued Executive Order No. 124.

It provided:

No city officer or employee shall transmit information respecting any alien to federal immigration authorities unless:

- 1) such officer’s or employee’s agency is required by law to disclose information respecting such alien, or
- 2) such agency has been authorized, in writing signed by such alien, to verify such alien’s immigration status, or
- 3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.³²

Further, the Executive Order made it impossible for any individual city employee to take action against an alien unilaterally, even if the employee suspected the alien of criminal activity. The Order required the designation of “one or more officers or employees who shall be responsible for receiving reports from such an agency’s line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports.”³³ The order thus established an organizational buffer between individual line officers and the federal Immigration and Naturalization Service (INS), thereby suggesting that the

³¹ *The New York Times* reported on October 15, 1985 that then Mayor Edward Koch had just written a memo in which “he ordered city employees not to report illegal immigrants living in the city to Federal authorities unless the alien ‘appears to be engaged in some kind of criminal behavior.’” The newspaper reported that “The Mayor said that the policy against reporting illegal aliens had already been in effect within city agencies and that his memorandum was meant to ‘reaffirm’ that policy.” Further, the Mayor’s justification for his memo is that aliens who do not access city services pose a danger to their well-being and to the city’s well-being. See Kerr (1985). This leads to the preliminary conclusion that although Executive Order 124 officially comes into being in 1989, a similar policy predated 1989. This also leads to the interesting theoretical question of how the policy changed in practice when it became a written policy rather than an unwritten matter of custom.

³² *City of New York v. United States*, 179 F.3d 29 at 31-32.

³³ *Id.* at 32.

decision of whether to communicate with the INS was one which involved a set of factors known fully only to this group and not listed in the text of the order.

In August 1996, President Bill Clinton signed the Welfare Reform Act. Section 434 of the Act, entitled, “Communication between State and Local Government Agencies and the INS,” provided in pertinent part:³⁴

Notwithstanding any other provisions of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.³⁵

In late September of the same year, Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act also became law.³⁶ Section 642 provided in pertinent part:

- a) Notwithstanding any other provision of Federal, State or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
- b) Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
 - 1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
 - 2) Maintaining such information.
 - 3) Exchanging such information with any other Federal, State, or local government entity.³⁷

³⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, 110 Stat. 2105 (1996).

³⁵ *City of New York v. United States*, 179 F.3d 29 at 32.

³⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

³⁷ *City of New York v. United States*, 179 F.3d 29 at 33.

Section 434 contained passive voice language that “no State or local government entity” may be prohibited or restricted from sending information to the INS. This likely left open the question as to whether the individual officer or rather the committee charged with making decisions about communicating with the INS is the relevant “local government entity.”

In contrast, Section 642(a) posited its subjects more directly and spoke in an active voice of “entities and officials” not being able to prohibit or restrict any other “entities and officials” from exchanging information with the INS. Section 642(b) narrowed further any possible ambiguity about the particular subject to whom this law applied, noting that “no person or agency” can promulgate such restrictions. While Section 434 identified “State or local government entities” as the relevant subjects, Sections 642(a) and 642(b) enlarged the applicability of the law to “officials,” “agencies,” and even “persons.”

Eleven days after the signing of the Illegal Immigration Reform and Immigrant Responsibility Act, Mayor Rudolph Giuliani’s administration filed a lawsuit in federal district court claiming primarily that Section 434 and Section 642 violated the Tenth Amendment³⁸ of the U.S. Constitution. The Giuliani administration argued that the statutes interfered both with the City’s right to control information obtained during the course of its official business and to control its own workforce.³⁹ The new federal law, the City of New York argued, was beyond the scope of even Congress’s considerable plenary power in the realm of immigration regulation in so far as it forced the City to participate in a federal regulatory scheme.⁴⁰

³⁸ The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Recent Supreme Court case law, particularly *New York v. United States*, 505 U.S.144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997) have interpreted the Tenth Amendment as prohibiting the conscripting of states (and by extension local government entities) into enforcing a federal regulatory program.

³⁹ *City of New York v. United States*, at 34.

⁴⁰ *Id.*

The Court of Appeals for the Second Circuit, like the federal district court that originally heard the case, rejected the City of New York's claim that it had been unconstitutionally conscripted into doing the federal government's work for it. The court also rejected the city's claim that the new federal statutes were beyond the scope of Congressional power.⁴¹ The court reasoned that while a statute that directed the executive branch of a state or local government to directly administer a federal program may indeed rise to the level of unconstitutionality, the statutes at hand did not directly compel subfederal jurisdictions to do anything.⁴² The statutes merely prohibited the prohibition of voluntary speech on the part of city officials, the court argued. Further, pointing out that insubordinate local officials frustrated desegregation until the federal courts ordered them to comply with *Brown v. Board of Education*, the court rejected the City of New York's claim that the 1996 federal statutes violated the Tenth Amendment. The court invoked the Supremacy Clause of the Constitution to support its holding.

It is perhaps understandable that the Court of Appeals was hesitant to accept New York City's aggressive facial challenge to a legislative act of Congress in an area historically marked by high deference to Congressional prerogative. But most important and interesting for the purpose of this paper is the language of the Second Circuit's opinion for what it suggests about declarations and statements of law (i.e. positive law) on issues of alienage in the context of cities.

The court stated in its opinion:

These sections (Sections 434 and 642) do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the *voluntary* exchange of immigration information with the INS [emphasis added].⁴³

⁴¹ Id. at 35.

⁴² Id.

⁴³ Id.

According to the Second Circuit, the federal law only prohibited cities from prohibiting their employees from voluntarily cooperating with the INS. In other words, a city employee could be silent, but that silence could not be commanded through city-level positive law or proffered in the form of a written legal command. The silence could be a matter of individual discretion or preference, but not a matter of city law or policy concerning information about immigration statuses.

This raises a few key theoretical questions. Does this silence that cannot be commanded but can nonetheless exist challenge both the sovereignty of the nation-state and its positive law more generally? But if this silence is based entirely on individual, official discretion, how can it be a “right” for an alien or the ground of any “political community?”

The Second Circuit Court suggested further that the City of New York chose to litigate this case in an unfortunately over-combative way and hence did not make some more conservative and therefore stronger constitutional arguments. The court suggested that if the City could show that its Executive Order was integral to the operation of city government *generally*, then perhaps the court could have been more sympathetic. The court itself offered a suggestion to the City of New York. Specifically, it noted:

Whether these Sections (434 and 642) would survive a constitutional challenge in the context of *generalized confidentiality policies that are necessary to the performance of legitimate municipal functions* and that include federal immigration status is not before us, and we offer no opinion on that question [emphasis added].⁴⁴

In December of 2002, a 42-year old woman was assaulted in a Queens, New York park. The suspects included five aliens. The Immigration and Naturalization Service provided records to the House Judiciary Committee that alleged that four of the five aliens were undocumented

⁴⁴ Id. at 37.

and that all five had been arrested before in New York City.⁴⁵ In February of 2003, John Feinblatt, Criminal Justice Coordinator for the City of New York, found himself testifying before the House of Representatives Subcommittee on Immigration. In a hearing entitled, “New York City’s ‘Sanctuary’ Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration,” members of Congress pushed Feinblatt on the issue of whether New York City was still following Executive Order 124, despite the 1996 federal statutes and despite its losing its constitutional challenge to the statutes in the Second Circuit in 1999.

Feinblatt assured the House Committee that New York City was in compliance with the 1996 statutes and the 1999 decision. When asked if there existed a text of an executive order that repealed Executive Order 124, Feinblatt stated only that a 2001 city charter authorized the Mayor to promulgate regulations regarding confidentiality, that such confidentiality regulations would be in accordance with federal law, and that the city was currently working on a new executive order.⁴⁶ Feinblatt stressed that federal law imposed no affirmative duty to report on city police officers, that INS agents were stationed in city jails, and that with reference to the December 2002 assault, the police detective on the case had indeed contacted the INS. The Committee Chairman asked in response why no one had called the INS during the course of the

⁴⁵ See Transcript of House of Representatives Subcommittee on Immigration, Border Security, and Claims Hearing, February 23, 2003; <http://commdocs.house.gov/committees/judiciary/hju85287>.

⁴⁶ Id.

suspects' other arrests. Feinblatt reiterated that police officers bore no affirmative duty to report to the INS and suggested that the INS had failed to respond in the past.⁴⁷

In May 2003, the City of New York established a “don’t ask” policy rather than a “don’t tell about immigration policy.” The “don’t ask” policy, Executive Order 34, prohibited City workers from inquiring about a person’s immigration status.⁴⁸ In September 2003, the City went further and established a “privacy policy,” Executive Order 41.⁴⁹ The order, which is currently on the books, is officially named, “City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services.” It first defines as “confidential information” a person’s immigration status, but also sexual orientation, income tax records, and welfare assistance history. It promises that no city employee shall disclose any confidential information unless such a disclosure is “required by law,” or “necessary to achieve the mission of a City agency.” In so far as immigration status is concerned, the exceptions that make possible disclosure of the otherwise confidential information include an officer’s suspicion that the alien has engaged in illegal act other than mere status as an undocumented alien, or the facility that dissemination would have for apprehension of a person suspected of engaging in an illegal act. Finally, in a separate section entitled “Law Enforcement

⁴⁷ Id. The February 2003 hearing transcripts belie an overwhelming concern with prevention of crime in cities, but also a frustrating and persistent lack of certainty as to whether the existence of policies such as Executive Order 124 are themselves crime prevention strategies or crime abetting strategies. Further, there is lack of certainty as to whether undocumented aliens are themselves criminals or more likely victims on account of their status. Interestingly, alien victimhood is represented primarily as a problem of undocumented alien women who are victims of violence within a private sphere they share with men whose status is more legal than their own. This raises the question of whether subfederal jurisdictions opt to separate out undocumented alien victimhood as a matter of official policy or communications with immigrant communities. In other words, it raises the question of whether victimhood can be a particular and protected ground for contact with local governmental officials, as a matter of practice if not of law.

⁴⁸ I have been unable to locate the text of Executive Order 34 in published city documents. Executive Order 34 is mentioned and discussed in Mayor Bloomberg’s speech announcing Executive Order 41. See “Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services for Immigrants.” Available at http://www.nyc.gov/html/imm/news/exe_order_41_remarks.shtml.

⁴⁹ The City of New York, Office of the Mayor. Executive Order No. 41, September 17, 2003. Available at: http://home2.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

Officers,” the order states that “Law enforcement officers shall not inquire about a person’s immigration status unless investigating illegal activity other than mere status as an undocumented alien,” and that “Police officers and peace officers . . . shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.”⁵⁰ Further, it attempts to separate out the categories of alien victims and witnesses, noting that it shall be “the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.”⁵¹

Unlike Executive Order 124, New York City’s new “privacy policy,” makes no command to its police officers about the transmission of information to the INS. Indeed, the INS is not mentioned by name at all in the policy. By removing explicit discussion of the INS all the while positing “continued cooperation with federal authorities” in dealing with criminal aliens, Executive Order 41 establishes in theory a broader scope of city police discretion, but not necessarily a broader scope of rights (in positive law) for aliens.

Further, Executive Order has the effect of folding immigration status into other matters of demographic and socioeconomic information. It thus posits that alienage has no primacy unless police officers suspect a crime, as if, *contra* Arendt and especially Warren, nation-state citizenship is not the right to have *all* rights, at least in the city. But important new questions emerge: Are what is posited in Executive Order 41 “rights” at all, where rights at least to some degree turn on recognition? Is there something oxymoronic about the expansion of “citizenship” through the purported expansion of discretion-based “privacy?”

⁵⁰ Id.

⁵¹ Id.

The language of city informational materials emphasizes that “Mayor Bloomberg’s Executive Order 41 Protects *All* New Yorkers” (emphasis original), and that order makes it more likely that immigrants will access “city services.”⁵² The language of “services” rather than “rights” further suggests that what is at stake at the city level is not the progressive reconstitution of political community but rather the deployment of a particularly administrative and discretionary mode of relations between city officials and aliens. The transformation of New York City’s policy from 1989 to 2003 reveals the ascendancy of this administrative mode of governance. The existence of this administrative mode suggests looking necessarily beyond positive law when confronting questions of alienage, cities, and citizenship. At the same time, it suggests that scholars should not necessarily expect to find progressive reconstitutions of citizenship or the politics and possibilities for political community that for Arendt had been lost when nation-states came to dominate citizenship.

Conclusion

This paper has sought to recast questions of undocumented alienage, cities, and citizenship using both political theoretical and sociolegal frameworks. Specifically, in response to works that posit or imply optimism about reconfigurations of citizenship for non-U.S. citizens in U.S. cities, this paper has pointed to the importance of considering carefully the extant legal framework for relations between the federal government and cities. Further, this work has pointed to the political theoretical implications of the foundation of modern U.S. immigration and alienage law in the particularly positive law of a nation-state. And it has presented a case study of New York City policies concerning first the policing, and now the “privacy” of aliens.

⁵² Mayor’s office of Immigrant Affairs, “Mayor Bloomberg’s Executive Order 41 Protects *All* New Yorkers.” Available at: <http://home2.nyc.gov/html/imm/downloads/pdf/eo41english.pdf>.

It has done so in order to show the necessary limits of positive law where the alien is a subject of city government, and also the extent to which cities are unlikely to be grounds for expanded non-citizen “citizenship,” or “rights” in the conventional senses of the terms.

The task of highlighting that the undocumented alien is a problem of and for the positive law of the nation-state is not intended to suggest that what happens outside the realm of the positive law of the nation-state is necessarily better for the undocumented alien, or by definition more just. Rather, this paper has set out to show that contrary to the focus on positive law and rights that permeates legal, sociolegal, and political theoretical scholarship on immigration and alienage, the illegal alien is likely to be governed precisely outside the realm of positive law in cities in particular. Ultimately, many questions this work has posed demand further archival and ethnographic research in so far as they involve questions of how practices at the city level affect the governance and experience of undocumented alienage in the U.S. today.

Finally, while the ends or limits of positive law may not necessarily be justice for the foreigner, they do suggest that what currently is, has not always been, and need not necessarily always be, especially where the sovereignty and the positive law of nation-states are concerned. For now, if the severance of law from justice that is the hallmark of much of our modern law of political community is brought to light by the uncertainty over questions of undocumented alienage in the current moment, then perhaps we all – natives and foreigners alike – have something to gain by paying attention.

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