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Neoliberalism, Immigration, and the State**

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Through an exploration of relevant legislation and court cases, this article discusses the contemporary constitution of neoliberal subjects via the devolution of select immigration powers to state and local governments by the federal government of the United States. Since the latter decades of the nineteenth century, the federal government has had plenary power over immigration, which has enabled it to treat “people as immigrants” (or as “nonpersons” falling outside of many Constitutional protections), simultaneously requiring that states and cities treat “immigrants as people” (or as persons protected by the Constitution). Beginning in the mid-1990s, however, the devolution of welfare policy and immigration policing powers has challenged the scalar constitution of personhood, as state and local governments have newfound powers to discriminate on the basis of alienage, or noncitizen status. In devolving responsibility for certain immigration-related policies to state and local governments, the federal government is participating in the rescaling of membership policy and, by extension, the rescaling of a defining characteristic of the nation-state. This recent rescaling is evidence of the contemporary neoliberalization of membership policy in the United States, and specifically highlights the legal (re)production of scale. *Key Words:* citizenship, immigration, neoliberalism, scale.

本文讨论在美国联邦政府选择下放有关移民的权力给州与地方政府过程中当代新自由主义对象的构建。这个讨论通过对相关的立法以及法院案例的探讨而进行。自十九世纪末期以来，联邦政府已拥有全权来处理移民事务。这使得它能把人当移民看待(或当作没有许多宪法保护的“非人”看待)，但同时能够要求州与城市把移民当人对待(或受到宪法保护的人)。然而，始自90年代中期，福利政策以及移民监督权力的下放挑战了不同个人身份的构建，因为州与地方政府拥有了可以按外国人和非公民身份而歧视人的新权利。联邦政府通过下放某些与移民有关的责任给州和地方政府也参与了身份政策的尺度重整，更推广一步说，这也对国家的一个决定性的特征的尺度重整。这近期的尺度重整反映了美国当代身份政策的新自由主义化并特别突现了尺度通过法律的再生产。*关键词:* 公民权，移民，新自由主义，尺度。

A través de una exploración de la legislación relevante y de casos judiciales, en este artículo se discute la constitución contemporánea de temas neoliberales mediante la devolución de ciertos poderes sobre la inmigración a los gobiernos estatales y locales por parte del gobierno federal de Estados Unidos. Desde las últimas décadas del siglo diecinueve, el gobierno federal ha tenido pleno poder sobre la inmigración, que le ha permitido tratar a las "personas como inmigrantes (o como "seres inexistentes" que son excluidos de muchas de las protecciones constitucionales), requiriendo simultáneamente que los estados y las ciudades traten a los "inmigrantes como personas" (o personas protegidas por la Constitución). Sin embargo, a partir de la mitad de la década de los noventa, la devolución de los poderes de las políticas de bienestar y del control de la inmigración ha desafiado la constitución escalar de la condición de persona, ya que los gobiernos estatales y locales tienen poderes recientemente adquiridos para discriminar en base a condición de extranjería o de no ciudadano. Al devolver la responsabilidad de ciertas políticas relacionadas con la inmigración a los gobiernos estatales y locales, el gobierno federal está participando en la reescalación de la política de afiliación, y por extensión la reescalación de una característica de definición de la nación-estado. Esta reciente reescalación es evidencia de la neoliberalización contemporánea de la política de afiliación en Estados Unidos, y recalca específicamente la (re)producción legal de la escala. *Palabras clave:* ciudadanía, inmigración, neoliberalismo, escala.

Scholars of neoliberalism have made recent calls for empirical contributions that provide further evidence and understanding of the emergence, expansion, and institutionalization of neoliberal

“spaces, states, and subjects” (Larner 2003, 511; see also Peck 2002, 2004). In seeking to answer that call, I explore one way in which neoliberal subjects—an estimated 11.6 million legal permanent residents

(Rytina 2006) and 12 million undocumented residents (Passel 2006) living in the United States—are being constituted through the devolution of select immigration powers from the federal government of the United States to state and local governments. I focus on the shifting scalar constitution of personhood and alienage in the United States or, in other words, historical and contemporary changes in the ability of different scales of government to create and enforce laws discriminating against individuals as a function of their “alienage,” or noncitizen status. The ability to discriminate on the basis of alienage has been interpreted by the courts as the ability to regulate membership in the nation-state. At different times in the history of the United States, nation-state membership has been differently scaled.

This contemporary rescaling has been enabled by a suite of laws passed in 1996, a product of the “Republican Revolution” of the 1994 midterm elections and ensuing 104th Congress. The laws include the Antiterrorism and Effective Death Penalty Act (AEDPA), the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Paired with the recent, rapid growth of grassroots immigration policy activism in local and state governments throughout the United States (National Conference of State Legislatures 2008; Varsanyi 2008),<sup>1</sup> the partial devolution of welfare policy and immigration policing powers challenges rather strict jurisdictional lines in place for over a century, and gives state and local governments newfound and increasing powers to discriminate on the basis of alienage or noncitizen status. This recent blurring of the long-held boundary between federal and local governments in this policy realm is evidence of the contemporary neoliberalization of membership policy in the United States and, to invoke Hannah Arendt’s words, the rescaling of “the right to have rights” ([1951] 2004, 298; see also Benhabib 2004).

Through an analysis of relevant legislation and court cases (in other words, statutory and case law) this article brings attention to the legal production of scale and the way in which law plays a prominent role in the rescaling processes associated with neoliberalization. Contemporary critical geographic scholarship on scale productively highlights a politics and political economy of scale (Agnew 1993; Smith 1995; Delaney and Leitner 1997; Swyngedouw 1997a, 1997b; Marston 2000; Brenner 2001, 2004; Marston and Smith 2001; Peck 2002; Mansfield 2005), but geographers have given little attention to the ways in which law plays an important role in both the production of scale and neoliberal rescaling

processes (although see Mitchell 2002). By engaging with law, this article admittedly remains focused on the realm of “politics with a capital P” and formal state structures, as opposed to exploring, for instance, the ways in which political contestation between different societal and political actors plays a role in producing scale (Agnew 1997; Delaney and Leitner 1997; Leitner 1997; Leitner, Peck, and Sheppard 2006). As Don Mitchell has forcefully argued, however, “law matters” (2003, 6), as laws have significant and real impacts on people’s lives. Legal geographic scholarship has played a crucial role in illuminating the ways in which law and legal processes produce sociospatial opportunities and limitations, particularly along the axes of race, gender, and social class (Kobayashi 1990; Blomley 1994; Mitchell 1994, 2003; Delaney 1998; Forest 2001). This article aims to contribute to that discussion by engaging legal geography with geographic research on scale and rescaling.

In what follows, I first place this case study—the devolution of membership policy—into a broader theoretical context regarding neoliberalism and the process of neoliberalization, the changing relationship between the state and noncitizen, and the contemporary rescaling of national membership. I next trace the statutory and case law that “fixed” the relationship between scale and membership from the latter decades of the nineteenth century through the mid-1990s.<sup>2</sup> I discuss the contemporary “scalar flux” (Brenner 2000, 373) of membership policy that began in the mid-1990s, focusing specifically on the partial devolution, from the federal government to cities and states, of welfare policy and immigration policing. I conclude by highlighting the instabilities and tensions emerging from these contemporary rescaling processes, which provides further evidence to support the idea that “all is not well with the neoliberal state” (Harvey 2005, 78).

## Rescaling the “Alien,” Rescaling Personhood: Neoliberalization, Migration, and the State

Neoliberalizing economic policies such as the North American Free Trade Agreement (NAFTA) that have challenged rural livelihoods in Mexico and elsewhere (Nevins 2007), combined with a consistently high demand for inexpensive, flexible labor to fuel the growth of, *inter alia*, the construction, service, and hospitality industries in the United States, act as powerful push and pull factors promoting cross-border labor migration.

Nonetheless, observers of contemporary migration, particularly undocumented migration, increasingly point to a contradiction in our neoliberalizing political economic system: Barriers to the flow of capital are rapidly falling, at the same time as enhanced border enforcement and militarization increasingly stanch the flow of labor and people (Andreas 2000; Nevins 2001, 2007; Massey, Durand, and Malone 2003; Coleman 2005; Varsanyi and Nevins 2007). In other words, the neoliberal ideology of the global free market has not, as a matter of affirmative policy, extended to the labor market.

James Hollifield (2004a, 2004b) further reflects on this growing contradiction characteristic of the contemporary “migration state.” On the one hand, liberal nation-states such as the United States, Canada, and Australia, as well as supranational regions such as the European Union, increasingly operate according to a logic of neoliberal economic openness, privileging and creating institutions to enable the free movement of goods, technologies, currencies, and ideas between nation-states. On the other hand, the nation-state is still a membership community, which must necessarily maintain a distinction between insiders and outsiders. Under this political logic, the liberal nation-state simultaneously operates under conditions of closure, carefully selecting would-be immigrants and excluding undesirable “others.” These competing logics lead nation-states into what Hollifield calls the “liberal paradox,” but which we might also call the *neoliberal paradox*: How can nation-states manage the tensions that emerge between the seemingly contradictory forces of economic openness and political closure?

In my view, the state is pursuing a pathway through this paradox that does not emerge from an either-or choice—either accepting that a consequence of economic openness is the increased movement of people, or choosing a pathway that restricts the flow of people at the expense of economic growth. Rather, over the past several decades and particularly since the mid-1990s, the state—and for the moment, I am referring specifically to the U.S. federal government—has been able to maintain a tense compromise between economic liberalization and political closure by pursuing a suite of seemingly contradictory policies, including intensive border militarization (Dunn 1996; Andreas 2000; Nevins 2001), lax internal immigration enforcement (Brownell 2005; Cornelius 2005),<sup>3</sup> and, more recently (the focus of this article) the devolution of select immigration powers to local and state governments. Devolution, combined with border militarization and

lax internal enforcement, allows the federal government to appear tough on border enforcement (*vis-à-vis* the war on terror and increasingly sophisticated migrant and drug smuggling syndicates), while leaving the messy and costly details of servicing and policing expanding noncitizen populations to state and local governments. As such, these policies enable a tense (although as I will conclude, tension-ridden and likely unsustainable) compromise between competing interests—free market, neoliberal expansionists, on the one hand, and nationalistic, security-minded exclusionists, on the other.

Immigration law scholar Linda Bosniak has recently asked, “the power to define membership in the national community begins at the nation’s border, but where exactly does it end?” (2006, 52). In other words, the federal government has long had authority to regulate who may enter the territory of the nation-state (immigration policy) and, furthermore, who is admitted to the polity (naturalization policy), but how far does the federal government’s power to regulate membership extend within the territory of the nation-state? There are several ways in which we could begin to answer this question, but one important cutoff has been framed in jurisdictional and scalar dimensions.

With a few interesting exceptions, prior to the mid-1990s, the courts in the United States upheld the federal government’s “plenary power” over the formulation and enforcement of immigration or, as some have called it, membership policy: the “law pertaining to the entry of noncitizens and their continued stay in the United States” (Motomura 1999, 1361; see also Scarperlanda 1996; Aleinikoff 2002b). Since the late nineteenth century, immigration policy has been framed as foreign policy in the United States, as decisions influencing the admission or exclusion of foreign nationals have the potential to affect relationships with other nation-states. As foreign policy, the formulation and enforcement of immigration law is considered a political matter, a concern of the executive and legislative branches of the federal government and outside the purview of the judicial branch. Plenary power authorizes the federal government’s treatment of “people as immigrants,” or, in other words, individuals as “aliens,”<sup>4</sup> essentially “nonpersons” beyond the protections of the Constitution. In a famous statement, Supreme Court Justice John Paul Stevens admitted that plenary power effectively upholds a double standard: “in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens” (*Mathews v. Diaz* 1976, 1891).

In stark contrast, until the mid-1990s, local and state governments were almost wholly excluded from this policy realm and relegated instead to the formulation of immigrant policy: laws that governed the “treatment of noncitizens in the United States with respect to matters other than entry and expulsion” (Motomura 1999, 1361). As a result of case law stretching back to the late nineteenth century, state and local laws impacting noncitizens were judged against Constitutional norms such as the Fifth Amendment’s Due Process Clause and the Fourteenth Amendment’s Equal Protection Clause. As such, state and local governments were held by the courts to a “personhood” standard: They were required to treat “immigrants as people,” or, in other words, as persons protected by the Constitution.<sup>5</sup>

Linda Bosniak (2006) argues that the federal government’s power to discriminate on the basis of noncitizen status does not end at national boundaries, but that the status of “alienage entails the introjection of borders” (5), or, in other words, that “the border effectively follows [noncitizens] inside” (4) the territory of the nation-state. This is undoubtedly true, as the federal government has immigration enforcement powers within the territory of the United States, as well as at its borders; however, in light of the neoliberalization of the state, it is accurate to say that the border is being both internalized and rescaled. During the last decade, state and local governments have been increasingly recruited by the federal government to formulate and enforce membership policy, enabling them to discriminate, as does the federal government, against people as immigrants: on the basis of their noncitizen status. In other words, membership policy is in the midst of a scalar flux as devolution has given rise to what some observers are calling “immigration federalism” (Spiro 1997).

The modern territorial state is characterized by a number of processes and institutions, but one of the most fundamental has been the nation-state’s sovereign power over determining its membership, including its power over immigration and citizenship. As Hannah Arendt once noted, state “[s]overeignty is nowhere more absolute than in matters of emigration, naturalization, nationality, and expulsion” ([1951] 2004, 278). Importantly, Arendt’s words, coming to us as they do from the period immediately following World War II—“the apogee of nationalism” (Hobsbawm 1990)—reflect not a timeless truth about a defining characteristic of the state, but rather an astute understanding of the production of the scale of the nation-state in the mid-twentieth century. When Arendt wrote her words, sovereign nation-states in the international state

system had codified into law and practice their power over “monopolization of the legitimate ‘means of movement’” (Torpey 2000), not only vis-à-vis one another, but crucially as well, vis-à-vis other scales of political organization: cities, subnational states, and supranational organizations.

The nation-state was not always defined by its ability to regulate membership. In the United States, the federal government’s power over immigration and naturalization policy took shape in the latter decades of the nineteenth century, one century after the nation’s founding. For the first hundred years of American history, during what legal scholar Gerald Neuman (1996) calls the “lost century of American immigration law,” states in particular—not the federal government—maintained a significant degree of power, both in law and practice, over immigration policy. As he details, states formulated and enforced varying statutes that barred the immigration of convicts, paupers, and those with contagious or other diseases.

The fact that what we now think of as one of the defining characteristics of the nation-state—the power to regulate membership—did not consolidate at that scale until the late nineteenth century lends weight to the idea that “[p]articular scalar fixes are . . . political constructions that are subject to periodic contestation; they are not transcendentally determined” (Peck 2002, 337). Geographic scales are commonly understood as ontologically given, an unchanging and nested hierarchy of bounded territorial spaces including the urban, regional, state, federal or nation-state, and global. Rather than being a concern for research in and of themselves, scales are frequently and unproblematically considered the locations in which other social, political, and economic processes take place. In recent years, however, geographers have developed a renewed interest in the concept of scale and have fruitfully debated the ways in which scales are socially and politically produced—not ontologically given—particularly in the context of neoliberal economic restructuring (Agnew 1993; Smith 1995; Delaney and Leitner 1997; Marston 2000; Brenner 2001, 2004; Marston and Smith 2001; Peck 2002; Mansfield 2005).

Scalar fixes give way to scalar fluxes, even though, as Hannah Arendt’s words imply, we often believe exactly the opposite: that particular scalar configurations are permanent and transcend history. Therefore, just as the power to regulate membership was rescaled in the late nineteenth century from state and local governments to the federal government, I argue that we are in the midst of another scalar flux—symptomatic of a

neoliberalizing state—as the power to regulate membership is being rescaled yet again, from the federal government to state and local governments. Given the federal government’s 120-year lock on its powers over immigration policy and the way in which we have understood power over immigration to be constitutive of the scale of the nation-state, it is noteworthy when the nation-state either loses or relinquishes power in this policy realm to scales both beyond and within (Soysal 1995; Leitner 1997). As a facet of neoliberal restructuring, the devolution of select immigration powers by the federal government of the United States is such an occasion.

This contemporary flux resonates with recent theorizations of the neoliberalizing state (Peck 2001, 2004; Peck and Tickell 2002; Brenner and Theodore 2002; Brenner 2004; Harvey 2005). Although the process of neoliberalization has proceeded in multiple phases and has meant different things in different places, the fundamental orthodoxy at the heart of these shifts has remained the same: to “purge the system of obstacles to the functioning of ‘free markets’; restrain public expenditure and any form of collective initiative; celebrate the virtues of individualism, competitiveness, and economic self-sufficiency; abolish or weaken social transfer programs while actively fostering the ‘inclusion’ of the poor and marginalized into the labor market, on the market’s terms” (Peck 2001, 445; see also Harvey 2005, 2). The passage of the 1996 laws undoubtedly reflected and institutionalized a further securitization of the state, as they were passed shortly after the 1993 World Trade Center bombing and the 1995 bombing of the Oklahoma City Federal Building (Coleman 2007a); however, the passage of these bills, along with the PRWORA (which, as President Bill Clinton [1993] (in)famously said, “ended welfare as we know it”), also reflected the neoliberal political economic agenda of legislators elected during the Republican Revolution of the 1994 midterm election, in which Republicans took control of both the U.S. Senate and House of Representatives for the first time in forty years. The incoming class of freshman legislators, led by Newt Gingrich as Speaker of the House, moved quickly to implement and institutionalize their Contract with America, a document written in part with text from Ronald Reagan’s 1985 State of the Union Address. In the opening lines of the Contract, the House Republicans promised that “[t]his year’s election offers the chance, after four decades of one-party control, to bring to the House a new majority that will transform the way Congress works. That historic change

would be the end of government that is too big, too intrusive, and too easy with the public’s money . . .” (Contract with America 1995). The Contract goes on to detail ten acts that its signatories promised to pass within the first one hundred days of the 104th Congress, most of which espoused neoliberalizing goals—subtly or outright—of slashing federal government budgets, decreasing the size of the federal bureaucracy, increasing regulatory flexibility for business, and promoting “individual responsibility” and work ethics by dismantling the welfare system (Contract with America 1995). A number of bills emerged out of the Contract with America and the 104th Congress, among them the PRWORA, AEDPA, and IIRIRA.

Whereas earlier discussions of globalization tended to focus on (and in some instances, celebrate) the withering and decline of the nation-state (Ohmae 1996), scholars of neoliberalism have more recently argued that the state is not so much in decline, as it is in redistribution (Peck 2001, 2004; Brenner and Theodore 2002; Peck and Tickell 2002). With one decade of hindsight, the bills passed during the Contract with America era did achieve a number of the neoliberal goals pursued by its adherents. Reflecting an inherent contradiction of the neoliberalizing state, however, many functions that were previously in the domain of the federal government were simply shifted and reorganized to other scales of government. As a number of the laws emerging from the Contract decreased the size and funding of federal government programs, they simultaneously devolved (and simply passed on) substantial administrative and financial responsibility for those programs to cities and states, frequently as unfunded or hidden mandates (Zimmerman and Tumlin 1999, 19–20). What has resulted, therefore, is not necessarily diminished state capacity, but rather the “hollowing out” of “a historically and geographical specific institutionalization of the state, which in turn is being replaced, not by fresh air and free markets, but by a reorganized state apparatus” (Peck 2001, 447). In other words, the relatively stable “scale fix” (Smith 1995, 61) of the Fordist–Keynesian era—crystallized around the territorial, sovereign nation-state—is replaced under neoliberal restructuring by “a highly volative *scalar flux* in which interscalar hierarchies and relations are continually reshuffled in response to a wide range of strategic priorities, conflicts and contradictions” (Brenner 2000, 373, emphasis added).

As I discuss in what follows regarding the devolution of membership policy, this neoliberal, devolved state, is not less powerful as much as it is “*differently*

powerful . . . not necessarily a less interventionist state; rather it organizes and rationalizes its interventions in different ways” (Peck 2001, 447, emphasis in original). As Jamie Peck reminds us:

‘devolution’ can be a signifier for a wide array of inter-scalar shifts [which] may, or may not, add up to a ‘real’ transfer of (national) state power. In fact, in its neoliberal guise, devolution usually exhibits a ‘thin’ form, by way of dispersal ‘out’ to markets and/or delegation ‘down’ to local agencies, while powers of institutional coordination and ideological control remain firmly located (albeit in a restructured form) at the center. (Peck 2001, 452)

Reflecting these neoliberalizing tendencies, the court cases and policies discussed in the following sections indicate not a complete devolution of immigration power to the local scale, but a partial, incomplete, and contingent devolution, with states and local governments being left to figure out the details of how to implement the federal government’s mandate, and the federal government still maintaining ultimate Constitutional control and veto power over this policy realm.

An outcome of this piecemeal devolution of membership policy has been the constitution of what I call the “neoliberal subject”: an alternative, evolving institution of “membership” for noncitizens living within the territorial boundaries of the nation-state. As Linda Bosniak (2006) points out, we often do not think of noncitizens as having “membership.” In everyday thinking, there is an “us”—the body of citizens on the inside and full members, or citizens, of the state—and a “them”—as Gerald Neuman’s (1996) language implies, “strangers to the Constitution,” or those who are outsiders to “us” and fall outside of the privileges of membership. Crucially, however, the membership of citizens is not paired with an absence of membership for noncitizens but, rather, as this article demonstrates, with a body of law that establishes a particular configuration of membership rights for noncitizens (which happens to be constituted, in large part, by the same rights accorded to citizens). Furthermore, just as citizenship rights and those admitted to the circle of citizenship have shifted and changed throughout the history of the United States, the present configuration of “citizenship for aliens” (Bosniak 2006) is not fixed, but has long been subject of contestation (Scaperlanda 1996, 718). Membership for neoliberal subjects (noncitizens in the contemporary period) reflects, therefore, a particular neoliberalizing constellation of legal and political institutions and is substantively different than noncitizen membership of past eras.

The aim of this article is not to elaborate on the substance of neoliberal membership (indeed, this could be the subject of another article), but rather to trace the creation of this membership status via neoliberal rescaling processes; however, it is worth taking a moment to reflect briefly on three intertwining characteristics that mark the contemporary membership of noncitizens, and that take on a particularly neoliberal flavor given the current rescaling of personhood: shifting conceptions of illegality, a rollback of rights, and the increasing specter of deportation.

First, the neoliberal subject is marked more than ever by the status of illegality. An act of migration is designated as illegal due not to a timeless standard of what is right and wrong. Rather, illegality is actively produced by a changing suite of laws that determine what is, or is not, against the law (Nevins 2001; Ngai 2003; De Genova 2004). For instance, the 1965 Hart–Celler Act abolished immigration quotas in place since the passage of the National Origins Act in 1924 and is widely celebrated as an example of enlightened, liberal legislation of the Civil Rights era. The Act, however, simultaneously placed numerical limits on immigration from the Western Hemisphere for the first time (at that time, 120,000 per year), thus drastically limiting the number of quotas available to Mexican labor migrants, despite a long history of, and continued demand for, their labor (Calavita 1992; Ngai 2003). Therefore, after the Act came into effect in 1968, Mexican labor migrants continued to cross the border as they had been doing for decades, but as a result of the newly instituted visa limits and a dearth of available visas for Mexicans, many migrants now crossed the border without legal authorization and were marked as illegal (Nevins 2001; De Genova 2004). The illegality of the contemporary period reflects iterations of laws such as Hart–Celler, but also reflects uniquely neoliberal configurations of laws and practices marking an increasing range of actions as unlawful. Contemporary illegality is exemplified, for instance, by the passage of HR 4437 in the U.S. House of Representatives in 2006, which, among other things, criminalized the act of crossing the border without authorization. HR 4437 did not ultimately become federal law, and first-time, unauthorized border crossing remains a civil, not criminal, violation, but the approval of HR 4437 in the House represents yet another significant trend in shifting constructions of illegality.

Second, in the decades prior to 1996, the rights available to noncitizens had converged with the rights of citizens to such an extent that Peter Schuck, a prominent

legal scholar, wrote of “the devaluation of American citizenship” (1989; see also Jacobson 1996). Noncitizens, regardless of legal status, had due process rights in criminal proceedings and legal permanent residents were entitled to freedom of speech and the press (Bosniak 2006, 49). Plenary power and the exclusionary ability of the federal government notwithstanding, noncitizens in the United States were, on the whole, excluded mainly from political rights such as the right to vote, serve on juries, and hold certain kinds of government employment. In 1996, however, new laws began a roll back of the rights of resident noncitizens—both legal and unauthorized—such as limiting access to federal- and state-funded welfare and medical programs, and narrowing Constitutional protections in criminal proceedings.

Third, related to the rollback of rights and the changing landscape of illegality, neoliberal subjects—both legal and unauthorized residents—are also increasingly vulnerable to deportation. The 1996 laws greatly expand the range of criminal offenses (including many offenses that were previously misdemeanors) for which noncitizens are subject to deportation, while decreasing or eliminating judicial oversight over deportation hearings (Coleman 2007a, 2007b). Furthermore, as legal scholar David Cole (2005) discusses, the post-11 September 2001 (hereinafter 9/11) enforcement climate has also witnessed a revival of the Alien Enemies Act of 1798, authorizing the federal government to arrest, detain, and deport aliens who are citizens of a “hostile nation or government” during a time of war. In the period immediately following 9/11, in sweeps targeting suspected terrorists, thousands of law-abiding Arab and Muslim noncitizens in the United States were detained by the federal government on civil immigration charges and under the Alien Enemies Act, thus making them subjects of plenary power (“noncitizens” as opposed to “persons”) and dramatically reducing their Constitutional protections against detention and deportation. Furthermore, the 1996 legislation enabled “expedited removal,” or the ability of immigration authorities to deport certain unauthorized migrants at airports and seaports without any due process and judicial oversight. A recent executive order has further expanded expedited removal to include undocumented immigrants apprehended within 100 miles of the land borders with Mexico and Canada, again without providing them the ability to contest their deportation in immigration court (Department of Homeland Security 2004).

Finally, as the landscape of illegality, rights, and deportation shifts, what makes contemporary noncitizen membership particularly unique is its constitution via neoliberal rescaling processes. Prior to the mid-1990s, the state to which noncitizens were vulnerable as noncitizens was the nation-state. Now the “state” is no longer only the federal government, but the states (and cities) of, for example, Arizona, Georgia, and North Carolina.<sup>6</sup>

The U.S.–Mexico boundary is an important site at which the seemingly contradictory policies of economic liberalization and political closure collide (in Matt Sparke’s words, a “neoliberal nexus of securitized nationalism and free market transnationalism” [2006, 153; see also Coleman 2005]), but the contradictions of this system do not stop at international borders; they simultaneously extend deep within the territory of the nation-state. As Mat Coleman argues, the devolution of immigration policing to state and local governments represents a novel “immigration geopolitics” and tool of statecraft. In the name of national security, fighting terrorism and the “undocumented-migrant-as-threat,” the pairing of two policies—the criminalization of immigration law and the expanded efforts by the federal government to engage local and state police in enforcing civil immigration violations—has resulted in the creation of “newly materializing spaces of immigration geopolitics” not only at the U.S.–Mexico border but within (and beyond) the United States as well (Coleman 2007b, 56).

Additionally, immigration policy—the power of the state to exclude, admit, and expel—is productively deployed not only as a tool of statecraft but as a tool for neoliberal capital accumulation via the constitution of neoliberal subjects. As Brenner notes, “it is no longer capital that is to be molded into the (territorially integrated) geography of state space, but state space that is to be molded into the (territorially differentiated) geography of capital” (2004, 16). The rescaling of immigration policy is, therefore, as much about the rescaling of geopolitics as it is a way in which the deployment of geopolitics (in the form of immigration policy as foreign policy) plays an important role in the production of neoliberal subjects and a nationally bounded, relatively free internal labor market, populated by disciplined, divided (along the lines of legal status), largely nonunion, and vulnerable labor force for which the state bears few costs and has few responsibilities or obligations.<sup>7</sup>



## Scalar Fix: Hardening the Line Between Immigrants as People and People as Immigrants

In this section, I document the laws and policies that governed the treatment of noncitizens living within the United States until the mid-1990s, when scalar flux in this policy realm began.<sup>8</sup> From the 1880s through the mid-1990s, with a few interesting exceptions, the federal government had sole authority over matters concerning immigration and the constitution of the national community. When states and cities attempted to treat noncitizens as immigrants or, in other words, when subnational governments attempted to develop policies that were interpreted by the courts as impacting membership in the national community, these efforts were either preempted by the federal government or declared unconstitutional, because noncitizens, when seen from the perspective of states and cities, must be treated as people and provided equal protection. In this section, then, I trace the way in which the line between the treatment of people as immigrants and immigrants as people was drawn fairly rigidly on scalar and jurisdictional lines until the mid-1990s, with the federal government charged with the former and states and cities charged with, or restricted to, the latter.

### Federal Plenary Power Over National Membership

As Supreme Court Justice Charles Evans Hughes wrote, “[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government” (*Truax v. Raich* 1915, 42). For over a century, the U.S. federal government, specifically the legislative and executive branches, has had plenary power over the creation and enforcement of policies that determine who will constitute the polity (Aleinikoff 2002b). This has meant that the federal government has had sole authority over the two “gates” leading to membership in the national community of citizens: the gate of territorial entry, governed by immigration policy (determining who to admit, exclude, and expel from the territorial nation-state), and the gate of entry to the polity, or naturalization policy (determining who is qualified to become a citizen and what measures will be used to test this worthiness; Hammar 1990). Given the persistence of plenary power for over 120 years, it is surprising to note that immigration, as such, is not mentioned in the Constitution. Instead, the federal government’s power in this policy realm was firmly established through court cases decided in the latter decades of the

nineteenth century, which drew on the Naturalization (Art. 1, Sec. 8, Cl. 4), Foreign Commerce (Art. 1, Sec. 8), and Foreign Affairs Clauses (Art. 1, Sec. 8; Art. 2, Sec. 2, Cl. 1 and 2) of the Constitution.

Although it took shape in piecemeal fashion prior to 1889,<sup>9</sup> the plenary power doctrine was most clearly articulated in the Supreme Court case *Chae Chan Ping v. United States* (1889), also known as the Chinese Exclusion Case. The infamous Chinese Exclusion Acts, passed in 1882 and 1888, prohibited the immigration of Chinese nationals to the United States. Chae Chan Ping had been living in San Francisco from 1875 to 1887 when he decided to return to China for a visit. Although he had followed the letter of the law and obtained a reentry permit required by the 1882 Act, when he attempted to enter the United States after the more restrictive 1888 Act had gone into effect, he was denied reentry. His appeal eventually reached the Supreme Court. In its decision, which ultimately denied him the right to enter the United States, the Court outlined three main characteristics of the plenary power doctrine.

First, the Justices emphasized the “inherent sovereign powers” of the federal government over determining membership, or in other words, the fact that the exclusion of noncitizens was a fundamental right of any sovereign government:

[The Chinese] laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think is open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. (*Chae Chan Ping v. United States* 1889, 603)

Furthermore, “[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation. . . . It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us” (*Chae Chan Ping v. United States* 1889, 606). Second, as control over immigration was thus defined as an element of foreign policy and in the sovereign interest of the federal government to control, the Court considered it a legislative and political issue, thus removing it from judicial review:

if the power mentioned [the power to abrogate on the conditions of the Burlingame treaty with China, and to exclude Chinese nationals from the United States] is vested in congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. (*Chae Chan Ping v. United States* 1889, 628)

As *Chae Chan Ping* was a noncitizen and the treatment of noncitizens was governed strictly by the legislative and executive branches of the federal government, the Court declared that it was not appropriate to rule on his case.<sup>10</sup> Finally, the Court made clear that local governments did not have power over immigration: “[The federal government] is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. . . . For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power” (*Chae Chan Ping v. United States* 1889, 629).

The related case of *Fong Yue Ting v. United States* (1893) also played an important role in the articulation of plenary power, specifically regarding the federal government’s right to discriminate on the basis of noncitizen status. Unlike *Chae Chan Ping*, who petitioned to enter the United States at a port of entry, the defendants in *Fong Yue Ting v. United States* were permanently settled in the United States (for between fourteen and nineteen years), yet faced deportation because they refused to obtain a required certificate of residence in accordance with the Exclusion Acts. Although the defendants’ presence within the territory of the United States might imply the protection of their rights as persons under the Equal Protection Clause of the Fourteenth Amendment of the Constitution, the Court defined the case as an immigration case and therefore treated the defendants as noncitizens (as opposed to persons), and thus came to the same conclusions as in *Chae Chan Ping*: First, regardless of a noncitizen’s residence and territorial presence within the United States, it is the sovereign right of the federal government of the United States (specifically the political branches) to exclude and expel foreigners from its territory. Second, given the powers of the Congress in this matter, this exclusion is not a matter on which the judicial branch can comment.

### Cases Concerning Local Governments’ Treatment of Legally Present Noncitizens

The federal government’s jurisdiction and power over membership was then solidified through a series of cases that simultaneously tested and set the boundaries of local governments’ abilities to create policy vis-à-vis noncitizens living within their jurisdictions. Examining the legal doctrinal context in which local governments’ policies vis-à-vis noncitizens are constrained draws attention to the “scalar fix” in immigration policy that was in place until the mid-1990s.

Local governments’ treatment of noncitizens legally present within their jurisdictions was and has been constrained and shaped by federal law in three ways. First, as decided in *Hines v. Davidowitz* (1941), local policies regarding immigrants that mirror federal policies have generally been struck down on preemption grounds. As the federal government occupied the field of immigration and naturalization policy, a Pennsylvania state law that included alien registration provisions was struck down as it was preempted by the Federal Alien Registration Act.

More prominently, however, a number of state and city statutes that attempted to discriminate against legally resident noncitizens on the basis of their noncitizen status have been struck down on equal protection grounds. The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that “[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” This clause provides a powerful mechanism for protection of noncitizens, as the latter portion guarantees protection for not just citizens, but for all persons resident (legally) within the jurisdiction of the United States. Under equal protection grounds, then, a number of Supreme Court cases, including *Yick Wo v. Hopkins* (1886), *Truax v. Raich* (1915), *Takahashi v. Fish and Game Commission* (1948), and *Graham v. Richardson* (1971) have upheld the rights of legally present noncitizens in the face of discriminatory state and city policies.

The more recent case of *Graham v. Richardson* (1971) set the standards against which contemporary state and local policies concerning noncitizens have been held, at least until the passage of the PRWORA in 1996. A group of noncitizens challenged Pennsylvania and Arizona state laws that established alienage restrictions

for state-funded welfare programs or, in other words, attempted to create state standards more stringent than federal standards for legal permanent residents who were seeking welfare benefits. In the Arizona case, the state wished to hold legal permanent residents to a fifteen-year residency requirement before being eligible for state welfare payments. In the Pennsylvania case, legal residents were barred from state welfare programs altogether. In establishing limits on the treatment of legal residents by local governments, *Graham* was important in three respects. First, Justice Blackmun wrote that in his opinion “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate” (*Graham v. Richardson* 1971, 371–72). In other words, because legal resident noncitizens are not able to vote, do not have a political voice, and therefore cannot protect themselves against discriminatory state action, state and city laws that discriminate against noncitizens on the basis of their noncitizen status must be held up to strict scrutiny by the courts. Second, because “[a]liens like citizens pay taxes and may be called into the armed forces” as well as “live within a state for many years, work in the state and contribute to the economic growth of the state,” (*Graham v. Richardson* 1971, 376) the Arizona and Pennsylvania laws violated the Equal Protection Clause of the Constitution, which treats all those (legally) within the territory of the United States as persons. Third, the Court commented that individual state governments could not establish local policies that were, in effect, membership policies and that conflicted with the immigration and naturalization laws of the federal government. With regard to immigration policy, “[s]tate alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible” (*Graham v. Richardson* 1971, 380). With regard to naturalization policy, “[u]nder . . . the Constitution, Congress’ power is to ‘establish an uniform Rule of Naturalization.’ A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement for uniformity” (*Graham v. Richardson* 1971, 382).

A final point about *Graham* highlights the importance of how cases are defined in determining their

outcomes. The first line of Justice Blackmun’s opinion was “These are welfare cases . . .” (*Graham v. Richardson* 1971, 366). In defining the case in this way and categorizing *Graham* as concerning immigrants as people, the Court removed the case from concerns related to immigration and national membership. This had the effect of protecting the case from federal plenary power (which could legitimately have upheld discriminatory policy) and allowing the Court to rule on it on equal protection grounds.

Although *Graham* seems to indicate clearly that states may not discriminate against legal residents on the basis of their noncitizen status, a case decided several years later further clarified the interesting relationship between the federal and local governments in the area of immigration and naturalization policy. In *Mathews v. Diaz* (1976), legal residents of Florida brought suit against the federal government, claiming that its five-year residence requirement for federal welfare program eligibility was unconstitutional. The Supreme Court dismissed their case. In his decision for the Court, Justice Stevens first reaffirmed that the federal government—specifically the political branches—held plenary power over matters pertaining to aliens. As such, the residency requirement could not be brought before the Court because it was not a Constitutional question, but instead was a political matter. To repeat his famous statement, the Justice admitted that plenary power effectively upheld a double standard: “in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens” (*Mathews v. Diaz* 1976, 1891). Crucially, given plenary power, just as it was inappropriate for the judiciary to subject immigration policies of the federal government to Constitutional scrutiny, it was inappropriate for state governments to become involved in the development of immigration and naturalization policy. Referring back to *Graham*, Justice Stevens wrote:

Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State’s interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. (*Mathews v. Diaz* 1976, 1894)

*Mathews v. Diaz*, therefore, strikingly illuminates two issues. First, it highlights a glaring double standard in immigration and naturalization law: Individual states could not discriminate against legal residents, but Congress and the Executive Branch could do whatever they please vis-à-vis noncitizens, protected by their plenary power and immune from judicial review. Second, *Mathews* implies that states may indeed discriminate against legal residents if this discrimination is uniformly authorized by the federal government. As I will discuss later, this issue has reemerged since 1996, with the passage of the PRWORA, which, among other things, devolved to the states the authority to determine eligibility for welfare, even if they develop divergent standards.

### Cases Concerning Local Governments’ Treatment of Illegally Present Noncitizens

I have discussed the way in which the treatment of legally resident noncitizens within the United States has been determined, in large part, by the scale at which the policy originated. What has been the reaction of the federal government, however, when local governments attempt to develop policies specifically addressing their population of unauthorized residents?

The decision of the Supreme Court in *De Canas v. Bica* (1976) is particularly relevant to this question, as it specifically highlighted the scalar boundary between people as immigrants and immigrants as people. The case addressed the constitutionality of a California labor code, which stated that “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers” (quoted in *De Canas v. Bica* 1976, 352). Although the California Superior Court and Court of Appeals both declared the law unconstitutional by arguing that it encroached on the exclusive and comprehensive Congressional regulation of immigration, the U.S. Supreme Court, surprisingly, overturned their rulings by arguing that although the “[p]ower to regulate immigration is unquestionably exclusively a federal power . . . the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain” (*De Canas v. Bica* 1976, 354–55). In other words, although the law in question regulated the employment of undocumented migrants, the Court stated very clearly that this regulation was not about an unconstitutional local regulation of immigration per se,

and therefore preempted by federal law, but rather fully within California’s right, as part of the states’ “broad authority under their police powers to regulate the employment relationship to protect workers within the State” (*De Canas v. Bica* 1976, 356). In *De Canas*, we see again how important the process of categorization is to the outcome of the case. Although the California courts had categorized the statute as an immigration matter, the Supreme Court decided instead that it was really a matter concerning employment, and thus ruled that it was well within California’s jurisdiction to penalize employers who knowingly hired undocumented laborers.<sup>11</sup>

In *Plyler v. Doe* (1982), however, a case considered by many to be a constitutional oddity, the Supreme Court—in a contentious five to four decision—defended the rights of undocumented children against a discriminatory Texas statute that aimed to deny public school enrollment to undocumented children who were not legally present in the United States, although they were de facto residents of Texas. Because the children in question were undocumented—present without authorization within the United States—in a fascinating attempt of territorial manipulation, Texas argued that they were not therefore “persons within the jurisdiction” of Texas and therefore not protected by the Equal Protection Clause of the Fourteenth Amendment. In other words, Texas argued that the children should be considered immigrants within the jurisdiction of the nation-state, not the state of Texas, and as such ineligible for equal protection under the Fourteenth Amendment. In rejecting this argument, the Court stated that the protections of the Fourteenth Amendment applied to all persons within the United States and that:

the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into any corner of a State’s territory. That a person’s initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State’s territorial perimeter. (*Plyler v. Doe* 1982, 215)

*Plyler* (1982) offers another fascinating example of a state law struck down for attempting to discriminate against people-as-immigrants, even when the immigrants in question were undocumented.

Additionally, following the logic in *De Canas* (1976), Texas attempted to avoid a categorization of the law as dealing with questions of alienage (and therefore opening it up to close judicial scrutiny and equal protection claims), and instead categorize the statute as addressing the fiscal concerns of the state, thereby placing it within

state jurisdiction. The Supreme Court's response to this was interesting. On the one hand, the decision made very clear that the Justices were not promoting unlawful entry to the United States and that undocumented migrants (in contrast to legal residents) were not a suspect class deserving of judicial protection. First, the Court agreed that "a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct" (*Plyler v. Doe* 1982, 219); however, they then argued that "[t]hese arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants" (*Plyler v. Doe* 1982, 219–20). Although "access to public education is not a right guaranteed in the Constitution, it nonetheless occupies a special place in the pantheon of public benefits, as denying education to a child would leave a lasting impact of its deprivation on the life of a child" (*Plyler v. Doe* 1982, 221) and "deny them the ability to live within the structure of our civic institution, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation" (*Plyler v. Doe* 1982, 223).

At least in this case, the minor status of the persons in question made for a unique decision by the Court that did not rely on the usual arguments regarding federal preemption, the degree to which the Texas law was harmonious with federal immigration and naturalization policy, and the prohibition against local governments "doing immigration policy." In a somewhat contradictory manner, the Court argued, on the one hand, that undocumented residents were territorially present and were therefore subject to equal protection against discrimination by the Texas law and, on the other hand, that undocumented migrants were not a protected class under the Fourteenth Amendment or, at least, that undocumented adults were not protected, but undocumented children were.

Since 1982, as a result of *Plyler* (1982), undocumented children have therefore been guaranteed a public primary and secondary education in the United States. This precedent, as well as the decision handed down in *De Canas*, was key in *League of United Latin American Citizens (LULAC) v. Wilson* (1995). This case decided the fate of California's Proposition 187, a heavily restrictionist ballot initiative passed by the state electorate (59 to 41 percent) in 1994, and arguably the progenitor of all contemporary grassroots local and state anti-immigration legislation. Among other things, the proposition created a system enabling state officials to verify the immigration status of "arrestees, applicants for social services and health care, and public school stu-

dents and their parents" (*LULAC v. Wilson* 1995, 764), report this status to federal immigration authorities, restrict illegal immigrants' access to publicly funded social services (health, education, and welfare), and criminalize document fraud. The vast majority of the proposition was thrown out in U.S. District Court on preemption grounds. Judge Pfaelzer upheld the right of the state to deny postsecondary education benefits to undocumented students, as well as the right of the state to prosecute document fraud as an element of its police powers; however, she threw out the rest of the proposition by first reaffirming the plenary power of the federal government over immigration and naturalization matters, and then arguing that much of the proposition relied on the development of a state-level "comprehensive scheme to detect and report the presence and effect the removal of illegal aliens" (*LULAC v. Wilson* 1995, 769). As "state agents are unqualified—and also unauthorized—to make independent determinations of immigration status," she declared these aspects of the proposition as impermissible (*LULAC v. Wilson* 1995, 770).

## Scalar Flux: Neoliberalization and the Rescaling of Membership

As the prior section demonstrated, before the 1990s, if a local government policy was defined as influencing membership in the national community, impacting people as immigrants, then it was generally viewed as encroaching on the federal government's plenary power and was preempted. If local policy was deemed as concerning immigrants as people and was not categorized as impacting membership, however, it was permitted, provided that the noncitizens in question were treated as "persons" and afforded all Constitutional protections. In stark contrast, in the current neoliberalizing, devolutionary context, this previously strict boundary between the responsibilities of the federal government and local and state governments in matters concerning noncitizens is starting to blur. The 1996 laws have given state and local governments select abilities to discriminate against people as immigrants, thus further constraining spaces of personhood and further constituting a body of noncitizen neoliberal subjects.

### Welfare Policy

The PRWORA, passed in 1996, gives states unprecedented powers in determining eligibility of, and

generating and disbursing funds for, various means-tested welfare programs, such as Temporary Aid for Needy Families (TANF, or cash assistance), food stamps, Supplemental Security Income (SSI), and nonemergency Medicaid. Several major changes in the law affect noncitizen residents. First, the law creates new administrative categories; it divides noncitizens into both "preenactment" and "postenactment" immigrants (legal residents who arrived to the United States before August 1996 versus those who arrived after), and it defines a category of "qualified" immigrants (for instance, legal permanent residents, refugees, asylum seekers), implying that all other noncitizens, such as unauthorized residents, are "unqualified" (PRWORA 1996). Second, the law expands the categories of immigrants who are ineligible for federal public assistance, including certain legal permanent residents. Third, both preenactment and postenactment immigrants are considered ineligible for SSI and food stamps, and postenactment immigrants are further barred from receiving TANF and nonemergency Medicaid during their first five years in the United States. Additionally, the law reemphasizes that undocumented residents are ineligible for publicly funded state or local services, with the limited exceptions of emergency health care, immunizations, and the treatment of communicable diseases. If a state wishes to provide funding for undocumented residents, it is now required to pass a law positively affirming its commitment to provide public services to this population (Zimmerman and Tumlin 1999).

Although the law has had far-reaching consequences for all U.S. residents, it marked an important shift in the powers of the states over all noncitizen residents of the United States, as states are now in charge of creating and funding state-level benefit programs and determining eligibility for those programs. Crucially, the PRWORA gives states the unprecedented ability to discriminate against noncitizens in deciding eligibility for their programs, an act that prior to 1996 was considered an unconstitutional encroachment into federal powers over membership policy. To the surprise of many, a number of states stepped into the vacuum produced by PRWORA and established state-level programs that provide public assistance to immigrants, predominantly postenactment legal immigrants in their first five years in the United States. Nineteen states provide TANF using their own funds, seventeen states provide food stamps, and both California and Maine have created state-level equivalents of the four main means-tested programs (including TANF, food stamps, SSI, and Medicaid) for all postenactment immigrants barred from

federal programs by the PRWORA (Zimmerman and Tumlin 1999, 22–23). Where they exist, however, state programs tend to provide both fewer and less substantial benefits for postenactment immigrants. Just as important, despite the generosity of certain states, many other states have opted against providing state funding and resources to the legal permanent and undocumented residents who are presently ineligible. Finally, a number of states that developed substitute food assistance programs after the passage of the PRWORA have specified that these programs are accessible only to noncitizen children, the elderly, and the disabled, thus restricting access to working-age adults (Zimmerman and Tumlin 1999, 23–25).<sup>12</sup>

In reformulating and rescaling welfare policy, an important effect of the PRWORA has been to dramatically reduce the number of noncitizens (and citizens) eligible for means-tested programs, thus producing an ever-expanding and increasingly vulnerable body of individuals living and working within the United States, and for whom the state (and states) claim few social reproduction responsibilities.

### Local and State Enforcement of Immigration Violations

Congress also devolved authority over enforcement of civil immigration violations with the passage of the AEDPA and IIRIRA in 1996, which gave state troopers, county sheriffs, and city police agencies the authority previously restricted to federal agents to arrest individuals on civil immigration violations (e.g., for being undocumented; see also Coleman 2007a, 2007b). The AEDPA gave local police the authority to arrest previously deported noncitizen felons. The IIRIRA established a Memorandum of Understanding (MOU) process, also referred to as 287(g) agreements in reference to U.S. code, whereby local and state police agencies interested and willing to enforce immigration laws can sign an agreement with the federal government that specifies "training, funding, and legal guidelines for their expanded responsibilities" (Gladstein et al. 2005, 6). Because police powers are constitutionally reserved for the states and their jurisdictional subunits, the federal government cannot require local governments to do immigration policing, but it can, and has, created an opening so that localities may request to be trained by and to join the federal government in enforcing immigration laws within the interior of the United States. This innovation has meant that, for the first time, local police forces, which normally enforce local and state

criminal laws, can assist the federal government in enforcing federal civil immigration violations, should they choose to do so.

The 1996 changes authorizing local immigration policing did not at first have much traction. Before the attacks on 9/11, the only instance of federal–local cooperation in the realm of immigration policing were the highly controversial and much maligned immigration sweeps performed by city police in Chandler, Arizona, accompanied by federal Immigration and Naturalization Service (INS) authorities. The “Chandler roundups,” conducted throughout the summer of 1997, ultimately detained 432 suspected undocumented residents of the city and placed them in deportation proceedings; however, the sweeps also generated a civil rights lawsuit in which the defendants claimed, and successfully argued, that they were the victims of racial profiling (M. Romero and Serag 2005).

The public mood changed after 9/11, however, spurred on by the Bush administration’s focus on national security, terrorism, and the perceived vulnerability of the country’s southern border. In April 2002, Attorney General John Ashcroft issued a classified and highly contentious memo arguing that the state and local police have the inherent, sovereign authority to make arrests for violations of civil, federal immigration law (Ashcroft 2002). This interpretation overturned the conclusions of a prior memo, issued by the Attorney General’s office in 1996, which asserted that local and state police did not have authority to make arrests based on federal civil violations (such as being present in the United States without authorization).

Although no local or state police forces signed MOUs with the Department of Justice prior to 9/11, the changing enforcement climate after the attacks spurred several police agencies to enter into agreements with the newly constituted Department of Homeland Security (DHS) beginning in 2002. In September 2002, the Florida Department of Law Enforcement was the first state police agency to sign an MOU with the DHS that initially authorized the training of thirty-five state and local police officers to be involved in immigration enforcement duties. Since that time, Alabama, Arizona, eight counties (five of which are in Southern California), and a number of cities have also entered into 287(g) agreements with the DHS, and dozens of others have expressed interest in the program (287(g) Freedom of Information Act response 2006).

As with the rescaling of welfare policy, the rescaling of immigration policing powers creates a patchwork of enforcement regimes across the country and greatly

increases the vulnerability—or at the very least, the perceived vulnerability—of noncitizens living within the United States. Indeed, given the prevalence of families with multiple legal statuses (e.g., families of native-born citizen children and undocumented parents), the Pew Hispanic Center recently reported that over half of all Latinos in the United States fear that they or someone close to them may be deported in the current immigration enforcement climate (Pew Hispanic Center 2007).

## Conclusion: Tensions and Instabilities

In our efforts to understand the current political economic context, Leitner et al. urge us to explore not only neoliberalization, but also, “to examine its articulation with contestations within and beyond the state that have shaped and will continue to influence its condition of possibility” (2006, 8). Indeed, the neoliberal rescaling of membership is rife with scalar tensions, instabilities, and volatility, which lends further evidence to David Harvey’s warning that “all is not well with the neoliberal state” (2005, 78). The rescaling of membership may not be a sustainable pathway through the (neo)liberal paradox of the migration state (Hollifield 2004a, 2004b) after all. Multiple fault lines cut across the landscape of rescaled membership that reflect all too clearly that not only is “*production of scale . . . a highly charged and political process,*” but that “[e]ven more politically charged is the reproduction of scale at different levels—the restructuring of scale, the establishment of new ‘scale fixes’ for new concatenations of political, economic and cultural interchange” (Smith 1995, 61–62, emphasis in original). These tensions include heated debates within the legal community, as well as tensions and fissures within and between local, state, federal, and international scales.

The rescaling of personhood has garnered significant debate between scholars of Constitutional and immigration law. The debates have turned primarily on the tricky issue of whether the federal government “pursuant to its plenary immigration power, [can] authorize states to undertake action that would otherwise be plainly unconstitutional” (*Harvard Law Review* Editorial Board 2005, 1; see also Wishnie 2001).

In the case of welfare reform, debates have turned on two issues. First, scholars are questioning whether the federal government can authorize states to develop nonuniform, divergent policies that discriminate against noncitizens, given the Constitution’s uniform rule of naturalization. Second, revisiting *Graham* and

*Mathews*, they are debating the degree to which welfare policy is related to immigration—policies that determine the entry and abode of noncitizens. Again, the way in which the cases are defined will have great bearing on their outcomes. Whereas *Graham* and *Mathews* made clear, prior to 1996, that individual states were prevented from discriminating on the basis of alienage when determining eligibility for means-tested public welfare programs, recent cases have destabilized this scalar division of labor. *Aliessa v. Novello* (2001) upheld *Graham* when the New York State Court of Appeals declared unconstitutional a New York state law denying qualified immigrants access to a state-funded Medicaid program. Nonetheless, in *Soskin v. Reimertson* (2004), the Tenth Circuit rejected *Aliessa*, upholding a Colorado statute that denied Medicaid benefits to qualified noncitizens.

To date, there have been no significant legal challenges to the devolution of immigration policing powers as spelled out by the 1996 Acts and Ashcroft's 2002 memo (Wishnie 2004, 1090). This reflects several issues. As mentioned, very few local law enforcement agencies have signed MOUs with the DHS thus far, although this number is steadily increasing. Furthermore, although there has been less legal ambiguity as to the powers of local and state police to enforce criminal violations of the Immigration and Nationality Act (INA), there is still significant debate among legal scholars over whether local police can enforce civil immigration violations (Hethmon 2004; Pham 2004; Wishnie 2004). In *Gonzalez v. City of Peoria* (1983), the Ninth Circuit determined that police officers in Peoria, Arizona, did not violate the Constitution when they enforced a city ordinance that required the arrest of individuals suspected of violating criminal provisions of the INA. On the other hand, in more recent cases, such as *United States v. Vasquez-Alvarez* (1999), the court also agreed that local police had the inherent authority to arrest individuals for violations of immigration law, but in this case, the court did not draw a distinction between civil and criminal violations, leaving the issue open for debate.

Beyond legal debates, the contradictions of neoliberalizing membership have also given rise to a vibrant and contentious politics of rescaling. Lax internal immigration enforcement paired with the recent and rapidly shifting regional geographies of immigrant settlement are key to understanding this emerging politics in the U.S. context (Ellis 2006; see also Clark 1998). Among other factors, immigrants choose particular settlement destinations as a consequence of transnational migra-

tion networks linking origin and destinations (Massey 1987; Menjívar 2000). In the past two decades, the settlement choices of immigrants—particularly immigrants from Mexico who make up approximately one-third of the foreign-born population in the United States (U.S. Bureau of the Census 2002)—have shifted dramatically from traditional “gateway” regions and cities in the West and Southwest (for instance, Los Angeles and El Paso) to “new destinations” in the Midwest, South, Southeast, and Northeast (such as Omaha, Atlanta, Charlotte, and New York City; Zúñiga and Hernández-León 2005). Furthermore, in all areas of the United States, immigrants are increasingly settling in suburbs and small rural communities, in contrast to historical settlement in rural agricultural areas and central cities (Singer, Hardwick, and Brettell 2008). As a consequence, communities previously unfamiliar with immigration are grappling with the challenges (and opportunities) of rapidly shifting demographics, demonstrating the ways in which cities and “city-regions have become key institutional sites in which a major rescaling of national state power has been unfolding” (Brenner 2004, 3; see also Peck and Tickell 2002).

In “contesting neoliberalism” (Leitner, Peck, and Sheppard 2006)—particularly the unauthorized migration symptomatic of neoliberalizing political and economic processes—cities and states have taken the lead in innovative policymaking of both inclusive and exclusionary varieties. For instance, a number of local governments and police departments, stating concerns for public safety, the importance of police–community relationships, and a progressive commitment to their immigrant communities, have rejected local civil immigration enforcement and partnering of local police and federal immigration officials entirely. Some have declared themselves sanctuary cities, and others follow a “don’t ask, don’t tell” policy regarding contact between unauthorized residents and city employees, including police. Although the absolute number of such cities in the United States is not large, the list includes cities with sizeable unauthorized immigrant populations—including New York City, Los Angeles, Detroit, Santa Fe, Houston, San Francisco, Denver, Austin, Tucson, Washington, DC, and others (Wells 2004)—thus effectively shielding a significant number of these residents from local civil immigration enforcement and deportation resulting from contacts with city police.<sup>13</sup>

In contrast, as David Harvey (2005, 81) warns, other cities and states are choosing decidedly exclusionary responses to neoliberalization. As discussed, a small number of cities, counties, and states have signed,



or have considered signing, 287(g) agreements with the federal government. As I have detailed elsewhere (Varsanyi 2008; see also Esbenshade 2000), many other cities have started to do immigration policing “through the back door”: to enforce city land use and public nuisance ordinances that constrain the behaviors and living conditions of undocumented residents. For example, a number of cities enforce antisolicitation and trespassing ordinances to police informal day labor hiring sites. More controversially, beginning in the summer of 2006, cities such as Hazleton, Pennsylvania, and Farmers Branch, Texas, have passed Illegal Immigration Relief Acts that, among other things, penalize landlords and business owners in the city for renting to or hiring unauthorized residents. As these efforts represent true grassroots efforts at immigration control, as opposed to efforts emerging from a devolution of immigration powers by the federal government (we might call them “unauthorized” attempts to cross the scalar boundaries of membership), they are currently being contested in court. In the first legal decision handed down on these ordinances, a district court declared Hazleton’s law unconstitutional by evoking familiar elements of the scalar fix in place from the 1880s onward: federal preemption, the necessity that states and cities treat immigrants as people with Constitutional protections for due process and equal treatment, and so forth (*Lozano v. Hazleton* 2007).

The rescaling of membership, particularly using civil immigration policing powers, is also giving rise to bizarre geographies of contradictory scalar priorities. For instance, although Denver, Boulder, and Durango, Colorado, have declared themselves sanctuary cities, the Colorado State Legislature recently passed legislation that outlaws sanctuary cities throughout the state (Richardson 2006). In an even more mind-bending example, the Phoenix, Arizona, city police have declared their opposition to local civil immigration enforcement at the same time as the Maricopa County sheriff and attorney have staked their reelections on a drive to arrest as many unauthorized residents as possible with their newfound devolved policing authority (Irwin 2007). Unauthorized residents of the Phoenix metropolitan region are therefore faced with daily decisions regarding, for instance, their drive to the grocery store: Potential routes may cross through both city and county jurisdictions, thus literally creating a patchwork and layered geography of personhood and alienage (and safety and fear) while driving down the road.

Finally, conditions are once again becoming ripe for a “Yick Wo” moment. In *Yick Wo v. Hopkins* (1886), the

case widely considered by legal scholars as the foundation for the “personhood standard,” the U.S. Supreme Court ruled that San Francisco (and by extension, California) could not discriminate against aliens on the basis of their noncitizen status, as this was a right reserved for the federal government. Among other reasons given, the court argued that California was not permitted to make laws that treated foreign nationals differently than required by agreements between the U.S. federal government and a foreign power (in this case, the Burlingame Treaty signed with the Chinese emperor; again, highlighting immigration policy as foreign policy). Scalar tensions are arising once again around “unauthorized” grassroots efforts by cities and states to discriminate against people as immigrants. For example, adding to Mexican President Felipe Calderón’s increasingly vehement critiques of the U.S. federal government’s policies vis-à-vis unauthorized Mexican workers (McKinley 2007), Mexican consular officials have started to contest local and state immigration policies such as Colorado’s law outlawing sanctuary cities (Richardson 2006).

I have provided evidence to demonstrate how the contemporary devolution of select immigration powers is creating both opportunities and requirements that local governments discriminate against people as immigrants, a right once solely reserved for the federal government. I have argued that this devolution reflects the neoliberal rescaling of membership policy in the United States, and that this rescaling is implicated in the production of neoliberal subjects. At the same time as demand for inexpensive, informal labor grows in the United States, these devolutionary policies produce categories of persons who, particularly when approached by the state as immigrants, are placed beyond the protections of the Constitution and the welfare capacity of the state, although they may live within the nation-state for many years. As the rescaling of membership creates ever-increasing walls between “us” and “them,” “citizens” and “aliens,” we must confront the implications of a seemingly permanent expansion of second-class membership and a working class increasingly composed of nonpersons (at least in the eyes of the law) for social, political, and economic justice. In his classic text, *Spheres of Justice*, Michael Walzer (1983) argues that democracies cannot tolerate a two-tiered society of citizens and noncitizens. In light of the rescaling of membership, and in terms of justice, his words ring true today, as they did when *Spheres* was first published in 1983: “Democratic citizens . . . have a choice: if they want to bring in new workers, they must be prepared to

enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done. And those are their only choices” (61).

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## Notes

1. According to the Immigrant Policy Project of the National Conference of State Legislatures, in 2005, state legislatures considered approximately 300 immigration or immigrant-related bills and passed approximately fifty. In 2006, state legislatures in forty-three states introduced 570 immigration- and immigrant-related bills, eighty-four of which became law. These numbers expanded even more in 2007, with 1,562 pieces of legislation being introduced in all fifty state legislatures, and 244 becoming law (National Conference of State Legislators 2008).
2. For a discussion of “scale fixes,” see Smith (1995).
3. In 2001, whereas 9,500 Border Patrol agents were stationed along the U.S.–Mexico border (enhanced in 2005 with an additional 6,000 National Guard troops), only 124 agents were assigned to investigate and enforce workplace immigration violations within the United States (Cornelius 2005, 786). As a result, workplace enforcement has plummeted. For example, the number of employer audits (investigations into the legal status of employees) dropped from 10,000 in 1990 to less than 2,200 in 2003. Similarly, the number of warnings given to employers found to be knowingly employing undocumented workers fell from 1,300 in 1990 to 500 in 2003; and the number of fines levied for violations fell from 1,000 in 1991 to 124 in 2003 (Brownell 2005).
4. Although I prefer the term *noncitizen* and use it when possible, I also use the terms *alien* and *alienage* in this article as the U.S. comprehensive immigration law, the Immigration and Nationality Act, is built around these terms and they are still the terms of choice in the legal literature. Even within the immigration law community, however, scholars recognize the exclusionary nature of these terms and express discomfort with their use (Johnson 1996).
5. As implied, there are limited circumstances in which this scalar division of personhood and alienage does not hold. For example, under the “political function exception,” states and local governments are able to treat people as immigrants and discriminate on the basis of alienage when the constitution of their political communities is in question, as “[a]liens are by definition those outside of this community” (*Cabell v. Chavez-Salido* 1982, 439–40; see also *Sugarman v. Dougall* 1973).
6. Prior to contemporary devolution, one prominent historical example of state and local involvement in immigration policing came during the Great Depression when more than 400,000 Mexicans in the U.S. Southwest and Midwest (approximately 60 percent of whom were American citizens by birth) were “repatriated” to Mexico by the federal Immigration and Naturalization Service (INS), and city and county welfare relief agencies (Ngai 2003, 71–73; see also Balderrama and Rodriguez 1995).
7. In this sense, neoliberal membership (and the neoliberal subject) differs from Soysal’s (1995) postnational membership thesis as her conception relies on a universal personhood standard that draws strength from the human rights regime and does not engage with the ways in which the nation-state still wields considerable power over its resident, noncitizen subjects (see also Aleinikoff 2002a).
8. For compelling and recent discussions of United States immigration law and policy, see Hing (2004), Johnson (2004), V. C. Romero (2005), Motomura (2006), Zolberg (2006), and Kanstroom (2007).
9. See, for example, the *Passenger Cases* (1849), *Henderson v. Mayor of City of New York* (1875), *Chy Lung v. Freeman* (1875), and the *Head Money Cases* (1884).
10. See also *Harisiades v. Shaughnessy* (1952, 588–89): “[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”
11. For another historical example of this dynamic, see *Terrace v. Thompson* (1923), in which the Supreme Court upheld California and Washington state laws prohibiting noncitizens from owning agricultural land on the grounds that these laws fell within the states’ police powers to protect the public good. These “alien land laws” mainly targeted Japanese immigrants, who had been declared ineligible for naturalization on racial grounds in *Takao Ozawa v. U.S.* (1922; Ngai 2003, 37–50).
12. In the year following the passage of the PRWORA, many decried its harsh eligibility standards, and newspapers were full of stories about desperate disabled legal permanent residents who would lose their only lifelines for survival—SSI and food stamps—when the law came into effect, as well as unimaginably tragic stories of

noncitizen adults and elders committing suicide, rather than facing the draconian cutbacks (see, for example, Hastings 1998). As a consequence, in 1997, the federal government reinstated SSI benefits for elderly and disabled noncitizens who would have lost their assistance as of September 1998, and more recently (in 2002) restored food stamp eligibility to legal immigrant adults and children regardless of the date they arrived in the United States.

13. For more on local policing practices and immigration, see Lewis and Ramakrishnan (2007).

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