

## Introduction: Noncitizen Participation in the American Polity

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## INTRODUCTION: NONCITIZEN PARTICIPATION IN THE AMERICAN POLITY

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In 2010 there were 22.5 million noncitizens residing in the United States.<sup>1</sup> These noncitizens accounted for 7.3% of the American population.<sup>2</sup> Within this population there is great diversity. Some entered as lawful permanent residents, others as non-immigrants, and others entered without inspection. Some were raised in the United States and have spent the majority of their life here, while others are recent arrivals. Some intend to stay for long periods of time, others plan on only a short stay. Some plan on becoming citizens while others are content to remain noncitizens. The ways in which this diverse population participates in American society is the topic of this Symposium Issue. The Symposium participants explored the various ways in which law, policy, and politics shape how noncitizens participate in American society, and how noncitizen participation shapes American law, policy, and politics.

Within the sociology literature on immigration, a “context of reception” approach has been utilized to describe and explain immigrants’ integration within society.<sup>3</sup> This approach emphasizes the ways in which the “structural and cultural features” of society influence immigrants’ opportunities for participation and integration “above and beyond the role played by their own individual characteristics or motivations.”<sup>4</sup> A key component of immigrants’ context of reception is government policy.<sup>5</sup> For example, immigration law and policy determine who is able to enter a country, how long they can stay, which of them can become citizens, when they can be kicked out, and how they will integrate within society. The answers to these questions determine an immigrant’s legal status, a status which dictates the security of one’s residence and opportunities for employment, political participation, and post-secondary education. Thus, the answer to these and related questions shape immigrants’ participation within a

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<sup>1</sup> ELIZABETH M. GRIECO ET AL., AM. CMTY. SURVEY REPORTS, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 (May 2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> HELEN B. MARROW, NEW DESTINATION DREAMING 9 (2011).

<sup>4</sup> *Id.*; see also ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA 92–102 (3d ed. 2006).

<sup>5</sup> PORTES & RUMBAUT, *supra* note 4, at 93 (“In every instance, governmental policy represents the first stage of the process of incorporation because it affects the probability of successful immigration and the framework of economic opportunities and legal options available to migrants once they arrive.”).

society. Professor Stephen H. Legomsky's Article, *Immigration Policy from Scratch: The Universal and the Unique*,<sup>6</sup> highlights the importance of these and related questions. This Article outlines the questions that every society must confront when developing immigration policy. The questions focus on defining the mission, citizenship, admission, integration, illegal immigration, expulsion, and decision-making authority. While the questions are universal, the answers will vary across societies due to the unique "histories, cultures, forms of government, social structures, economic realities, age and labor demographics, values, and ultimately even different missions."<sup>7</sup> The answers that each society arrives at reveal what it is that the society truly believes.<sup>8</sup>

The remaining articles in this Issue explore what the answers to these questions reveal about what the United States truly believes about noncitizens. The articles approach this issue through three themes. The first set of articles examines the ways in which laws regulating immigration and the lives of immigrants shape noncitizen participation in the United States, and the ways that such participation shapes American society. The second group of articles explores what nonimmigration rights tell us about the membership status of noncitizens. The final two articles offer new insights on the growth of sub-federal immigration enforcement and the implications of such enforcement strategies on immigrant communities.

Professors Kevin R. Johnson, Rick Su, and Michael A. Olivas each explore the ways in which social structure, in the form of law or politics, shape noncitizens' participation in the United States. In *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*,<sup>9</sup> Johnson argues that there are parallels between Alabama's protection of civil rights during Jim Crow and today. During both eras Alabama used law to limit access to education. During Jim Crow segregation, law limited African Americans' access to educational institutions and Alabama's 2011 Beason-Hammon Taxpayer and Citizen Protection Act limits undocumented students' access to K-12 public schools. The focus on education is meaningful because education "remains central to the struggle of outsiders for fundamental civil rights and full membership in American society."<sup>10</sup> Laws regulating access to education not only shape noncitizens' participation in educational institutions, but also shape their interactions with other members of the society.

In *Urban Politics and the Assimilation of Immigrant Voters*,<sup>11</sup> Rick Su focuses on political structure, specifically urban governance models, to explain immigrant

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<sup>6</sup> Stephen H. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 WM. & MARY BILL RTS. J. 339 (2012).

<sup>7</sup> *Id.* at 340.

<sup>8</sup> *See id.* at 366.

<sup>9</sup> Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367 (2012).

<sup>10</sup> *Id.* at 369.

<sup>11</sup> Rick Su, *Urban Politics and Assimilation of Immigrant Voters*, 21 WM. & MARY BILL RTS. J. 653 (2012).

political participation. Su successfully demonstrates the impact that different models of urban governance have on immigrants' political integration. While machine politics actively encouraged immigrants to naturalize and become part of the political system, the reform city explicitly sought to limit immigrant participation. The advent of the fragmented city has encouraged immigrants to vote with their feet rather than at the ballot box. Consequently, the type of cities that immigrants reside in, rather than individual characteristics, play a significant role in shaping political participation.

Immigration status plays a significant role in determining how a noncitizen can or will participate in their country of residence. The Article by Professor Olivas contrasts the participation expectations of long-term residents with the existing law and policy governing immigration status. He concludes that existing law and policy inadequately protect long-term residents' legitimate interest in remaining in the United States. In *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*,<sup>12</sup> Professor Olivas explores the history of prosecutorial discretion and deferred action and current policy regarding DREAMers. Professor Olivas concludes that current deferred action policy does not adequately address the immigration status of DREAMers. Only comprehensive immigration reform can achieve this task, and until it is achieved DREAMers will not be fully incorporated into the American community.

Professor Daniel Kanstroom creatively looks at the other side of the ways in which law and policy shape noncitizen participation. In "*Alien*" *Litigation as Polity-Participation: The Positive Power of a "Voteless Class of Litigants"*,<sup>13</sup> Professor Kanstroom explores the ways in which noncitizen participation in litigation actually "*define[s]* the rules of constitutional democracy."<sup>14</sup> Rather than viewing noncitizen litigants as a "tragic corrective" or "an annoyance," he views them as "an *essential* component of the revitalizing project of American constitutional democracy."<sup>15</sup> Litigation by noncitizens is "part of the dynamic process of defining the polity itself and of mediating the inevitable tension between majoritarian power and the 'rule of law.'"<sup>16</sup>

The Articles by Professors Peter Spiro and Pratheepan Gulasekaram address the second theme, which explores what nonimmigration rights tell us about the membership status of noncitizens. In *The (Dwindling) Rights and Obligations of Citizenship*,<sup>17</sup> Peter Spiro contends that citizenship status plays a minimal role in allocating rights and responsibilities in the United States. Through an examination of civil rights and

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<sup>12</sup> Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012).

<sup>13</sup> Daniel Kanstroom, "*Alien*" *Litigation as Polity-Participation: The Positive Power of a "Voteless Class of Litigants"*, 21 WM. & MARY BILL RTS. J. 399 (2012).

<sup>14</sup> *Id.* at 413.

<sup>15</sup> *Id.* at 412.

<sup>16</sup> *Id.*

<sup>17</sup> Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. (forthcoming Mar. 2013).

extraterritorial rights, Professor Spiro illustrates that personhood rather than citizenship is the basis for such rights. Because citizenship no longer coincides with actual community in a meaningful way, citizenship has become a “less robust form of association.”<sup>18</sup> Thus citizenship status plays a less significant role in defining membership within the nation-state. One context in which citizenship status may remain important in signaling membership and for allocating rights is gun rights. In *Guns and Membership in the American Polity*,<sup>19</sup> Professor Gulasekaram contends that the allocation of gun rights in the United States speaks to how the polity views itself, outsiders, intergroup interactions, and interpersonal interactions. Current limitations on noncitizens’ gun rights indicate that the United States is a polity still fearful of immigrant violence.<sup>20</sup> Judicial interpretations of “the people” suggest “‘we’ still resist non-citizen inclusion and participation in the polity.”<sup>21</sup> Professor Gulasekaram concludes by noting that in the United States the gun is “unique because it has defined, and will continue to define, membership and belonging in the polity.”<sup>22</sup>

Professors Jennifer M. Chacón and Stephen Lee address the final theme in *The Transformation of Immigration Federalism and Workplace Enforcement Workarounds*. In these Articles the authors explore the changing nature of immigration enforcement. In *The Transformation of Immigration Federalism*,<sup>23</sup> Professor Chacón contends that while the Supreme Court reaffirmed traditional doctrine regarding federal supremacy over immigration in *Arizona v. United States*, the courts are limited in their ability to constrain sub-federal immigration enforcement. This is because the growth of sub-federal immigration enforcement is due to political forces that view this type of enforcement as the rule rather than the exception. Professor Chacón details the socio-legal history of sub-federal immigration enforcement. This history reveals a push from below and above. Congress has authorized more opportunities for sub-federal participation in immigration enforcement and states have actively sought new ways to participate in immigration enforcement. The Court’s opinion in *Arizona v. United States* accepted the assumptions underlying the need for greater sub-federal immigration enforcement. Consequently Professor Chacón concludes that the proponents of S.B. 1070 have already scored an important victory.<sup>24</sup>

Stephen Lee’s Article tackles another challenge in immigration enforcement and that is conflicting goals. In *Workplace Enforcement Workarounds*,<sup>25</sup> Professor Lee

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<sup>18</sup> *Id.*

<sup>19</sup> Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619 (2012).

<sup>20</sup> *Id.* at 650.

<sup>21</sup> *Id.* at 652.

<sup>22</sup> *Id.*

<sup>23</sup> Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012).

<sup>24</sup> *Id.* at 617–18.

<sup>25</sup> Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549 (2012).

contends that the Obama Administration's workplace enforcement policy is being undermined by its pursuit of "criminal aliens."<sup>26</sup> Analyzing this situation using the workarounds framework, Professor Lee demonstrates that the pursuit of "criminal aliens" is frustrating the goal of punishing "exploitive employers."<sup>27</sup> This analysis provides a framework for disaggregating interior immigration enforcement arrangements and identifying new challenges with sub-federal participation in immigration enforcement.

The context that immigrants encounter in the United States shapes whether noncitizens will participate in American society, and if so, how. Noncitizens' participation in American society also shapes American law and policy. Through the articles in this Issue the reader is able to gain greater insights into the role of law and policy in shaping immigrants' context of reception.

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<sup>26</sup> *Id.* at 552.

<sup>27</sup> *Id.*