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Introduction

October 5, 2013, was a big day for immigration and citizenship in the United States. Tens of thousands of protesters – undocumented immigrants, naturalized citizens, and native-born alike – rallied across more than forty states around the country, from large cities like Los Angeles, New York, and Boston to smaller places like Reading, Pennsylvania; Hobbs, New Mexico; and Yakima, Washington.¹ In Minneapolis, nearly 2,000 demonstrators “marched from the Basilica of St. Mary, after an interfaith prayer service, to the plaza, hoisting flags and placards and chanting empowerment cries, including ‘Si se puede!’”² In Birmingham, Alabama, hundreds of rally participants listened to “the president of the N.A.A.C.P. in Alabama, [who] portrayed the immigration effort as part of broader civil rights activism in the state,”³ while in Reading, Pennsylvania, “demonstrators demanded that the congressmen sign onto or co-sponsor bipartisan immigration reform, speak on the House floor about the urgency of reform and oppose laws that promote racial profiling.”⁴ These protests were all part of the National Day of Immigrant Dignity and Respect, as thousands of Americans joined President Barack Obama’s call for Congress to pass immigrant legalization as part of a comprehensive reform package.

Even though the nationwide rallies for immigrant legalization were sizable and widespread, they were not the most important development on immigrant rights and citizenship happening that day. An even more consequential action on citizenship took place on October 5, 2013, in Sacramento and primarily involved just one individual: Governor Jerry Brown of California. That day, Governor Brown signed a set of eight bills that sought to expand immigrant rights in the state. Prominent among them was the California TRUST Act (AB 4), which would significantly constrain the circumstances under which state and local law enforcement could “[detain] an individual on the basis of a United States Immigration and Customs Enforcement hold after that individual becomes eligible for release from custody.”⁵ Other bills the governor signed

that day included a measure that would allow unauthorized immigrants to practice law in California and gain admission to the State Bar, another bill suspending or revoking an employer's business license "for retaliation against employees and others on the basis of citizenship and immigration status," and yet another measure that would allow extortion charges against those who threaten to "report the immigration status or suspected immigration status of an individual or the individual's family."⁶ Importantly, Jerry Brown signed these immigration bills two days after signing another landmark piece of legislation, AB 60, that would allow unauthorized immigrants to move more freely across the state by applying for driver's licenses and obtaining auto insurance.⁷

Taken together, these various state laws in 2013 advanced immigrant rights on several key dimensions, such as the right to free movement, the right to due process and legal protection, and the right to human capital formation (including allowing people to practice their profession and to be immune from workplace retaliation). The governor recognized the symbolic importance of his actions that day, even as thousands were marching on streets across the country. "While Washington waffles on immigration, California's forging ahead," he said, adding, "I'm not waiting."⁸ What Brown did not realize, however, was that his actions were propelling California toward a new era of progressive state citizenship in the United States. Not only did these laws provide a meaningful measure of protection for undocumented residents, but they also marked a pivotal moment in the state's ability to provide residents with access to a panoply of rights. These citizenship rights were not only constitutionally permissible but also politically feasible. As we shall demonstrate in this book, California had made sufficient progress on key dimensions of citizenship that, by the summer of 2013, had reached a tipping point. The various legislative measures that Governor Brown signed in October pushed it over the edge, accelerating it toward a new era of progressive state citizenship. Today, California's example inspires many advocates across the country to reimagine citizenship for a new era, with states playing a critical role in the advancement of civil rights.

CALIFORNIA IS NOT ALONE

While California has gone the farthest in advancing the rights of its immigrant residents, it is by no means alone. As of this writing, sixteen states and the District of Columbia offer all residents access to state driver's licenses, regardless of their immigration status.⁹ These include not only Democratic states with long-established immigrant populations, like Washington, Illinois, and Hawaii, but also politically mixed states with relatively newer immigrant populations, like Nevada, Utah, and Vermont. In addition, nineteen states and the District of Columbia provide in-state tuition to residents regardless of their immigration status, and six states plus the District of Columbia provide

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immigrant children access to health insurance, regardless of their immigration status. Finally, in addition to California, seven other states (Connecticut, Illinois, New Jersey, New York, Oregon, Vermont, and Washington) and the District of Columbia have so-called sanctuary policies that limit cooperation between law enforcement and US Immigration and Customs Enforcement.¹⁰

California was by no means the first state to pass strong policies protecting immigrants and meaningfully advancing their rights. Earlier in 2013, Connecticut Governor Dannel Malloy signed both a driver's license bill and a TRUST Act limiting the state's cooperation with immigration enforcement.¹¹ And more than twenty-five years prior, on July 7, 1987, Oregon enacted one of the country's first state sanctuary policies, severing their enforcement of federal immigration law. The Oregon bill had easily passed the Senate, twenty-nine votes to one, as well as the House, fifty-eight votes to one, and was signed into law by Governor Neil Goldschmidt. It remains in effect today, stating:

No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.¹²

Oregon's state sanctuary law was born out of happenstance. In 1977, Delmiro Trevino was dining with three other Chicano men at the Hi Ho Restaurant in Independence, Oregon. Without showing a warrant or properly identifying themselves, sheriff's deputies entered the restaurant and began interrogating the men about their citizenship status. According to a news account, "a deputy grabbed [Trevino] by the arm and forced him to stand in the middle of the restaurant in front of other customers. Trevino, a U.S. citizen of Mexican descent, later filed what would become a class action lawsuit in which he said being publicly called out left him feeling humiliated."¹³

Trevino enlisted the help of a trial lawyer in Salem, Oregon, and together they filed suit against law enforcement agencies in Oregon for engaging in "a pattern and practice of stopping, detaining, interrogating, searching and harassing" people of Mexican origin because of their appearance.¹⁴ Although the case was dismissed, Trevino's lawyer Rocky Barilla ran for state assembly nearly a decade later and won. Once there, Barilla convinced his colleagues to pass a law that would end local police abuses and limit state and local cooperation with immigration authorities. Importantly, Oregon's sanctuary law in 1987 was not an outgrowth of the Central American sanctuary movement in the 1980s, nor was it part of a broader effort by Oregon to pass a litany of immigrant rights measures. Indeed, as Barilla noted, "this was not meant to be a sanctuary law . . . It was meant to protect local city resources from using them to supplant federal spending."¹⁵ Still, the law was meaningful in that it provided immigrants and Mexican Americans in Oregon the rights to due process and free movement in the state.

What do these examples tell us about the evolving nature of citizenship in the contemporary era? And what accounts for the expansion and contraction of state citizenship rights in the United States? These are two of the central questions motivating this book. In answering these questions, we will have more to say about Oregon, Connecticut, and other states that are pushing toward what California has already achieved – a durable, multifaceted, and meaningful form of state citizenship. We call this development “progressive state citizenship,” where states provide rights and protections that exceed those provided at the national level. At the same time, we also seek to shed greater light on what we call “regressive state citizenship,” where states remove or erode citizenship rights that are supposed to be guaranteed at the national level.

STATE CITIZENSHIP?

Many may balk at the notion that California, or any other state, can provide citizenship to its resident populations. Our claims rub against the conventional legal view of citizenship in the United States today – as an exclusive and formal membership controlled by the federal government, with sovereign power over its borders and people. This legal conception of citizenship – as predominantly or exclusively national – is prevalent well beyond the United States. National citizenship has become intuitive and normalized as *the* dominant type of rights-based citizenship across the world. National articulations of citizenship draw heavily on Max Weber’s framework of modern political citizenship as membership in national states, with varying emphases such as the process of state formation through war-making and the creation of welfare states with strict rules defining insiders who are entitled to benefits and outsiders excluded from those same benefits. Regardless of the emphasis, the conventional view of citizenship today is still one that is largely tied to a framework where national governments reign supreme within their territories and where the world is divided into mutually exclusive jurisdictions.

The conventional view of citizenship today has three hallmark features: citizenship is binary, unidimensional, and exclusively national. First, citizenship is viewed as binary – one is either a citizen or one is not, with no gradations in between. Furthermore, this binary view of citizenship is often tied to just one dimension: legal status. Citizenship is largely seen as a unidimensional gateway, as rules concerning birthright citizenship and naturalization prove to be authoritative in providing individuals access to a comprehensive set of political, social, and legal rights. Without legal status, the thinking goes, one cannot hope to draw upon any kind of citizenship rights. Finally, the conventional view sees citizenship as exclusive to national governments, with state and local forms of citizenship rendered irrelevant with the rise and consolidation of the modern national state. Thus, most scholars and practitioners today still see national governments as having a monopoly over the use of legitimate force. They also see national

governments as having the exclusive ability to define and control citizenship – with documents such as passports, birth certificates, and naturalization certificates serving as important markers of legal presence and controlling access to a variety of rights. We say more about the conventional view of citizenship in Chapter 2.

In recent years, scholars and practitioners alike have offered alternative conceptualizations of citizenship, but they have largely done so outside a rights-based framework. Scholars in urban studies have challenged the traditional model of citizenship over its claims to national exclusivity.¹⁶ For example, Michael Javen Fortner (2016) develops the concept of “effective citizenship,” emphasizing city-level autonomy and governmental ties to the local community and particularly the capacity of local actors to work together to achieve collective goals.¹⁷ Rogers Smith (2016) has a similar, expansive view of urban citizenship. As he explains, cities play three specific roles that have an upward impact on American citizenship: “as sites of political activity embedded in larger [national] structures, as political actors in those larger structures, and as political symbols.”¹⁸ In this formulation, citizenship is a generalized concept that has both local and national dimensions, with policies, actions, and symbols that can provide individuals with varying levels of representation, empowerment, and sense of belonging. Scholars of global cities go even further. Decentering citizenship studies away from national boundaries, these scholars point to multiple, overlapping, and coexisting memberships, including urban, local, national, global, transnational, postnational, and dual-national membership.¹⁹

In addition to urban scholars, immigration researchers have also challenged the conventional view of citizenship for its fixation on legal status as: (1) a binary distinction providing a sharp line between noncitizen from citizen; and (2) an authoritative distinction that lords over all other dimensions of citizenship by controlling access to a variety of political, social, legal, and economic rights. This challenge has a long tradition. Writing in 1965, T. H. Marshall traced full citizenship as an evolving concept, beginning with civil rights and then expanding to include political and social rights.²⁰ Writing more recently, Elizabeth Cohen builds on Marshall’s foundational work by developing a more precise and concise framework of multidimensional citizenship that is grounded in the provision of rights.²¹

Other scholars of multidimensional citizenship go beyond a focus on rights, drawing attention to factors like legal status, political participation, and sense of belonging. Importantly, Irene Bloemraad, Anna Korteweg, and Gokce Yurdakul (2008) argue that these dimensions can operate semi-independently from each other and that citizenship need not be collapsed into one single dimension of rights.²² By presenting these four general dimensions shared by state-centered and human rights approaches alike, Bloemraad, Korteweg, and Yurdakul provide a broad foundation for addressing the substance of citizenship that is sorely lacking in the national citizenship framework.

Others, writing in traditions as varied as postnationalism, multiculturalism, and feminism, have also offered expansive notions of citizenship, moving beyond rights to include the exercise of sovereign power and the lived experiences of people.²³ As we note in Chapter 2, these broader frameworks present compelling critiques of the conventional view of citizenship. At the same time, they also run the risk of “conceptual stretching” by combining such disparate ideas as access to rights, the exercise of those rights, and psychological notions of identity and emotional attachment.

We believe that it is possible to preserve a multidimensional view of citizenship that is entirely grounded in rights, including the provision of rights by governments and access to those rights by members of social groups. We also argue that citizenship rights are not exclusive to the federal government and that states have acted in various ways throughout American history to expand or contract those rights. Finally, we produce a set of indicators showing expansion and contraction in various dimensions of citizenship rights. We do all of this while drawing attention to important federalism dynamics involving *constitutional frameworks* as interpreted through courts, *legal actions* pushed by political parties and social movements, and the *bureaucratic capacity and political will* of national and state governments to enforce citizenship rights. Importantly, we show that, even though state citizenship may be moving in a progressive direction in many places today, the United States has also seen many periods of regressive state citizenship, where states have used the cover of federalism to contract citizenship rights.

THE DARK SIDE OF FEDERALISM

Federalism does not have a great reputation in the history of U.S. civil rights. Vivid images from the Civil Rights era to the present day capture the dark side of states’ rights: the Arkansas National Guard preventing nine black students from entering an all-White high school in 1957; Southern sheriffs turning loose attack dogs and firehoses on civil rights protesters in 1963; a county clerk in Kentucky refusing to issue marriage licenses to gays in 2015. All of these images, and their associated stories, powerfully depict the attempts by states and localities to claw back rights that were won at the national level.

The concern about federalism as a cover for eroding civil rights is reflected not only in popular understandings of the topic but also in much scholarship on federalism and civil rights. Writing in 1964, William Riker concluded that “if in the United States one disapproves of racism, one should disapprove of federalism,” and that, by contrast, “if in the United States one approves of Southern White racists, then one should approve of American federalism.”²⁴ Since Riker’s provocative statement, a large body of scholarship in the post-Civil Rights era has called out federalism for preserving the power of states to enforce racially punitive policies, making little mention of the ability of states to

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push for progressive reforms that promote the rights of immigrants and racial minorities.²⁵

Scholars have also noted how racial politics continue to shape the politics of federalism and poverty in the post-Civil Rights era. For example, Joe Soss, Richard Fording, and Sanford Schram explain that federal cuts to welfare programs, such as Aid to Families with Dependent Children (AFDC) and General Assistance programs, led to the reassertion of state control over welfare provision. Removing federal rules in 1996 that previously blocked states from preventing who has access to welfare, states are now able to employ a principle of “less eligible” to discipline the poor and to disproportionately target racial minorities.²⁶ Lisa Miller’s *The Perils of Federalism* also highlights how the structure of federalism favors interest groups like the National Rifle Association and prevents national solutions to local crime in primarily Black and poorer neighborhoods, leaving them even more vulnerable to gun violence.²⁷

In *Federalism and the Making of America*, David Brian Robertson argues that federalism creates a double battleground of: (1) whether the government should act and by what means; and (2) which level of government should have the power to act.²⁸ This has often benefited racial inequity, Robertson explains: “Federalism’s powerful influence on American political development is most clear in the enduring political battles about race,” from preserving slavery and Jim Crow-era racial order under the banner of states’ rights to paving the road to racial disparities in employment, housing and education in modern times.²⁹ According to Robertson, states rights’ have been invoked time and again to prevent national interference and to preserve particular kinds of racial orders or regimes. He depicts federalism as a weapon, one that White supremacists have successfully wielded to prevent and slow progress on racial equality and even reverse gains from the Civil Rights era. Federalism’s effectiveness in these racial battles, he explains, has had the unintended consequence of legitimatizing the concept as a conservative weapon for other issues, including fights against environmentalism, abortion, and same-sex marriage.

Finally, Jamila Michener’s *Fragmented Democracy: Medicaid, Federalism and Unequal Politics* advances a new line of critique against federalism and its harmful effects on racial minorities. Examining differential access to Medicaid, a program funded by both the federal government and the states, Michener argues that federalism acts as an institutional “purveyor of political inequality” that erodes political capacity among low-income people, especially Black and Latino minorities who are low-income, because they reside in states with restrictive Medicaid policies.³⁰ Thus, not only does federalism allow for massive inequalities in welfare provision, but it also produces significant disparities in political participation among low-income, minoritized residents. In addition to these indirect harmful effects of federalism on minority participation, states have placed even more direct constraints on voting by passing strict voter identification and felon disenfranchisement laws that have

been particularly prevalent in states with expanding Black and Latino populations.³¹

Critiques of federalism are not confined to the Civil Rights era and its aftermath. Scholars have shown that federalist accommodations in the Progressive and New Deal eras strengthened racial conservatives and White supremacists in state and local governments. Eileen L. McDonough shows that progressive national reforms in the 1910s and 1920s emerged as welfare policy initiatives, but developed distinctly from civil rights issues, as states and local governments continued to erode the rights of racial minorities.³² Similarly, Margaret Weir explains that, contrary to conventional wisdom, Progressive-era reforms did not bear a direct relationship to New Deal reforms. The Progressive movement ran parallel to the New Deal, but had different goals. Essential to the Progressive movement was a devolution in political participation, away from party control. Thus, the movement sought to advance structural reforms to constrain political participation and corruption, while opening pathways to new forms of democratic political participation at the state and local level. The New Deal, by contrast, sought to establish federal reforms that would empower and mobilize new national constituencies. According to Weir, “states, fundamentally, were not part of the New Deal regime.”³³ As a result, “the [national] reform impulse that transformed the federal government in the 1930s had no enduring counterpart in the states” and soon lost steam.³⁴ With their own distinctive capacities and political logics, states thus set their own pathways of development, often focusing around exclusionary and racist policies.³⁵

Patterns of racial exclusion at the state level can be seen across the literature on New Deal federalism. James T. Patterson shows that liberal New Deal reforms at the federal level developed alongside conservative movements at the state level.³⁶ The few states that aligned with federal reforms, including New York and Massachusetts, experienced successful and enduring reforms in the administration of relief and labor laws. Cybelle Fox reveals, however, that these Northeastern states’ inclusive welfare policies only benefited White European immigrants. The devolution of New Deal relief administration to states also provided new tools for Southern and Southwestern states to exclude, target, and marginalize racial minorities, regardless of their citizenship or immigration status.³⁷ Similarly, Robert Lieberman’s *Shifting the Color Line: Race and the American Welfare State* and Michael Brown’s *Race, Money, and the Welfare State* highlight state-level dynamics that undercut the aspirations of federal reformers to provide broad social protection, in both North and South. Finally, Suzanne Mettler shows us that states used their police power after New Deal federal reforms to restrict social welfare to women and minorities through the 1960s, until federal judicial rulings began to narrow the scope of this power.³⁸

From the New Deal reforms and beyond, much scholarship on federalism has shown how conservative state and local governments exploited the framework of federalism to create authoritarian enclaves, uphold White supremacy, and

hinder the progress of federal reforms.³⁹ It is thus abundantly clear that federalism can significantly worsen racial and gender inequality, labor relations, social welfare, health, voting rights, and civil liberties.⁴⁰

PROGRESSIVE FEDERALISM

The dark side of federalism offers a cautionary tale, but it is not the only story about states and the advancement of civil rights. As both the historical and contemporary records show, federalism can also provide structural opportunities for states and localities to advance progressive reforms. These developments have occurred both within states and across states, building momentum toward national reforms. As we discuss in Chapter 3, the expansion of women's suffrage was a state-led affair, starting in the Mountain West during the late 1800s and expanding rapidly across other Western states in the 1910s before snowballing into a federal constitutional amendment by the end of the decade. The right of same-sex marriage went through a different process of state diffusion – starting with state court decisions in Massachusetts (2004), California (2008), Connecticut (2008), and Iowa (2009) and followed by a series of state legislative expansions from 2009 through 2014 before finally becoming a nationally guaranteed right with the Supreme Court's 2015 decision in *Obergefell v. Hodges*.

These examples point to the possibility of progressive federalism, where states serve as political and policy laboratories that advance the rights and interests of disenfranchised populations. Our work on state citizenship thus builds on a growing body of scholarship on progressive federalism. A cornerstone of the progressive view of federalism is that states can move the country forward by advancing equality and justice, and particularly so when progress is stalled at the federal level. This flips the script of “states’ rights,” showing that federalism and devolution of authority are not exclusively a conservative rallying cry to block progressive reforms and enforce racially exclusive policies and norms. Advocates of progressive federalism also employ state’s rights arguments but in a modified manner – arguing for federal laws and constitutional provisions that set a durable floor upon which states can build additional protections.

At the same time, most contemporary writing on progressive federalism has focused not on the expansion of rights but rather on the diffusion of social welfare spending and state regulatory policies such as smoking bans, environmental protections, and minimum wage increases. Indeed, in “The Promise of Progressive Federalism,”⁴¹ one of the most influential contemporary pieces on the topic, Richard Freeman and Joel Rogers conceive of rights as being set primarily at the national level, with states being allowed to innovate and expand on federal standards primarily through regulation and the provision of benefits. The authors note that devolution of authority does not have to lead inevitably to a “race to the bottom” where exclusion is the norm, as the dark side of federalism might suggest. Instead, the federal government can

set an important “floor” upon which states can build further benefits and protections, rather than a “ceiling” that limits state progress through the power of federal preemption. At the same time, most of the innovations that Freeman and Rogers envision involve pro-worker laws at the state level, including state minimum wages, welfare eligibility, and collective bargaining, although they also briefly consider state-led environmental regulations, progressive voting reforms, and expansions in health care access, reproductive rights, and antidiscrimination laws based on sexual orientation. More recently, Lenny Mendonca and Laura Tyson (2018) have argued more generally for progressive federalism as a strategy for encouraging social innovation that can scale up to the national level. Indeed, they use the analogy of the federal government as “a venture capitalist, soliciting, supporting, and scaling innovative solutions developed by state and local governments.”⁴²

Heather Gerken and others advance the concept of progressive federalism even further, calling it “the new nationalism” and reenvisioning the American state in its federalist form as beginning from the state to the federal level.⁴³ Gerken and colleagues collectively show that federalism is a tool for progress in national politics, national power, national policymaking, and national norms. They argue that progressive states can advance a “well-functioning *national* democracy” in many ways that go beyond policy diffusion from the bottom up to also include pushing the nation forward by overcoming political gridlock, cultivating discourse and agenda setting, and diffusing policy upward as a model for national reform.⁴⁴

In other work, Gerken pushes against that long-held view of states’ rights and federalism as being intrinsically opposed to progressive reforms. The federal government, she explains, “has plenty of power to protect racial minorities and other groups,” but to do so requires “political will.”⁴⁵ Viewing states’ role in federalism as progressive, Gerken explains, “upends conventional thinking that the federal government is the backstop for maintaining progressive policy.”⁴⁶ According to this view, local and state politics do not undermine national policies – rather, they fuel national reforms. Moreover, as Gerken explains, viewing progressive change from the bottom up centers the analysis on racial minorities, who may now have greater access to political power in local and state government than at the national level. Similarly, Jessica Bulman-Pozen argues that federalism provides a “durable and robust scaffolding” for political parties to compete, with national parties using state and local jurisdictions to wage partisan fights.⁴⁷

Progressive federalism thus paints the interconnection between local, state, and national government differently than what we see from the conservative view of federalism. States become core parts of the nationalist vision rather than serving as barriers to it. States seek to integrate rather than divide the nation state. As Gerken explains: “Federalism-all-the-way-down is not your father’s federalism. It cannot be invoked to shield local discrimination from national interference, but it may play a role in promoting equality . . . [It] can provide