RESPONSE

Designing Populations: Lessons in Power and Population Production from Nineteenth-Century Immigration Law

Juliet P. Stumpf[*]

History has a bad reputation for recidivism.[1] In *The Hidden Dimension of Nineteenth-Century Immigration Law*,[2] Kerry Abrams brings to light the ways in which laws encouraging white Christian migration and restricting the settlement of others interlocked to populate the West along racial, religious, and gendered lines.[3] *Hidden Dimension* redefines immigration law history on several levels. It expands the scope of immigration law to include migration within the

* Associate Professor of Law, Lewis & Clark Law School. I am grateful to Kerry Abrams, Mary Holland, and Jenny Roberts for invaluable comments and conversations. Hoshihito Kondo, Melanie Rose, and Brienne Carpenter provided excellent research assistance. Special thanks to Eric, Liam, and Kai. For Dan Chepaitis, who was always thinking, and always inspired my own.

1. "History, we know, is apt to repeat herself." 2 GEORGE ELIOT, SCENES OF CLERICAL LIFE 186 (Garland Publishing, Inc. 1975) (1858); *see also* 2 GEORGE SANTAYANA, THE LIFE OF REASON, OR THE PHASES OF HUMAN PROGRESS 284 (2d ed. 1924) (observing that "[t]hose who cannot remember the past are condemned to repeat it"); *cf.* JOSEPH ANTHONY WITTREICH, FEMINIST MILTON 150 (1987) ("History may not repeat itself but it does rhyme. . . . ").

2. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1392–1403 (2009).

3. *See infra* notes 9-20 and accompanying text (summarizing the analysis).

United States, and widens the historical lens beyond restrictive immigration policies to include legal frameworks that encouraged white Christian migration. By recasting immigration law history as the story of the production of a population, *Hidden Dimension* invites further exploration of how public and private actors use modern legal frameworks to maintain or shape the demographic and cultural face of the United States.[4]

I take up that invitation in this Response, seeking to use *Hidden Dimension*'s historical tale to shed light on two current issues. First, *Hidden Dimension* sketches a precedent for using law as the leading edge in the integration of migrants into the national population. By integration, I mean the acceptance of newcomers into a community over time.[5] The recent migration of noncitizens into nontraditional geographic regions of the United States, such as the Southeast and the Midwest, has made integration of noncitizens a pressing and controversial issue.[6] Abrams weaves the story of the western migration of white Christian women into a compelling tale of the role of law in enabling their passage and assimilation into the western territories. *Hidden Dimension* also reveals that lawmakers and other actors recognized the population-shaping power of migration and marriage and employed them to establish white European cultural values in those culturally contested areas.

Second, the article brings historical depth to the pitched contemporary debate over who decides whether noncitizens are entitled to enter and migrate freely within the country. Arizona's ongoing attempts to regulate migration into and within the state are the tip of the iceberg of state and private interest in regulating migration.[7] Abrams's broad view of immigration history, and the

---

4. Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. *DE NOVO* 905 (2011) (describing the ways in which modern subfederal immigration laws act as proxies for legislation aimed at maintaining or restricting racial demographics).

5. *See* Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 100 (2007–2008) (defining integration as "the process by which newcomers gradually become accepted into a particular society across time and generations").

6. *See* Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1493 (2002) (describing migration of Mexicans into nontraditional regions).

7. *See, e.g.*, Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's SB 1070 and the Failure of Comprehensive Immigration Reform*, ARIZ. ST. L.J. SOC. JUST. (forthcoming) (manuscript at 9–14), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695236 (describing the increase in state and local laws seeking to govern aspects of migration and describing Arizona's SB 1070 as "[p]erhaps the most well-known recent example of an effort of a state to aggressively move into the realm of immigration enforcement"); Gabriel J. Chin & Marc L. Miller, The Unconstitutionality of State Regulation of

insight it brings about integration of migrants, provokes a new perspective on who controls migration into and within the United States. The article challenges the notion that the federal government has been the primary source of laws regulating migration. By engaging with emerging conceptions of immigration law as population design,[8] *Hidden Dimension* reveals a set of government and private actors that influenced and channeled migration into and within the United States.

If a deeper understanding of the past can mollify history's inclination to repeat itself, Abrams's contribution illuminates pathways for disrupting the exclusionary lows in the cycles of U.S. immigration law. *Hidden Dimension* invites us to imagine how the population of the United States might be composed had history been different, without the twin projects of exclusion of nonwhites and inclusion of women and men of European descent. In doing so, it provides an impetus for evaluating the role of law and legal actors in ameliorating the effects of that historical scheme. This Response will seek to draw connections between the various actors and tools of population construction revealed in *Hidden Dimension* and those identified by immigration scholars examining the constructive role of law in producing a population that integrates immigrant communities with the incumbent population.

I. INTEGRATION AND THE PRODUCTION OF CULTURE

Hidden Dimension examines how withholding regulation or using it to affirmatively construct migration can define a community of insiders and outsiders. Abrams shows us both hands of the law in action. If restrictionist immigration laws are the hand holding back the undesirables, as the Chinese Exclusion Laws exemplify,[9] *Hidden Dimension* reveals the hand that beckons the desired, those considered best suited to shape the future of the society and form a bulwark against the perceived evils of mixing the races and importing

---

Immigration Through Criminal Law (Feb. 22, 2011) (unpublished manuscript) (on file with author) (critiquing state laws, such as Arizona S.B. 1070 that purport to carry out federal immigration functions).

8. *See* ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 1 (2006) (describing immigration policy as a "major instrument of [American] nation-building," fostering the notion that a nation could be designed).

9. *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding deportation of Chinese permanent residents who failed to present a white witness to testify to their residency); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (upholding nineteenth-century laws excluding Chinese laborers from entering the United States and prohibiting the return of Chinese residents who left).

foreign non-Christian influences. Abrams's central actors are the private individuals who impelled white Christian migration, state and local governments that chose not to stand in the way, and legislators and agencies who used mainstream domestic law—property, civil rights, welfare, and criminal law—to encourage this settlement. Together, these legal actors fashioned an identity for the western states-in-waiting that was white, Christian, heterosexual, and reflective of the constrained gender roles of the time.

A. Ingredients of Exclusion

The legal actors and methodologies identified in *Hidden Dimension* that performed the exclusionary role in population-shaping ways have counterparts in our time. Abrams describes how federal and regional law in the nineteenth century worked to destabilize or discourage the establishment of undesirable racial, ethnic, and religious communities.

Federal law restricted Chinese immigration and denied constitutional citizenship to many Native American tribal members.[10] It used the power to confer or deny statehood to drive subfederal restrictions, conditioning statehood in Utah on banning the polygamous marriages of Mormons and requiring heavily-Hispanic New Mexico to adopt English language requirements and discourage the teaching of Catholicism.[11] Beyond this direct federal impetus, states used their powers to shape criminal and marriage laws to prohibit and often criminalize white marriage with blacks, Asians, or Native Americans.[12] As *Hidden Dimension* notes, this is the law's repressive function, restricting the cultural flourishing of particular racially- and religiously-defined southwesterners through restrictions on language, marriage, and education.

Moreover, the role of the law at that time was to repress integration. Subordination on the basis of race relies on delineating racial categories and attaching cultural meaning to those categories. Anti-miscegenation laws restricted the conduct of private actors because of fear of ethnic, racial, and cultural intermingling. Legal

10. An Act to Execute Certain Treaty Stipulations Relating to Chinese (The Chinese Exclusion Act), ch. 126, 22 Stat. 58 (1882); *Chae Chan Ping*, 130 U.S. at 600 (upholding the Chinese Exclusion Act); Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that "Indians" are not U.S. citizens under the Fourteenth Amendment and therefore cannot be deprived of Fifth Amendment rights).

11. Abrams, *supra* note 2, at 1402.

12. *Id.* at 1411–12 (citing Gabriel J. Chin & Hrishi Karthikeyan, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 2 (2002)).

restrictions on language closed off an arena in which diverse languages and the communities using them might have coexisted and accommodated one another. The collaboration between federal and state law magnified the law's power to stratify by race, ethnicity, and religion, cordon off the undesired from access to social or political power, and deter integration of the cultural communities on the western end of the continent.

B. Ingredients of Inclusion

Hidden Dimension emphasizes that laws that foster migration and social inclusion can contribute as much to the production of a particular demographic and cultural geography as legal restrictions do. The two components of this productive role of law are the mobilization of migration and the integration of migrants into the receiving community. Here the legal actors are federal and state, but with an important addition: private actors as mobilizers of migration.

The federal government in the nineteenth century was a major force in attracting migration internationally from Europe, but also domestically from east to west through statutory land grants.[13] The protagonist in *Hidden Dimension*'s immigration story, however, is not the federal government or an immigrating noncitizen. Instead, the migratory impetus came from a private resident of Washington Territory, Asa Shinn Mercer, who orchestrated the transplantation of white Christians from the east coast to the west. The active legal genre here is not international law or federalism, but contract—the dominion of private action. Mercer contracted with white male settlers in Washington Territory to bring back wives for $300, and separately negotiated the price of passage with the women and men migrating from the east coast.[14]

Federal, state, and territorial law took a significantly permissive stance toward Mercer's scheme. In contrast to laws restricting Asian women and African Americans from migrating based on their perceived potential for poverty, prostitution, and debauchery, authorities refrained from interfering with Mercer's scheme to import from the east coast boatloads of white Christian single women. No legal barrier emerged to discourage marriages between these migrants and the incumbent residents.[15]

13. *Id.* at 1403.
14. *Id.* at 1366–67.
15. *Id.* at 1388–90.

Moreover, each of these government actors played a part in creating a legal framework to support and integrate the newcomers. Land grants from the federal government conferred property rights that privileged white women, granting them a material security. State and territorial laws granting civil rights to white women, most significantly the right to vote as well as the power to define community standards of criminality through service on grand juries,[16] located the rights-holder as a member of the community. Even Mercer's scheme to bring boatloads of brides westward imagined a transformation of the migrants to wives, obtaining status through their husbands as (subordinate) members of the community, while at the same time serving an important civilizing role in the territory.[17]

What is striking in *Hidden Dimension* is the responsibility that the receiving community felt to integrate the migrants, as well as the acceptance of the power of immigrants to change the receiving society. Abrams notes that when commentary about the voyage turned negative, "citizens began to caution that heaping too much opprobrium on the immigrants would lead to difficulties integrating them into society once they arrived."[18] Marriage was the primary means of integration, both literally in that the legal identity of the wife was subsumed into that of the husband, and because marriage was seen as a form of "privatized welfare" based on the husband's duty to provide economic support for the wife.[19] Washington Territory seems to have relied on marriage as the primary means of integration despite the reality that many of Mercer's immigrants were not single marriageable women, but males, married and widowed women, and children.[20]

Beyond integration, Abrams's story reveals a national embrace of the power of immigration to transform communities. Legal frameworks that paved the way for the movement westward of white Christian women came into being not only to ease their assimilation, but to foment change. The structure of the law contributed to producing white Christian families, combating the feared influence of morals and cultural practices of Native Americans and the Chinese, and importing European-based morals and sensibilities. In the face of perceived cultural conflict with Native American and Asian populations, the law harnessed the culture-shaping power of marriage

16. *Id.* at 1408.
17. *Id.* at 1400, 1416.
18. *Id.* at 1375.
19. *Id.* at 1390–91.
20. *Id.* at 1392.

coupled with migration, and selectively employed white married women in their productive and reproductive capacities as bearers of cultural change.

C. Modern Integration and Change

If we peer through the other end of the lens that *Hidden Dimension* has trained on western migration, we find a recipe for integrating new migrants into established U.S. communities. The article identifies the ingredients for producing a population composed ethnically, socioeconomically, and with particular gendered, racial, and religious elements. It highlights the current absence of a national project to integrate the population of immigrants in the United States. Examining the ingredients in that historical recipe, and those who combined them, offers insight into what a modern integration project might entail.

Nineteenth-century immigration law, defined using Abrams's broader framework, illustrates that the role of law in the hands of federal, subfederal, and private actors was a powerful force not only for restricting migration, but also for integration. An emerging body of scholarship critiques the present lack of a considered government focus on integration and offers contemporary solutions.[21] There are significant parallels between the legal tools that *Hidden Dimension* identifies as contributing to shaping the western territorial population and those that contemporary scholars have offered to support integration efforts. These legal tools foster the social status, legal identity, and stake in the community that civil and property rights did for white women and married couples in the nineteenth century.

Treating lawfully admitted permanent residents as intending citizens, as Hiroshi Motomura has advocated, requires fostering the social benefits and employment opportunities that would keep immigrants from falling into poverty,[22] just as separate property

---

21. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 23 (2006) [hereinafter MOTOMURA, AMERICANS IN WAITING]; Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL'Y REV. 335 (2009); Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 29 IMMIGR. & NAT'LITY L. REV. 465 (2008); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2071–74 (2008) [hereinafter Motomura, *Immigration*]; Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007); Laura Spitz, *The Evolving Architecture of North American Integration*, 80 U. COLO. L. REV. 735 (2009).

22. MOTOMURA, AMERICANS IN WAITING, *supra* note 21, at 190–91; Abrams, *supra* note 2, at 1357 n.15.

rights for white married women and unrestricted marriage for the Mercer girls were intended to do in the nineteenth century. Similarly, state and local voting rights and other civil rights for permanent residents, like those that many new states and territories granted to nineteenth-century white women and European intending citizens, could create a legal status that is close to full citizenship.[23] These elements set the groundwork for "reimagin[ing] citizenship as an inclusive framework for participation in American society."[24]

Failing to pay attention to integration has population-shaping effects. Even for lawful permanent residents, a lack of the kind of tangible support in meeting naturalization requirements such as English language and civics requirements will slow the progress to citizenship in ways that will disparately impact immigrant communities of color and lower socioeconomic status. Immigration law privileges the admission of close relatives of U.S. citizens over the relatives of permanent residents.[25] Over time, then, the absence of such support for integration will have disproportionate effects on the presence of those racial and socioeconomic groups in the United States, slowing those communities' eventual acquisition of full membership through citizenship and civil rights.

Hidden Dimension can be plumbed still more deeply. Immigration history viewed as population production invites us to look beyond integration of immigrants into society to the potential that immigration carries to transform the receiving society. That potential, or realistic inevitability, raises the question of the role that law should play in channeling that change or preparing the incumbent community to meet it. As one example, immigrants bring to the United States a variety of language skills. U.S. law and society has been ambivalent about the use of language other than English, with English-only laws coexisting with foreign language instruction in public school and recurring debate over multilingual government documents.[26] When law supports multilingualism in both immigrant

---

23. Abrams, *supra* note 2, at 1414; *see also* MOTOMURA, AMERICANS IN WAITING, *supra* note 21, at 116–19. *See generally* Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT'L J. CONST. L. 30, 43–48 (2010) (comparing the robust histories of noncitizen voting in the United States, New Zealand, and Ireland and its role in the incorporation of noncitizens).

24. MOTOMURA, AMERICANS IN WAITING, *supra* note 21, at 199.

25. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1151(b)(2)(A) (exempting "immediate relatives" of U.S. citizens from admissions quotas), 1153(a) (generally setting a higher priority for adult offspring of U.S. citizens than for spouses and children of lawful permanent residents).

26. *See* Ming H. Chen, *Civil Rights Reconstructions: Regulatory Agencies Translating "National Origin Discrimination" into Language Rights, 1965–1980*, (Nov. 12, 2010), *available at* http://ssrn.com/abstract=1704190.

and incumbent communities through education or otherwise, it can ease the interactions between immigrants and incumbents and foster practical and cultural competencies for both that have value within our interconnected international economies.

II. WHO DECIDES?

Nineteenth century recipes for repressive and integrative ingredients for population design shed light on complaints that modern immigration law has too many chefs. The history of immigration law is often portrayed as the ascendance of the federal government as the supreme immigration lawmaker. The significance of this approach is its focus on the players. Who decides who will stay and go, and using what criteria? To put it another way, who is privileged to imagine the community that newcomers will join?[27] Since the nineteenth century, the traditional understanding is that the federal government has exclusive power to decide who may come across the border and who will be excluded or expelled.[28] This power has, in turn, defined the scope of immigration law.

In this version of immigration law history, the early states are merely placeholders, holding the scepter of the immigration power until the federal government assumes its exclusive sovereignty over immigration, with power to fashion a national identity into which newcomers must fit. The Supreme Court, through the Chinese Exclusion Cases, plays a central role in recognizing such an exclusive

---

27. *See generally* BENEDICT R. O'G. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

28. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (declaring that the nation has an "absolute and unqualified" right to "expel or deport foreigners who have not been naturalized, or taken steps towards becoming citizens of the country" as well as regulating who enters the country); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (declaring that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States"); Henderson v. Mayor of New York, 92 U.S. 259, 274 (1875) (striking down a New York statute requiring the owner of a vessel to pay a bond for every noncitizen passenger, reasoning that the law encroached upon Congress's exclusive authority over foreign affairs); *see also* DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); MOTOMURA, AMERICANS IN WAITING, *supra* note 21, at 23 (describing the *Passenger Cases*, 48 U.S. 283 (1849), in which the Supreme Court struck down two state laws and held that regulating immigration is exclusively a federal responsibility); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1102 (1994) (emphasizing the assertion in Graham v. Richardson, 403 U.S. 365, 377–80 (1971), that the national government, not the states, regulates immigration); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 142–43 (2002) (emphasizing the Court's assertion in *Fong Yue Ting*, 149 U.S. at 707, that nations have inherent authority to exclude or expel aliens).

federal power and policing the other actors, limiting state power over immigration and defining the noncitizen as a passive receiver of federal directives.[29] Citizens and other residents of the United States are all but invisible in this picture.[30] In this version, the Court returns after many years to crack open the door to state regulation of noncitizens at the margins, either at the direction of the federal government or in overlooked corners.[31] I have told a version of this story myself.[32] *Hidden Dimension* argues, persuasively, that this story is incomplete.

A. Federal, State, Local, and Private Decisionmakers

Hidden Dimension suggests that framing immigration law as the story of federal ascendance obscures the outlines of a multidimensional struggle for the power to define the "right" kind of community. Arizona and other states and localities have passed laws requiring local law enforcement authorities to take part in enforcing federal immigration laws,[33] preventing landlords from renting to undocumented migrants and employers from employing them.[34]

---

29. *See Fong Yue Ting*, 149 U.S. at 707 (defining a broad federal power over deportation of noncitizens); Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (grounding the federal power to regulate immigration in the law of nations and the sovereign power to conduct foreign policy and holding that the Constitution does not protect noncitizens seeking admission); *id.* at 606 (stating that "[f]or 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"); *id.* at 603 (holding that aliens can be excluded from the United States).

30. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting) (objecting that "[t]oday . . . the Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws").

31. Plyler v. Doe, 457 U.S. 202, 228 n.23 (1982) ("Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns."); DeCanas v. Bica, 424 U.S. 351, 365 (1976) (holding that federal immigration law did not preempt state authority to regulate the employment of undocumented migrants).

32. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1617 (2008) (arguing that because the federal government has shifted the focus of immigration law enforcement from the borders to the interior of the country, it has revived the conflict between exclusive power and preemption on the one hand and traditional state powers to enforce employment, welfare, and criminal laws on the other).

33. ARIZ. REV. STAT. ANN. § 11-1051 (2010) ("[W]here reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practical, to determine the immigration status of the person"); ARIZ. REV. STAT. ANN. § 23-212(A) (2010) ("An employer shall not knowingly employ an unauthorized alien"). As of this writing, many of Arizona's restrictions have been preliminarily enjoined. *See* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

34. MISS. CODE ANN. § 71-11-3(8)(c)(i) (2010) ("It shall be a felony for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an

Controversy over these laws is often framed as a struggle about the margins of the immigration power, about whether states may use their unique powers to assist the federal government in enforcing established immigration prohibitions or whether those states are butting into an area exclusively reserved for federal sovereignty and expertise.[35] But the intensity of this debate reaches beyond the margins to the core of immigration law, to the way that federal migration control interacts with subnational actors and mainstream law to further population design.[36] As examples, federal deportation grounds rely on state criminal law definitions to determine what criminal conduct will lead to expulsion.[37] Arizona's reliance on criminal law to enforce federal immigration prohibitions calls upon traditional state authority over crime, but uses criminal law to magnify the exclusionary function of federal immigration law.

At the same time, the Mercer story points up the significance of private actors in mobilizing migration and choosing who migrates. Admission and expulsion of noncitizens are combined federal-private functions. Grounds for admission to the United States give private actors a major role in screening noncitizens for entry into the community: in deciding who to marry, who to employ, and whether to petition the federal government for lawful status with the noncitizen as a passive beneficiary.[38] On the flip side, terminating those relationships may provide grounds for expulsion.[39]

---

unauthorized alien with respect to employment during the period in which the unauthorized employment occurred"); S.C. CODE ANN. § 41-8-30 (2010) ("A private employer shall not knowingly or intentionally employ an unauthorized alien"); Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (striking down Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) (requiring apartment dwellers to obtain an occupancy permit and requiring proof of citizenship or lawful residence for receipt of permit)).

35. *See e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 801–02 (2008) (evaluating and questioning this framework); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) (arguing that federal exclusivity over immigration is ahistorical and that federal, state, and local governments should form an integrated system to regulate immigration flows and integrate immigrants into the body politic); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001) (arguing that the power to regulate immigration is exclusively federal and that Congress may not devolve that power to the states).

36. ZOLBERG, *supra* note 8, at 1 (asserting that "from the very outset, by way of its state and federal governments, the self-constituted American nation not only set conditions for political membership, but also decided quite literally who would inhabit its land").

37. *See* Stumpf, *supra* note 32, at 1593 (noting that "state statutory definitions of crime play a major part in determining whether a federal deportability ground will apply to a conviction").

38. *E.g.*, Immigration and Nationality Act, 8 U.S.C §§ 1153(a)(2) (2010) (allocating visas to spouses and children of aliens lawfully admitted for permanent residence), 1153(b)(3)(C) (requiring employer to obtain a labor certification from the Secretary of Labor before issuance of

Modern immigration law has expanded the employer's role in regulating migrants. The 1986 Immigration Reform and Control Act ("IRCA") placed employers in the role of screening new hires for work authorization when it created sanctions for knowingly hiring employees without such authorization.[40] IRCA was supposed to end the employment magnet for undocumented immigrants by exponentially expanding the labor-screening function previously allotted to the federal government.[41]

The role of private actors in restricting immigration is contested, in large part because of the power that private individuals wield to determine the composition of the community. The employer-sanctions scheme has been condemned for, ironically, enabling some employees to more easily hire undocumented employees. Criticism of IRCA maintains that the immigration sanctions give employers power and incentive to discriminate on the basis of perceived citizenship status, race, and ethnicity.[42] Groups of "Minutemen" fulfilling self-

---

an immigrant visa to skilled workers, professionals, and other qualified workers), 1154(a)(1)(A)(i) (permitting U.S. citizens to petition for the admission of a qualified alien).

39. *See, e.g.*, 8 U.S.C. § 1186a (2010) (establishing permanent resident status for certain alien spouses conditioned on the survival of the marriage for approximately two years). Expanding the participation of private actors in enforcing immigration law has been characterized alternatively as a panacea and an invitation to chaos. *See generally* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 800–25 (2008) (discussing both sides of the debate).

40. *See* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1) (1986) ("It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . . "); *see also* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1115–16 (2009) (noting that "Congress devolves some screening authority to employers who, in their capacity as current members of the national community, may sponsor new members").

41. The electronic revision of this process, entitled E-Verify, is heralded as the patch for the malfunctions of the currently operating employer-sanctions scheme. *See, e.g.*, *U.S. Pushes E-Verify for Hires*, WASH. TIMES, Sept. 25, 2007, *available at* http://www.washingtontimes.com/news/2007/sep/25/us-pushes-e-verify32for-hires; Press Release, Dep't of Homeland Sec., *DHS Unveils Initiatives to Enhance E-Verify* (Mar. 17, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1268843939770.shtm.

42. Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 369–70 (1994) (noting that employers have discriminated against "individuals with physical features, cultural attributes, or linguistic preferences that employers perceive to be foreign"); *see also Employer Sanctions: Comments on H.R. 3362—Employer Sanctions Improvement Act: Testimony Before the Subcomm. on Int'l Law, Immigration and Refugees*, Comm. on the Judiciary, House of Representatives, 103d Cong. 5–6 (Sept. 21, 1994), *available at* http://www.gao.gov/products/T-GGD-94-189 (noting that only ten percent of the employers who have been sanctioned are reinspected, and according to an INS official, there is insufficient data to determine if employer sanctions have had a deterrent effect at all); U.S. GEN. ACCOUNTING OFFICE, GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3, 5–7 (1990), *available at* http://archive.gao.gov/d24t8/140974.pdf (finding that employer sanctions had increased the incidence of discrimination against noncitizens and U.S. citizens perceived to be noncitizens); Kitty Calavita,

appointed roles as immigration enforcers along the Mexican border call explicitly on population design themes, warning that an "illegal alien invasion" will lead to a nation composed of "a tangle of rancorous, unassimilated, squabbling cultures with no cohesive bond."[43] State and local laws requiring landlords or employers to screen for immigration status propose larger roles for state and private actors to address concerns about changes in the ethnic composition of the community.[44]

B. Who Integrates?

Hidden Dimension's expansion of the scope of the "law" encompassed in the term "immigration law" offers a different role for subnational governments and individuals, one concerned with integrating migrants and receiving communities. The article delineates how state, local, and private decisions in the nineteenth century to withhold legal restrictions on migration and implement migration-inducing laws encouraged white settlers and eased their integration to the West Coast. Today, the areas of law that state and local governments traditionally control, such as employment, education, and welfare, have garnered attention from scholars seeking successful integration strategies.[45]

More controversial is the modern role of subfederal governments in the integration of migrants present without authorization. For immigrants who lack legal status or who have precarious status, the actions of cities, states, and private actors are paramount for integration.[46] Both of the postures that *Hidden*

Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime, 24 LAW & SOC'Y REV. 1041, 1059 (1990) (highlighting the potential that employers seeking to comply with IRCA's employer sanctions provisions will refuse to hire those who "look or sound foreign"); Espenoza, *supra*, at 369 n.217 (noting evidence that employers require Hispanics and Asian Americans to produce documents not required of others).

43. Jim Gilchrist, *An Essay By Jim Gilchrist*, 22 GEO. IMMIGR. L.J. 415, 426 (2008) (authored by the co-founder of the Minuteman Project); *see* Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007); Anderson Cooper, *Minutemen Build Fence Along Southern Border*, CNN, May 1, 2006, *available at* http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2006/05/minutemen-build-fence-along-southern.html.

44. *See supra* note 33–34 (providing examples of such laws).

45. *See supra* note 21 (sampling integration scholarship).

46. Luin Goldring et al., *Institutionalizing Precarious Migratory Status in Canada*, 13 CITIZENSHIP STUD. 239, 239–65 (2009) (defining precarious legal status as uncertain or less-than-full immigration status and discussing the movement between such statuses); Motomura, *Immigration*, *supra* note 21, at 2071–83 (mapping immigration outside the law and drawing connections between the meanings of unlawful presence, the role of states and cities, and integration of immigrants).

Dimension identifies the law taking toward the Mercer migration are apparent here. First, when states and localities forbear from passing restrictive immigration laws, coordinating with federal immigration enforcement, or undertaking independent enforcement actions, the absence of those laws or enforcement actions creates a space for integration of noncitizens in those communities.[47]

Second, states and localities may undertake affirmative integration efforts. The avenues that integration scholars have identified parallel the same legal approaches as in the nineteenth century. Avenues for integration feature access to education for undocumented students as a foundation for "functional participation" in U.S. society and as the key to avoiding the creation of an underclass of noncitizens.[48] Support for immigrant businesses and communities to provide economic sustainability and locally-based identification documents that create legal identity provide frameworks for participation in the private sector, such as the banking industry.[49] As in *Hidden Dimension*, the key to integration here is the use of law to establish some form of legal identity and a pathway to participation in public and private spheres. State and local governments, as well as private decisionmakers, do most of the work of creating or regulating these pathways.

Hidden Dimension answers the question of who regulates immigration by expanding the scope of immigration law to include the fostering of desired immigration and the repression of undesired communities. Once immigration restriction and regulation fall into place with those less visible pieces of the puzzle of population design, it becomes apparent that the federal government, subfederal governments, and private actors each played major parts in shaping the racial, ethnic, and religious face of the nation at the turn of the nineteenth century.

CONCLUSION

Hidden Dimensions illustrates how nineteenth-century, racially-restrictive immigration law contributed to a larger design for a population drawn along racial, religious, and gender-based lines. In

47. *See* Motomura, *Immigration*, *supra* note 21, at 2077 (explaining that "policies of sanctuary, noncooperation, or other forms of insulation from federal enforcement should be interpreted not just as skepticism or resistance to enforcement, but also as efforts to establish safe zones in which public and private initiatives can foster integration"); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 590 (2008).

48. *See* Motomura, *Immigration*, *supra* note 21, at 2072–75.

49. *See id.* at 2077–79.

doing so, the article compels reflection about how modern laws restricting immigration, combined with inattention to integration and the power of migration to transform society, will affect the future of U.S. society.[50]

Perhaps one reason we do not recognize modern immigration law as producing (or maintaining) a population is the existence of significant conflicts among the major players about what that population design should be. Federal, subfederal, and private actors disagree about whether to seek to maintain the current racial, ethnic, religious, and cultural lines of our current population by favoring more restrictive immigration laws and assimilation. Others view population shifts as either attractive or inevitable, and may therefore favor either more open migration or acceptance and integration of the current population of noncitizens residing in the United States. Either way, Abrams's tale from the nineteenth century makes a compelling argument for measuring the scope of immigration law more broadly to consider the myriad ways in which the law shapes the demographic and cultural outlines of the United States.

50. *See* Keith Aoki & John Shuford, *Welcome to Amerizona – Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, FORDHAM URB. L.J. (forthcoming) (manuscript at 6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695228 (asking with respect to immigration law reform: "*What kind of future would we want to leave to the next generation and to those not yet here? What steps are likely to contribute to its realization, and which ones are likely to prevent it? What kind of future is being created by, or is likely to result from, steps that are taken (or contemplated) right now?* and *Whose future matters for what, and why?"*) (italics in original).