

# Immigration, Civil Rights & the Evolution of the People

*Cristina M. Rodríguez*

*Abstract: In considering what it means to treat immigration as a “civil rights” matter, I identify two frameworks for analysis. The first, universalistic in nature, emanates from personhood and promises non-citizens the protection of generally applicable laws and an important set of constitutional rights. The second seeks full incorporation for non-citizens into “the people,” a composite that evolves over time through social contestation – a process that can entail enforcement of legal norms but that revolves primarily around political argument. This pursuit of full membership for non-citizens implicates a reciprocal relationship between them and the body politic, and the interests of the polity help determine the contours of non-citizens’ membership. Each of these frameworks has been shaped by the legal and political legacies of the civil rights movement itself, but the second formulation reveals how the pursuit of immigrant incorporation cannot be fully explained as a modern-day version of the civil rights struggle.*

The Immigration and Nationality Act of 1965, which eliminated formal racial distinctions from the law, coincided with the enactment of framework civil rights legislation. Throughout the mid-to late twentieth century, lawmakers and advocates who pressed for immigration reform formulated their ideas as extensions of the civil rights struggle.<sup>1</sup> And generally speaking, the civil rights movement has given us the vocabulary with which we frame debates concerning justice, equality, and citizenship. Characterizing the immigration debate as a civil rights struggle therefore has strong intuitive appeal for defenders of immigrants’ rights.

But what precisely it means to connect immigration with the civil rights project is not self-evident. The immigrant population encompasses persons whose ties to the body politic vary considerably in kind. “Civil rights” is itself a term with multiple meanings. It can refer to particular legal protections against discrimination and exploitation, as well as to abstract principles of equality and anti-subordination, and it can be employed to evoke the civil rights

CRISTINA M. RODRÍGUEZ is Professor of Law at Yale Law School. Her publications include *Immigration and Refugee Law and Policy* (with Stephen H. Legomsky; 5th ed., 2009); chapters in several edited volumes, including *The Encyclopedia of Human Global Migration* (2013) and *Taking Local Control: Immigration Policy Activism in U.S. Cities and States* (2010); and numerous articles in journals such as the *Duke Law Journal*, the *International Journal of Constitutional Law*, the *Michigan Law Review*, and the *Yale Law Journal*.

© 2013 by the American Academy of Arts & Sciences  
doi: **NUMBER TO COME**

*Immigration, Civil Rights & the Evolution of the People*

movement itself and the forms of popular mobilization that defined that social struggle.

When advocates or scholars invoke the civil rights of immigrants, or charge that the treatment of non-citizens undermines civil rights, they might mean any number of things. The claims could mean that the constitutionally protected civil liberties of immigrants have been violated, or that immigrants have been denied the protections of generally applicable social welfare legislation. The reference might also be to the civil rights externalities generated by efforts to enforce the immigration laws – rights violations that fall disproportionately on lawful permanent residents and U.S. citizens of the same race or national origin as the primary targets of enforcement. And sometimes the appeal to civil rights might be intended to invoke something grander – to tap into a historical struggle for justice and inclusion by marginalized groups in order to build the moral case for events such as the legalization of the unauthorized population.

When invoking civil rights in immigration debates, we ought to distinguish between two interconnected but distinct frameworks of analysis. The first formulation, universalistic in orientation, emphasizes the right of all persons to basic respect for their dignity and to protection from arbitrary state action. This civil rights formulation focuses on personhood and promises immigrants the protection of generally applicable laws, as well as a limited but important set of constitutional rights grounded in the fact of personhood. The second formulation accepts the rights that emanate from personhood as a baseline but ultimately seeks recognition of full membership in “the people.” “The people,” in turn, should be understood as taking shape over time, primarily through social contestation, rather than by operation of universalistic norms enforceable

by courts. Whereas the personhood formulation entitles non-citizens to the protection of certain rights by virtue of their identity alone, the process of incorporation requires taking into account the preferences and prerogatives of the existing members of the body politic, thus implicating a reciprocal relationship between the non-citizen and the polity. This difference between what it means to be respected as a person and what it means to be incorporated into the people reflects the difference between civil rights as a basic legal regime and civil rights as an ongoing social struggle.

I have given sustained treatment elsewhere to the personhood formulation of civil rights as it has applied in the immigration context. After considering the significance of personhood briefly, I therefore focus largely on what the definition of “the people” entails. I explore the place of non-citizens within that construct and consider the benefits and limitations of drawing from civil rights history as part of the inquiry.

On the one hand, immigration law developed in dialogue with the civil rights and civil liberties movements of the 1960s and 1970s, and meaningful similarities exist between the circumstances of many immigrants today and the subordinated groups whose struggle constituted the civil rights movement. Many poor, non-white immigrants perform essential but difficult labor, often at the mercy of the removal laws and without full capacity to defend their interests in the political process. But as important as these convergences might be, immigrant incorporation and the civil rights movement also implicate equities quite different in kind. Whereas the protagonists of the civil rights movement sought recognition of the full citizenship guaranteed to them at birth by the Fourteenth Amendment, immigrants seek entrance into a new polity



that has made no preexisting commitments to their inclusion.<sup>2</sup> Accepting these distinctions does not mean that debates over immigrant incorporation cannot benefit from application of the principles that triumphed in the civil rights movement, namely, equality and nondiscrimination on the basis of race. Instead, the distinctions highlight how justifications for immigrant incorporation have always (properly) taken their own shape, given the nature of the demands made on the polity.

Scholars have written at length about how personhood has been mobilized to challenge legal and social distinctions made between citizens and aliens.<sup>3</sup> The literature reveals how courts, in cases involving non-citizens, have interpreted the constitutional provisions that protect the rights of persons to recognize certain universally applicable personal rights. The due process guarantees in the Fifth and Fourteenth Amendments of our Constitution, which promote rule of law values by restraining the government from arbitrary action, also have been invoked to advance human dignity by ensuring that persons are not deprived of basic liberty interests without adequate legal safeguards. The courts similarly have understood the equal protection clause as preventing states (though not the federal government) from denying generally available social welfare protections to at least lawfully present non-citizens (and, in limited circumstances, unlawfully present non-citizens). In so doing, the courts have highlighted how social policy goals that also promote equality and justice can be served by evenhanded treatment of non-citizens.<sup>4</sup>

This regime does not operate perfectly. Critics of the federal government's deportation policies would point to the government's failure to respect due process norms and take into account humanitarian con-

cerns when enforcing the law.<sup>5</sup> Critics of the slew of state and local laws designed to crack down on unauthorized immigrants – Arizona's Support Our Law Enforcement and Safe Neighborhoods Act of 2010 (S.B. 1070) most notorious among them – have condemned the laws for violating the basic civil liberties of the unauthorized and giving rise to civil rights externalities in the form of racial profiling and use of aggressive police tactics, even against lawfully present immigrants and citizens.<sup>6</sup> But when fully realized in practice – when legislatures exercise restraint in their treatment of non-citizens, when the executive engages in proportional enforcement, and when courts act as backstops to political actors' excesses – the personhood formulation meaningfully protects basic rights of immigrants.

Despite its relative stability in American law, however, the personhood formulation falls short of the sort of incorporation reflected in the highest ambitions of the civil rights project. As constitutional law scholar Ruth Rubio-Marín and I have written, "Despite the universalistic promise of a human rights discourse focused on personhood as the source of entitlement, the persistence of national sovereignty as an organising concept means that rights-respecting governments need not treat citizens and non-citizens equally."<sup>7</sup> Personhood today does not entitle non-citizens to core elements of membership in the polity: namely, the right to remain in the United States and the right to vote.<sup>8</sup> Personhood also does not require that existing members of the people take equal or even meaningful regard of non-citizens' political interests, or of their demands on public resources and institutions. These exclusions are justified not only by the persistence (and importance) of national sovereignty, but also by powerful socio-cultural norms that define polities as discrete entities comprised of persons tied

*Cristina M. Rodríguez*



*Immigration, Civil Rights & the Evolution of the People*

to one another for historical, emotional, and practical reasons. Indeed, personhood cannot confer the sociocultural dimensions of full membership – goods that can take time even for new citizens to acquire. And thus, an understanding of the civil rights of immigrants grounded in universal personhood norms is valuable, but it has a particular and limited meaning.

Determining who exactly may claim membership in the people ultimately involves ongoing political debate; perhaps the critical feature of “the people” as a concept is that it must be constituted over time. To be sure, the birthright citizenship rule of the Fourteenth Amendment reconstitutes the bulk of the people automatically with each generation. But defining the polity also involves identifying other potential members and establishing the terms of their full inclusion, which then occurs at different rates along legal, political, and social dimensions.

To understand how these dimensions of the nation-building enterprise unfold, we should begin with consideration of the very formal legal processes that define full membership. But it then will be crucial to appreciate how membership can transcend these formalities by emerging through quotidian social interactions. It ultimately should become clear that both the formal and informal mechanisms of incorporation have been shaped to some degree by civil rights norms, but that such norms have been elements of wider-ranging political processes that have highlighted the particular challenges immigration can pose to the concept of the nation.

The conventional, albeit oversimplified, narrative of immigrant incorporation into the people begins with legal migration, usually authorized for the benefit of an existing citizen or lawful resident, but also to protect persons fleeing persecution or other forms of disaster. A period of

legal residency follows, during which the non-citizen may claim nearly all the rights of citizens,<sup>9</sup> and during which a process of political and social acculturation presumably occurs. The process then culminates in naturalization and the former alien’s incorporation into the range of legal rights and nonlegal benefits of full membership. This linear narrative sustains America’s self-conception as a nation of immigrants and offers an account of nation-building based on an ordered transition from alien outsider to fully assimilated citizen. Though debates persist over whether permanent residents ought to be guaranteed to all the same rights as citizens, and the federal government remains free to remove non-citizens, block their naturalization, or otherwise discriminate against them in the distribution of benefits,<sup>10</sup> the instability that attends noncitizen status remains limited in time, because those on this trajectory have been selected as eligible for ultimate incorporation.

Historically, the parameters of this narrative have been defined as much by the exclusion of certain groups as by a national commitment to turning immigrants into members of the people.<sup>11</sup> But over the course of the twentieth century, the United States eliminated categorical racial and ethnic exclusions from the law through processes that culminated in the Immigration and Nationality Act of 1965,<sup>12</sup> through which Congress finally abandoned the numerical quotas that limited the admission of immigrants from Southern and Eastern Europe, as well as from the “Asia-Pacific triangle.”<sup>13</sup>

The motivating factors for these developments were likely myriad. Typical interest-group politics and intra-governmental institutional concerns certainly shaped congressional action; Italian, Eastern European, and Chinese ethnic lobbies sought to open legal migration to their family members and coethnics,<sup>14</sup> and the State Depart-



ment forcefully pressed its concern over the negative implications of a discriminatory immigration regime for foreign relations.<sup>15</sup> But more idealistic references to the civil rights movement and the ethical and legal principles of nondiscrimination that emanated from it also inflected debates over whether and how to restructure the incorporation trajectory. As scholars have remarked, “The temporal coincidence (as well as discursive linkage) of immigration reform with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 is too obvious to be missed.”<sup>16</sup>

Indeed, numerous lawmakers pursued immigration reform by vigorously defending application of formal egalitarian norms to the immigration code, arguing that a person’s national origin could not define his or her eligibility for entrance into the body politic. President Johnson, for example, exhorted Congress in his 1964 State of the Union to “return the United States to an immigration policy which both serves the national interest and continues our traditional ideals.” He observed that “[n]o move could more effectively reaffirm our fundamental belief that a man is to be judged – and judged exclusively, on his worth as a human being.”<sup>17</sup> And in an April 1965 speech on immigration legislation, Vice President Hubert Humphrey was even more concrete, noting that “[w]e want to bring our immigration law into line with the spirit of the Civil Rights Act of 1964.”<sup>18</sup> The politics as well as the achievements of the civil rights movement thus helped make the legal framework for immigrant incorporation both more open and stable. By removing the taint of racial preference from the law, the reforms of 1965 transformed the people as a concept into a body composed without regard to ancestry or race – a significant civil rights advancement.<sup>19</sup>

At the same time, while these shifts resulted in a more egalitarian code at a formal

level, as well as tangible benefits for certain existing citizens and residents, the idealism the reforms embodied grew largely out of a desire to promote American virtue by aligning the legal system with the nation’s developing self-conception as incompatible with racially defined citizenship, not from a particular vision of the membership claims of non-citizens. The reforms, accordingly, were process-oriented and did not occasion an especially broad or deep *popular* debate about how American society ought to use its exclusion powers to constitute the people. More important, despite its civil rights “perfectionism,” the conventional narrative cannot fully account for how “the people” actually have taken shape. Today, at least two trends in immigration law complicate the account of nation-building: the increased turn to legal but temporary labor migration and the rise of a population of unauthorized immigrants numbering in the millions. Though non-citizens in each category typically enter without any expectation of ultimate incorporation, their interests can mature into valid claims to membership, the legal foundations for which can be elusive. If we focus on unauthorized immigrants, in particular, it becomes clear that we must move beyond legal formalities to understand what constituting the people entails. It becomes necessary to traffic in sociological judgments and appreciate a far less ordered and more fluid understanding of nation-building than the step-by-step conventional narrative allows.

An appreciation of the fluidity of the people actually appears in constitutional doctrine, albeit in an underdeveloped way. Two insights characterize the courts’ reflections. First, not all persons within the United States or subject to the reach of U.S. law are part of the people, but the people encompasses more than the citi-

Cristina M.  
Rodríguez



zenry. And second, membership can turn on the extent of one's earned connection to American society and may not be merely a function of legal status (though the birth-right citizenship rule does make membership a matter of happenstance for the vast majority of the polity).<sup>20</sup> In *United States v. Verdugo-Urquidez*, the Supreme Court famously expressed these ideas, suggesting that certain non-citizens possessed "[t]he right of the people to be secure in their persons" and thus the right to be free from "unreasonable searches and seizures," as guaranteed by the Fourth Amendment. The Court referred to the people as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>21</sup> In *Johnson v. Eisentrager*, the Court conceptualized non-citizens' rights similarly, as existing along a trajectory defined by the degree of connection to the United States:

[T]he alien . . . has been accorded a generous and ascending scale of rights as he increases identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.<sup>22</sup>

In other words, the Court has on some occasions articulated a concept of "the people" that entails earned membership but that does not necessarily map onto formal legal status – a concept legal scholar Hiroshi Motomura has called "immigration as affiliation."<sup>23</sup>

The lower courts similarly have explored this sociological approach to defining membership, most recently in cases concerning whether the federal law that prohibits unauthorized aliens from possess-

ing firearms violates the Second Amendment "right of the people to keep and bear arms." On the one hand, no court appears to have struggled to uphold the statutory provision as consistent with the government's interest in regulating firearms. But the cases have provided occasion to explore how the people differ from persons as subjects of the Constitution.

The Tenth Circuit Court of Appeals, for example, expressed reluctance to limit the people protected by the Second Amendment to citizens<sup>24</sup> – a reluctance that appears to have been driven by the desire to maintain consistency in meaning across constitutional provisions, as well as by intuitions concerning the validity of certain non-citizens' claims to membership in some sort of American collective. In resolving the case before it, the Tenth Circuit observed that the unauthorized alien challenging the gun control law may well have belonged to the national community, by virtue of having "been here for decades and nowhere else."<sup>25</sup> As a consequence, the court subjected the elimination of his right by federal law to intermediate scrutiny, the form of judicial review invoked when significant interests or protected classes of persons are at issue. Similarly, a dissenting judge in a case decided by the Fifth Circuit Court of Appeals premised his conclusions even more squarely on an affiliation model, suggesting that a person, by virtue of simply having taken certain actions – living in the country for eighteen months, paying rent, supporting a family, and generally accepting social obligations to employers, his landlord, and his family – could claim to be part of the people. For this judge, one could accept societal obligations without complying with the immigration laws.<sup>26</sup> The sociological reality of the individual's life was what determined his membership.<sup>27</sup>

Of course, despite its ruminations, the Tenth Circuit had little trouble in conclud-



ing that Congress had good reason to keep firearms out of the possession of persons present unlawfully, in part because of their inherent untrustworthiness.<sup>28</sup> But these Second Amendment cases still suggest that defining the people entails a competitive dynamic that demands consideration of the contributions made and risks posed by those seeking incorporation, and not just their legal status. The judges' reasoning highlights the fluidity of the concept of the people and the balancing of individual and social equities that goes into its definition. Embedded in the discussion of formal categories is thus a dialogue about who the Constitution, and the people themselves, might regard as complete members of the polity.

The unauthorized immigrant presents a particularly stark challenge to the formal mechanisms for defining membership. He embodies a collision between the sovereigntist belief in the state's ability to control the nation's composition by laying out *ex ante* procedures for incorporation and the notion of earned membership.<sup>29</sup> As legal scholar Linda Bosniak has explored, the unauthorized immigrant has long had a dual identity in American consciousness as both an outsider to and a member of the national community.<sup>30</sup> This duality reflects ambivalence about the membership of the unauthorized—ambivalence that appears even in cases regarded as victories for immigrants' rights. In *Plyler v. Doe*, for example,<sup>31</sup> rather than squarely address the claims to social status of unauthorized immigrants, Justice Brennan emphasized the unauthorized child's lack of blame<sup>32</sup> and the social policy implications of unequal treatment. In his explanation for his holding, Justice Brennan combined a commitment to an anti-subordination vision of equality with recognition of the social ills that would result from such inequality, emphasizing that:

Denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles on the basis of individual merit. . . . The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual . . . makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework embodied in the Equal Protection Clause. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.<sup>33</sup>

Cristina M.  
Rodríguez

His approach thus underscores that the difficult question of whether to legally incorporate unauthorized immigrants cannot be answered exclusively as a matter of individual right. Instead, it must be the subject of political contestation that involves the weighing of social equities.

This contestation has been an ongoing feature of the political process, at least since the late 1970s, when members of Congress (and then the Reagan administration) began grappling with whether and how to legalize the existing population of unauthorized immigrants. Among the goals of reformers a generation ago was to bring the formal membership regime in line with a more sociological conception similar to the one described above. The debates culminated in the Immigration Reform Control Act of 1986, which acknowledged millions of unauthorized immigrants as functional members of American society by creating legal paths to their eventual citizenship (albeit in exchange for a redoubled commitment to enforcement).

And yet, whatever consensus might have existed at the time concerning the criteria for membership, it was short-lived.<sup>34</sup> Whereas in other societies, periodic legal-



*Immigration, Civil Rights & the Evolution of the People*

izations occur as a matter of course, in the United States the debate over the moral and social status of unauthorized immigrants recurs. Today we are living through yet another period of heightened debate over who constitutes the people and what it might mean for unauthorized immigrants to claim membership in the polity, with persistent ambivalence still framing the debate.

The national-level legislation that would be required to resolve the status of the current unauthorized population has attracted meaningful support in recent years within Congress and among the public at large, but its passage has proven elusive. Perhaps the most vivid examples today of the ambivalence that stands in the way of a resolution are the voluminous and conflicting state and local efforts to address illegal immigration. As I have discussed at length elsewhere, this activity, which simultaneously treats illegal immigration as a social scourge and seeks to make it “functional,” reflects the polity’s protracted consideration of whether to regard unauthorized immigrants as *de facto* members, or as false claimants to society’s respect.<sup>35</sup> This debate, percolating in a decentralized fashion, has been fundamentally about whether an alien’s lack of legal status amounts to a technicality that can be fixed by formally recognizing sociological membership, or whether the fact of illegality defeats the legitimacy of a person’s claim to membership.<sup>36</sup>

The fortunes of the Development, Relief, and Education for Alien Minors (DREAM) Act, the legislation first proposed in 2001 to provide unauthorized youth who meet certain conditions a path to lawful status and citizenship, also highlight the difficulty of achieving popular consensus. The claims of the affected youth, whose unlawful status initially resulted from the choices of others, might seem to present an easy

moral case for incorporation. The fact that most of the would-be beneficiaries of the DREAM Act are also functional Americans who have been socialized by our institutions would seem to establish the sort of commonality and connectedness that should make the granting of legal status an afterthought.<sup>37</sup> And yet the DREAM Act has languished in Congress, stymied in part by concern that rewarding illegal behavior would create perverse incentives for future illegal immigration.

But even as these examples of law reform reflect deep public disagreement, most participants in the debate over the membership status of the unauthorized share one basic assumption: that it is not tenable to maintain a large unauthorized population embedded in the nation’s social structures, because illegality has corrosive effects, whether on society or the immigrants themselves. For those who believe unauthorized status disqualifies non-citizens from membership, legal recognition remains anathema, and some combination of enforcement measures and imposition of legal disabilities becomes attractive as a means of reducing if not eliminating the population. But for those like me, who accept the premise that many of the unauthorized constitute members sociologically speaking, the imperative becomes to turn the ambivalence that has characterized the debate into broad support for legal recognition through legislation, to stabilize and anchor the social fact of membership.<sup>38</sup>

In 2013, the country may be on the verge of expanding its membership rules in dramatic fashion. Any immigration legislation that does emerge likely will be the product of partisan and interest group trade-offs, and support for legalization in particular will continue to be built by appeals to the self-interest of politicians and the polity alike. But one of the lessons of the debates of the 1960s and 1980s is that





ideas can also matter – especially ideas that embody basic American values. In his account of what finally prompted Congress to enact the legalization program in 1986, legal scholar Peter Schuck contends that the standard pluralist model of the legislative process cannot explain the dramatic and expansionist policy adopted. He cites instead the power of ideas and values that “can precede interests as well as advance them,” contending that popular assumptions about the benefits of ethnic diversity and family unification, and the belief that human rights, civil liberties, and due process norms should govern our treatment of even illegal immigrants, “helped to galvanize a consensus around an expansive immigration policy.”<sup>39</sup>

The enactment of a legalization program today thus may depend on advocates and lawmakers turning the sociological factors suggestive of the unauthorized immigrant’s actual membership into political arguments grounded in appeals to fairness, justice, and social welfare.<sup>40</sup> These arguments might call back to the paradigmatic civil rights movement, but they must also engage the unique membership questions posed by legalization. In its recent decision striking down most of Arizona’s S.B. 1070, the Supreme Court identified certain positive equities that might be entertained, including “whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”<sup>41</sup> These considerations parallel the factors scholars and activists have long highlighted, most common among them length of presence, extent of ties to the country, and existence of a criminal record<sup>42</sup> – factors that combine notions of fairness and dessert with an assessment of the existing polity’s interests. Presence and ties appear to stand in as proxies for de facto membership, defined in part by the extent of the non-citizen’s contribution, as well

as the potential disruption to his or her life or the lives of others that might attend an uprooting. And emphasis on criminal conduct reflects either an intuition that we ought to choose only members of good moral character, or a belief that past conduct can serve as evidence of the individual’s respect for the society into which he seeks incorporation.

Also relevant to the gestalt is the basis for the individual’s “illegality”: whether it arose because of a largely unconstrained choice, as a response to persecution or deprivation, or because of the choice of another, such as a parent.<sup>43</sup> This question requires interrogating our assumptions about illegality to determine whether it is best understood as an administrative violation, or whether it in fact reflects bad character or a moral transgression that obscures the equities in the non-citizen’s favor.<sup>44</sup> These questions, in turn, might prompt consideration of unauthorized immigrants’ motives, such as whether their actions reflect a desire for self-improvement and a willingness to work, or some less creditable motives. The legitimacy of these motives will be connected to the extent of the existing polity’s own “blame” for illegal immigration<sup>45</sup> – a complicity no less real because of the difficulty of quantifying it, or ascribing it to individual choices rather than systemic factors, such as allocation of enforcement resources or failure to properly channel economic and demographic pressures.

And finally, the transformation of the sociological case into a political claim for legal recognition requires consideration of incorporation’s likely effects on existing citizens and future iterations of the polity, including the possibility that incorporation would weaken the status of the least well-off and create incentives for future illegal immigration, which in turn would compound these negative effects.<sup>46</sup> This element requires an honest reckon-

*Cristina M. Rodríguez*



*Immigration, Civil Rights & the Evolution of the People*

ing with the question of whether the interests of the existing polity ought to take primacy over the interests of those seeking incorporation.<sup>47</sup> It should not be enough to assume in a nationalistic vein that the impact on existing citizens should always take precedence, at least not if that impact is more perceived than real, or if means of ameliorating the impact while also accounting for the interests of non-citizens can be identified. But failure to take into account the costs of incorporation for existing members would circumvent the reciprocal dimension of membership important to the long-term stability of the nation-building project.

An argument for the sociological membership of unauthorized immigrants that in turn justifies their legal recognition as part of the people ultimately demands an unwieldy balancing of interests. The incorporation debate thus must revolve around

the particular circumstances that define it. The conventional narrative casts a very long shadow over this debate, because the existing legal mechanisms of incorporation are perceived to be neutral and fair. But placing this narrative in proper historical perspective requires acknowledging its formal limitations and unintended consequences. The underlying premises of legalization are necessarily that the formal legal regime has failed and must be brought into line with the complex social structures that define actual membership, and that this realignment will promote equality and fairness while offsetting future social dysfunction. In the end, this vision of a better integrated society ties the immigration debate to the civil rights movement and the core commitments of the American polity, even as the vision depends on understanding the moral ambiguities associated with nation-building.

#### ENDNOTES

- <sup>1</sup> For examples of this framing, see Cristina M. Rodríguez, "Immigration and the Civil Rights Agenda," *Stanford Journal of Civil Rights and Civil Liberties* 6 (2010): 125–127.
- <sup>2</sup> My aim here is largely descriptive—to provide a socio-legal account of how non-citizens become members of "the people." I leave for another day whether the process of incorporation should be governed by certain moral imperatives, such that it might be illegitimate for existing members of the polity to exclude non-citizens who seek incorporation. For an influential defense of the polity's right to exclude, see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 34–42.
- <sup>3</sup> For representative literature, see Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford: Oxford University Press, 2006), 80–95; and Peter Spiro, *Beyond Citizenship: American Identity After Globalization* (Oxford: Oxford University Press, 2007), 81–108.
- <sup>4</sup> For discussion of this framework, see Cristina M. Rodríguez and Ruth Rubio-Marín, "The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States," in *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, ed. Marie Dembour and Tobias Kelley (New York: Routledge, 2011), 74, 81–84, 92–98.
- <sup>5</sup> See Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass.: Harvard University Press, 2007), 3–5.
- <sup>6</sup> For an account of how immigration enforcement, particularly at the state and local levels, raises civil rights concerns, albeit different in kind from Jim Crow segregation, see Kevin R. Johnson, "Immigration and Civil Rights: State and Local Efforts to Regulate Immigration,"



*Georgia Law Review* 46 (2012): 629–638. Johnson asks, “[H]ow can racial profiling in border enforcement, massive detentions of non-citizens, and record levels of deportations not implicate civil rights concerns” (611). See also Kevin R. Johnson, “A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform,” *UC Irvine Law Review* 2 (1) (2012): 352–356.

Cristina M. Rodríguez

- <sup>7</sup> Rodríguez and Rubio-Marín, “The Constitutional Status of Irregular Migrants,” in *Are Human Rights for Migrants?* ed. Dembour and Kelley, 74.
- <sup>8</sup> For an account of these rights as “sovereignty” rights, see *ibid.*, 83.
- <sup>9</sup> For a discussion of this point, see Spiro, *Beyond Citizenship*, 81–108.
- <sup>10</sup> *Mathews v. Diaz*, 426 U.S. 67 (1976).
- <sup>11</sup> For an account of this discriminatory history, see Gabriel J. Chin, “The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965,” *North Carolina Law Review* 75 (1996): 279–297.
- <sup>12</sup> In the years leading up to the 1965 reforms, “cumulative ad hoc measures,” often driven by foreign policy, led to the gradual erasure of racial exclusion from the code. See Christian Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (Cambridge, Mass.: Harvard University Press, 2005), 51–53. Congress, for example, eliminated the Chinese exclusion laws in 1943, and presidents used their executive authority to admit refugees from the otherwise disfavored region of Eastern Europe.
- <sup>13</sup> Pursuant to this scheme, which Congress added to the Immigration and Nationality Act in 1952 to replace the “Asiatic Barred Zone,” two thousand visas were allocated annually for “all nonwhite immigrants born within an Asian-Pacific Triangle stretching from India to Japan to the Pacific Islands.” See Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton, N.J.: Princeton University Press, 2002), 191.
- <sup>14</sup> Joppke, *Selecting by Origin*, 55.
- <sup>15</sup> See Tichenor, *Dividing Lines*, 176–181. Scholars have identified this dynamic in the passage of civil rights legislation generally. For influential accounts, see John Skrentny, “The Effect of the Cold War on African-American Civil Rights,” *Theory and Society* 27 (1998): 237–285; and Mary Dudziak, “Desegregation as a Cold War Imperative,” *Stanford Law Review* 41 (1988): 61–120.
- <sup>16</sup> Joppke, *Selecting by Origin*, 56.
- <sup>17</sup> Quoted in *ibid.*, 261 n.66.
- <sup>18</sup> Quoted in Tichenor, *Dividing Lines*, 215; see also Chin, “The Civil Rights Revolution Comes to Immigration Law,” 300–302.
- <sup>19</sup> In his work on the subject, Jack Chin challenges the view that the 1965 Act was designed to expand white Southern and Eastern European immigration; see Chin, “The Civil Rights Revolution Comes to Immigration Law,” 275. He argues that “Congress meant exactly what it said—that race was no longer to be a factor in America’s immigration law” (278). He points to evidence throughout the legislative record suggesting that lawmakers were aware that they might transform the country’s demography by enabling the admission of large numbers of Asian immigrants, in addition to Europeans, underscoring the dramatic egalitarian nature of the reforms (303–321).
- <sup>20</sup> The adoption of this rule in 1868 undid the most discredited of the Supreme Court’s efforts to define “the people,” in *Dred Scott v. Sandford*. The Court concluded that blacks were “not included, and were not intended to be included,” and that, at the time of the Constitution’s formation, they were thought to be “subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to give them”; see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).



- <sup>21</sup> 494 U.S. 259, 265 (1990). In his concurring opinion, Justice Kennedy rejects this construct and writes: “Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit recognition of ‘the right of the people’ to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it” (at 276).
- <sup>22</sup> 339 U.S. 763, 770 (1950).
- <sup>23</sup> Motomura, *Americans in Waiting*, 11 – 12.
- <sup>24</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1166, 1168 (10th Cir. 2012).
- <sup>25</sup> *Huitron-Guizar*, at 1169.
- <sup>26</sup> See *United States v. Portillo-Munoz*, 643 F.3d 437, 442 – 443, 446 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part). In elaborating this view, the dissenter tacks back and forth between an effort to define the people as a term of art and the more fundamental concept of the person reflected in the due process precedents, thus demonstrating how robust defenses of the rights of personhood inevitably inform articulation of the collective people (at 445 – 446). To this dissenter, the rights to bear arms, to be free from unwarranted searches, and to peaceably assemble, which all belong to “the people,” represent mechanisms of self-defense against the state that all persons who make their home in the United States ought to be considered to possess (at 444).
- <sup>27</sup> Linda Bosniak, for example, expresses her sympathy for an “ethical territoriality” according to which membership is treated as “a matter of social fact rather than as a legal formality”; see Linda Bosniak, “Being Here: Ethical Territoriality and the Rights of Immigrants,” *Theoretical Inquiries in Law* 8 (2) (2007): 392.
- <sup>28</sup> *Huitron-Guizar*, at 1170. Both the Tenth and Fifth Circuits found it permissible for the government to prevent unauthorized aliens from possessing firearms, and in the course of so finding described unauthorized immigrants as having unknowable identities – as persons “who . . . are likely to maintain no permanent address in this country, elude detection through an assumed identity, and already living outside the law, resort to illegal activities to maintain a livelihood”; see *Portillo-Munoz*, at 441.
- <sup>29</sup> Catherine Dauvergne writes: “Globalization brings a range of pressures to national borders, and they are increasingly permeable to flows of money and ideas. . . . Although it is evident that prosperous states would like to assert complete control over those who cross their borders, it is equally evident that this is not possible. Or, at least, that states (especially democratic capitalist ones) are not willing to undertake the trade-offs (mostly economic) that would be necessary to come anywhere close to achieving this goal”; see Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), 17.
- <sup>30</sup> Linda Bosniak, “Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law,” *Wisconsin Law Review* (1988): 956.
- <sup>31</sup> 457 U.S. 202 (1982).
- <sup>32</sup> Justice Brennan invoked justice as a basis for his conclusion, noting that “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice. . . . [I]mposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing”; see *Plyler*, at 220 (quotations omitted).
- <sup>33</sup> *Ibid.*, at 222.
- <sup>34</sup> As Daniel Tichenor has documented, in implementing the Immigration Reform Control Act, the Reagan administration “set out to restrict the number of amnesty grants that were issued” under the statute; see Tichenor, *Dividing Lines*, 263 – 265.



- 35 See Cristina M. Rodríguez, “The Significance of the Local in Immigration Regulation,” *Michigan Law Review* 106 (4) (2008). Cristina M. Rodríguez
- 36 The Supreme Court’s recent intervention into this debate through its decision to strike down most, but not all, of Arizona’s S.B. 1070 will limit the tools with which states and localities may respond to anti-incorporationist sentiments in particular, but it remains to be seen how the Court’s decision will affect the broader debate over whether and how to incorporate unauthorized immigrants. By limiting the states’ capacity for action, the decision might accelerate the debate at the federal level, though the same opposition to incorporation reflected in Arizona’s enforcement laws may simply entrench the stalemate in Congress. See *United States v. Arizona*, 567 U.S. \_\_\_ (2012).
- 37 As Joseph Carens has put it, “Human beings who have been raised in a society become members of that society: not recognizing their social membership is cruel and unjust”; see Joseph Carens, “The Case for Amnesty,” *Boston Review* (May/June 2009), <http://bostonreview.net/BR34.3/carens.php>.
- 38 This imperative feels urgent, but its realization demands patience. As the history of the 1986 reforms highlights, a legislative breakthrough can take years of agitation; though the 1980s began with an American public “convinced that the country had lost control of its borders” and willing to “embrace . . . harsh crackdowns on illegal immigration,” by the middle of the decade, previously unthinkable legislative victories had been won. Tichenor, *Dividing Lines*, 242.
- 39 Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Boulder, Colo.: Westview Press, 1998), 93–96. For a detailed account of the forces responsible for the 1986 reforms, see Tichenor, *Dividing Lines*, 261–262.
- 40 The willingness of unauthorized youth to publicly state their claims to membership provides something of a model, as their actions helped create the political and moral pressure that prompted the Obama administration to announce its plan for deferred action for childhood arrivals – a plan that has allowed those who meet certain eligibility criteria to be considered for a form of temporary relief from removal and authorization to work. See the memorandum from Janet Napolitano, Secretary of Homeland Security, to DHS Officials, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” June 15, 2012, <http://www.dhs.gov/ynews/releases/20120612-napolitano-announces-deferred-action-process-for-young-people.shtm>.
- 41 *Ibid.*, 4–5.
- 42 Joseph Carens has argued that “[i]rregular migrants should be . . . allowed to remain with legal status as residents – if they have been settled for a long time. Some circumstances – arriving as children or marrying citizens or permanent residents – may accelerate or strengthen their moral claims to stay”; see Carens, “The Case for Amnesty.” Rogers Smith has called for legalization of those who have been present at least ten years and who do not possess a criminal record, on the ground that such a conservative proposal would stand a chance of “breaking the destructive gridlock on immigration”; see Rogers M. Smith, “A More Conservative Proposal Has a Better Chance of Succeeding,” *Boston Review* (May/June 2009), <http://bostonreview.net/BR34.3/smith.php>. Linda Bosniak has developed an argument she calls “ethical territoriality,” or the “conviction that rights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence”; see Bosniak, “Being Here,” 390–391.
- 43 As Catherine Dauvergne has emphasized, “The minimal content of the term ‘illegal’ obscures the identities of those to whom it is affixed”; see Dauvergne, *Making People Illegal*, 16.
- 44 Dauvergne notes the increasing shift in perception toward illegality as criminal in a “mala in se sense”; see *ibid.*
- 45 For an account of how U.S. immigration policy since 1986 has contributed directly to the rise of illegal immigration, see Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell





*Immigration, Civil Rights & the Evolution of the People*

Sage Foundation, 2002), 73–104. These scholars also have identified the reforms of 1965 as a culprit in the creation of large-scale unauthorized immigration. These and other legal reforms meant that between 1968 and 1980, the number of visas available to Mexicans “dropped from an unlimited supply” to twenty thousand per year; coupled with demographic and economic factors, the changes in the law meant that “only one outcome was possible: an explosion of undocumented migration” (43–44).

<sup>46</sup> In *United States v. Arizona*, the Supreme Court described additional concerns, relying on reports presenting descriptive statistics, as well as anecdotal evidence: “Accounts in the record suggest there is an ‘epidemic of crime, safety risks, serious property damage, and environmental problems’ associated with the influx of illegal migration across private land near the Mexican border”; see *Arizona*, at 6.

<sup>47</sup> Carol Swain has emphasized consideration of the “impact of illegal immigration on the most vulnerable members of American society: native-born Americans and legal immigrants with low skills and low levels of education”; and has contended that moral claims of these individuals “trump” those of the “unknown millions who are in the country illegally.” See Carol M. Swain, “Apply Compassion Offered Illegal Immigrants to the Most Vulnerable Citizens,” *Boston Review* (May/June 2009), <http://bostonreview.net/BR34.3/swain.php>.

