Reciprocity in an Age of Migration

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In this Paper, I seek to contribute to a fledgling but growing conversation about whether moral obligations constrain democratic nation states when they devise their immigration policies. In devising a theory of immigration, there are a number of ways to proceed. We could focus on defining the types of immigrants who are deserving of entry, whether an individual right to migrate exists, or whether we have particular historical relationships with other countries that should translate into accepting their citizens as members of our society. We might focus on whether we have an obligation to admit family members out of respect for the familial integrity of existing citizens and residents. We could consider whether we have non-discrimination obligations when setting screening requirements. We might even consider whether we have an obligation to admit a certain percentage of the world's population annually to evenly distribute global population burdens. Without discounting any of these possibilities, which might form the basis for future work, I want to focus on the phenomenon of economic migration and address what I consider to be a moral disaster within the United States' borders—the presence of twelve million unauthorized immigrants. My claim in this Paper is that democratic societies have an obligation to adopt policies that preclude the emergence of illegal immigration, and when it is reasonably foreseeable that exclusion will not prevent this emergence, the obligation is to admit.

Considering what external limitations might apply to our formulation of immigration policy is essential, because current debates suffer from a serious de jure/de facto disconnect, one that

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demonstrates a stark incompatibility between the political and theoretical frameworks through which we understand immigration as a phenomenon and the actual sociology of migration. On the one hand, politicians and theorists take a highly formalized approach to determining who is legitimately in the United States; only those who entered through the visa processes established by Congress (and in some instances through the exercise of executive discretion) have status, and those present without the imprimatur of the *legal* system have undermined the rule of law. Similarly, we maintain a highly centralized conception of the number and types of people who may legitimately enter in the future. This number is for us to determine as a society, through deliberations in Congress, according to our own preferences. On the other hand, we are reminded by those who study the sociology of migration of trends that operate in tandem with as well as outside the purview of the preferences expressed in formal admissions policy—research that suggests that a certain amount of migration is inevitable, or at least highly resistant to control by the purported legal rules designed to determine the rate of migration.[1]At this level, the talk is of a global reconfiguration of people brought on by heightened interdependence and development—a reconfiguration shaped but not wholly determined by the friction created by borders and enforcement.

In short, we have on the one hand an orderly vision of immigration as controlled entirely by law, and on the other, a much more dynamic process of the movement of peoples within which the law acts as but one force. Our conceptions of what we owe immigrants stem from the former, but the latter is more consistent with how the world actually functions and should therefore shape how we understand the requirements of political morality and obligation in the context of immigration.[2]

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[1] For a discussion of this literature, see *infra* Part II.

[2] Liberal theory, in particular, is curiously divorced from the dynamics of migration, emphasizing repeatedly that the obligations of nation states are to the citizens of those states, without respect to how the nation state is embedded in broader relationships and patterns. Theorists develop conceptions of what we owe immigrants through a highly stylized conception of the nation state acting to protect its own. *See, e.g.*, Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, in DEBATING IMMIGRATION (Carol M. Swaine ed.,

My point is not that the law should precisely reflect the market, that the market is not affected by decisions made regarding enforcement, or that there exists an optimal level of migration, but rather that the divide that exists between law and reality suggests that our frameworks for understanding the relationship between immigration and the state need some reformulation.

The primary obstacle to the development of this sort of a theory, however, is a powerful one, deeply embedded in the constitutional history of the United States and in more general theories of the nation state. The world over, immigration debates are framed with the question: how can a nation be sovereign if it does not control its borders? This elemental connection between identity as a nation state and the policing of the frontier supports a conception of sovereignty that I call the sovereignty of the fence.[3] This conception forms the rhetorical basis for opposition to proposals that would legalize the existing population of undocumented immigrants, it serves as the foundation for enforcement-first or even enforcement-only immigration policy, and it provides the intellectual underpinnings for an immigration policy focused exclusively on the preferences of American politicians and voters.[4] The basic assumption that sovereignty and border control are synonymous also pervades constitutional and political theory. The enforcement-first position is not just "reactionary" politics; it is the distillation of an extraordinarily influential conception of sovereignty that treats border closure as a part of the definition of what it means to be a nation state and subsequently shapes the constitutional and political theory of immigration and citizenship that

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2007) ("I argue that it is as members or co-participants in self-governing political communities that we have special obligations to our fellow members.").

[3] For critical reflection on the idea of loss of control, see, for example, Virginie Guiraudon & Galia Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 Comp. Pol. Stud. 163 (2000); Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 Pol. Sci. Q. 591 (Winter 1998-99).

[4] My use of the metaphor of the fence should not be taken as an expression only of a frontier border enforcement mentality. As with raids in the interior, the defense of sovereignty takes many forms. Linda Bosniak's word provides an extended analysis of the myriad ways in which the border actually operates in our interior to assert the line between insiders and outsiders. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006).

recognizes few, if any, limitations on the membership decisions external to the already constituted nation's preferences.[5]

As part of a consideration of how a democratic society ought to formulate its immigration policy, this understanding of sovereignty must therefore be interrogated. The notion that a sovereign state has the absolute right to exclude has made it difficult to devise a theory of how a democratic society ought to formulate its immigration policy, particularly in an era of mass migration and population reallocation. The first step in my argument is thus to demonstrate that the sovereignty of the fence represents a conception of sovereignty curiously divorced from the actual reality of the nation state as it plays out today. I content that the sovereignty of the fence should be superseded by an understanding of sovereignty based on principles of reciprocity, comity, and burden sharing that begin from the premise of interdependence, rather than of atomistic nation states. The idea that a democratic society has certain obligations that stem from its presence in the world, and that those obligations govern how immigration policy is formulated, must be introduced into the debate.[6] As I hope to demonstrate, a conception of sovereignty based on comity and reciprocity is more stable, more usable, and ultimately more morally defensible in a democratic setting that the sovereignty of the fence. My aim in this Paper is not to address questions that currently and rightly pre-occupy many scholars concerning where the border might be found, whether the classic conception of the

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[5] For influential discussions of the process by which the polity delimits membership, or draws lines between insiders and outsiders, members and strangers, see T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CONTEMPORARY MEMBERSHIP (2006); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006).

[6] Scholars are increasingly thinking in this vein. For my own preliminary views on the subject, see Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. Chi. L. Forum 219. *See also* Mathias Risse, *On the Morality of Immigration* (2008), Faculty Working Paper Series, John F. Kennedy School of Government, *available at* http://ssrn.com/abstract=1124296 (arguing that humanity owns land in common and that the United States is obligated to admit as many people as our territory can reasonably sustain); Colin S. Grey, *The Problem of Justice and Authority in Immigration* (PhD dissertation draft on file with author).

nation-state as geographically static and determined is an accurate account of today's reality, or even what rights are owed to immigrants.[7] Instead, my concern is more structural—how ought a democratic society in an interdependent context construct its polity, or set the terms of who is "in" and who is "out." The answer to that question will depend at some level on what attaches to the status of being "in," but I hope to be able to abstract from those details for the sake of simplicity.

To acknowledge the requirements of reciprocity is not to suggest that sovereignty does not include the power to control borders, nor is it to suggest that borders are disappearing into a post-national haze. The nation state is alive and well, but it is evolving in relation to other forms of political association and organization that have emerged to address the growth of global interdependence.[8] Instead, I emphasize that the way in which the power to control borders is both conceived and exercised should take account of the United States as part of a community of states with mutual obligations, as well as of popular conceptions of sovereignty according to which members of a society bear obligations of cooperation and reciprocity to those with whom they associate. In other words, this position is not one that requires abnegation of self-interest, nor is it based on a post-national conception of political organization. In advancing an argument for sovereignty as reciprocity, I do not dispute that a crucial function of the sovereign is to control borders, including and perhaps especially when that sovereign is democratic. In other words, my argument is not for open borders—the position typically offered as the alternative to the border closure model.[9] Instead, I take aim at how constitutional law and political theory transform the

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[7] *See, e.g.*, Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 2 Stan. J. C.R. & C.L., 165, 165-70 (2007); *see also* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006). For examples of the ample immigrant's rights literature, see, e.g., RUTH RUBIO-MARIN, IMMIGRATION AS DEMOCRATIC CHALLENGE (2001), etc.

[8] *Cf.* Saskia Sassen, Territory, Authority, Rights (2005) (for a discussion of how different forms of institutional association have arisen as the result of global economic interdependence).

[9] For recent and compelling arguments in favor of open borders, based on pragmatic as well as humanitarian rationales, see KEVIN JOHNSON, OPENING THE FLOODGATES (2007). For the classic defense of open borders, see Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251-252 (1987).

correlation between the idea of the nation state and border control into a highly formalistic and centralized conception of sovereignty divorced from the ways in which the United States actually behaves as a nation state, and from any sense of obligation to behave ethically in an international context.

With this Paper, I ultimately seek to right a conceptual distortion that impoverishes immigration-related discourse in the United States, namely the persistent framing of immigration as a domestic political issue, and the widespread assumption, in the law, political theory, and in public debates, that whom we admit for membership is a function of our own domestic needs, our own design, our own grace, as opposed to a function of role the United States plays in a world of inter-dependent nation states. Even assuming that the sovereign has the capacity to control its borders and is obligated first and foremost to the well being of its own citizens, we would be better off if we replaced the sovereignty of the fence with principles of reciprocity and comity, according to which we take account of the interests of other nations and peoples when formulating immigration policy. The primary upshot of this reformulation will be to recognize that the United States as a polity has an obligation (call it moral or political) to give legal status to certain economic migrants and to ultimately given them the option of joining the political community.[10] The tricky questions are of course: what must that status be, how must the transition to political inclusion be structured, and in what numbers must migrants be admitted? But the difficulty of these policy questions should not obscure the basic recognition that moral considerations are relevant to debates over immigration; *e.g.*

[10] For another example of an argument for the relevance of moral considerations in debates about immigration, see Mathias Risse, *On the Morality of Immigration*, John F. Kennedy School of Government working paper series, available at http://ssrn.com/abstract=1124296 (arguing that "the earth belongs to humanity in common" and that the United States must absorb its "share" of the global population, given the constraints of its size and the ability of its terrain to sustain population).

that we have an obligation to extend status to those whom we can reasonably foresee will become part of our society.[11]

I develop these conclusions in three parts. First, I define the sovereignty of the fence more fully, demonstrating how it operates at the level of constitutional law, as well as in political theory. In both cases, I note that though the most exclusionary conceptions of sovereignty have been modified over time to acknowledge the rights of immigrants, the notion that morality and justice govern immigrant admissions themselves has received little attention. Second, I establish why the reigning conception of sovereignty in immigration law is incompatible with migratory patterns, arguing that immigration is reasonably foreseeable in a way that imposes an obligation on the United States to extend legal status even when popular constituencies might prefer not to. The sociology of immigration requires a more honest reckoning with how our demographic future is taking shape than current political and constitutional debates acknowledge. Finally, I spell out what I mean by reciprocity and burden sharing and demonstrate how a reorientation of the conceptual framework surrounding immigration would lead to a reorientation of our policy priorities. Most obviously, the reorientation would provide a justification for legalization policies, but it also would support a more robust emphasis on bilateral and multi-lateral migration-related accords, and provide a normative justification for greater delegation in admissions decisions from Congress to the Executive Branch.[12]

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[11] The framework I seek to develop here would not be limited in its application to the formulation of U.S immigration policy. As the term reciprocity suggests, the obligations I have in mind are not of the United States alone. Instead, they are obligations of cooperation, and in spinning out what our immigration policy ought to be, the concomitant responsibilities of other nation states, given their particular situation in today's global context (is the state a sending or a receiving country, a developed or a developing society?), also should properly factor into policymaking. But the conception of sovereignty that frames current debates over immigration stands at the far unilateralist end of the spectrum, and the need for its reformulation is therefore the most pressing.

[12] For an extended discussion of delegation as a policy suggestion that addresses some of the structural causes of an inefficient immigration system that produces rule of law and human rights pathologies, see Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. __ (forthcoming 2009).

II. THE SOVEREIGNTY OF THE FENCE

Immigration, particularly of the illegal variety, is often characterized as a challenge to sovereignty. In today's political debate, belief in the centrality of border control to the very idea of the nation state fuels support across the political spectrum for re-enforcing the border through substantial budgetary outlays and experiments with new technologies, both high (through surveillance equipment) and low (through manpower and the fence). Re-enforcing our brute power to exclude—shoring up the sovereignty of the fence, quite literally—represents the essential starting point for the immigration conversation and justifies the circumvention of environmental and labor laws in the interest of asserting closure.[13]

Of course, the fact that the political process prioritizes mechanisms for stopping or controlling immigration, resisting a purely market-oriented approach that would allow free labor migration, should not come as a surprise. Historically, the sovereign power to exclude has been defended on two primary grounds: as a kind of prophylactic to ensure national survival, and as an essential feature of maintaining a particular kind of state—the democracy. These justifications infuse not just public debate, but also constitutional and political theory.

At the level of constitutional law and theory, sovereignty is conceptualized as the absolute authority to exclude outsiders—an authority premised on the sovereign's first and exclusive duty to protect its people.[14] This version of sovereignty admits to no power-sharing limitations, whether between the United States and the world, or between the federal government and sub-federal entities. As I will explain, this conception has been modified over time. But the Constitution, though

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[13] In 2005, Congress adopted a provision as part of the REAL ID Act that delegated to the Secretary of Homeland Security the authority to suspend environmental and other laws to construct the border fence. For a discussion of the scope and debate over this authority, see Cox & Rodriguez, *supra* note, at [].

[14] This idea is the first component of the so-called plenary power doctrine, which is ultimately a doctrine of judicial review, according to which immigration-related matters constitute political questions for the political branches to decide. Though the Supreme Court, since the late nineteenth century, has modified the plenary power doctrine by acknowledging that the political branches are bound by due process in their treatment of non-citizens, the notion that determining who may enter.

it governs non-citizens who have been admitted to the United States, is understood to impose no limits on how many immigrants and under what circumstances Congress may choose to admit them; admissions, instead, represent a matter of legislative grace. Similarly, within political theory, it is a commonplace to assert that the duties of a nation state and its members extend primarily and even exclusively to fellow citizens, who have the right in combination to control who becomes part of the political community through a centralized decision-making process. To put it in Walzerian terms, membership represents the ultimate good that existing members of a society have the right to distribute according to criteria they themselves devise, largely unlimited by justice or morality-based constraints.[15] Exclusion is seen as a function of securing the conditions for democratic legitimacy.[16] Apart from arguments made by some for open borders, little if any consideration is given to whether standards of any kind ought to govern how the sovereign wields its powers to exclude. As Michael Blake puts it, "[philosophers] have a long history of asking . . . what we owe one another through our political institutions; we have only now begun to develop the tools needed to determine who shall be a party to those institutions themselves."[17] The most that political theorists have acknowledged by way of external limitation on the sovereign selection process is the relatively easy case of the refugee, or the duty to implement protections of some kind for persons fleeing

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[15] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 39-41 (1983); *but see* KWAME ANTHONY APPIAH, COSMOPOLITANISM 158 (2006) (discussing the possibility of gradations of obligation beyond the citizen-to-citizen obligation, but noting that "to say that we have obligations to strangers isn't to demand that they have the same grip on our sympathies as our nearest and dearest"). Walzer recognizes the duty of "mutual aid," which appears to be a kind of good-Samaritan style obligation that requires responses to emergencies but does not impose obligations to accept outsiders whose interests are largely economic.

[16] Or as Bruce Ackerman frames it in *Social Justice and the Liberal State*, the only justification for exclusion of immigrants is maintenance of the liberal conversation. But even this justification focuses on the needs and parameters of the selecting society without regard for the legitimacy of the concerns for those being excluded.

[17] Michael Blake, *Universal and Qualified Rights to Immigration*, 4 Ethics and Economics 1 (2006). For a recent discussion of the ethics of who should be permitted into a territory, see Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, THEORETICAL INQUIRIES IN LAW 389, 399 (2007).

persecution,[18] and to provide mutual aid—a limited form of humanitarian assistance that falls far short of permanent admissions, and certainly of incorporation into the polity.[19]

I consider both the survivalist and democracy-based justifications for the sovereignty of the fence below, but it is first worth noting an important underlying cause for the mobilization of these defenses. To be sure, the concern that high levels of immigration today imperil the future of the nation state is misplaced in some objective sense; in Europe, in particular, where the native population is not reproducing itself at replacement rates, the future of the nation state actually *depends* on continued immigration. But the question is really one of popular perception and the *speed* of the change that immigration produces. What we are witnessing in the anxieties expressed in

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[18] At least as early as 1875, Congress exempted persons who had committed political offenses from exclusion, despite providing that convicts be denied entry to the United States. *See, e.g.,* Act of March 3, 1875, Ch. 141, § 5, 18 Stat. 477. In 1952, Congress wrote into the INA a provision that gave the Executive discretion to withhold removal of a noncitizen who would be subject to physical persecution in his country of origin—a provision embodied today in INA §241(b)(3), which provides for withholding or removal if the alien can demonstrate his life or freedom "would be threatened" upon return. During the major reforms of 1965, Congress adopted a refugee provision that allowed for the admission of refugees who had fled persecution in a Communist country or within the general area of the Middle East. *See* Immigration and Nationalist Act Amendments of 1965, Pub. L. No. 89-236, §3, 79 Stat. 911, 913. In the 1980 Refugee Act, Congress adopted an asylum procedure and incorporated the definition of refugee set out in the 1951 Refugee Convention, giving permanent legal status in the U.S. to aliens who can demonstrate that they have a well founded fear of persecution on account of specified grounds in their countries of origin. Finally, a variety of statutory provisions exist giving the Executive discretion to extend legal status to individuals fleeing hardships or calamities of some kind, even if they do not meet the definition of refugee, including temporary protected status, according to which the Secretary of the Department of Homeland Security may grant TPS to nationals of foreign states in which armed conflict, natural disaster, or other circumstances power a serious threat to personal safety or the ability of the state to handle the return of the aliens in question. *See* INA§ 244.

[19] *See* WALZER, *supra* at 33. Theorists more generally certainly have called for a re-evaluation of conceptions of sovereignty to recognize that the nation-state can no longer control who crosses the border. *See, e.g.*, SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996). [12]Indeed, the prime example in existing law of external obligations shaping our immigration policy is the transition from the National Origins quotas of the 1920s to equal ceilings for all countries in 1965. The legislative history of the 1965 statute is full of references to the idea that the U.S. has a moral/constitutional obligation to not discriminate on the basis of race in its admissions policy. The 1965 Act rejects the idea that in all cases the United States may legitimately give preference only to those immigrants who are most "desirable." Indeed, though it is generally assumed that an admissions policy that discriminated on the basis of race would not be justiciable, Congress has arguably internalized equal protection principles in its immigration policy, and a case for Court-imposed substantive limits on discriminatory admissions policy could be made. Other precedents involving external obligations imposing limitations on the admissions decisions of Congress include the Iraqi refugee situation and the Nicaraguan and Central America Relief Act, which set has set aside, since its enactment, 5000 visas for persons from Central America affected by the wars of the 1980s, but who do not need to meet the standards of proof required by asylum law.

wealthy countries over immigration is that a certain rate of demographic change triggers the deep-seated survival impulse embodied in the sovereignty of the fence. As one demographer has put it, in the period of time book-ended by the end of the Cold War and the first decade of the twenty-first century, migration has achieved "unprecedented velocity, mass, spatial extension, and complexity."[20] Even if immigration is strengthening rather than undermining the nation state, popular perception nonetheless brings the sovereignty of the fence as a framing device into play. Not only does immigration, like the larger phenomenon of global integration of which it is a component part, disrupt existing social dynamics, even when it comes in small waves, it changes the terms of the social bargain, creating new winners and losers and heightening the member-stranger dynamic that has always shaped our political relations, whether we think of them from the micro perspective of the family or the macro perspective of the nation-state. Even more to the point, even if immigration is slowing, we are still at the leading edge of a process that takes time—a process of absorption and integration, or of discerning the medium and long-term impacts of historic immigration on American society, which leaves the future of our identity as a nation state more of a mystery than it would be absent massive immigration.[21]

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[20] *See* Ueda, *Immigration in Global Historical Perspective*, THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965 17 (Mary C. Waters & Reed Ueda, eds. 2007). Ueda goes on to note that " Concurrent waves of permanent settlement, transient migration and repeat migration developed into commonplace phenomena, and the maintenance by migrants of active connections with their homelands coexisted with their integration into their host nations through acquisition of citizenship, acculturation, and social mobility." *Id.* at 17. In 1965, international estimates put the number of total migrants at 75 million. In 1990, it was at 120 million. And in 2000, the number of people on the move around the globe reached approximately 175 million. Indeed, the number of migrants grew more in the last decade of the twentieth century than in the previous 25 years. *See* Ueda, *supra* note, at 18. Here in the United States, the numbers also suggest a story of demographic transformation; between 1971 and 2000, nearly 20 million immigrants came to the United States through formal legal channels—almost 2 million more people than entered between 1891 and 1920, the last major period of migration-fueled transformation in this country. As a percentage of total population, immigrants today represent a smaller cohort than at the turn of the twentieth century, but not by very much—compare today's approximately 12% to yesterday's 15%. And if current trends continue, the Pew Hispanic Center estimates that nearly one in five Americans will be an immigrant in 2050, and that the Latino population will triple in size, accounting for 29% of the population in 2050, as compared to 14% in 2005.

[21] I have explored at length what I consider to be the diverse metrics of assimilation and how the dimension of time should factor into our understanding of assimilation in other work. *See* Rodriguez, *Guest Workers and*

1. *Exclusion and survival*

As a matter of constitutional law, the sovereignty of the fence has its origins in nineteenth century understandings of the law of nations. In 1889, in *Chae Chan Ping v. United States*[22], otherwise known as the *Chinese Exclusion Case*, the Supreme Court traced Congress's power to exclude Chinese laborers from the United States not to the Constitution, but to the sovereignty that precedes it. The understanding of sovereignty that justified the exclusion of the Chinese was embodied in the idea that "jurisdiction over its own territory is a proposition which we do not think open to controversy," because it is "an incident of every independent nation."

In articulating the source of the power to exclude, the Court drew its understanding of the then-dominant conceptions of the law of nations, which emphasized the right of every nation to refuse to admit a foreigner when "he cannot enter without putting the nation in evident danger."[23] In *Ekiu v. United States*,[24] the Court re-enforced the nature of the power to exclude as inherent in the existence

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Integration, *supra* note at 231-247. The sense that there is a direct connection between national identity and border control is further compounded by the fact that our existing institutional capacities for managing large-scale migration are exceeded by demand. The head of the U.S. Citizenship and Immigration Service, for example, has testified before Congress that it cannot handle the dramatic increase in naturalization applications of the last year. A recent study by the Migration Policy Institute concludes that the need for language and literacy instruction "dwarfs" the scale and abilities of the current system. And the dispersion of immigrants to non-traditional regions, such as the Southeast, has been sudden and recent, making the institutional challenges there particularly acute. The newness of the encounters between immigrants and Americans, as well as of the immigrant populations themselves, feed the perception of an assault on our sovereignty—a perception magnified by the size and scope of the population of unauthorized immigrants (approximately 12 million). Whatever demographic transformation is occurring appears to be occurring largely without the consent of our legal system and therefore of our polity. And so, the viability of the national project depends on re-enforcing the power to exclude those who might threaten its continuity. For more detailed discussion of this phenomenon, see DOUGLAS MASSEY, NEW FACES IN NEW PLACES: THE CHANGING GEOGRAPHY OF AMERICAN IMMIGRATION (2008); TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA (Audrey Singer, et al. eds. 2008); IMMIGRATIONS NEW FRONTIERS: EXPERIENCES FROM THE EMERGING GATEWAY STATES (Greg Anrig & Tova Andrea Wong eds., 2006).

[22] 130 U.S. 581 (1889) (upholding congressional act of 1888 barring return of Chinese laborers to the United States unless laborer possessed government-issued certificate).

[23] *See id.* at (citing Vattel, Law of Nations). For an scholarly account that dismantles the conclusion that nineteenth century international law justified an unlimited right to exclude, see Nafziger, Am. J. Int'l. Law (1986).

[24] 142 U.S. 651 (1892) (upholding the immigration act of 1891, which codified existing Chinese exclusion laws and provided for exclusive federal inspection of arriving aliens).

of the nation state, emphasizing that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." And in *Fong Yue Ting*, where the Court extended this conception of sovereignty to include the power to summarily deport those who have been admitted, it cited Vattel's *Law of Nations* for the proposition that the nation's right to refuse to admit a foreigner stems from "what it owes to itself, the care of its safety."

The Court's approach, in the *Chinese Exclusion* cases and other precedents of the era, to identifying the source of the immigration power was of course in some tension with the first principles of American constitutionalism—that the federal government is one of enumerated powers. Rather than ground the power to exclude in an authority delegated by the people, through the Constitution, to Congress, and thus according to the popular conception of sovereignty that shaped the Constitution, the Court turned to a kind of international power politics, or to a conception that emphasizes the "status of the nation-state as one among many in an international world."[25] The idea of external or inherent sovereignty reached its apotheosis in the 1930s, when the Court explained in *Curtiss-Wright*, a controversial and foundational precedent in the law of foreign affairs:

> The broad statement that the federal government can exercise no power except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.[26]

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[25] Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 614 (2008).

[26] *United States v. Curitss-Wright Export Corp.*, 299 U.S. 304 (1936). For a leading critique of the logic of this decision, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 23-26 (1972). Henkin actually concludes that *Curtiss-Wright* extends beyond the Chinese exclusion cases, in which the Court treated the immigration power not as extra-constitutional, but as inherent in sovereignty and therefore supplemental to

But the "end-run" around enumeration when it comes to matters related to the "outside" world has its origins in the era of Chinese exclusion. It appears that in the Court's estimation at that time, the absolute power to exclude did not need to be enumerated, because without it, the nation state could not exist; there would be no constitutional project to maintain.[27] Indeed, the Court warned that "[i]f a sovereign could not exclude aliens, it would be to that extent subject to the control of another power."[28]

Today, Congress's power to regulate international and interstate commerce would be sufficient to ground the immigration power in an enumerated provision, and the Court throughout the nineteenth century certainly considered the commerce-related implications of *state* efforts to regulate migration, striking down some such measures, and leaving others in place.[29] But when confronted directly in 1898 with the question of Congress's authority to regulate immigration upon Congress's passage of the Chinese Exclusion Acts, the Court opted for a source of authority that could be characterized as simultaneously exclusively federal, as well as unlimited and unconstrained. This

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the enumerated provisions in the Constitution. *See id.* at 22. In my view, this distinction is largely one of emphasis, not of substance. To read the Court's definition of the immigration power through a kind of "necessary and proper" lens would be to distort the Necessary and Proper Clause. What is more, the idea of inherent sovereignty seems to be in tension with the conception of popular sovereignty that defines the Constitution.

[27] Survivalist arguments are often invoked in foreign affairs and national security contexts, *i.e.*, in Justice Jackson's words, "the Constitution is not a suicide pact." *See Terminiello v. Chicago.* As Learned Hand has written, "For centuries it has been a accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language." *See* LEARNED HAND, THE BILL OF RIGHTS 14 (1958).

[28] *Chae Chan Ping.*

[29] For a discussion of these cases and the scholarship assessing them, *see, e.g.*, Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 611-12 (2008). In the antebellum period, the Court was likely reluctant to articulate a strong federal authority, grounded in the Commerce Clause, or any other constitutional provision, to regulate the movement of peoples, given the implications such power might have had for the Congress's authority to control the domestic slave trade, as well as the states' authority to limit the entrance of free blacks into their jurisdictions. *See id.* at 612. After the Civil War, the theory of exclusivity began to take shape, initially through Commerce Clause analysis. *See id.*

move may have reflected then ascendant conceptions of international law, and a Court approaching this question as one of first impression today would arguably be more likely to rely on some combination of the Commerce Clause and the Naturalization Power[30] to find authority for congressional regulation. But the framing of the immigration power as an incident of sovereignty external to the Constitution has exerted extraordinary influence over how we understand the nature of the state's authority over immigration, facilitating the continued treatment of immigration as, at best, a constitutional gray area.[31]

Today, our immigration policy is far more open than in the era of Chinese exclusion (and no longer blatantly racially discriminatory); indeed, it often tends toward the expantionist, despite public preferences for more limited immigration.[32] But the sovereignty of the fence still looms large. It is clearly at work in recent Court decisions such as *INS v. Nguyen* and *De More v. Kim*.

In *Nguyen*, decided in 2001, the Court ostensibly reserved the question of whether Congress's plenary power over immigration justified reducing the Equal Protection scrutiny given to a derivative citizenship law (no longer in effect today) that made it more difficult for the father of a non-marital child to pass on his U.S. citizenship than for similarly situated mothers.[33] The Court held

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[30] The fact that the Constitution gives Congress the exclusive power to establish a uniform rule of naturalization is often cited by courts in immigration cases as evidence that the immigration power is exclusively federal. But, of course, naturalization and immigration are hardly synonymous, and relying exclusively on the naturalization power to support not only an immigration power, but also an exclusively federal immigration power, is dubious.

[31] Many scholars have articulated and critiqued the nature of the so-called plenary power and discussed the ways in which the Supreme Court's jurisprudence over time appears to have eroded its force. *See, e.g.*, [string cite]. My purpose in this Paper is not to reinvent this particular wheel, though recent decisions such as *De More v. Kim* and *INS v. Nguyen* underscore that the plenary power still influences constitutional jurisprudence in the immigration context. Instead, I seek to offer an alternative that is consistent with the sovereign interest in border control but that nonetheless acknowledges the de facto limitations on this form of state authority.

[32] *See* Peter Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration*, in DEBATING IMMIGRATION, *supra* note, at 17, 20 ("81 percent of Americans oppose higher immigration—a level of opposition that contradicts the thrust of immigration's political economy, which is decidedly expantionist").

[33] The derivative citizenship law then in force permitted mothers to transmit their citizenship to their non-marital children without limitation (other than the requirement that the general requirement that the mother have lived in the U.S. for a certain period of time in her life), but required fathers to claim and prove paternity before the child's eighteenth birthday. The petitioner in *Nguyen* was born overseas but raised in the United

that the discriminatory law satisfied the intermediate review required of gender classifications. Justice O'Connor's vigorous dissent in the case, which emphasizes the Court's acceptance of gendered stereotypes masquerading as substantial state interests,[34] makes the compelling and in my view correct case that the Court's opinion fails utterly to apply the scrutiny to the government's position that precedent requires in the case of gender classifications. Indeed, it is hard to explain the outcome in *Nguyen* other than by pointing to the context in which it was decided: The Court was forced to evaluate a decision by Congress defining the transmission of membership in the political community against a backdrop of the massive overseas deployment of U.S. troops (Nguyen was the product of a union between a U.S. soldier and a Vietnamese woman in the 1970s), which appears to have given rise to a concern in Justice Kennedy's mind that the strict application of equal protection norms would make the United States as a polity responsible for the sexual activity of its male service members.[35]

In 2003, in *De More v. Kim*, the Court reasserts the primacy and inerrancy of Congress represented by the plenary power by upholding a mandatory detention scheme passed in 1996 and rejecting the claim that due process requires individualized hearings before the government can

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States by his father from a young age. His father did not seek to secure his derivative citizenship until after petitioner's 18th birthday, when petitioner ended up in removal proceedings.

[34] Two state interests that justified treating men and women differently in their ability to transmit citizenship to their children born out of wedlock. The first interest was ensuring the verifiability of parentage, something obvious to the mother at birth, but not necessarily to the father, hence the presumption in favor of U.S.-citizen mothers. This presumption is apparently permissible, despite the fact that the *INS* was unlikely to have been present at the birth and therefore faces the same challenge of assessing claims of parentage for fraud, whether a mother or a father makes the claim. The Court's assumption must have been that birth records are more reliable as proof of maternity than as of paternity, because there can be no question as to who has given birth to the child. The second interest accepted by the Court was enhancing the likelihood that the U.S.-citizen parent has had a relationship with the child—a relationship that presumably stands in as a proxy for the child's attachment to the United States. The likelihood of a relationship, the Court concludes, can be presumed for the mother but not for the father, because the mother is necessarily present at birth and therefore more likely to be compelled to nurture the child. This latter state interest and Congress's use of the gender classification to advance it reek of the gendered stereotypes supposedly verboten under the Court's equal protection doctrine. Indeed, in his assessment for the Court of the unique bonds between mother and child, Justice Kennedy foreshadows his sentimental tour de force in *Gonzales v. Carhart*. [Quote from AMK and SOC deriding AMK in *Nguyen*.]

[35] *See* Nina Pillard, *Miller v. Albright*.

detain a non-citizen pending his removal hearings. Though the Court, over time, had imposed due process-based limits on the scope of Congress's authority to set rules for the treatment of non-citizens that would not be acceptable when applied to citizens, thus imposing external limitations on Congress's sovereign authority, *De More* signaled that the constitutional normalization of immigration law would not run its full course. In that opinion, Chief Justice Rehnquist pointedly reasserted that all the process that is due non-citizens is the process Congress decides to extend.[36] In both cases, the sovereignty of the fence continued to exert considerable influence on the Court's constitutional analysis. In *INS v. Nguyen*, the sovereignty concern was of being overwhelmed with new citizens produced as the result of our military ventures. The sovereignty concern in *De More* revolved around public safety and security, a concern whose roots extend back to *Fong Yue Ting* and the articulation of the power to exclude as essential for the protection of national security, where national security was defined not just as the rejection of invading armies, but also of the more quotidian public health, safety, and welfare threats posed by aliens.[37]

In a sense, what I have just described is the contours of the rise, fall, and reassertion of the plenary power, a story familiar to and much commented on by scholars of immigration law. As a

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[36] [*eMore* came as a particular blow to advocates and scholars who had long criticized the anti-constitutional nature of the plenary power, because it seemed to reassert the plenary power, which many had believed had been eroded through the application of due process norms to the processes of removal. The conception of sovereignty contained by the plenary power is also reflected in the treatment of the border as a site of relaxed constitutional protection. The authority to search the persons and now laptops of anyone, citizen or non-citizen alike, to protect the territorial integrity of the United States justifies relaxation of privacy or personal liberty concerns. [NOTE: Courts of appeals have been active recently in addressing the Border Patrol's increasingly invasive border searches, and I intend to incorporate this case law either in this footnote, or in more detail in the text, depending on how interesting it is. *See, e.g.*, *United States v. Ickes* 393 F. 3d, 501 (4th Cir. 2005) (holding that there is no First Amendment exception for expressive materials to the relaxation of the Fourth Amendment during border searches); *United States v. Arnold* (CA9 2008) (holding that border control agents who found child pornography on defendant's laptop did not violate the Fourth Amendment despite not having reasonable suspicion to conduct the search).]

[37] These cases could be characterized as immigrants' rights cases, as opposed to sovereignty cases. But even though they demonstrate that the crack in sovereignty that have been permitted have been in order to extend basic constitutional protections to citizens within our territory, it is impossible to separate the conception of sovereignty as border control from the conceptualization of the rights owed immigrants and the constraints the Constitution can be said to place on state action in this context. *Cf.* Adam B. Cox, *Immigration Law's Organizing Principles*, __ Penn. L. Rev. __ (2009).

legal doctrine, the plenary power essentially has become a doctrine of judicial review according to which the Court polices some questions of process but cedes as a political question all questions of substance, and even the scope of the Court's own authority. Most of the scholarly commentary critiques this aspect of the doctrine, though as a matter of separation of powers, this understanding of the plenary power seems entirely appropriate. Of course, it's possible that both *De More* and *Nguyen* could have come out differently without requiring the Court to decide a political question. The more important point is that cases reflect the Court's willingness to abandon even a limited supervisory role in the immigration context. My purpose in recounting the narrative is to isolate the conception of state sovereignty at work in order to highlight the connection the Court has drawn, explicitly and implicitly, between the survival of the idea of the nation state itself and the strict policing of entry into the United States.

Of course, the sovereignty of the fence is more than the plenary power as understood in constitutional doctrine, and it is arguably stronger outside the contours of the plenary power than within them. The sovereignty of the fence is arguably more pronounced in the political arena, or in the behavior of the political branches. It is reflected in the popular rhetoric that a government unable to control its borders is neither a competent nor trustworthy government capable of performing its most elemental responsibilities, which has translated into pressure (from voters and politicians) on many state and local law enforcement agencies to devote their own law enforcement resources to immigration policing. The sovereignty of the fence also feeds the political position, taken by actors from across the spectrum, that a fully controlled or secured border must precede all dealings with outsiders, including any discussion of reforming visa policy. The architectural metaphor of the border wall, to say nothing of the actual fence, is a way of re-enforcing, if only symbolically, that the state is in control, or can achieve control with investment in the right technology.

2. *Exclusion, social welfare, and the conditions for democracy*

Exclusion historically has also been justified by the imperatives of democracy. During the last wave of migration comparable to the one the United States has been experiencing since the early 1990s, this view was on display. Between 1891 and 1920, heated debate over border control occurred in Congress in the media. The debate culminated in an aggressive, government-sponsored Americanization campaign and a paradigmatic shift in immigration policy from what one might call behavioral restrictions (the exclusion of prostitutes, people with loathsome diseases, and individuals likely to become public charges) to the National Origins Act of 1924, which instituted the infamous national origins quota system designed to prevent the American population from changing in its ethnic composition.[38] As Aristide Zolberg has observed in his sweeping study of the history of American immigration policy, "the imposition of limits on immigration was well-nigh inevitable because a concatenation of changes associated with the globalization of capitalism and the demographic revolution in the final decades of the nineteenth century induced a sudden and worldwide escalation in the number of people on the move internationally and the distances they covered"—an observation that easily could describe circumstances today.[39]

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[38] *See* ARISTIDE ZOLBERG, A NATION BY DESIGN 239 (2006).

[39] The question then, as now, was what form exclusion would take. Nothing was determined or necessary on that score, and over a thirty-year period, various interests, many of which have analogues today, weighed in on the question. Criminal Italian Catholics and venal Eastern European Jews were popular bête-noirs. In the 1890s, the *Nation* recommended that only English-speaking immigrants be admitted, and the nearly three-decade battle over whether to adopt a literacy test as a screening mechanism for new immigrants took off. Though neutral on its face, the literacy test was understood to be a mechanism of excluding Southern and Eastern European immigrants, and became a cause célèbre among progressive reformers, as well as the likes of Senator Henry Cabot Lodge, whose strong conceptions of sovereignty and Anglo-Saxon supremacy made him a League of Nations opponent and immigration restrictionst. Multiple presidents vetoed the measure, and Congress eventually managed to override Woodrow Wilson's second rejection of the bill. Support for the literacy test ebbed in response to foreign policy distractions, such as the Spanish-American War, entreaties by the business community, and pressure by Northern politicians looking for the immigrant vote. Support rose in relation to the ambivalence of labor unions, populist sentiment fed by interventions by social scientists armed with statistics on the size of the foreign-born population, and ultimately by national security crises such as World War I. Indeed, the arrival of new ethnic groups was linked to the War, precipitating the disappearance of formerly robust German-language schools, newspapers, and clubs, and the deportation of many Eastern European radicals to the Russia in the same period. *See* Zolberg [FIND PINCITES]

The reasons exclusion became the order of the day certainly included the desire to preserve the existing racial and cultural character of the population as it then stood, and perhaps even the hope of Anglicizing it a bit further. But a 1916 editorial in the *New Republic* encapsulated an important dynamic that is instructive for understanding immigration politics today. The editors of the magazine were opposed to implementing a literacy test for new immigrants—an idea popular at the time as a mechanism to screen-out uneducated and poor immigrants. But they premised their opposition on the ground that it would not be an effective selection device for the right sort of immigrant, emphasizing in line with the restrictionist point of view that free migration was one of the "elements of nineteenth century liberalism fated to disappear," in part because it was a danger to "an industrial democracy with an incipient welfare state." In other words, the rise of the democratic welfare state would make it difficult to sustain strong public support for high levels of immigration, presumably because the fiscal and redistributivist demands of the welfare state would test communal solidarity, thus making the turn toward exclusion necessary.

That immigration puts pressure on the welfare state and challenges the cohesiveness of liberal democracy in today's world is apparent in various ways. As I have noted elsewhere, in Europe, "the maintenance of a robust welfare state arguably depends on a kind of thick social contract—a commitment to a national community formed through a sense of belonging to one and the same people."[40] This claim is an empirical one, and it may at the end of the day be nothing more than an easy excuse for anti-immigrant sentiment, rather that a real explanation of the immigration's effects on the viability of the welfare state. These effects may be more fiscal in nature than anything else, given that low-wage immigrants are more likely to consume public services. But some research, such as the work of Robert Putnam, does support the notion that social solidarity, on which support for strong government action arguably depends, can be challenged by new arrivals, particularly ethnically

[40] Rodriguez, *The Citizenship Paradox*, *supra* note, at 1125 (citing evidence of this dynamic from Europe).

or culturally distinct arrivals.[41] Putnam ultimately concludes that democratic societies have demonstrated the capacity to create new forms of solidarity and to offset over time the negative effects of diversity,[42] suggesting that his findings need not be interpreted as justification for closure or policies aimed at homogenizing democratic societies. As I will argue in Part II, the right question is not how to stop diversity from emerging, but how to devise alternative strategies to border closure to address the effects of diversity, not just through integration policies, but through material forms of compensation to the "losers" in the demographic reshuffling.

When considering the relationship between immigration and democracy, it is also worth parsing out whether the solidarity effects of immigration are primarily on the viability of the social welfare state, or on the very possibility for democratic government itself.[43] The comparative differences between U.S. and European approaches to immigration (with the former generally more open, or at least less controversy-ridden, than the latter) suggest that it is too reductive to say that immigration interferes with the goals of a liberal democracy; in attempting to understand the relationship between immigration and democracy, we must consider what sort of liberal democracy it is that we are trying to construct. But to even begin this inquiry, it seems essential to at least recognize that the member-stranger dynamic affects social relations and social bonding.

In this vein, it should not be surprising to learn that it is authoritarian, non-democratic or semi-democratic societies that sustain the highest levels of immigration relative to total population—74%

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41 *See* Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-first Century*, 30 Scandinavian Pol. Stud. 137, 138 (2007).

42 *See id.*

43 In *Social Justice in the Liberal State*, Bruce Ackerman contends that only those immigration restrictions that are necessary to maintain the liberal democratic conversation are permissible. This standard dictates a different immigration policy than one designed to enable the maintenance of a robust welfare state, as well as a different policy from what would be required if we were to meet Michael Walzer's standards of treating all members equally in all respect, whether citizen or not. Other distinctions that could be drawn include between legal status and basic rights on the one hand and political rights such as voting on the other. *Cf.* Neal Katyal, STAN. L. REV. (2008) (arguing that non-citizens can be legitimately excluded from welfare benefits and political rights, but that basic liberty protections, such as access to the write of habeas corpus, cannot be compromised).

in the United Arab Emirates; 58% in Kuwait; 40% in Jordan; and 34% in Singapore[44]—as well as the greatest success rates in preventing unauthorized immigration and ensuring that temporary foreign workers return home. A number of factors likely explain these high percentages relative to the proportions I cited at the outset in democratic, immigrant-receiving countries such as the U.S., Canada, and Australia, but among the factors are surely: the reality that these governments are not required to generate popular support for immigration; the fact that the political cultures of these countries do not impose on them obligations to extend any semblance of equal treatment to all members of the society; and the authority (*relative* to that of democratic societies, of course) that their political systems afford to use coercive methods to secure compliance with immigration laws. Democratic societies are thus more likely to choose closure when defining formal immigration policy, in recognition of the simultaneous fragility and importance of certain democratic values that arguably require some level of homogeneity to secure, such as equality and self-government and civic mindedness.

Of course, the United States and Europe both tolerate a great deal of illegal immigration,[45] with countries such as Spain and Italy engaging in regular legalization efforts, underscoring that practice and aspiration, not surprisingly, do not align. It is the persistence and scale of unauthorized immigration that causes the sovereignty of the fence, when justified as a necessary component of maintaining democracy, to ring hollow. I explore the implications of the unauthorized phenomenon more fully in Part II, but for the time being, it is important to see that the core justification in liberal theory for the sovereignty of the fence stems from the belief in importance of closure to liberal democracy. Michael Walzer, for example, premises his theory of immigration on the obligations that democratic society owes to the people within it. As he explains it, a democratic society cannot justify

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[44] *See* Ueda, *supra* note at 19.
[45] *Cf* Christian Joppke, *Why Liberal States Accept Unwanted Immigration*, in Migration Reader (Messina, ed.) (exploring why democratic societies tolerate high levels of illegal immigration).

treating immigrants differently from citizens. "Members must be prepared to accept, as their own equals in a world of shared obligations, the man and women they admit."[46] As a result, society must be careful about whom it admits, and the demands that immigrants be treated as citizens justifies keeping the border closed and tightly controlled. Under this formulation, the sovereignty of the fence is required to secure democratic cooperation on the inside, but that cooperation extends to the legally present non-citizen, whose interests are protected from arbitrary government interference. Still other theorists begin from the premise that the state's primary obligation is to its own citizens, and that while some general humanitarian duty might extend to non-citizens, no moral obligation exists to permit immigration if it comes at any cost to citizens,[47] save usually for certain categories of refugees and asylees.[48] Like the binary Walzer establishes between full inclusion or full exclusion, this point of view appears to based on an assumption that responsibilities to citizens justify ignoring the interests of foreigners when the interests of citizens might be affected by them.[49]

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[46] *See* Walzer, *supra* note, at 52.

[47] *See, e.g.*, Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy* in DEBATING IMMIGRATION 63, 70, 76, 77-80 (Carol Swain, ed. 2007) (arguing that "borders are morally significant," such that while we have obligations to non-citizens, the obligations to fellow citizens are greater; that those who are outside the "system of collective self-governance" that borders establish may be owed some general humanitarian duty, but "special obligations to our citizens" should govern immigration policy); *cf.* Nagel, *supra* note, at 129-130 ("The immigration policies of one country may impose large effects on the lives of those living in other countries, but under the political conception that by itself does not imply that such policies should be determined in a way that gives the interests and opportunities of those others equal consideration. Immigration policies are simply enforced against the nationals of other states; the laws are not imposed in their name, nor are they asked to accept and uphold these laws. . . . [I]t is sufficient justification to claim that the policies do not violate their prepolitical human rights.").

[48] *See, e.g.*, Nagel, *supra* note, at 130 ("Even a nation's immunity from the need to justify to outsiders the limits on access to its territory is not absolute. In extreme circumstances, denial of the right of immigration may constitute a failure to respect human rights or the universal duty of care.").

[49] A related strand of thinking posits that extending rights and status to non-citizens dilutes the value of citizenship. As a result, for citizenship to retain its identity, it must be exclusive in some meaningful way. This observation is obviously true: if everyone in the world were entitled to the rights of U.S. citizenship, the set of U.S. citizens would lose its coherence, and admitting more people into the citizenship fold necessarily requires relaxing the criteria for, as well as many of the benefits of, citizenship, some of which (such as the right to vote) are of less value to the individual the more people who have the right. But the difficult question these sorts of observations raise is at what point this lack of coherence occurs. What is more, how seriously we take dilution as a threat to democracy depends again on what sort of a democratic society we want to sustain—one with a robust ethnic identity and a strong welfare state, or one that values inclusion and private ordering.

Perhaps the most fundamental problem with these ideas is that they draw heavily from an analogy between the family and the polity, if not explicitly, at least in form.[50] The casual observation that the bonds that hold together a polity are like the bonds that keep the family together seems to justify exclusion. But the bonds are different in kind. Families are hierarchical, based on often primordial attachments, and we accept that families may discriminate arbitrarily when deciding with whom to associate, including through marriage, where selection decisions based on race or religion are hardly objectionable to most people. But relations among citizens represent arms-length transactions that require feelings of attachment that are different in kind. Love is quite distinct from respect. In other words, analogizing the state to the family creates a false sense of need for the fence to maintain cohesion. I take up this theme in more detail in Parts II and III, but the idea that a democratic society is constrained by morality in its treatment of outsiders has grown up alongside the development of the sovereignty of the fence, and so it is worth briefly exploring already recognized limitations on the concept.

3. *Cracks in the fence*

Even in the late nineteenth century, in the jurisprudence of Chinese exclusion, limitations on the sovereign's power to act summarily against the foreigner were perceived. Whether these limitations were understood as modifying the sovereignty of the fence, or as articulating a parallel, domestic conception of sovereignty triggered once the focus turned from the extraterritorial to the territorial United States is less important than the recognition that the logic of exclusion had to have limits.

In a different vein, is it even possible to talk about a "unique" good in a country of nearly 300 million citizens, such that admitting a few million more would have a demonstrable effect on the meaning of citizenship? In his recent work, Peter Spiro demonstrates that the American conception of citizenship is actually quite thin and growing thinner by the day, but for potentially very good reasons, including fidelity to the *jus soli* rule, dual citizenship, expanding the ability of U.S. citizens to pass on their citizenship to children born abroad, and the relatively easy path to naturalization embodied in U.S. law. United States citizenship does not actually mean that much, except the right to stay within and be protected by the state. In this context, then, the dilution argument seems like a drop in the bucket.

[50] *See* Appiah.

Seeing this makes it possible to ask the question: is it conceptually coherent to talk of territorial limits but not extraterritorial ones?

In *Chae Chan Ping*, for example, Justice Field, writing for the majority, acknowledges that there are exceptions to the "full and complete power of the nation within its own territories," but that they must "be traced up to the consent of the nation itself,"—the very same idea embodied in Walzer's approach to immigration. In dissent in *Fong Yue Ting*, he takes this a step further, rejecting the majority's conclusion that the power to deport flowed seamlessly from the power to exclude, on the grounds that aliens admitted with the consent of the government could not be deported without constitutional restraint—underscoring that the initial consent of the polity to the alien's presence translated into an obligation of fair treatment in the future. "Arbitrary and despotic power can no more be exercised over them without reference to their persons or property, than over the persons and property of native-born citizens. As men having our common humanity, they are protected by all the guaranties of the Constitution." Even the majority in *Fong Yue Ting*, which extended the logic of *Chae Chan Ping* to those aliens to whose presence the polity had consented, arguably acknowledged this possibility, when it wrote that Chinese laborers "continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them." The protection of common humanity may not have extended to the Chinese, but the sovereign power over foreigners was arguably limited as those aliens who *were* permitted to naturalize and developed ties to the U.S.

In *Yick Wo v. Hopkins*, where the Court applies the Equal Protection Clause to the case of Chinese immigrants who had been systematically denied permits to operate laundries that had been systematically granted to non-Chinese, it observes: "sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all

government exists." From there, the Court underscores that the rights to life, liberty, and the pursuit of happiness are secured by the constitutional principles that are "the monuments showing the victorious progress of the race in securing to men the blessings or civilization under the reign of just and equal laws" and that "the very idea that one man may be compelled to hold his life, or the means of his life, at the mere will of another, seems to be intolerable in any country where freedom prevails." In other words, in this era, the Court is struggling to reconcile two competing conceptions of sovereignty—a statist and absolutist one, and the popular conception of sovereignty unique to American constitutional design at the time.

Today, these views have matured in two seemingly contradictory ways. First, Justice Field's dissenting views in particular have become constitutionally grounded protections for the rights of non-citizens, developed through the gradual application of the Due Process Clause.[51] There is a rough commitment to equal treatment of citizens and non-citizens inside U.S. territory—at least at the hands of state governments.[52] Second, and more important, the sovereignty of the fence operates largely at the level of rhetoric, theory, and in the laws of Congress on their face, rather than practice. Immigration law and policy, in their particulars, address the discrepancy between the rhetoric and reality of migration all the time, through administrative practice, or by relaxing the sovereignty of the fence through discretionary decision-making. The Executive's decision not to prosecute removal, the use of administrative parole to allow migrants with no legal authorization to enter the United States, the granting of relief from removal, and even the occasional retroactive legalization, represent mechanisms by which the political branches compensate for the limitations of ex ante visa policy as set by Congress. These ex post forms of permitting entry are the mechanisms through which the

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[51] Footnote on *Mezei*, *Plascencia*, and *Zadvydas*, and Justice Scalia's recognition that government could not torture someone it is holding, even if he had no right to enter. The Court protects some bare minimum of human dignity protected even when the person has no status before the law in the U.S.

[52] *See* Seyla Benhabib, The Rights of Others (demonstrating recognition by liberal theorists of the existence of obligations across borders).

government addresses the sociological realities of migration that may overwhelm the law on its face. Indeed, the most telling of these limitations on the sovereignty of the fence is the fact that the United States and other liberal democracies tolerate a great deal of illegal immigration. Whether this tolerance is reflected in deliberate under-enforcement, or just general neglect or incompetence, this tolerance is arguably the largest of the cracks in the fence that are evident throughout the system.[53]

And thus, despite the persistent rhetorical emphasis on enforcement and the rule of law that marks public debate, de facto compromises are made through ex post administrative practices that are the functional equivalent of admissions decisions. All of these cracks reveal the democracy and equality-based justification for exclusion to be (depending on their source) either insincere or so abstract as to misunderstand the dynamics of immigration in a democracy. The extent to which this ex-post accommodation occurs is not sufficiently articulated, which perpetuates the overly formalistic way in which we debate matters of immigrant admissions, or the easy division between legal and legitimate immigrants and illegal immigrants whose presence undermines the rule of law.

These two developments in U.S. immigration law and policy—of a rights-based jurisprudence governing the treatment of immigrants and the development of administrative practice to address the harsh consequences of the sovereignty of the fence—are in considerable tension, because the former represents an ideal important to our constitutional heritage, and the latter underscores the challenge of maintaining that ideal in today's world. Perhaps both the ideal and the ways we compensate for our failure to achieve it can be reformulated to achieve an immigration policy more worthy of a democracy. The question I address in the next two parts is whether these cracks in the fence render the whole conceptual edifice structurally unsound, requiring a new conception of sovereignty to frame our approach to immigration.

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[53] *Cf.* Joppke, *supra* note, at [].

II. IMMIGRATION AND FORESEEABILITY

A fundamental disconnect exists between the social scientists who study migration and political theorists who puzzle over questions of immigration and citizenship based on the model outlined above—a disconnect that has produced a stale discourse on open versus closed borders, both at the rarified academic level and in public considerations of the politics and morality of immigration. Much of the sociological and economic writing on migration projects current trends as likely to continue for the foreseeable future. Though it's not clear that these studies take into account the impact that different enforcement regimes might have on future migratory flows, the social science of migration reveals a host of complex factors at work that threaten to overwhelm the fence, whether actual or rhetorical. In other words, when studied from a distance and over time, migration across borders appears inevitable, though rates may rise and fall. This literature discusses immigration patterns as reflective of global trends and complex international historical relationships—patterns that are likely to replicate themselves into the foreseeable future.

At the same time, discussions of immigrant admissions in the political as well as the philosophical arenas proceed from the assumption that our duties are first and foremost to our domestic interests and fellow citizens and that we have the right to control who becomes part of the political community by setting admissions rates at the levels that existing citizens deem appropriate. The picture is of an economy and a community carefully and deliberately designed through central planning.[54] Questions of distributive justice and political obligation are therefore addressed to an

[54] In his sweeping history of American immigration policy, Aristide Zolberg establishes how the United States has used immigration policy to design itself as a nation, thus demonstrating how legal and policy choices have been conceived to and have had the effect of creating a nation in a particular image. *See* ARISTIDE ZOLBERG, A NATION BY DESIGN (2006). My point in this Part is not to suggest that immigration has been or is today haphazard or uncontrolled by law, nor to deny that immigration and citizenship laws can be used to construct the social order in a particular demographic image. Instead, I emphasize that formal law is but one mechanism through which community is constructed and that we cannot ignore the multiple factors that

imagined community defined by formal law, rather than an actual community that has grown up through practice.

Part of my intention in this Paper is to harmonize these two literatures in a way that will improve how we understand the demands immigration imposes on a democratic society. My basic claim is that, in formulating immigration policy, the nation is responsible for its practices, or for events that are reasonably foreseeable, particularly when those events are shaped by the behavior of the nation's citizens. In other words, the formal concept of the sovereignty of the fence must give way to an understanding of state responsibility that takes into account the way the state actually behaves, in the real world circumstances in which it is situated. This concept is familiar in the criminal law, in the form of the principle that we are culpable for reasonably foreseeable consequences of our actions, or consequences that result from reckless indifference, or some other similar mental state. The idea is also present in constitutional law, in the Supreme Court's dissent in *Massachusetts Personnel v. Feeney*, in which the dissenting Justices emphasize that a state is responsible for the discriminatory impacts of its actions if those impacts are reasonably foreseeable. In the context of this discussion, if it is reasonably foreseeable that X amount of migration will occur, we must accommodate X amount of immigration through legal channels. Once we acknowledge the foreseeability of cross-border traffic spurred by economic interdependence, our obligations vis-à-vis immigration policy change. Given that sovereign admissions decisions do not operate in a vacuum or with perfect authority, but are made instead within a larger global context, why should that context not provide the frame for determining what the obligations of the sovereign are?

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contribute to migration if we are to devise an immigration policy that not only is rational in a cost-benefit sense, but that also meets the requirements of justice.

I thus take important cues from the Supreme Court's recent decision in *Boumediene v. Bush*, in which the Court relied on the United States' effective control over Guantanamo, despite the absence of formal sovereignty, to support application of the habeas guarantees of the Constitution to the detainees held at the base. As the Court notes, "it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another."[55] The Court thus rejects the idea that the sovereignty in the "legal and technical sense" should determine the rights afforded to non-citizens held by the United States at Guantanamo.[56] The Court was emphatic that though formal questions of sovereignty and territorial governance are the province of the political branches, Congress and the Executive do not have the power "to switch the Constitution on or off at will," and circumvent the Constitution's limits on their powers by invoking a formalistic conception of sovereignty to shield its actions from review.[57] In other words, the external limitations on the sovereign's behavior must apply when the sovereign is acting as such in both its *de jure* and *de facto* capacities. To be sure, by invoking this analogy, I am not suggesting that the Court may impose substantive restrictions on Congress's immigration policy, though I do think it defensible to claim that admissions policies violate the Constitution and the Court might so say. Rather, *Boumedienne* simply underscores that when it comes to sovereignty, formal definitions are insufficient to accurately characterize the sphere of influence in which Congress can be said to operate.

In the section that follows, I develop my observation that the cracks we see in the fence require us to rethink its viability altogether. I argue that we should conceptualize foreseeability in two ways: in strong form and in weak form. The strong form posits that factors beyond the capacity of the law to control will propel migration. The weak version of foreseeability suggests that even if

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[55] Slip op. at 24.
[56] *Id.* at 23.
[57] *Id.* at 35.

we could alter the dynamics likely to produce continued migration to reduce it to what the political process has determined is the ideal level of migration, the costs of doing so would be too high, and inconsistent with our democratic commitments, and the United States as a society either should not or is highly unlikely to take those steps. Even if the strong form of foreseeability is wrong, or its driving factors are more susceptible to manipulation through law than the stylized version of my argument admits, it remains the case that we are unlikely as a society to make the choices necessary to close the border in actual fact. Rather than rely on the formal conceptio

A. *Strong foreseeability*

The strong argument for foreseeability acknowledges that migration is inevitable, or that globalization and its economic effects make it nearly impossible for the nation-state to control its borders completely. Whether we like it or not, there are external constraints on our sovereignty. Saskia Sassen has identified two of them as economic globalization and the rise of an international human rights regime, concluding that these two forces "reduce the autonomy of the state in immigration policy making," despite the state's desire to nationalize immigration policy in response to populist pressures.[58] Douglas Massey has show empirically that globalization and its economic effects place strong limitations on the efficacy of state controls of immigration, and numerous studies suggest that restrictive policies have had little effect on illegal immigration.[59]

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[58] Sassen, at []; *see also* Myron Weiner, *Ethics, National Sovereignty, and the Control of Immigration*, 30 Int'l. Migration Rev. 171, 176 (arguing that globalization has created a market for labor and migration is inevitable, such that efforts to control the border will fail and the sovereign power of the state is now anachronistic); STEPHEN CASTLES & MARK MILLER, THE AGE OF MIGRATION (2003) (despite the claimed desire of governments to stop illegal migration, many of the causes are to be found in the political and social structures of the immigration countries, and their relations with less-developed areas").

[59] *See* Douglas S. Massey, *International Migration and the Dawn of the Twenty-First Century: The Role of the State*, 25 Population and Development Review 303, 314, 317 (1999); *see also* Michelle Wucker, Lockout: Why America Keeps Getting Immigration Wrong When Our Prosperity Depends on Getting it Right 234 (2006) (arguing that the state cannot completely control immigration, because the impetus to emigrate is less a pull than it is a push).

I am skeptical that the human rights regime adds much more pressure on the U.S. government than the due process norms articulated above, and "economic globalization" is stated at such a high level of abstraction that it is difficult to get traction on it as a vector shaping our ability to control our borders. Perhaps it makes more sense to emphasize that immigration is not a matter of altruism, as the sovereignty of the fence assumes, but rather arises from our labor market needs, as well as through the network effects of our political, military, and foreign aid policies.[60] As Alejandro Portes and Ruben Rumbaut have demonstrated, our economic and foreign policy choices result in the creation of social networks that facilitate migration, even once the economic incentives for that migration fade.[61] They emphasize that Mexican migration to the U.S. in particular is the result not of "individual calculations of gain," but of "forces buried deep in the history of the relationship between both nations," forces that include NAFTA, to be sure, but that also are the result of a history of contact and colonization between the two societies.[62]

In addition to these network effects, wage differentials between contiguous nations; the explosion of a young working age cohort in countries such as Mexico; the powerful economic logic of illegal immigration according to which labor moves from lower to higher value use and is the most responsive form of labor to shifts in the labor market because of the comparative absence of roots possessed by unauthorized immigrants; our own labor market needs and the aging of the American (and European) population all combine to make future migration inevitable.[63] Ultimately,

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[60] *See* Saskia Sassen, Globalization and its Discontents 31, 49 (1998). For recent work assessing the ways in which U.S. economic and foreign policy and the processes of globalization have shaped current trends of illegal immigration, see CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW (2008) AND DAVID BACOM, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS (2008).

[61] *See* ALEJANDRO PORTES & RUBEN RUMBAUT, IMMIGRANT AMERICA 17 (2006).

[62] *Id.* at 254.

[63] For a variety of reasons, even those social scientists who conclude it is too early to tell whether the ramped-up border enforcement of recent years has been successful nonetheless have reason to believe that Mexican migration will continue. Migration spawns migration. We already have experienced such high levels of migration in the last 15 years that, even if migration is declining, the socio-cultural forces that contribute to

the important point is not so much that migration is on an inexorable slope upward—indeed it has probably leveled off some as the result of the current economic crisis—but rather that it is a dynamic phenomenon shaped by factors that operate beyond the reach of our enforcement capacities.

Perhaps even more important, these are factors in which the United States and its citizens are complicit. The sovereignty of the fence presents immigrant admissions policy, in particular, as the result of a stylized process of membership granted through a national conversation. In reality, the factors that affect who actually enters the United States result from preferences that exist in tension with desire to exclude and that operate through decentralized family and economic networks. It may be the ultimate sovereign decision to define who may enter the nation, but today those sovereign decisions are made by markets, citizens, and consumers.[64] The power of decentralized decision-making, in the case of immigration, directly challenges centralized authority, and Americans live in a constant state of contradiction on matters related to immigration. As I have emphasized in previous discussions of immigration federalism, we would be better off abandoning the idea that when it comes to immigration, we speak with one, centralized voice.

B. *Weak foreseeability*

The strong version of foreseeability points to law's impotency in the face of globalization. But perhaps this proves too much. Countries such as Singapore and the Gulf States are able to keep unwanted immigration to near zero. Globalization appears to make migration inevitable not because there are not mechanisms to stop it, but because the costs of stopping it, or reducing it to a level

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continued cross-border traffic are well in play. Moreover, the stark wage differential between the United States and Mexico will persist, even if economic reform in Mexico generates higher wage jobs, and even if the size of the job-seeking population in Mexico declines in the near future. *See, e.g.*, Frank D. Bean & Lindsay Lowell, *Unauthorized Migration*, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, 80-81 (Mary C. Waters & Reed Ueda, eds. 2007).

[64] *See* Ibister (we can maintain the fiction that the ties built through labor and consumption do not exist, but it obscures the ways in which we actually behave).

that is different in kind from what occurs today, would be too high. This weak version of foreseeability emphasizes that the limitations on our sovereignty that unauthorized immigration, in particular, suggests are self-imposed, but for at least two good reasons.

The first reason stems from the nature of liberal democracy itself. The level of surveillance, policing, interference with the economy, and social dislocation (of mixed families integrated into countless communities) that would be required to prevent unauthorized immigration when economic conditions in the hemisphere seem to support it would be inconsistent with the sort of dynamic and open society we value and which we are arguably in danger of losing in the name of addressing problems such as illegal immigration.[65] What is more, though there have been frequent and recent drives to raise the penalties for entry without inspection—indeed prosecutors in Postville, Iowa significantly raised the stakes by charging the workers caught in the July 2008 ICE raid with aggravated identity theft—unauthorized presence remains a misdemeanor. In other words, principles of proportionality in "punishment" limit the forms of coercion we are willing to employ in stopping unauthorized immigration. This is not to suggest that our enforcement policies don't sometimes violate important democratic norms; affronts to due process, such as the mass hearings held in tents with poor translation and limited access to counsel after the July 2008 raid on a meatpacking plant in Postville, Iowa, are not uncommon.[66] The point, instead, is that such violations deviate from the

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[65] Christian Joppke points out that there is always a gap between authority to control and control itself. The problem is simply exacerbated in liberal states. The reasons he cites for why liberal states tolerate unwanted immigration include the nature of the legal process that adjudicates immigration disputes, such that judges who are insulated from political pressures and have internalized constitutional values are more likely to provide relief than the political process would, and the ability of civil rights activists to connect anti-immigrant positions to discourses of race and ethnicity surrounding Hispanics, which makes effective controls politically costly. *See* Christian Joppke, *Why Liberal States Accept Unwanted Immigration*, in Migration Reader (Messina, ed.).

[66] A *New York Times* editorial described the government conduct subsequent to the raid, noting that the suspected unlawful immigrants were charged with the serious crime of aggravated identity theft, when they ordinarily would have been charged with administrative violations, and that mass hearings with one lawyer to 17 people were held at a fairgrounds after approximately 30 minutes of consultation per client, subsequent to which almost 300 people agreed to pleas pursuant to which they were sentenced to 5 months in prison. *See*

standards of behavior a democratic society expects of itself, and resistance to their continuation is inevitable. Because of how we behave internally, we do not create strong disincentives to immigrants to come illegally in the future. The limitations on the way we treat those who cross our borders functions as a constraint on our ability to exclude—as a *de facto* admissions decision. The constraints we acknowledge on our treatment within our territory affect the extent of future migration across our borders based on factors other than what might be legally permitted.[67]

Indeed, we have not shown ourselves to be capable as a society of resisting unauthorized migration. We face what I have called an admissions-status tradeoff when formulating our immigration and integration policies: sometimes (during times of economic distress or when facing national security crises) more immigration translates into less support for immigrants' rights, and more robust immigrants' rights translate into less support for immigrant presence. The United States has fairly consistently made the admissions-status trade-off in favor of more admission and less status, despite the equality worry to which this version of the tradeoff gives rise.[68] The 11-12 million unauthorized immigrants present today demonstrate that the United States does not have an appetite for treating the immigrants on whom we clearly depend as potential citizens, preferring instead to let them do their work, but with minimal security regarding their future as members of the polity.

What are the implications of this admissions-status trade-off? It may be that unauthorized status is the only politically achievable status for channeling some substantial segment of today's migratory flow. As a result, some would argue that immigrants in particular, and the American consumer, too, are well served by the sorts of accommodations made by the law that I discuss above—a conclusion

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The Jungle, Again, N.Y. Times, Aug. 1, 2008, at A18. *See also* DHS manual providing guidance on securing plea agreements after the raids.

[67] *Cf.* Cox, *supra* note.

[68] Other examples of the admissions-status tradeoff include the 1996 reforms that excluded many lawful immigrants from public benefits programs, but did not restrict immigration itself.

that is almost certainly true if the only other option is complete closure. But despite the irresistible logic of the admissions-status trade-off, it can always be invoked to justify a compromise policy position. Indeed, the point that a political compromise position is more likely to be realized than a policy that sits away from the center on the political spectrum seems non-falsifiable. My intention, therefore, as it has been in previous work,[69] is to underscore these accommodations in order to clarify the parameters of the debate we should be having, not to identify the most politically viable set of options. Assuming we are incapable of simultaneously closing the borders and providing full equality to those whom we choose to admit, how ought we go about determining who should be admitted to membership and on what terms?

The second reason we essentially impose illegal immigration on ourselves is that, in addition to the cost to democratic principles, the cost to efficient allocation of national security resources significantly limits our ability to control. The amount of money being spent to fortify the border probably represents a dramatic overinvestment of resources to offset the supposed but elusive "costs" of immigration into the United States.[70] Of course, determining whether enforcement efforts are essential to the survival of the nation in its present form, or what level of enforcement is

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[69] *See Guest Workers and Integration*.

[70] *See, e.g.,* Testimony of Douglas S. Massey to Senate Judiciary Committee, Oct. 18, 2005. Massey notes that "the Border Patrol's enforcement budget has increased by a factor of ten and the number of officers tripled" between 1986 and 2002, though bi-national trade with Mexico has grown by a factor 8 in that same time. The annual budget of the border patrol in 2005 was $1.4 billion. He concludes that "[T]he American attempt to stop the flow of Mexican workers within a rapidly integrating North American economy has reduced the rate of apprehensions at the border, raised the rate of death among migrants, produced longer trip lengths, lowered rates of return migration, increased the pace of undocumented population growth, and transformed what had been a circular flow of workers affecting three states into a settled population of families scattered throughout the 50 states, all at the cost of billions of taxpayer dollars." *See also* Douglas Massey, *When Less is More: Border Enforcement and Undocumented Migration*" Testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, House Committee on the Judiciary, April 20, 2007 ("At this point, pouring more money into border enforcement will not help the situation and in my opinion constitutes waste of taxpayer money. The border is not now and never has been out of control—the rate of undocumented in-migration has been virtually constant for more than 20 years."). Kevin Johnson also makes the point that the amount of money spent on border enforcement is not commensurate with the "costs" that these outlays are intended to prevent. *See* JOHNSON, OPENING THE FLOODGATES, *supra* note, at .

necessary to stop genuine public safety threats, such as drug and human trafficking, is complicated. But it is hard to imagine that limited national security and law enforcement resources are best spent in the manner described above. That we should mobilize a law enforcement apparatus to address a phenomenon that does not really threaten our actual safety certainly seems anomalous, and, again, wasteful. What is more, the new surveillance technologies designed to keep threatening foreigners out are increasingly enhancing the government's surveillance capacities more generally,[71] leading us to slowly build the wall and its accoutrements into our own lives as citizens, contributing to the entrenchment of what constitutional scholars have called the national surveillance state.[72]

In the end, no matter how you characterize the economic interdependence that produces immigration—as an insatiable desire for inexpensive labor or as a function of a native population that is simply better educated and largely liberated from performing the sorts of jobs that unauthorized immigrants perform—the benefits of the current regime are ones we are highly unlikely to give up. What is more, as one demographer forcefully argues, as a population we are on our own demographic precipice, with the baby boomers set to retire, triggering an urgent need for rejuvenation of our population through immigration[73]—a need that is all the more acute in many European societies, making immigration *the* socio-political issue of the day for those societies. The

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[71] For a detailed analysis of how the United States and other societies of immigration are redesigned border controls in ways that penetrate into the interior and increasingly affect citizens as well as non-citizens, all in order to reassert control in an age of globalization, see Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 2 Stan. J. C.R.-C.L. 165 (2007).

[72] Cite to Jack Balkin and Sandy Levinson. And yet, my goal here is not to resolve this particular debate about whether the costs of enforcement are outweighing its benefits, or, more to the point, to identify the optimal level of enforcement, given the benefits of immigration. It may be that, at the end of the day, these costs are justified by whatever gains are made in terms of preventing unauthorized immigration, or threats to our security more generally. But the sovereignty of the fence preempts any such cost-benefit analysis. The enforcement-first paradigm simply does not brook consideration of whether supposed assertions of sovereignty are justified by the nature of the threats supposedly being addressed, because the invocation of sovereignty works as a conversation stopper. The sovereignty of the fence makes the engagement of the cost-benefit question virtually impossible. Today's turn to enforcement at the federal, state, and local level is simply a manifestation of the historically engrained impulse to turn to the fence, in the absence of an alternative, to address immigration-related challenges.

[73] *See* DOWELL MYERS, IMMIGRANTS AND BOOMERS. (2006)

question, then is how all of these factors ought to shape our formulation of immigration policy going forward. If it is reasonably foreseeable, given these many conditions, that migration will occur at level X, are we obligated to permit immigration at level X?

III. RECIPROCITY AND BURDEN SHARING

Having erected and deconstructed the sovereignty of the fence, we can now return to the argument at the core of this Paper and with which I began: democratic societies have an obligation to adopt policies that preclude the emergence of illegal immigration, and when it is reasonably foreseeable that exclusion will not prevent this emergence, the obligation is to admit. Given the factors that make migration reasonably foreseeable, we can no longer justify conceiving of immigration policy unilaterally, or assuming that no concern is owed to those we choose to define as outside the political community *de jure*, even when they are or will be present *de facto*. The sovereignty of the fence is incompatible with both the strong and weak forms of foreseeability. Modern day policy is expantionist because it has to be.[74]

The conception of sovereignty on which this obligation of the nation state is based is one of reciprocity, or an ethic of mutual cooperation and burden sharing. This paradigm is a fundamentally liberal one both in the internationalist and philosophical sense, because it is based on the basic idea of cooperation. Of course, reciprocity, burden sharing, and cooperation are all abstract concepts and do not in and of themselves tell us who should be carrying what weight. I doubt that we could quantify accurately complicity or participation in the factors outlined in Part II, in any case. The crucial point is that the framework for formulating immigration policy should be a dynamic one that weighs the variety of interests in play and takes account of the realities in which the nation state is

[74] The turn to exclusion of the 1920s is not a viable option today; even then, as Atlantic migration was significantly curtailed, the United States turned to Mexico for the supply of immigrant labor it needed. *See* MAE NGAI, IMPOSSIBLE SUBJECTS: UNDOCUMENTED IMMIGRANTS IN THE MAKING OF AMERICA (2005).

situated, rather than a static one that reflects a single set of preferences and an imagined sovereign selection process. A proper framework for addressing our responsibilities vis-à-vis migration would treat the sovereignty of the fence as an unrecognizable construct and would instead frame immigration and its management as functions of our place in an interdependent world. Recognition of this *de facto* and inescapable inter-relationship requires developing a framework for understanding immigration that takes account of how our policy choice fit within larger international networks.

The concept of reciprocity in immigration has an external and an internal dimension, which complicates matters. The internal dimension—my primary focus—concerns how the United States as democratic society should structure the relationships among those who inhabit or will in habit its territory. The external dimension involves relations among societies or nation states: How should the United States interact with or regard the societies from which immigrants come? The latter largely involves a world where promotion of mutual interests is at stake, and the former context is the more familiar one for discussing questions of justice and obligation. But though my argument is premised on the requirements of internal reciprocity—how does our immigration policy construct the status of those who are part of the United States in a *de facto* sense, it is essential to consider both dimensions, because questions of internal reciprocity are necessarily situated in the external context, and the full scope of justice in immigration cannot be properly understood without considering the external dimension, or how the United States' policy affects sending societies.

This intersection of the external and the internal may be precisely why migration-related theorizing leads to fairly absolutist positions like the sovereignty of the fence. Immigration involves the entry into our territory and our social fabric of the physical manifestations of the outside world—human consequences with *agency*. When the worlds of international politics and interest mediation and internal self-government collide, the result tends to be confusion and obfuscation, because it's not clear whether we should be invoking internationlist or domestic norms of behavior.

Nonetheless, in laying out what I imagine the external and internal conceptions of reciprocity in immigration policy to be, I recognize the points of difficulty or conflict—instances in which internal reciprocity may come at the expense of other nations—and offer principles by which they might be resolved. Again, the important point is dynamism: as the social science develops on questions of why migration occurs, as well as how migration affects economic development in sending societies, as well as the social cohesion, growth, and budgets in receiving societies, the distribution of burdens necessarily will differ.

Before exploring what internal and external reciprocity mean, one side note is in order: Because this idea of reciprocity embraces the nation-state and concepts of territoriality as part of its foundation, one might ask: why accept the nation-state framework at all? Frictionless migration may well produce the most efficient allocation of people around the globe, enhancing global welfare.[75] The obvious response to this post-national proposition is that the nation-state remains the fundamental unit of political organization,[76] not because of path dependence, but because it offers the best framework for securing the allocation of responsibility for the world's population to the particular institutions best placed to address the needs of particular people, and because it represent a unit of organization simultaneously large enough to secure prosperity and small enough to enable effective governance, and especially self-government.[77]

But more important, immigration is disruptive to existing social arrangements and imposes burdens on sending and receiving society alike. To be sure, often—probably more often than not—

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[75] For an argument to this effect, see Myron Weiner, *Ethics, National Sovereignty, and the Control of Immigration*, Int'l. Migration Rev. 171, 182 (1996); *see also* Mathias Risse, *On the Morality of Immigration* (2008), Faculty Working Paper Series, John F. Kennedy School of Government, *available at* http://ssrn.com/abstract=1124296 (basing a moral claim on the notion that each society should take in the number of people its territory can reasonably sustain).

[76] *See* Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership 6 (2006) ("post-national or transnational forms of citizenship remain a real but limited part of the citizenship landscape").

[77] Elsewhere I have made a more extended case for the continuing centrality of the nation state and political identity affiliated with territorial governments. *See* Rodriguez, *The Citizenship Paradox in a Transnational Age*, *supra* note, at 1119-1122.

that disruption leads to positive outcomes in the form of greater economic prosperity, respect for human rights (in the case of refugees in particular), and development (through remittances and other contributions migrants make to their home countries). But because immigration changes the participants in the polity's conversation, it produces friction that inevitably gives rise to the need for mediating mechanisms, which include passports, visa requirements, and citizenship laws. Whether the "burden" imposed, in the form of drains on public services, increased crime, poor integration, or depression of wages of the native born, is actual or simply perceived is in a sense beside the point. As I noted in Part I, democratic societies require social bonds among members to function, and so control of entry in and out of a society is responsible and ethically required. The point is not so much that politics requires policymakers to manifest the desire to close (though that's certainly true) or that open borders are not politically achievable (also true), but rather that democratic society depends on the existence of repeat players, or the *management* of change. Sometimes change outpaces people's capacity to absorb it, and a role of the state is to help facilitate that change through control. But as I noted at the outset, accepting the need for control only begins the inquiry, as the question of according to what standards that control is exercised is central.

A. *Internal reciprocity*

In defining what the content of internal reciprocity might be, I want to begin with a limited premise regarding legal status, leaving aside the more complex issue of equal status. The all-or-nothing approach advanced by Walzer (full equality for all people present or no immigration) makes it difficult to develop a conception of the nation state's obligations to outsiders that is based in reality. Whatever else we might ultimately say about the demands of equality vis-à-vis the non-citizen, our obligation is to prevent the condition of illegality—of having no status before the law despite having social and economic status—from arising. The justification for this premise is that

the liberal conception of a society as a cooperative scheme depends for its viability on a sense of obligation to regard those with whom we actually associate within our community as entitled to status before the law and within the formal bounds of the national community.[78] Illegal status not only places the individual at the sufferance of the government, depriving all of his interactions with the government of the hallmarks of the rule of law—predictability, stability, and fair-dealing—but it also deprives the individual of the capacity to defend his interests. Even if the state were inclined to treat the unauthorized immigrant with equanimity, the status necessarily chills the individual's interaction with the state, because it lacks any semblance of security. Moreover, the unauthorized individual loses his ability to persuade members of society to regard him as someone with interests worth defending or views worth expressing. The unauthorized individual is governed by law over which he has no control. In other words, we are obligated to avoid the emergence of illegal status.

Given the foreseeability factors I outline in Part II, this obligation, which theoretically could be fulfilled through border closure, requires the extension of legal status to those non-citizens with whom we can predict we will associate. (A next-step corollary would be that all such migrants must be given a reasonable opportunity to acquire equal status.) This approach would recognize the obligation to treat those with whom we associate with the dignity that legal status conveys. The point is not that the United States as a sovereign nation does not get to decide who enters its territory legally, because it could not be otherwise. But the central sovereign who formulates immigration policy must take responsibility for the disaggregated decisions that drive foreseeability

[78] *Cf.* Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFFAIRS, 113, 141 (2005) ("perhaps such a theory of justice as a "continuous" function of degrees of collective responsibility could be worked out. It is in fact a natural suggestion, in light of the general theory that morality is multilayered. But I doubt that the rules of international trade rise to the level of collective action needed to trigger demands for justice, even in diluted form. The relation remains essentially one of bargaining, until a leap has been made to the creation of collectively authorized sovereign authority."

and incorporate them into the formal expressions of membership. Another way of putting this is that our expressions of popular will as citizens must take responsibility for expressions of popular will as consumers and social actors.

This emphasis on actual associations brought into being has the advantage of distinguishing relations between people who are or will predictably be in our self-governing polity and the relations we have forged with people on the other side of the world through trade and development policy. Obviously this approach reflects a fairly limited conception of obligation, in that it focuses on those with whom we have or will come into contact. We could broaden the question to ask whether there is a larger morality at work, one that demands economic redistribution across borders that would require states to admit immigrants without respect to their own actions or predicted actions. And we could begin developing a conception of a right to migrate, which would impose a human rights obligation on nation states to allow to entry. This approach, which has support in international human rights circles, is an analogue to the open borders argument, and the problems with it are familiar. But among the factors that have thwarted the development of a morality of immigration are the sense that it would shade into concepts of global justice and a global citizenry according to which the factory worker in Beijing is as much a part of our community as our neighbor. I therefore take a decidedly territorial view, and in this sense depart from or carve out an exception to the global justice story, but I believe this is just the sort of intermediary view a morality of immigration requires because of its nexus with territorial identity.[82]

B. *External reciprocity*

Of course, extending legal status to those with whom we can foresee we will come into contact might lead to a set of policies with moral implications of their own, namely the creation of a U.S.

immigration law that has the effect of depriving other societies of the labor and brain power they need to sustain and develop themselves. A reciprocity framework will not keep us from having to prioritize equally compelling interests. Development goals in sending societies and democratic imperatives in receiving societies may not be fully reconcilable, and thus perfect reciprocity is not possible. What is more, a crucial factor that must be taken into account, as I note above, is the autonomy of the migrant him or herself. This factor can be worked into the concept of internal reciprocity, and it drives my views regarding guest worker programs,[79] which I develop as an example below. If we are going to take seriously the idea that immigration policy must reflect the presence of the United States within a larger inter-dependent world, it is important to take account of how our policies affect the concerns of others, including the negative consequences of policies justified by the requirements of internal reciprocity. Though this external aspect of the morality of immigration is not my primary concern in this Paper, it is worth considering the problem. The inevitable prospect of trade-offs, like the inevitable political complications, should not thwart the effort to put immigration policy into a cooperative framework.

Take, for example, the leading reform proposal for managing this future flow—the guest worker program. On the one hand, guest worker programs appear to embody the idea of reciprocity perfectly. The receiving society has engineered for itself, the sending society, and the guest worker an apparent bargain. The program suits the labor market needs of the United States, satisfying domestic employers and consumers, and the development of Mexico, which relies heavily on remittances from abroad. A regularized, legalized form of temporary migration promises to protect immigrants from exploitation by smugglers and employers, as well as from the general anxiety typical of life as an unauthorized migrant. The programs thus appeal to current and future migrants by providing them with legal means to support their families or raise funds to finance business

[79] *See* Rodriguez, *Guest Workers and Integration*

ventures or home construction. The advantage of this arrangement is particularly clear for migrants in a climate in which the political will does not exist in the receiving society to provide more avenues for legal migration.

But as I have written elsewhere, the success of this bargain is highly contingent, and there is no such symmetry in the relationship between the immigrant and American society. As the overwhelming weight of historical and comparative evidence suggests, migrants' interests change in ways they may not foresee when they enter into the guest worker contract, and guest worker programs that are truly temporary (a program the likes of which a democratic society has not been able to successfully administer on a large scale), ultimately force migrants into untenable choices: to fall into unauthorized status when the temporary visa expires or give up the economic, social, and family ties they have built during their time as guest workers. I do not think it possible, as I have argued elsewhere, to open up these kinds of networks without expecting some kind of resettlement—a specific example of the foreseeability thesis, in both strong and weak form, at the heart of the immigration issue.

Perhaps more importantly, to the extent that guest worker programs actively facilitate circular migration, they permit immigrants to treat the United States as a way station to greater social and economic mobility at home. There are civil society implications to permitting such transitory migration: immigrants become disconnected social actors with no reason to act in ways that better their communities in the long term—a form of behavior that is likely to exacerbate the distrust that Robert Putnam's research has shown arises in ethnically diverse settings. And, by creating a temporary laboring class without full participation rights, or even the prospect of full participation rights, guest worker programs introduce opportunities for exploitation into social, political, and economic relations. The power of the state, exercised primarily through the employer, looms tyrannically over guest workers in the form of the constant threat of deportation.

So how do we balance respect for the autonomy of immigrant individuals—a principle embodied in the claim that we should devise immigration strategies that take account of changed intent—with the interests of the two societies on either side of the reciprocity equation? The debate over the guest worker program highlights the limitations of a concept of reciprocity: the external and the internal imperatives may conflict, and the immigration solutions targeted at one level might compromise dynamics or burden sharing at the other. This is the most difficult of questions. If a guest worker program is best for Mexico, but we conclude that it is anathema to the sort of society we aspire to be, what do we do?

In the end, our democratic commitments must shape the ultimate solution. Exclusionists would say the same, but I hope that by making the case for foreseeability and inter-dependence I have made clear that those commitments include obligations to those with whom we can foresee we will associate. In the context of the guest worker program, I would suggest two related forms of burden sharing. On the one hand, no temporary worker program should be adopted without providing immigrants with presumptive right to become permanent residents and therefore citizens, provided they adhere to contract terms that are consistent with human rights norms and are worked out between the United States and countries such as Mexico. At the same time, we could recognize the significance of cyclical migration and make such a transition an option, rather than a requirement, but nonetheless require workers after some limited period to make an election: to either return to Mexico permanently, or to make a long-term commitment to the United States, with the obligations of assimilation that that entails. To make this arrangement feasible, we must maintain and expand our openness to dual citizenship to our own naturalization process. Mexico has already performed its end of the bargain by changing its laws to permit its citizens to retain their status even when they naturalize abroad, and countries such as France, Canada, Russia, and the UK have taken similar steps in permitting naturalized citizens to maintain their citizenship of origin.

Another example that highlights how we might reconcile the external dimension of reciprocity with the internal is the debate over high-skilled immigration and economic competitiveness. During the immigration reform debate in the Senate in the spring of 2007, Bill Gates famously testified that if Congress did not expand opportunities for software engineers and other high-skilled migrant to enter the United States, Vancouver stood to gain a new office part. The United States appears to have a clear need in certain high-end segments of the labor market for workers (or for better paying jobs or better engineering programs). The focus of the debate on how to address these needs has been on shoring up American competitiveness and using the human resources of the world to do it.

But in a variety of different public venues, and through a new human rights NGO called Realizing Rights,[80] former President of Ireland and UN High Commissioner Mary Robinson has offered a different perspective on this issue, emphasizing a human rights-based version of the brain drain critique in an effort to promote "ethical globalization." She foregrounds the example of health care workers, where the so-called brain-drain problem is particularly acute. The Philippines, for example, has had its health care sector seriously diminished by the United States' steady recruitment of doctors and nurses to compensate for our own nursing shortage.[81] If we took the idea of reciprocity seriously, we would worry about whether in our zeal to maintain our economic status we weren't also being rapacious by recruiting the world's talent to fill our shortages. Among the challenges organizations like Robinson's seek to address is how to respect the rights of health care

[80] *See* http://www.realizingrights.org/.

[81] Mary Robinson & Peggy Clark, *Forging solutions to health worker migration*, 371 *The Lancet* 691 (Feb. 23, 2008), *available at* http://www.thelancet.com ("All over the world, increased demand from wealthier countries resulting from ageing populations and medical advances has pulled large numbers of health workers from some of the world's poorest countries—many of whom are left with acute shortages of health workers of their own. Africa carries 25% of the world's disease burden yet has only 3% of the world's health workers and 1% of the world's economic resources to meet that challenge. Migration, together with other factors in many source countries such as insufficient health systems, low wages, and poor working conditions, are key factors determining low health-worker density in countries with the lowest health indicators.").

workers to make autonomous decisions and leave their countries in search of a better life while still promoting the development of a health care sector in the society of origin.

Several different countries, embodying an ethic of reciprocity, have entered into bilateral agreements intended to address the impacts migration has on societies where health care workers are already in short supply. Norway, for example, established a new health-worker recruitment policy in April 2007 that includes reducing its contribution to draining health care workers from their home countries, essentially compensating the countries from which it recruits health care workers through development assistance.[82] The UK and South Africa entered into a Memorandum of Understanding in 2003 designed to "stem the unchecked flow of South African health workers to the UK" and to provide technical assistance to South Africa to help development its health care sector.[83] Knowing how to weigh these interests, of course, requires knowing whether the draining of human capital is compensated for by remittances, the feedback effects on host societies of migrants educated abroad, and the long-term investments in infrastructure development enable by those same migrants—a source of debate in the literature. And factoring in the interests of individual migrants makes the work particularly complex. But these nonetheless represent examples of the form of thinking external reciprocity would require.

3. *The liberating effects of reciprocity*

Approaching questions of immigration policy from the perspective I have outlined ultimately would liberate our immigration discourse. First, thinking in these terms is likely to open us up more to the possibility of allowing for greater institutional accommodation of migration realities. For example, the possibility of administratively-driven adjustments to visa-levels through notice-and-comment rulemaking, rather than through much more cumbersome legislative action, would seem

[82] *Id.* at 692.
[83] *Id.*

more feasible and intuitive if we thought in terms of creating a dynamic immigration policy responsive to disaggregated factors.[84] Instead of treating admissions as the products of a grand, national conversation about the meaning and nature of immigration, we might be more open to making administrative adjustments. This shift would mark a transition from accommodating the foreseeability factors through ex-post enforcement policies to ex ante admissions policies. There might be policy reasons to reject this arrangement, as it may be less efficient by virtue of requiring pre-commitments to more immigrants before gathering information about whether they are good additions to our society.[85] But the shift to admissions versus under-enforcement is arguably what is required as a matter of obligation, because it gives predictable immigrants the legal status that is required as a matter of reciprocity. Reciprocity need not necessarily be embodied in admissions. Employer sanctions are a reflection of the attempt at reciprocity—trying to curb the behavior of hiring immigrants not deemed worthy of legal status according to the terms set by Congress. But the failure of employer sanctions underscores the futility of this approach.

Second, if we moved away from the sovereignty of the fence, we would begin to refocus our distributional concerns in a much more productive direction—toward meaningful distributional solutions that actually address directly the losses people might experience as the result of immigration, rather than obliquely through immigration restriction and cheap populism. In other words, the reciprocity approach would begin from the premise that we owe obligations to more than just our fellow citizens, but that the obligations we owe to citizens require compensating those who are affected by migration instead of drawing a tight family circle around the United States and keeping others out. Economists such as Howard Chang have proposed addressing the distributional impacts of immigration by increasing the progressivity of tax system, which he argues is more

[84] For a discussion of this idea, see Cox & Rodriguez, *supra* note.
[85] *See* Cox & Posner for a characterization of the advantages of ex-post as opposed to ex-ante screening of immigrants in this vein.

efficient than the protectionism embodied in exclusion. Other scholars have suggested compensating native-born workers for losses of wages that result from guest worker programs, either through training or cash payments. This approach does not require establishing that we have an obligation to admit certain immigrants, but establishing the point does make this focus on compensation seem more compelling, because it provides a solution to a moral dilemma.

[WORKSHOP PARTICIPANTS: Yet to be written are two discussions tying this analysis to constitutional jurisprudence, though this discussion might be more appropriate in Part II of the Paper, since they go to the point of responsibility more than the meaning of reciprocity. First, I will note how debates about obligation with respect to immigration are similar in structure to affirmative action debates, where critics of affirmative action reject the idea that there is a social responsibility that would involve sacrificing individual interests to compensate for the effects of slavery and segregation. The debate is framed in terms of *personal* responsibility for discrimination—in Justice Scalia's famous words: my ancestors were not slaveholders. The second omission is a discussion of precedents in U.S. immigration policy for thinking in terms of external limitations on sovereign admissions decisions. The prime example is the transition from the National Origins quotas of the 1920s to equal ceilings for all countries in 1965. The legislative history of the 1965 statute is full of references to the idea that the U.S. has a moral/constitutional obligation to not discriminate on the basis of race in its admissions policy. The 1965 Act rejects the idea that in all cases the United States may legitimately give preference only to those immigrants who are most "desirable." Indeed, though it is generally assumed that an admissions policy that discriminated on the basis of race would not be justiciable, Congress has arguably internalized equal protection principles in its immigration policy, and a case for Court-imposed substantive limits on discriminatory admissions policy could be made. Other precedents involving external obligations imposing limitations on the admissions decisions of

Congress include the Iraqi refugee situation and the Nicaraguan and Central America Relief Act, which set has set aside, since its enactment, 5000 visas for persons from Central America affected by the wars of the 1980s, but who do not need to meet the standards of proof required by asylum law.]

CONCLUSION

The sovereignty of the fence imagines the United States as capable of acting to keep the world out, or to let it in on terms it has determined unilaterally, when in reality our immigration policy is like a piece of a puzzle that fits into a set of broader patterns. To figure out how to shape its edges, we have to consider the shape of the other pieces in the pile, which themselves must be shaped with reference to one another. The pieces do not make sense in isolation, but only when fit together with other complementary pieces. Sovereignty is not just an expression of self-interest, but also a question of managing our presence in the world and accepting the consequences of that presence. Reciprocity is thus demanded by interdependence, and we must constantly be considering what each participant in the processes of migration—sending societies and receiving societies, immigrants and resident members—should give up, and in exchange for what guarantees. This necessarily requires internationalizing our perspective on migration in order to understand where the benefits and burdens lie, but it emphatically does not mean giving up on territorially grounded conceptions of citizenship or embracing a post-national ethos, and it revolves around an emphasis on *mutual* obligation.

It could be that the sorts of ex post accommodations that abound in the law as the functional equivalents of what I have proposed here might be better mechanisms for promoting justice than a more open admissions policy. The applications of provisions, such as relief from removal, reflect the injection of justice-based concerns into the treatment of non-citizens who nonetheless possess no

substantive right to remain in the United States.[86] The judgments about to whom to extend leniency are made when dessert regarding relief is easier to determine—when the individual has made contributions or developed ties to the United States that may be worth recognizing.[87] Framed from an efficiency perspective, as Adam Cox and Eric Posner have put it, these sorts of ex post accommodations permit the state to operate with better information about the non-citizen in question, thus serving as a better selection mechanism for the right sort of immigrant.

At the end of the day, it cannot be escaped that the accommodation of migratory reality through ex post administrative practice is ultimately inconsistent with how a democratic society should treat its de facto members, precisely because it is ad hoc and unpredictable.[88] This approach tends toward crisis, because it is based on tolerance of illegality until sufficient political pressure mounts to require heavy-handed enforcement and calls for border closure. Indeed, it is precisely the

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[86] *See* Hiroshi Motomura, Americans in Waiting (describing a concept of immigration as affiliation according to which the more time a non-citizen has spent in the United States, the more solicitude his interests receive)
[87] As I note in *The Citizenship Paradox in a Transnational Age*, this trade-off was apparent during the 1996 immigration reforms, which excluded lawful immigrants from many public benefits programs, but did not restrict immigrant admissions. The fact Congress restored many of those benefits in subsequent years, and that many state governments stepped into the breach, suggest that the trade-off is not necessarily a perfect one, and that admissions and status can under some circumstances rise (or fall, as in times of serious nativist ferment) together. This trade-off is also apparent in the re-emergence of the guest worker idea and the new allure of cyclical migration that can be sold as temporary admissions for the benefit of the labor market without the threat of permanent resettlement. *See* Arizona scheme. stepped into the breach, suggest that the trade-off is not necessarily a perfect one, and that admissions and status can under some circumstances rise (or fall, as in times of serious nativist ferment) together. This trade-off is also apparent in the re-emergence of the guest worker idea and the new allure of cyclical migration that can be sold as temporary admissions for the benefit of the labor market without the threat of permanent resettlement. *See* Arizona scheme. [92] The claim is not that ex post screening, or a law of deportation, is impermissible, but that compensating for the failure to control illegal immigration by authorizing it after the fact is unacceptable. [93] I defend these propositions in greater detail in other work. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law* (manuscript on file with author) (2008); *see also* Adam B. Cox & Eric Posner, *The Second Order Structure of Immigration Law*, AND STAN. L. REV. (2007) (noting that ex post screening arguably operates as a substitute for ex ante admissions, and that such a regime might ultimately be more efficient by screening for those immigrants who are most likely to contribute to and invest in society).
[88] I defend these propositions in greater detail in other work. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law* (manuscript on file with author) (2008); *see also* Adam B. Cox & Eric Posner, *The Second Order Structure of Immigration Law*, STAN. L. REV. (2007) (noting that ex post screening arguably operates as a substitute for ex ante admissions, and that such a regime might ultimately be more efficient by screening for those immigrants who are most likely to contribute to and invest in society).

fact of this choice that demonstrates how outmoded the sovereignty of the fence has become. The choices we have made in the admissions-status trade-off underscore that sovereignty of the fence no longer works as an explanatory paradigm, nor as a paradigm for conceptualizing the morality of immigration, because it is inconsistent with our behavior. By affirmatively articulating what might already exist in legal practice but remains under-theorized, I hope to help shift the conceptual terrain on which we debate how to manage the consequences of global interdependence, including immigration, by exposing the need for a conception of sovereignty that not only better describes, but better channels, how we behave as a nation state. This approach may require accepting unequal treatment of various sorts, and we must decide what forms of inequality are permissible. But it may also result in the articulation of external limits on admissions decisions that may not be reflected perfectly in practice but that are achievable when framed properly.