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OPPOSING PROP. 187: UNDOCUMENTED IMMIGRANTS AND THE NATIONAL IMAGINATION

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"Political imagination is, almost always, national imagination."¹

I. INTRODUCTION

Among the many bruising battles engendered by the recent immigration wars in this country, the battle over California's Proposition 187 has touched an exceptionally deep nerve. Approved by the state's voters in 1994, this "anti-illegal alien initiative" will—if the courts uphold it—deny health care, education and other public services to undocumented immigrants and require social service providers to report any

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1. Richard Rorty, Unger, Castoriadis, and the Romance of A National Future, 82 Nw. U. L. Rev. 335, 343 (1988).

service user they suspect of undocumented status to law enforcement authorities.² Support for Prop. 187—and now for its progeny in other states³—has been wide and deep; in fact, these measures have served

2. The initiative's provisions are codified at CAL. EDUC. CODE § 48215(a) (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130(a) (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1995).

On the day following its approval in the Nov. 8, 1994 election, opponents filed several lawsuits in both state and federal courts seeking to enjoin the initiative's implementation; these were consolidated into three actions and quickly produced temporary restraining orders. In one of these cases, U.S. District Court Judge Mariana Pfaelzer of the Central District of California subsequently invalidated those provisions of the initiative which would require state school and welfare officials to demand proof of legal immigration status and to report "suspected" undocumented immigrants to federal and state authorities, on grounds that the federal government is exclusively empowered to regulate immigration. See *Gregorio T. v. Wilson*, No. 94-7652 (MRP) (C.D. Cal. Nov. 20, 1995) (partial summary judgment). On the same grounds, the court held that the state may not deny undocumented immigrants any public services that are fully or partly funded by the federal government. *Id.* Finally, the court also invalidated those provisions which would deny K-12 education to undocumented children, on grounds that they conflict with the Supreme Court's 1982 ruling in *Plyler v. Doe*, 457 U.S. 202 (1982). *Id.* The State has indicated it will appeal these rulings, and the remaining issues are expected to go to trial. See Ken McLaughlin, *Judge Guts Core of Prop. 187*, SAN JOSE MERCURY NEWS, Nov. 21, 1995, at 1A; Laura McCoy, *Prop. 187 Backers Hope to Win Appeal*, S.F. EXAM., Nov. 24, 1995, at A27.

3. In Florida, anti-immigration activists are currently collecting signatures in an effort to place "Florida-187" on the 1996 November ballot in that state. See Angelica Quiroga, *Copycat Feber: Proposal To Ban Social Services For Illegal Immigrants*, 8 HISPANIC 18 (April, 1995) ("Since [Prop. 187's] passage by the citizens of California, several states, such as Arizona, Washington, Oregon and Florida have begun to consider similar measures."); Sergio R. Bustos, *Immigration Debate Organizing: Opposing S. Florida Groups Fight For, Against State Ballot on Services*, SUN SENTINEL, Aug. 5, 1995, at 1B. See also Patrick McDonnell, *Despite Legal Snags, Prop. 187 Reverberates*, L.A. TIMES, Nov. 8, 1995 ("Proposition 187-type initiative drives have sprouted in other states, notably Florida and Arizona, and related movements have even gained momentum in Oregon and ostensibly liberal Massachusetts."); Maria Puente, *States Setting Stage For Their Own Prop. 187's*, USA TODAY, Nov. 18, 1994, at 3A (discussing efforts to enact similar laws in Arizona, Florida, New York, and Texas).

In addition, some members of Congress have sought to amend federal law to ensure that access to all federally funded programs other than emergency medical care is denied to undocumented immigrants. For a limited sampling, see 104 H.R. 1377 (1995) (bill to amend the Immigration and Nationality Act to authorize States to deny public education benefits to aliens not lawfully present in the United States); 104 H.R. 341 (1995) (bill to prohibit direct federal financial benefits and unemployment benefits for illegal aliens); 104 H.R. 438 (1995) (bill to amend the Internal Revenue Code of 1986 to deny the earned income credit to illegal aliens); 104 H.R. 484 (1995) (bill to prohibit public welfare assistance to aliens not lawfully in the United States); 104 H.R. 560, § 301 (1995) (provisions of proposed immigration reform package that would prohibit direct federal financial benefits and unemployment benefits to aliens who are not lawful permanent residents); 104 H.R. 637 (1995) (bill to limit alien eligibility for public welfare assistance to aliens residing permanently and lawfully in the United States); 104 S. 999 (1995) (bill denying aliens not lawfully in the United States any direct Federal financial benefit or social insurance benefit, unemployment benefit and housing benefit). See also Faye Fiore, *Congressman's Proposal Mirrors Prop. 187*, Los Angeles Times July 19, 1995, at 3.

to mobilize reserves of mass disaffection with immigration the likes of which have not been seen for nearly eighty years.⁴ Despite the substantial popularity of such measures, however, political liberals and progressives have almost uniformly opposed them, finding them wrongheaded as a matter of policy, and often offensive as well. Prop. 187 has become, for its critics, a symbol of the excesses of the current wave of anti-immigrant anxiety in this country, and the shorthand for a dangerous politics of resentment.⁵

Much has been said elsewhere about the nature of the Prop 187 enterprise, including the nature of the support it has received.⁶ My concern in this article is, instead, with its critics. The question I want to examine, in general terms, is this: What is the basis for the deeply-felt antipathy toward Prop. 187 and similar restrictionist efforts among the initiative's opponents? What, precisely, do the critics understand to be wrong with Prop. 187? And how far does their aversion to such

The electoral success of Prop. 187 has also created political momentum for more dramatic reform. Some of the original promoters of Prop. 187 have drafted an advisory ballot measure for the 1996 elections in California which calls for an amendment to the federal Constitution to eliminate automatic birthright citizenship for the U.S.-born children of undocumented immigrants. (The measure's acronym, SOS II, is a shorthand for "Save Our Sovereignty.") See Patrick J. McDonnell, *Despite Legal Snags, Prop. 187 Reverberates*, L.A. TIMES, Nov. 8, 1995, at A1. Similar efforts are now pending in Congress. See e.g. 104 HJR 93 (1995) (joint resolution proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a U.S. citizen unless one parent is a U.S. citizen or possesses lawful immigration status at the time of birth). For a useful critical analysis of recent efforts to abolish birthright citizenship for the children of undocumented aliens, see Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994).

4. For accounts of the anti-immigrant movements of the early part of this century and their effects, see THOMAS J. CURRAN, *XENOPHOBIA AND IMMIGRATION* 109-44 (1975); JOHN HIGHAM, *STRANGERS IN THE LAND* (2d ed. 1984); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

5. "The term 'resentment,' derived from Nietzsche, . . . connotes impotent hatred, envy, repressed feelings of revenge, the inability to act out antagonistic impulses in open conflict." Lewis A. Coser, *Max Scheler, An Introduction*, in MAX SCHELER, *RESENTMENT* 21 (1961). See F. NIETZSCHE, *GENEALOGY OF MORALS*, 34-38 (1964). The concept has been invoked by contemporary historians of nationalism to characterize certain defensive aspects of the development of national consciousness and national identity. See, e.g., LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 15-17 (1992).

6. See, e.g., Ann Davis, *The Return of the Nativists*, NAT'L L.J., June 19, 1995, at A1; Marc Cooper, *Prop. 187's True Colors: After the Vote, Will Californians Ever Get Along?*, VILLAGES VOICE, Dec. 6, 1994, at 13; Elizabeth Kadetsky, *Bashing Illegals In California*, THE NATION, Oct. 17, 1994, at 416; Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y.L.J., Jan. 3, 1995, at 3; Peter Schuck, *The Message of 187*, AM. PROSPECT, No. 21, Spring 1995, at 85, 89-91; *Tough Proposition*, NAT'L REV., Nov. 21, 1994, at 20; Mike Davis, *The Social Origins of the Referendum*, NACLA Report on the Americas, vo. XXIX, No. 3, Nov/Dec 1995, at 24.

measures extend?

During the course of the "No On 187" campaign, activists set forth a variety of compelling objections to the proposed initiative. Sometimes the organizations that worked against it disagreed over how to articulate the arguments; their divisions were often divisions over strategy, though at times they diverged over principle as well. In the end, however, there was a striking uniformity in what most critics said, and correspondingly, in what they did not say, when opposing the initiative. In particular, while opponents advanced critical arguments on empirical, consequentialist and normative grounds, arguments invoking the injustice of the measure for the actual *objects* of the initiative's provisions—the undocumented immigrants themselves—were rarely heard. Whatever was wrong with Prop. 187, in other words, the problem was apparently *not* that it treats undocumented immigrants unfairly.

My purpose in this article is to examine the complex political and intellectual challenges faced by critics in opposing Prop. 187 and similar initiatives. I first outline the shape of the opposing arguments that activists set out during the course of the campaign in California and some of the tensions that surrounded their making. I then turn to the question of why the "unfairness" argument was heard so rarely and reflect upon the meaning of its omission. I understand this omission, in significant part, as a pragmatic response to the recent wave of anti-immigrant anxiety that has recently swept this country. In a hostile political climate, emphasizing the initiative's negative consequences for Americans' own self-interest is more effective and less risky than representing undocumented immigrants (who are, after all, the apparent source of the public's anxiety) as legitimate subjects of concern and interest.

Yet I also understand the significance of the omission to extend beyond the realm of pragmatic politics. I suggest that the question of whether measures like Prop. 187 treat undocumented immigrants unjustly—and the question of how to articulate the nature of that injustice, if so—are often extremely problematic for these measures' critics in both normative and analytical terms. To be sure, the question of the measure's justice may be perceived as largely irrelevant by some of the initiative's more mainstream opponents, who understand the unauthorized presence of these immigrants to place them outside the scope of common normative concern by legal definition. But I suggest that for many progressives, including progressive scholars, who instinctively oppose Prop. 187, the matter of the measures' injustice in principle is far more troubling. For, on the one hand, progressives are fundamental-

ly committed to challenging the systematic exclusion and subordination of classes of people in our society, and by this measure, Prop. 187 and its progeny plainly must be condemned as unjust. At the same time, however, most progressives tend to think about justice in distinctly national terms; they tend to collectively possess what I call a "national political imagination," one which regards the national community as the predominant community of normative concern and presumes the legitimacy, and perhaps the necessity, of maintaining boundaries around it. This nationally informed vision of social life, I argue, stands in tension with progressives' broader commitments against social marginalization, and it gets in the way of our ability to robustly articulate the interests of undocumented immigrants in this society.

I should make clear at the outset (if it is not clear already) that I am a staunch opponent of Prop. 187 and similar anti-immigrant measures. Yet I also count myself among those who have struggled to articulate the basis for that opposition—not merely in strategic terms but also as a matter of principle. Addressing the status of undocumented immigrants requires progressives—activists and scholars alike—to confront important tensions within our own commitments (diverse and multiple though they are) concerning the normative significance of national boundaries. The recent wave of immigration-related anxiety in this country presents this question in very stark terms and provides us with an opportunity for critical self-reflection on this difficult subject. The following reading of opponents' rhetorical efforts to combat measures like Prop. 187, and the various questions I pose in response, are offered in the interests of contributing to such a project.

II.

In order to convince California voters to reject the Prop. 187 ballot initiative, it was up to opponents to provide them with reasons to vote "no." Articulating these reasons, it turned out, was a delicate task, since the art of political campaigns requires fashioning a message that simultaneously reaches as many and offends as few people as possible—and the possibilities for offense on the subject of immigration are, unquestionably, immense. A variety of opposition groups worked throughout the state to defeat the measure, and they often differed amongst themselves as to how best to frame the arguments. But in the end, the opposition's message was fairly consistent in outline, and was com-

prised of three principal claims.⁷

The first claim was that Prop. 187 is objectionable because it is racist or xenophobic. In its most trenchant form, the racism argument charged that supporters of Prop. 187 are motivated by animus against the growing population of Latinos in California, Mexicans in particular; it also charged that the initiative's "reporting requirements" will allow for a widespread campaign of racial harassment against people of color in the state.⁸ A "softer" version of the argument emphasized that ethnic minorities in the state will be affected disproportionately by the measure, since social service providers will often wrongly assume that people of color are undocumented;⁹ it further stressed that the initiative's terms will create the perception, if not the reality, of racial scapegoating, thereby fanning flames of ethnic strife in the state.¹⁰ Either by

7. I should emphasize that my characterization of the campaign and the arguments it proffered in Parts I and II of this essay represent not so much reportage as an interpretive reading of the dynamics of argument and omission that characterized the "No On 187" campaign. While grounded in the particulars of the campaign as it unfolded, my purpose here is to highlight silences and tensions, both covert and expressed, characterizing the campaign, as well as the parties' public postures. Various players involved in opposition to the initiative may well disagree with aspects of my reading—although some of them have provided me with information and views which have formed the basis of my own thoughts here.

8. For example, Taxpayers Against 187, one of the two principal opposition organizations, repeatedly emphasized that "the people behind 187 (namely, the Federation For American Immigration Reform, or FAIR) have close ties to a White Supremacist Group," called the Pioneer Fund, which Taxpayers characterized as "a secretive group that believes in the genetic superiority of the white race." See generally Taxpayers Against 187, Memo to Opponents of Proposition 187 RE: Press Coverage of Prop. 187 Promoters, Campaign Literature (on file with the author).

For post-mortem analysis of the initiative which stresses its racial motivation, see, e.g., Duane Campbell & Eric Vega, *Immigrants' Rights After NAFTA: The Struggle Against Prop. 187*, DEM. LEFT, Jan-Feb 1995, at 18 ("Make no mistake about it. This was an anti-Mexican, anti-Latino campaign. While the Governor [Republican Pete Wilson] said he welcomed legal immigrants, the photos, the references, and the scapegoating were clear. Governor Wilson and the Republican party gave over \$400,000 to the Yes campaign, and he used most of his commercials to promote stereotypes and prejudice.").

9. See, e.g., Mexican American Legal Defense and Education Fund, (MALDEF), Information on Proposition 187 (undated campaign literature, on file with the author) ("Prop. 187 creates a police state mentality. It would force public officials to deny vital services and report anyone they 'suspect' might not be a legal resident, but Prop. 187 does not define the basis for suspicion. This increases the probability of discrimination. Will the suspicion be based on the way you speak? The sound of your last name? The color of your skin?") See also *Don't Panic*, NEW REPUBLIC, Nov. 21, 1994, at 7 ("If Proposition 187 passes, no one doubts that a Hernandez would be more suspect than a Smith"); Isaac Guzman, *Students At UCLA Protest*, L.A. TIMES, Oct. 7, 1994, at B1 ("More than 200 boisterous UCLA students and civil rights activists marched through the Westwood campus Thursday, some saying that Proposition 187 would subject them to unwarranted racial stereotypes. At a rally after the march, Miya Iwataki of Californians United Against Prop. 187 decried what she saw as the creation of 'an environment ripe for racism' by 'save our state' proponents.").

10. For example, in a statement deploring the passage of Prop. 187, the National Conference

design or inadvertence, therefore, Prop. 187's measures will make California a less hospitable place for its minority population.

The racism critique is clearly a powerful and indispensable critique of the initiative; there is simply no way to address Prop. 187 without recognizing its deep imbrication in a politics of racial anxiety in this country—and many Californians no doubt recognized as much. But despite its importance, this argument only goes so far. For as it turned out, African-Americans and Asians ended up voting for Prop. 187 in surprisingly large numbers, and the Hispanic vote in favor was substantial as well.¹¹ The likely reason for such broad-based minority support (despite the initiative's clear racial overtones) is that it formally targets only one relatively small segment of the immigrant population—that is, immigrants without legal immigration papers, or the undocumented.¹² Most voters in the state, including minority voters, apparently saw the initiative less as a referendum on ethnic relations than as a response to the illegal immigration status of one specific group of newcomers and voted accordingly.¹³

The "illegality" issue, of course, lay at the heart of the pro-187 message. Supporters promoted the initiative, in instrumental terms, as a sure-fire method of controlling undocumented immigration; the claim was that undocumented immigrants come to this country in order to obtain social benefits, so that making those benefits unavailable will deter people from coming in the first place—or will induce those who are here to go home.¹⁴ They also promoted the initiative as a much-

of Catholic Bishops stated that the initiative "established an intimidating tone that could foster 'harassment of persons who may look or sound "undocumented."'" David Gonzalez, *Bishops Assail An Initiative About Aliens*, N.Y. TIMES, Nov. 18, 1994, at A1.

11. Fifty-six percent of African-Americans voters and fifty-seven percent of Asian-American voters reportedly supported the proposition, as did thirty-one percent of the state's Hispanic voters. *After Prop. 187: Heading North*, ECONOMIST, Nov. 19, 1994, at 29.

12. Broadly speaking, undocumented or "illegal" immigrants are people who either entered this country without formal permission, or who entered legally but subsequently violated the terms of their visas. The undocumented are estimated to represent approximately 13% of the total number of foreign-born persons (including naturalized citizens) currently residing in the United States. MICHAEL FIX & JEFFREY R. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 21-25 (1994). On the other hand, approximately 43% of the country's undocumented reside in California. Elizabeth Kadetsky, *Bashing Illegals in California*, NATION, Oct. 17, 1994, at 416-17.

13. See, e.g., Evelyn C. White, *Immigration A Tough Call For Blacks: Proposition 187 Debate Has Stirred Deep Feelings*, S.F. CHRON., Oct. 10, 1994, at A1.

14. As Alan C. Nelson, former Commissioner of the Immigration and Naturalization Service and one of the initiative's key sponsors, stated: "Proposition 187 contains several components aimed at stopping illegal immigration [and will] prompt[] many illegal aliens to return to their

needed method for preventing an outlaw population from brazenly robbing Californians of their hard-earned tax-dollars. As the initiative's sponsoring organization, "Save Our State" (or S.O.S.) put it, "it's time to stop rewarding illegals for successfully breaking our laws."¹⁵ Given the resonance of these arguments for many people in the state, opponents of Prop. 187 had to go beyond a critique of the initiative on grounds of racism to address the specific anxiety over illegal immigration promoted by the "Yes" campaign.

Opponents, therefore, set out two additional arguments against the initiative, each of which addressed the illegal immigration issue directly.¹⁶ First, opponents sought to refute supporters' instrumental claim that denial of social benefits to the undocumented will serve as an effective method of immigration control. Opponents produced data showing that undocumented immigrants come to this country not to avail themselves of public medical services and public education but to work and to join their families.¹⁷ According to this "no deterrence"

home countries. Proposition 187 provides the only comprehensive vehicle to accomplish this goal." Alan C. Nelson, *Proposition 187: An Important Approach to Prevent Illegal Immigration*, 2 HUMAN RIGHTS BRIEF 8 (Winter 1995).

Notably, emphasis by Prop. 187's supporters on the immigration-control objectives of the initiative serves to undermine the position of the state of California in pending federal litigation against the initiative. Plaintiffs have charged, with substantial success so far, that to the extent California is engaged in "immigration regulation," the measure is preempted by federal law. For a general discussion of the preemption question in the immigration context, with special attention to Prop. 187, see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994); Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994). See also Gregorio T. v. Wilson, No. 94-7652 (MRP) (C.D. Cal. Nov. 20, 1995) (partial summary judgment).

15. S.O.S., Save Our State, California's Illegal Immigration Control Initiative (undated promotional flyer) (on file with the author); Anna Cekol et al., *Backers of Anti-Illegal Immigrant Petition Deliver Signatures*, L.A. TIMES, May 17, 1994, at A3 ("We've allowed California to be a welfare state for illegals too long," said one of the Initiative's key sponsors.).

16. Many opponents nevertheless characterized the "illegality" question as a mask for hostile racial attitudes. See, e.g., John Roemer & Marta Sanchez-Beswick, *Can SOS Be Stopped?*, S.F. WEEKLY, Aug. 24, 1994, at 13 ("Backers of Prop. 187 want to 'Save Our State' from a supposed flood of undocumented immigrants. But defiant Latino activists say the real emergency is the rising tide of bigotry and racial scapegoating.").

17. See, e.g., Mexican American Legal Defense and Educational Fund, Preliminary Section-by-Section Analysis of Proposition 187, June 30, 1994, at 3 (on file with the author) ("[T]he underlying premise of the initiative is that immigrants come to the U.S. to receive public benefits and services. In fact, immigrants come for jobs, for family reunification and to flee persecution If anything, public benefits are the last thing immigrants want from this country [U]ndocumented immigrants tend to avoid any institution that even resembles gov-

argument, Prop. 187 won't work on its own terms; it won't do what it is ostensibly meant to do, which, once again, is to control unauthorized immigration.

Second, opponents of Prop. 187 made the consequentialist argument that, far from solving the state's social problems, the initiative would lead to frightening social pathologies for the people of California. They contended, for example, that to impose illiteracy on a class of children in the state will only undermine both the economy and the democratic fabric of society.¹⁸ Similarly, they pointed out, people afraid to go to the doctor will simply create the conditions for a public health catastrophe and will end up costing the state more money later on.¹⁹

ernment or official authority.") Opponents pointed out, in addition, that under the law as it existed prior to Prop. 187's passage, undocumented immigrants were already excluded from access to all public services other than education, emergency medical care and school lunch programs in any event; thus, the charge that access to social services motivates them to come to this country is simply nonsensical. *Id.*, at 2-3.

18. Angelica Quiroga, *Copycat Fever: Proposal To Ban Social Services For Illegal Aliens*, 8 HISPANIC No. 3, at 18 (1995) ("Opponents of Proposition 187 . . . contend that the social damage created by an increase in juvenile delinquency and illiteracy are far too costly"). Justice Brennan made this same argument in *Plyler v. Doe*. "It is difficult," he wrote, "to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime" already faced by the nation. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

19. See, e.g., Paul Feldman, *Proposition 187: Measure's Foes Try to shift Focus From Walk-outs To Issues*, L.A. TIMES, Nov. 4, 1994, at A3 ("At a Los Angeles news conference, top Los Angeles health officials said passage of 187 would have drastic health repercussions for the public. 'If we do not immunize undocumented children, we will increase the incidence of measles, whooping cough, mumps, rubella, diphtheria and hepatitis B in all children, not just the undocumented,' said Dr. Brian D. Johnston, secretary of the Los Angeles County Medical Association [He said, furthermore, that] '[e]very dollar spent on prenatal care saves between \$3 and \$10 later on in caring for babies who are born with medical problems that could have been prevented Every dollar spent on immunization saves between \$10 and \$14 in future disease and disability costs.'").

In addition, critics argued that Prop. 187 would serve to substantially undermine efforts to fight crime. See, e.g., Californians United Against Prop. 187 (San Jose), Statement of Opposition to Proposition 187 (undated) (on file with the author) ("By requiring law enforcement agencies to report to the Immigration and Naturalization Service (INS) any individuals they suspect to be undocumented, criminals would prey upon the entire community because many witnesses and victims would fear coming forward because of the possibility of being reported to the INS. This provision would severely undermine efforts in many cities to implement community policing and other effective models of police-community cooperation.").

Opponents also objected to the initiative's requirements that teachers and health care workers and other social service providers verify the legal status of students and service users on grounds that it would turn providers into tools of a "big brother state," with serious civil liberties concerns for everyone. See Californians United Against Proposition 187, No On 187 (undated campaign material, on file with the author) (Prop. 187 will "create a 'big brother' police state as people are forced to turn in one another as suspected of being undocumented.").

Each of these latter arguments against Prop. 187 was important to make because each appears to be correct as a matter of fact. Research on the causes of undocumented immigration indicates that these immigrants come to this country primarily for employment and family reunification purposes, so that denial of social benefits will poorly serve restrictionist objectives.²⁰ Likewise, both common sense and expert opinion suggest that exclusionary measures such as these will, in fact, produce frightening social pathologies.²¹

In addition to the consequentialist arguments noted here and in the text, opponents also argued that passage of Prop. 187 would cost the state billions of dollars in federal funding annually. Federal law prohibits release of information about publicly funded schools and universities, *see* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232 *et seq.*, and Prop. 187 opponents argued that the initiative's reporting requirements would stand in direct contravention of these provisions, thereby jeopardizing millions in federal education funding to California. *See* Beth Shuster, *Prop. 187 To Cost L.A. Schools Put At \$450 Million*, L.A. TIMES, Sept. 21, 1994, at B1.

20. *See, e.g.*, Wayne A. Cornelius *et al.*, *Introduction: The Ambivalent Quest for Immigration Control*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE*, 3, 37 (Wayne A. Cornelius *et al.* eds, 1994) ("[T]here is little empirical evidence for the proposition that availability of social services or entitlements is a powerful magnet for would-be illegal entrants, as compared to other demand-pull factors.").

Professor Cornelius has argued elsewhere as follows:

Having spent the past 20 years studying Mexican migrants to California, most of whom entered illegally, I have yet to encounter a single one for whom getting access to some tax-supported service was the principle reason for coming here.

In my own studies, as well as those of dozens of other researchers, only 2% to 5% of would-be migrants or those interviewed on U.S. soil mentioned social services as even a secondary or contributing factor in their decisions to migrate. In all extant studies, the availability of higher-paying jobs and family ties with immigrants already living in this country were the overwhelming incentives [Furthermore], [i]t is inconceivable that an immigrant family, in many cases containing at least some members who are here legally, a family that is already permanently settled in California, with at least one member of the household regularly employed, would pack up and return to a place where they have no viable economic options and no possibility of attaining anything remotely resembling even a modest U.S. standard of living If serious research is any guide, the vast majority of undocumented immigrants and their children who have been living continuously in California for five years or more will stay here, whether or not [restrictive social measures] are approved.

Wayne A. Cornelius, *Don't Vote for a Fix That Won't Work*, L.A. TIMES, Oct. 28, 1994, at A11.

21. Professionals in many fields have predicted that the enforcement of Prop. 187 will substantially undermine the health and well-being of American society.

Law enforcement officials, for instance, have argued that Prop. 187 could exacerbate crime by rendering immigrants afraid to cooperate in community policing efforts. *See You May Be Surprised At Who's Against Prop. 187; Conservative, Business, Police Leaders See Measure as Grave Mistake*, L.A. TIMES, Nov. 6, 1994, at B2. The public health threats posed by measures like Prop. 187 are also severe. Dr. Bernard Lo, a medical ethics expert from the University of California, has argued that requiring medical personnel to report patients' immigration status may

Compelling as these arguments are, however, it is worth noting that their precise formulation was sometimes the source of substantial disagreement among different groups of Prop. 187 opponents. With respect to the "no-deterrence" argument, some opposition groups—including the mainstream Taxpayers Against 187—bent over backwards to assure the public that they shared its concern over illegal immigration, and agreed it has to be controlled; they simply contended that Prop. 187 is not the most effective method for achieving that goal.²² As an alternative, they and their allies affirmatively called for sending the National Guard to the U.S.-Mexican border and toughening enforcement of employer sanctions laws.²³ Other opposition groups, like the more progressive Californians United Against Prop. 187, made efforts to avoid such inflammatory restrictionist rhetoric; they commonly charged that Prop. 187 supporters were engaged in "immigrant bashing,"²⁴ and if pressed on the

well give rise to increased spreading of tuberculosis, among other epidemic diseases. He writes: "Proposition 187 supporters argue that those who are ill will return to their native countries for medical care. It is equally plausible that people will deny illness, try home remedies, obtain medications from friends or delay seeking care, thereby worsening their medical conditions and potentially threatening public health." Tal Ann Ziv & Bernard Lo, 332 NEW ENG. J. MED. 1095, 1096-97, Apr. 20, 1995. (In fact, although most provisions of Prop. 187 have yet to be enforced, many undocumented immigrants have already been deterred from seeking needed medical care, sometimes with fatal consequences. See, e.g., Lee Romney & Julie Marquis, *Calif. Measure Contributed To Boy's Death, Activists Say*, PHIL. INQUIRER, Nov. 24, 1994, at A4; P. Burdman, *Woman Who Feared Prop. 187 Deportation Dies at S.F. General*, S.F. CHRON., Nov. 26, 1994, at A14.) Lo has argued, in addition, that the initiative's reporting requirements would "harm[] medical professionalism" because it would require "the potentially unlimited disclosure of medical information and will undermine medical confidentiality." Ziv and Lo, *supra*, at 1095. For these and other reasons, the California Medical Association and the California Association of Hospitals and Health Systems opposed the measure. *Id.*

22. "Illegal immigration IS a problem, but 187 won't fix it. 187 will only make a bad situation worse . . . It does absolutely nothing to beef-up enforcement at the border or crack down on employers who break the law and knowingly hire illegal immigrants." Taxpayers Against 187, "Memorandum To Opponents of Proposition 187," (undated), at 2 (on file with author).

23. *Id.* Additionally, California Senator Barbara Boxer (Dem.), an opponent of Prop. 187, supported supplementing border patrol agents with "'well-trained, well-equipped' military personnel as an innovative solution to that state's illegal immigration problem." *Senator's Plan To Fight Illegal Immigration Shunned By Pentagon*, Los Angeles Times, August 7, 1994, at A19. Along with California Senator Diane Feinstein (Dem.), who is also a Prop. 187 opponent, Boxer has also "suggested that a peso loan be linked to Mexico stopping illegal immigrants from crossing the border." Susan Ferriss, *Tougher Weapons Against Illegals*, S.F. CHRON., Feb. 24, 1995, at A2. And Kathleen Brown, the unsuccessful Democratic candidate for the governorship in 1994, and likewise a Prop. 187 opponent, "favors using military troops at the border and wants to issue tamper-resistant Social Security cards to make it harder for illegal workers to get jobs." Maria Puente, *Illegal Immigration: An Ignitable Issue*, USA TODAY, Apr. 4, 1994, at A8.

24. See generally Elizabeth Kadetsky, "Save Our State Initiative": Bashing Illegals In California, NATION, Oct. 17, 1994, at 416; A New Initiative For Immigrant-Bashing (Editorial), S.F.

border control issue, they tended to argue that the most effective way to deter undocumented immigration is to enforce the nation's wage and hour laws.²⁵

There were also differences amongst opposition groups over how to frame the consequentialist "Prop. 187 will be bad for Californians" argument. In particular, Taxpayers Against 187 commonly campaigned against the initiative by warning that its passage would result in an increase in truancy and gang violence in the state—on the theory that kids who are kept out of school are likely take to the streets.²⁶ Taxpayers also warned of the health threats posed by the initiative by declaring that passage of Prop. 187 would result in immigrants "spreading disease throughout the state."²⁷ Many progressive opponents, on the other hand, strongly objected to what they regarded to be the not-so-veiled appeals to racist and classically nativist anxieties in these formulations.²⁸

CHRON., June 13, 1994, at A22.

Additionally, opponents sometimes argued that the generalized hostility toward undocumented immigrants embodied in measures like Prop. 187 serves to mask the fact that they contribute more to the overall economy than they derive from it in the form of tax-supported services. *See, e.g.,* Mexican American Legal Defense and Educational Fund, Preliminary Section-by-Section Analysis of Proposition 187, June 30, 1994, at 1-2 (on file with the author) (While "Proposition 187 claims that the people of the state are suffering economic hardship caused by the presence of undocumented immigrants . . . [e]very reputable study which has been undertaken to date shows that immigrants—both documented and undocumented—contribute far more in tax revenues and to the economy than they utilize in government services.").

25. Conversation with Lina Avidan, Californians United Against Prop. 187 (Feb. 11, 1995). *See also* Robert Scheer, *The Dirty Secret Behind Proposition 187: If Wilson Was Serious About Illegal Immigration, He'd Put Muscle Behind the Labor Laws*, L.A. TIMES, Sept. 29, 1994, at B7.

26. "187 is opposed by law enforcement because it will mean MORE crime, not less. It will kick an estimated 300,000 kids out of school and onto OUR streets, with no supervision." Taxpayers Against 187, Memorandum, *supra* note 8, at 2.

27. Patrick J. McDonnell, *Foes of Prop. 187, Toeing A Difficult Line*, L.A. TIMES, Sept. 26, 1994, at A16. *See also* Marc Cooper, *The War Against Illegal Immigrants Heats Up*, VILLAGE VOICE, Oct. 4, 1994, at 28 (quoting an Orange County Democratic candidate for state assembly, who opposed Prop. 187, as follows: "'Do you really want people cooking your food, cleaning your babies and taking care of your old folks when they have no access to health care?'").

28. *See, e.g.,* Lisa Duran et al., *Prop. 187: Where do We Go From Here?* FORWARD MOTION, Jan. 1995, at 11, 13-14:

In the name of 'realism,' some coalitions focused their appeal on the relatively large bloc of moderate-to-conservative Reagan democrats . . . By appealing to the self-interest of this admittedly racist and anti-immigrant voter bloc, they may have jeopardized the long-term struggle for immigrant rights . . . Let us be clear. The groups desperately trying to defeat Prop. 187 were up against daunting electoral realities. But while a debate about electoral tactics is appropriate, we oppose any public documents that reduce the humanity of immigrants or reinforce the ideology of racism and xenophobia.

III.

Despite these and other differences in style and approach among members of the opposition, however,²⁹ what is striking in retrospect is the relatively narrow range of arguments that were made against Prop. 187 by opponents overall, and the corresponding absence of certain sorts of arguments almost entirely. Especially notable was the near-complete omission from the public debate of one particular opposing argument which might have seemed, in theory, an obvious one to make: this is the argument that Prop. 187 should be rejected on grounds that its treatment of undocumented immigrants is unjust.³⁰ I say that this argument might seem an obvious one to make given the express terms of the initiative itself. Prop. 187 is, after all, a law that specifically targets undocumented immigrants for social exile from the most basic institutions of our society; to say that it imposes on them a comprehensive form of legal apartheid is hardly mere hyperbole. One might think

See also Kadetsky, *supra* note 6, at 421 (Taxpayers Against Prop. 187, "an effort of the Republican-leaning P.R. firm Woodward & McDowell, has spent so much energy nodding its head about the presumed 'problem' of illegal immigration that individuals like Maria Erana from the American Friends Service Committee in San Diego have been left with the feeling that 'even if Prop. 187 is defeated, the use of these kind of arguments will be detrimental to all of us afterwards.'").

29. Perhaps the issue that most divided opponents of Prop. 187 concerned the demonstrations by Los Angeles students—including thousands of high school students who had walked out of classes—against the initiative in the days before the November balloting. The demonstrations' most controversial aspect was that many of the students carried Mexican and Salvadoran flags; and images of the flag-waving students were widely disseminated by the media during the days before the election. Dick Woodward of the consulting firm Woodward & McDowell, which managed the "No" campaign for Taxpayers Against 187, declared after the election that the marchers had "polarized the issue." "We cringed every time we saw [images of flag-waving students.] We didn't want them to march, because we knew exactly what would happen, and we have the polling data to show that's exactly what did happen." Patrick J. McDonnell, *State's Diversity Doesn't Reach Voting Booth*, L.A. TIMES, Nov. 10, 1994, at A1; *see also* Robert Suro, *California Teenagers Rise Up; Latino Marches Add Unpredictable Element as Proposition 187 Vote Nears*, WASH. POST, Nov. 5, 1994. Some members of Californians' United Against Prop. 187 also expressed concern about the marches on tactical grounds. Conversation with Lina Avidan (Feb. 11, 1995).

30. When I speak of the absence of justice arguments in the debate, I refer to the formal positions put out by the principle organizations opposing the initiative. Many people, of course, regarded the initiative as unfair to the immigrants and said so amongst themselves, but such sentiments were rarely expressed in general public fora. Journalist Ruben Martinez has recently made the same observation; *see* Ruben Martinez, *Fighting 187: The Different Opposition Strategies*, NACLA: Report On The Americas, Vol. XXIX, No. 3, Nov/Dec 1995, at 32 ("Absent from the discourse of most mainstream institutions (and elected officials) [was] word on the fate of the undocumented, who are, at least ostensibly, the direct target of 187.").

that the damaging effect of these measures on their designated objects would be an excellent—and indispensable—ground for political criticism.

Yet during the debate over Prop. 187, such arguments were rarely heard—with only two consistent exceptions. First, church-based organizations often objected to the initiative on grounds that it represented an affront to the immigrants' "human dignity."³¹ Second, claims that the initiative treated its designated objects unjustly were heard sometimes on behalf of undocumented children—"innocent children," as they invariably were described, who should not be made to suffer for the sins of their parents.³² Otherwise,³³ what the public mainly heard—in

31. Cardinal Roger Mahoney, Archbishop of Los Angeles, criticized Prop. 187 "within the biblical perspective that sees every human person as created in the image of God and therefore endowed with an innate dignity and worth. It is a society's duty, the Cardinal concludes, to protect this dignity, not to undermine it, as Proposition 187 would do." *The Territorial Imperative, California Style* (Editorial), *AMERICA*, Nov. 5, 1994, at 3. Archbishop John R. Quinn of the San Francisco Archdiocese also denounced Prop. 187 as "a great wound to humanity." See Coalition For Immigrants Rights and Services, 187 Update, No. 2, Dec. 8, 1994, at 3. See also Bee News Services, *Wilson Links Prop. 187, Mandatory ID Cards*, *FRESNO BEE*, Oct. 26, 1994, at A1 (At an event in Sacramento, local religious leaders called the measure an 'affront to humanity' that particularly targets innocent children . . . [According to Bishop William Weigand,] "'we have to be concerned about the human dignity and the sacredness of all of our people, including those who happen to be illegal immigrants.'").

32. Of course, defending the interests of the "innocent child" assigns culpability to the adult undocumented immigrant by implication. Justice Brennan set out the contrast between innocent child and culpable adult in its fullest form in *Plyler v. Doe*, 457 U.S. 202 (1982), a case in which the Supreme Court struck down a state law effectively barring undocumented immigrant children from the public schools. The "innocent" undocumented immigrant children, he wrote, "'can affect neither their parents' conduct nor their own status.' Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220, (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). For further discussion of the culpable adult/innocent child distinction in the *Plyler* opinion, see Linda S. Bosniak, *Membership, Equality and The Difference That Alienage Makes*, 69 N.Y.U. Law Rev. 1047, 1121-23 (1994); see also T. ALEXANDER ALEINIKOFF, *GOOD ALIENS, BAD ALIENS AND THE SUPREME COURT, IN DEFENSE OF THE ALIEN*, 46, 48 (1986); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 55 (1988).

33. In addition to the exceptions indicated in the text, I should note that many individuals stepped forward to make their moral opposition known. For just one example, see Ernie McCray, *A School Principal Speaks Out Against 187* (Editorial), *SAN DIEGO TRIBUNE*, Nov. 4, 1995 (reprinted in) *NACLA: Report on the Americas*, Vol. XXIX, No. 3, Nov/Dec 1995:

Despite the passage of Proposition 187, my disposition remains the same. I will not, in any way, play a role in willfully hurting another person.

I have sat at the back of the bus. I've had someone tell me to get my 'black ass' out of a hotel when there were plenty of rooms available. I've skated at the rink on special 'Negro' days.

I know the hurt and humiliation that come with being mistreated. So, needless

addition to charges of racism—were empirically-based predictions that the proposed policy provisions would fail to achieve their stated goal, and arguments highlighting the deleterious effects of the law on Americans (or Californians). The former arguments, of course, are not, by their terms, concerned with matters of justice at all, and although the latter arguments address human interests by addressing the law's social consequences, their concern is the law's effect on *American* well-being, and *American* interests. Even the racism argument, which is fundamentally an argument about justice, most often characterized the problem as one in which United States citizens or lawful permanent residents of color would be either maliciously or mistakenly ensnared by the initiative's provisions. The actual referent in the justice-based race argument, in other words, was generally not the undocumented immigrants themselves but a class of nationals and perhaps lawful permanent residents of color who would be (collaterally or directly) harmed by, or in the process of, efforts to crack down on those immigrants.³⁴

The obvious question, therefore, is how we can account for the omission of the undocumented immigrant as an explicit subject of concern in most opponents' critiques of the initiative. If the initiative is meant to harm, and will in fact harm, a class of people residing and working in the state, why shouldn't the fact of this harm, both intended and actual, serve as grounds for political criticism?

In the case of many of Prop. 187's mainstream opponents, the reason for the omission is probably straightforward: they presume the moral interests of undocumented immigrants to be largely irrelevant. While these critics are concerned with the initiative's human costs, the costs they worry about are those borne by persons presumed to be members of the American national community. Undocumented immigrants—whose presence in this country, as these critics themselves often emphasized, is in violation of national law³⁵—are understood to stand outside that community; and as a result, their interests (beyond those, presumably, in being afforded a minimum of fair procedural treatment) simply don't matter.

to say, there is no way on God's green earth that I could ever treat fellow human beings with such disrespect that I would ask them to prove to me their right to be in this corner of the world.

Id.

34. See, e.g., Guzman, *supra* note 9 ("The general public can't tell the difference between an illegal immigrant and any other person of color," said English major Ryan Masaaki Yokota. "I personally stand to lose a lot if this passes.")

35. See *supra* notes 22 and 23.

For other opponents, however, excising the undocumented and their experience from the "No On 187" message was, I think, more troubling. These latter critics—I will call them the "progressive" critics here—at times wished to make more affirmative arguments on behalf of the undocumented, but they also recognized that an apparently pro-immigrant message would backfire given the current hostile anti-immigrant mood in this country.³⁶ Indeed, since the pro-187 forces had characterized the presence of undocumented immigrants as precisely the problem the initiative would serve to redress, critics considered it good strategy to deflect the debate away from the undocumented, and focus on exposing the flaws in the proponents' own reasoning and methodology. For pragmatic reasons, in other words, they narrowed their arguments.³⁷

On the other hand, the reluctance most progressive critics felt to argue affirmatively on behalf of undocumented immigrants (at least on behalf of undocumented adults) cannot be attributed entirely to the intense wave of anti-immigrant anxiety currently sweeping this country. For, in fact, advocates for immigrants have always had a difficult time figuring out how to frame affirmative arguments on behalf of the undocumented.³⁸ The reason is that advocates invariably find themselves

36. Conversation with Lina Avidan, Californians United Against Prop. 187, (Feb. 11, 1995).

37. Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund published an unusually candid statement about the pragmatic considerations involved in shaping the "No On 187" message. According to Hernandez:

When Proposition 187 came around, we knew we had to strategize. We had to look into the mind of the person who would vote for Proposition 187. The coalition opposed to Proposition 187 hired the best political consultants. For this fight, they had to be Republicans. They also had to have won an initiative that dealt with controversial issues. We hired them, and they were good. They told me not to talk about compassion, so I did not. They said, "You cannot be out in the forefront . . . speaking on this issue. We will put you in the closet. We have got to find the League of Women Voters, people who look like they came from Nebraska, and Orange County types. We are going to get them to speak on the issue." They told me we would talk about self-interest and economics. I said, "Well, I want to win. Let's do it."

Antonia Hernandez, *The Shading of America: Keynote Address Before the 1995 National Conference of Law Reviews*, 26 ST. MARY'S L.J. 927 (1995).

38. This difficulty has existed, I should say, so long as undocumented immigrants have existed as such. Gerald Neuman suggests that the category undocumented immigrant, or "illegal alien," was not a meaningful category in American thought until at least 1875. See Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1898-99 (1993).

On the other hand, formulating arguments on behalf of undocumented immigrants may have been somewhat easier a decade ago when advocates could more easily point to government inaction on the issue—and argue that penalizing the immigrants for the sins and omissions of

constrained by the near-sacred commitment in conventional political discourse to one of the cardinal norms of the system of state sovereignty — that countries have the rightful authority to control both the entry of foreigners into the national territory and (within certain limits) the terms of their membership once present. Advocates have long struggled to formulate a defense of immigrants' rights and interests without appearing to disregard the sovereignty imperative; in practical terms, they have sought to frame their advocacy in such a way as to avoid the (not uncommon) accusation that they favor "open borders"—a charge which, if it sticks, effectively writes them out of the political debate altogether.³⁹ Because undocumented immigrants appear to embody a violation

others is simply unfair. Today such arguments are less convincing—and are less often heard—given the enactment of employer sanctions legislation in 1986 and other concerted government efforts to crack down on undocumented immigration.

39. According to Pro-187 forces: "The defeat of Prop. 187 would be a declaration of open borders. Millions of new illegals will flood into California, swelling the hundreds of thousands who already come here every year." Save Our State (S.O.S.), Proposition 187, The "Save Our State" Initiative: The Fiction and the Facts, Undated Campaign Literature (on file with the author).

Notably, not all immigrants rights advocates are concerned that they will be charged with supporting "open borders;" some affirmatively embrace the notion. For example, the Raza Rights Coalition and the San Diego chapter of the National Chicano Moratorium Committee are sponsoring "a National March/Protest and counter-convention" to be held during the Republican National Convention in San Diego, California Saturday August 10, 1996. According to the organizations, the "demands of the march" will include the following:

Rescind Prop. 187

[. . .]

Abolish the I.N.S. and the Border Patrol

Tear down the false border between Mexico & the U.S.

Annul NAFTA

Impeach Pete Wilson

Electronic Mail Message from Raza Rights Coalition to subscribers of "187resist" mailing list, Aug. 29, 1995 (message on file with the author). See also Martinez, *supra* note 30, at 29, 30, 31 (describing "post-nationalist" anti-187 activists who "decry the line between San Diego and Tijuana. The new thinking—reflected in the popular slogan, 'We didn't cross the border, the border crossed us,'—re-imagines the old Mexico that governed the Southwest before the Mexican American War.").

On the other hand, many progressive advocates have publicly acknowledged the need for immigration control (humanely executed) precisely to avoid being dismissed from the debate (although they also point out that such control efforts are bound to be only marginally effective given the massive global forces, economic and social, which give rise to unauthorized immigration in the first place; see discussion accompanying notes 141-145, *infra.*) . Yet the advocates' willingness to state that border control is politically legitimate (within limits) has its own costs: it tends to reinforce the perception that the presence of these immigrants in this country is itself illegitimate, thus apparently undermining the force of their claims to just treatment (i.e., how can people whose presence here is in violation of law make claims upon the government for the benefits of membership?) Advocates often respond to this problem by pointing out that most

of state sovereignty by definition,⁴⁰ any direct defense of their interests can easily be read as an assault on the very legitimacy of state borders. Under the circumstances, advocates have often found it preferable to frame their message in other terms.

Still, the public outrage over undocumented immigration that is currently convulsing parts of this country has made the invocation of any argument that might possibly be construed as "pro-illegal" that much less attractive to the immigrants' advocates.⁴¹ If ever there were a time

undocumented immigrants come here because there is a persistent demand for their labor, and that demand, in turn, is facilitated by government failure to enforce the wage and hour laws (making undocumented immigrants especially desirable to employers). According to this argument, the immigrants should not be penalized for the sins and omissions of others. This response, though powerful, creates its own difficulties since it suggests that undocumented immigrants undersell domestic labor—a point that advocates are often at pains to deny. For further discussion of the effect of undocumented workers on domestic labor, see text accompanying notes 114-115, *infra*.

40. See generally Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGR. REV. 737 (1991).

41. The fact that the subject of illegal immigration is so highly charged and so politically treacherous arguably accounts for the strategy many immigrants' rights and ethnic rights groups have recently pursued in response to the immigration reform measures now pending in Congress. As of this writing, both the House and the Senate are considering legislation that would not only enhance control of undocumented immigration via greater border patrol and workplace enforcement expenditures, but would also substantially curtail legal immigration to this country. See S. 1394, S. 269, H.R. 2202. In response, many organizations have pursued a "splitting" strategy, urging that legal and illegal immigration be treated as separate and distinct issues. As the major national immigrants' rights coalition put it, joining the issues "unfairly and unwisely punishes legal immigrants and refugees as an overreaction to public concerns about illegal immigration. Moving a sweeping bill that blurs the distinction between illegal immigration and legal immigration will punish those who have played by the rules and waited in line to enter the U.S. legally." National Immigration Forum, H.R. 2202 Alert, Oct. 5, 1995 at 2 (on file with the author). See also Statement of Raul Yzaguirre, President, National Council of La Raza, House Judiciary Committee, June 29, 1995 ("The NCLR takes the position that the U. S. has a right and a duty to control its borders. We are in agreement with the overall goal of the current policy debate; indeed, the critical question is not, 'Should the U.S. control its borders?' but rather, 'How, do we achieve this goal?' . . . [But] NCLR is concerned that the legislation before this Subcommittee goes well beyond the question of preventing illegal entry, including sweeping and dramatic provisions to revise the legal immigration system as well. We believe such changes are unwarranted and unjustified; grappling with legal immigration in the same legislation as immigration control is likely to confuse the issues, and result in approaches which are inadequate on both fronts.").

This splitting strategy was the cornerstone of the Clinton Administration's immigration policy during the first part of his term. See Tom Morgenthau, *America: Still A Melting Pot?* NEWSWEEK, Aug. 9, 1993 ("Bill Clinton's goal, like that of most defenders of continued large-scale immigration, is to drive home the distinction between legal immigration (good) and illegal immigration (very, very bad)."). In fact, for the administration, demonstrating a willingness to crack down on undocumented immigration was understood as crucial precisely in order to safe-

that a "compassion" message might seem counterproductive, this is it.

IV.

Yet if fashioning affirmative arguments on behalf of undocumented immigrants represents a political tightrope act for anti-187 activists, it is also true that the difficulties faced by the initiative's progressive critics are not merely those of practical politics. Their dilemma goes deeper; it is also a dilemma of theory and of principle—and as such, it poses a fundamental intellectual challenge for the left overall. For strategy aside, there remains the question whether, in fact, we should regard Prop. 187's treatment of undocumented immigrants as unjust, and in what respects, if so. Although the injustice of the initiative's measures usually is regarded as axiomatic by immigrants' rights advocates, the question of the measure's justice turns out to be a far more difficult and more profound question for most progressives—including progressive legal scholars—than one might initially suppose.

At the heart of the difficulty is the question of how far progressives' articulated commitment to the pursuit of social justice can be understood to extend. Despite the enormous variety of substantive and methodological concerns that characterize contemporary progressive legal and political thought,⁴² one of its consistent normative themes

guard the legal immigration system from the draconian cuts that some Republicans were threatening; the imperative was "to close the back door so as to keep the front door open," in the conventional formulation. Significantly, however, in 1995, the Congressionally-created U.S. Commission on Immigration Reform—headed by the late Democrat Barbara Jordan—concluded that legal immigration should likewise be curtailed, see U.S. COMMISSION ON IMMIGRATION REFORM, *Legal Immigration: Setting Priorities: A Report To Congress, Executive Summary*, 1995, and the Administration quickly embraced its conclusions. See Janet Hook, *Immigration Culback Urged By U.S. Panel*, L.A. TIMES, June 8, 1995, at A1.

42. As I use the term here, "progressive thought" is concerned very broadly with advancing social criticism of various institutionalized relationships of subordination and exclusion. The term "progressive" can be construed in more affirmative and aspirational terms than these. (For one such understanding, see Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 774 (1992) (characterizing the "progressive" vision as concerned with promoting "autonomy," "rewarding work, education and culture," and "life affirming connections with intimates and co-citizens" that are "free from the disabling fears of poverty, violence and coercion.") But for my purposes here, I am concerned with progressive thought in its critical modes. There are many different scholarly enterprises that will qualify as "progressive" under this understanding, including (but not necessarily limited to) feminist theory, critical legal studies, critical race theory, and some strands of pragmatism, civic republicanism, and law and society scholarship (though not all work in these traditions will qualify all of the time). Once again, what links these projects most consistently for my purposes, are their normative commitments against vari-

has been a commitment to challenging the systematic exclusion and subordination of various classes of people in our society.⁴³ Progressives vari-

ous forms of social subordination and exclusion of classes of people in our society. On the other hand, substantial differences in approach among and between these projects certainly exist; for further discussion, see note 43, *infra*.

I should note that while I include various forms of "critical scholarship" in my list of progressive intellectual enterprises, not all self-described "critical theorists" will agree that their enterprise is a normative one. While one critical scholar describes critical theory as entailing "an emancipatory interest" on the part of its practitioners, see IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 5 (1990), some post-modern critical theorists have criticized the what they have called the "emancipatory metanarratives" characterizing "modern" progressive thought, e.g., JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984), and reject normative legal and political theory almost entirely. E.g., Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139, U. PENN. L. REV. 801 (1991); Steven Winter, *For What It's Worth*, 26 LAW & SOC. REV. 789, 801-07 (1992). Others have argued, in response, that a left critique of normativity is itself incoherent. See Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992), and that there is no inherent contradiction between "a continuing loyalty to a postmodern perspective and the practical implementation of a radical political agenda." Allan C. Hutchinson, *Doing The Right Thing? Toward A Postmodern Politics*, 26 LAW & SOC. REV. 773, 774 (1992). Others still have criticized the post-modern critique of normativity on normative grounds. See Martha Minow, *Partial Justice: Law and Minorities*, in *THE FATE OF LAW* 15, 62-63 (Austin Sarat & Thomas R. Kearns eds., 1991):

Unlike the postmodernists, whose politics often remain hidden or diffuse, the scholars from the margin [who advocate on behalf of women and people of color] feel the urgency of political action and the need for aspiration, direction and change . . . [P]ost modernists may respond, with some force, that I have fallen into the old trap of consoling myths of reason, and have made the particular mistake of treating identities and experiences as essential and grounded rather than shifting and containing their opposites . . . [But any] theory that seems to produce quiescence and a sense of helplessness is not good enough.

See also Martha Minow, *Incomplete Correspondence: An Unsent Letter To Mary Joe Frug*, 105 HARV. L. REV. 1096, 1101, n.19 (1992); see also Handler, *Postmodernism*, *supra*.

43. I make no claim that the literature I characterize as "progressive" is internally uniform and coherent in all respects. In fact, the various strands of work that maintain an "emancipatory" normative commitment, see note 42 *supra*, diverge over extremely important matters. In the first place, concerns with marginalization and exclusion, on the one hand, and subordination and domination, on the other, are not necessarily identical concerns nor are they necessarily expressed by the same authors—although they may be. Furthermore, within progressive literature, scholars often disagree amongst themselves about the ontological status of the various groups of people whose domination and/or exclusion is being protested. While some scholars emphasize the core and distinctive experience and "voice" of members of various subordinated and excluded groups—employing what Sandra Harding has called "standpoint epistemology," see SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 26-29 (1986)—other scholars have criticized the "essentialism" of such formulations. One critique of essentialism protests the tendency in some progressive thought to treat the experience of membership in such groups as monolithic, thereby excluding diverse voices and perspectives *within* the group. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("The problem with identity politics is . . . that it frequently conflates or ignores intragroup difference."); Angela P. Harris, *Race and Essentialism in Femi-*

ously have championed breaking down boundaries against "outsiders,"⁴⁴ dismantling hierarchy and subordination,⁴⁵ "unmasking" and criticizing the exercise of power,⁴⁶ and attending to social "domination

nist Legal Theory, 42 STAN. L. REV. 581 (1990). A second critique of essentialism rejects treatments of identities per se as natural and essential, and emphasizes the contingency and social constructedness of these identity categories even as it pursues progressive critique. See, e.g., AFTER IDENTITY: A READER IN LAW & CULTURE (Dan Danielsen & Karen Engle, eds., 1995) (a collection of essays which criticize the "essentialism" of much left "identity politics," but whose authors are, nevertheless, "committed to social struggle." Danielsen and Engle, Introduction, in *id.*, at xix). See also Cornell West, *The New Cultural Politics of Difference*, in THE CULTURAL STUDIES READER, 212, 213 (Simon During ed., 1993) (critiquing "essentialist rhetoric" of some African-American social criticism, but nevertheless embracing "demystificatory criticism" or "prophetic criticism" . . . which makes explicit its moral and political aims. It is partisan, partial, engaged . . . yet always keeps open a sceptical eye to avoid dogmatic traps, premature closures, formulaic formulations, or rigid conclusions.").

While it is worth keeping these distinctions in mind, they are largely immaterial for my purposes here. To the extent they do bear upon the argument, I will make that clear.

44. See, e.g., Martha Minow, *Partial Justice*, *supra* note 42, at 54 (approvingly describing "the 'outsiders' story" about recent developments in legal and political theory. "This is a story of exclusion and resistance. It is about the theories and experiences of people made marginal by the [insiders story]—women, children, members of racial and religious minorities, and disabled persons."); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RIGHTS L. REP. 7, 9 (1988) (urging attention to "communities of outsiders struggling around their immediate needs—for jobs, for education, for personal safety."); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1724 (1990) (urging importance in pragmatist thought of hearing "the outsiders who have been silent and are now trying to speak").

45. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (seeking to understand and undo "the subordination of women to men"); Duncan Kennedy, *Political Power and Cultural Subordination: A Case For Affirmative Action in Legal Academia*, in Danielsen & Engle, *supra* note 43, at 84 (arguing that "we should structure the competition of racial and ethnic communities and social classes in markets and bureaucracies, and the political system, in such a way that no community or class is systematically subordinated"); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) ("[T]he anti-subordination perspective . . . seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities."); Boaventura de Sousa Santos, *Three Metaphors for a New Conception of Law: The Frontier, The Baroque, and the South*, 29 LAW & SOC. REV. 569, 579 (1995) (urging critique of "all forms of subordination brought about by the capitalist world system: exploitation, expropriation, suppression, silencing, unequal differentiation, and so on.").

46. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence For The Last Reconstruction*, 100 YALE L.J. 1329, 1394 (1991) ("The work of feminists, critical legal scholars, critical race theorists, and other progressive scholars has been the work of unmasking: unmasking a grab for power disguised as science, unmasking a justification for tyranny disguised as history, unmasking an assault on the poor disguised as law."); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 112 (1990) (arguing that "attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful.").

and oppression"⁴⁷ as integral parts of the struggle for social justice. In so doing, they have urged greater attention to those on the losing end of such processes: to the silent, the marginalized, and those located (in one scholar's evocative phrase) "at the bottom."⁴⁸

Undocumented immigrants would appear, at first glance, to constitute precisely the sort of class that progressives are usually most concerned about. These are people who routinely do much of our society's least desirable work—as dishwashers and janitors and sweatshop operatives and farm laborers and nannies and lawn care workers.⁴⁹ While

47. YOUNG, *supra* note 42, at 3. See also Catharine Frances Lee Ansley, *Stirring the Ashes: Race, Class and The Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129, 1073 (1989) (urging the importance of overcoming "relations of white dominance and nonwhite subordination," which she calls "white supremacy"); John Calmore, *Critical Race Theory*, Archie Shepp, and *Fire Music: Securing An Authentic Intellectual Life In a Multicultural World*, 65 S. CAL. L. REV. 2129, 2228 (1992) (arguing that "critical race scholarship provides an oppositional expression that challenges oppression"); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 430 (1984) ("The conditions that make 'rights' seem necessary must be changed, and these conditions cannot be changed as long as women are oppressed."); Mary Joe Frug, *A Post-Modern Feminist Legal Manifesto (an Unfinished Draft)*, 105 HARV. L. REV. 1045, 1067 (1992) (endorsing "using law to oppose the oppression of women."); Richard Delgado, *Storytelling For Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411, 2437 (1989) (urging process of storytelling because "stories about oppression, about victimization, about one's own brutalization—far from deepening the despair of the oppressed, lead to healing, liberation, mental health."); Martha A. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catherine MacKinnon*, 5 YALE J. L. & FEM. 217, 250 (1993) ("I agree with the many feminists who assert the necessity of feminist struggle against all oppression.").

48. Mari Matsuda, *Looking To The Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, (1987). See generally Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1720, 1724 (1990) (urging importance in pragmatist thought of "accepting the significance of the perspective of the oppressed" and hearing "the outsiders who have been silent and are now trying to speak"); Patricia Williams, *The Obliging Shell*, in PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 98, 121 (1991) ("Blacks and women are the objects of a constitutional omission that has been incorporated into a theory of neutrality It is thus that affirmative action is an affirmation; the affirmative act of hiring—or hearing—blacks is a recognition of individuality that includes blacks as a social presence"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1529 (1988) ("[T]he pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups."); Minow, *Making All The Difference*, *supra* note 46, at 16 (urging "taking the perspective of the traditionally excluded or marginal group" as a means of "remak[ing] the meaning of difference.").

49. Undocumented immigrant workers in this country are largely concentrated in the service sector (especially domestic and janitorial services and in restaurants); in the low-wage manufacturing sector (especially garment, electronics and footwear), in construction, and in agriculture (as farm-workers). See Jeffrey Passel, *Undocumented Immigration*, in IMMIGRATION AND AMERICAN PUBLIC POLICY, 487 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (1986), at 181, 192-94; SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* 79-82

they formally are afforded the minimum rights of personhood under the law, they lie entirely outside the law's protections for many purposes,⁵⁰ and they live subject to the fear of deportation at virtually all times.⁵¹ It would be hard to find a group of people who live further at the margins, or closer to "the bottom," than the undocumented.

As a practical matter, however, undocumented immigrants have rarely been treated as the explicit subjects of progressives' concern. Outside the relatively small field of immigration law, undocumented immigrants—and noncitizens in general—have been largely absent in the work of progressive legal theorists.⁵² Indeed, in the various theoretical literatures on exclusion and subordination, there is little indication that the subject of alienage—or of exclusion on account of alienage—is even on the radar screen; most progressives simply seem to ignore

(1988); Saskia Sassen, *Why Migration?* 26 Report on the Americas (NACLA) 14, 17-18 (1992). Their wages, while not routinely below minimum-wage, are low relative to U.S. workers. BARRY R. CHISWICK, *ILLEGAL ALIENS: THEIR EMPLOYMENT AND THEIR EMPLOYERS* 145 (1988). For discussion of the economic effects of undocumented immigrants, see notes 114-115, *infra*.

50. See generally Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988). In particular, undocumented immigrants are ineligible for virtually all forms federally-funded public benefits. See Passel & Fix, *supra* note 12, at 62. They are effectively denied the right to obtain drivers licences in many states, see, e.g., Jerry Gilliam, *DMV, INS to Check New License Applicants*, L.A. TIMES, June 22, 1994, at B3 (California); Marcy C. Fitzgerald, *Bills Would Make Illegal Aliens Illegal Drivers*, TRENTON TIMES, July 25, 1992, at A1 (New Jersey); virtually all states deny them unemployment compensation insurance, see, e.g., CALIFORNIA UNEMP. INS. CODE § 1264(a) (1995) (limiting unemployment benefits to aliens who were lawfully present at time qualifying employment was performed); TEXAS LAB. CODE § 207.043(a) (1996) (same); FLA. STAT. § 443.101(7) (1995) (same); and some states deny them, or substantially limit their access to, worker's compensation and wrongful death benefits. See, e.g., *Collins v. New York City Health and Hospital Corporation*, 206 N.Y.L.J. 27 (1991) (holding undocumented immigrant cannot receive wrongful death benefits for lost wages at U.S. rates); Iver Peterson, *Senate Votes To Toughen Stance on Illegal Aliens*, N.Y. TIMES, Oct. 20, 1995 at BG (describing New Jersey State Senate proposal to deny workers compensation payments to undocumented aliens). Furthermore, even when they are formally protected under the law, they are often ineligible for any remedy associated with the law's violation. See, e.g., Bosniak, *Exclusion and Membership*, *supra*, at 985, 1022-35 (describing lack of availability of remedies for undocumented immigrants who are victims of labor and employment law violations); Maria Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94) (same in employment discrimination context).

51. See generally Bosniak, *Exclusion and Membership*, *supra* note 50. See also text accompanying notes 88-90, *infra*.

52. For examples of scholarship associated with the field of immigration law which examine and critique the status of undocumented immigrants in the United States, see Bosniak, *Exclusion and Membership*, *supra* note 50, Kevin Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law Enforcement*, 1993 B.Y.U. L. REV. 1139 (1993); Gerald Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615 (1981); Ontiveros, *supra* note 50.

the issue of immigration status altogether.⁵³ One measure of this inattention can be found in the routine inventories of oppressed or excluded groups that progressive theorists often set out in their work. Martha Minow, for example, writes of progressives' concern in recent years with the exclusion of "women, children, disabled people and members of religious, racial and linguistic minorities," and of "other disfavored groups includ[ing] incarcerated felons, prostitutes, drug addicts, alcoholics, persons with terminal illnesses, and persons with contagious diseases."⁵⁴ When the inventories get as specific as this, the omission of noncitizens from the list is striking.

The lack of attention paid to alienage, and to illegal alienage in particular, as a category of exclusion and domination in much of the progressive literature no doubt can be accounted for in a variety of ways. Some critics, first of all, may assume that undocumented immigrants are, in fact, present in the critical discourse by way of the attention progressives pay to the exclusion of racial, cultural and linguistic minorities in this country. Necessary as such attention is, however, subsuming alienage-based exclusion into analyses of racial and cultural marginalization is problematic, not merely because not all undocumented immigrants belong to ethnic and racial minority groups,⁵⁵ but also because it fails to capture what is specific about the exclusion experienced by undocumented immigrants, which is constituted, in substantial

53. One partial exception is the examination by Kimberlé Crenshaw of the way in which the irregular legal status of undocumented immigrants works in tandem with racism and gender oppression to produce the specific form of powerlessness experienced by battered immigrant women of color. See Kimberlé Crenshaw, *Mapping the Margins*, *supra* note 43, at 1246-50. Yet Crenshaw's analysis only goes part of the way, for although she *shows* that immigration status structures the experience of these women, she does not *theorize* it: rather, she characterizes the problem as one that arises "[w]here systems of race, gender and class domination converge." *Id.* at 1246. The issue of alienage, *per se*, in other words, is obscured.

54. See, e.g., Minow, *Partial Justice*, *supra* note 42, at 36, 36 n.20. Elsewhere Minow adds "age, height, weight, family membership [and] sexual orientation" to the list.). Minow, *Making All The Difference*, *supra*, note 46, at 112. In this latter list, Minow also mentions "nationality" as a category of exclusion. *Id.* By including nationality, she acknowledges that foreign origin or citizenship can give rise to exclusionary attitudes and practices. However, the word "nationality" is most often associated with "the status of belonging to a particular nation," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 874 (1992); and references to exclusion on account of nationality tend to suggest exclusion based on dislike for the particular nation from which a person hails (i.e., national origin). Alienage, in contrast, denotes the lack of full formal membership (i.e., citizenship) in the state, irrespective of national origin.

55. Although the great majority of undocumented immigrants are from Latin America or Asia, at least 13 % of the undocumented population is of European and Canadian descent. FIX & PASSEL, *supra* note 12, at 24.

part, by their irregular status under the country's immigration laws.⁵⁶ Another possible reason for the absence of attention to alienage in most progressive scholarship is that noncitizens—especially undocumented noncitizens—have mobilized politically *qua* noncitizens only rarely,⁵⁷ and they are quite unlikely to affirmatively assert their lack of citizenship as an identity to be proclaimed and revalued; in other words, there has been no self-conscious mass social movement based specifically on alienage—and on illegal alienage especially—to spur Americans to sit up and take notice. At the same time, public policy debate regarding the general status of noncitizens—undocumented noncitizens especially—has been relatively limited until quite recently.

Today, however, the subjects of alienage and citizenship are squarely on the political agenda in this country.⁵⁸ It therefore seems reason-

56. See text accompanying notes 88-90, *infra*.

57. Various immigrant-based organizations have been actively lobbying against restrictionist immigration reform and anti-immigration welfare reform legislation now pending in Congress. However, these organizations are usually identified with particular ethnic groups or nationalities, and their members are mostly citizens. See, e.g., Testimony of Raul Yzaguirre, President, National Council of La Raza, before the House Judiciary Committee (June 29, 1995) (in testimony on pending immigration legislation, stating that two-thirds of the national Hispanic organization's members are "not immigrants"). Also politically active on immigration issues are resettlement service organizations, immigrants rights groups, and church-based organizations, but the work of these groups is undertaken largely by Americans on behalf of the immigrant and refugee communities, and not by the immigrants themselves.

58. I refer not merely to the campaign over Prop. 187 in California, and its likely analogues in other states, see text accompanying notes 1-5, *infra*, but also the debates in Congress about whether noncitizens, including lawful permanent resident aliens, should be precluded from receiving virtually all public benefits, see, e.g., Personal Responsibility and Work Opportunity Act of 1995, 104 H.R. 4 (1995) (Act that would deny most legal immigrants SSI and Food Stamps, and would permit states to deny such aliens other social benefits, including AFDC and non-emergency Medicaid) (vetoed by Pres. Clinton, January 9, 1996); see also sources cited *supra* note 3. I refer, in addition, to federal and state efforts to amend the federal Constitution to deny birthright citizenship to children born in the United States of undocumented parents. See Citizenship Amendment Introduced, United Press International (Lexis), May 25, 1995 (Twenty House members introduced measure that would amend the Constitution's guarantee of U.S. citizenship to any child born on U.S. soil by requiring that at least one parent have lawful status under federal immigration laws); Michael Winters, *Prop. 187 Sequel Would Narrow Door To Citizenship*, S.F. EXAM., Oct. 16, 1995, at A4 (describing planned California ballot initiative which would register state's support to amend the federal constitution so to deny birthright citizenship to children born in this country of undocumented alien parents.) See also *supra* note 3. I should note that debates over all of these measures are taking place alongside ongoing public controversy over the future of the country's immigration policy. Congress is currently considering legislation that will substantially limit the numbers and categories of immigrants admitted, and will further enhance border patrol efforts and employer sanctions regulations. See generally S. 1394, S. 269, H.R. 2202. For an overview of the pending immigration reform legislation, see *Senate Subcommittee Approves Legal Immigration Reform Measure*, 72 INTERPRETER RELEASES 1605 (1995).

able to assume that the issue will increasingly capture the attention of progressive scholars as well. But even if progressives become more attuned in the coming years to alienage as a category of exclusion and subordination, it is nonetheless hardly clear that undocumented immigrants can simply and unproblematically be added to "the list." The reason, I want to suggest, is that the particular form of marginalization that undocumented immigrants experience, which derives from their legal status as outsiders to the national society, is a marginalization which, at least in part, is presupposed, and possibly even required, by the terms of much progressive thought itself.

Here is the problem: Despite progressives' commitment to challenging systemic forms of subordination and marginalization, the political and legal landscape they are concerned with is most often a national landscape, and the boundaries they seek to dismantle are, most often, political and legal boundaries that exist within the already bounded community of the nation-state. Although there are exceptions,⁵⁹ most progressive legal scholarship produced in this country devotes nearly exclusive attention to relationships among people who are already presumed to be national community members, and in this work, the nation's boundaries provide the frame for analysis.⁶⁰ Sometimes, this

59. The principal exceptions are in the field of progressive international legal scholarship. See text accompanying notes 121-124, *infra*.

60. To the extent that the subject of progressive legal scholars's attention is American law, they are naturally apt to concern themselves with the community in which that law is effective and relevant—i.e., the United States. Much progressive legal scholarship falls into this category. For example, progressive constitutional scholarship in this country is fundamentally concerned with the significance of the American constitutional document and its readings to those to whom the Constitution is addressed: "We The People." See, e.g., Robin West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992) (urging attention to the question "whether our Constitution is desirable . . . [whether it] further[s] the 'good life' for the individuals, communities, and subcommunities it governs"); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499-1500 (1988) (analyzing "American constitutionalism.") Likewise, most critical race theory is concerned with the subordination and exclusion of people of color in the American legal context, see Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (describing her work as a "consideration of race in the American legal context"). And so forth.

At the same time, methodological approaches in progressive legal theory which emphasize interpretive readings of law also often lead to national preoccupations. To the extent, for example, that progressive scholars understand law as "a communal language"—one through which "individuals and groups make meaning" collectively, see Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861, 1862 (1987), they are going to be naturally inclined to attend to the community of those who collectively speak that language and make those meanings—which very often will be a community constituted in national terms. E.g., *Id.*, at 1911 ("Rights can be understood as a kind of communal discourse that reconfirms the diffi-

frame is made explicit, as when scholars directly invoke the United States or "America"⁶¹ or the constitutional Republic⁶² as their community of normative concern. More often, it is entirely unspoken;⁶³ the fact that the normative world which preoccupies progressives is a national world is apparently so obvious, so much a given, as to require no specific assertion at all.⁶⁴ In either case, progressives tend to pos-

cult commitment to live together even while engaging in conflicts and struggles.").

61. As I indicated in note 60, *supra*, many progressive legal scholars make clear that they are concerned in their work with social and legal relations which prevail within the bounds of the United States; their work expressly addresses American law and American society. *See, e.g.,* Radin & Michelman, *Pragmatist and Post Structuralist Critical Legal Practice*, 139 U. PENN. L. REV. 1019, 1048 (1991) (arguing that "hierarchies of race and sex remain cruelly entrenched, economically socially and culturally, in American life," and urging attention to "the informal, ebbed, transinstitutional oppressions of life in America.")

Sometimes, however, the United States appears not merely as the presumed backdrop for the analysis, but as an affirmative normative presence or value. Thus, Mari Matsuda professes a belief in "a collective national soul," Matsuda, *Voices of America*, *supra* note 46, at 129, and she likewise writes: "I can say that as an American, I am choosing as my heritage the 200 years of struggle by poor and working people, by Native Americans, by women, by people of color, for dignified lives in this nation." Matsuda, *When The First Quail Calls*, *supra* note 44, at 10. *See also* Calmore, *supra* note 47, at 2228, 2230 (urging a struggle "to bring oppressed peoples into the national community as American citizens or members of society who are viably integrated within the nation's structures of opportunity, power and privilege" and concluding the article with the query: "Can we save the children so that they will have their chance to save the nation?").

For further discussion of affirmative invocations of the concept of national community in progressive thought, *see* text accompanying notes 109-111, *infra*.

62. In their work, progressive civic republicans likewise invoke a normative community—the "political community," or the Republic—which is more-or-less explicitly depicted as the community of the nation-state. *See, e.g.,* Frank Michelman, *Conceptions of Democracy: The Case of Voting Rights*, 41 FLA. L. REV. 441, 445 (1989) ("The special mark of republican constitutional thought is affirmation of . . . a common interest existent and determinable . . . at the encompassing level of the sovereign or law-making state."); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 717 (using terms "political community" and "state" interchangeably.). Notably, members of the Republic are usually referred to in this literature as "citizens." *See, e.g.,* Michelman, *Law's Republic*, *supra* note 48, at 1503, 1531 (defining "citizenship" as "participation as an equal in public affairs, in pursuit of the common good," whether directly through the state or through various arenas in (national) civil society.).

63. However, even if the national character of the social world that concerns them is not specifically acknowledged, the idea is often conveyed by other means. Use of the terms "society" and "culture" commonly serve as proxies. *See, e.g.,* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) ("Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole."); Elizabeth Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 302 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) ("The idea that legal rights have some intrinsic value is widespread in our culture.").

64. *See* R.B.J. Walker, *State Sovereignty, Global Civilization and the Rearticulation of Po-*

sess what we might call a "national imagination,"⁶⁵ according to which political life is understood to take place in the territorial nation-state, among members of that state.⁶⁶ But if the presumptive normative uni-

litical Space, Princeton University, Center For International Studies, 1988, at 3, 22 ("Most political ideologies and political aspirations now take statist forms of political community as given . . . [For] those concerned with justice, freedom, community and progress within states . . . sovereignty has become normalized.").

65. The phrase is Richard Rorty's. See Rorty, *supra* note 1. (Note, however, that although Rorty asserts that "[p]olitical imagination is, almost always, national imagination," *id.*, he nevertheless believes that the political imagination of the American academic left is insufficiently national in character. See Richard Rorty, *The Unpatriotic Academy*, N.Y. TIMES (op-ed), Feb. 13, 1994, at E15 (critiquing academic left on grounds that "it is unpatriotic. In the name of 'the politics of difference,' it refuses to rejoice in the country it inhabits. It repudiates the idea of national identity, and the emotion of national pride."))

For diverse critical analyses of the "national" or "statist" imagination and its construction, see BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983); R.B.J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993); Martha Nussbaum, *Patriotism and Cosmopolitanism*, XIX BOSTON REVIEW No. 5, at 3 (1994).

66. A word about terminology is in order here. When I use the phrase "national imagination," I refer to a habit of thought which presumes that political community is constituted by ties amongst members of the nation-state, and that the boundaries of the nation-state represent the horizons of political community. Later in the text, I similarly refer to what I call the "nationalist premise," or the "normative nationalism" imbedded in much progressive thought; by these phrases, I refer to the habit (conscious or not) of granting normative priority to nation-state members over perceived outsiders to the nation-state.

Yet use of the words "national" and "nationalist" in this context may lead to some confusion. I should make clear that I do *not* use the words to specifically refer to the distinctive ethnic or cultural identity of a people, as many analysts do. See, e.g., ERNEST GELLNER, *NATIONS AND NATIONALISM* 125 (1983) (defining nationalism as "the principle of homogenous cultural units as the foundations of political life"). Rather, in this context, I use the adjectives "national" and "nationalist" to refer to the nation-state and its attributes. In this usage, it does not matter whether any particular nation-state defines itself largely in ethno-cultural terms, in civic-political terms or otherwise; the word "national" simply serves as an adjectival shorthand for the nation-state, however constituted. This understanding of the term is conventional in much political thought: For example, we commonly speak of "international" rather than "interstate" relations or society, and members of a state are commonly referred to as its "nationals." In such usage, "nation" refers to the (currently predominant) unit of human political organization which is understood to possess sovereignty; i.e., the nation-state. This usage of the term is widespread not merely in popular discourse but among academics as well.

In fact, this latter, state-linked understanding of the word "national" is the sense in which Rorty (whose phrase "national imagination" I have borrowed) uses the term; when he speaks of a "national imagination," he speaks of the imagination associated with people's ties to particular nation-state communities, without any presumption that these ties are specifically cultural or ethnic in character. The example he gives is Roberto Unger's (asserted) imaginative ties to Brazil, see Rorty, *supra* note 1, a country which, as it happens, is a decidedly multicultural and multiethnic state.

In any event, because I use the terms "national" and "nationalist" to refer to attributes of nation-states, I sometimes substitute the terms "statist" or "statism" to describe the habits of mind I am concerned with. Some have critiqued the conflation of state and nation in contem-

verse in the work of most progressive American scholars is the American national community, then undocumented immigrants, who are non-members of the American state by legal definition, present what can only be described as an awkward case.

I do not mean to suggest that progressives' predominantly national vision of social life leaves them unequipped or unprepared in all circumstances to treat undocumented immigrants as subjects of their normative concern. On the contrary, progressives can issue powerful criticism of measures like Prop. 187 from within a national idiom. They can insist, for example, that—withstanding the circumstances of their entry—those undocumented immigrants who live and work among us are entitled to the basic rights of (national) membership by virtue of their contributions to our society, and that to treat them as outsiders and deny them such rights is both a formalist lie and a means of ensuring their continued subordination in the workplace and elsewhere.⁶⁷ They also can protest the social exclusion, by law, of undocumented immigrants on grounds that this country's own articulated political ideals cannot permit it; a democratic and egalitarian political community, they can insist, cannot abide the sort of entrenched caste structure which such exclusion produces.⁶⁸

But compelling as these arguments are, they only go so far. The problem is that the presence of undocumented immigrants does not merely implicate social relations within the national society (undocumented immigrants are not merely "inside-outsiders," to borrow a phrase⁶⁹), nor do they simply spring up here by magic. Rather, they come, from the outside, as part of a global process of formally unau-

porary political discourse, see, e.g., Walker Connor, *A Nation Is a Nation, Is A State, Is an Ethnic Group, Is A . . .*, in NATIONALISM 36, 38 (John Hutchinson & Anthony D. Smith eds., 1994) (criticizing "the propensity to employ the term nation as a substitute for that territorial juridical unit, the state"); see also WALKER, *INSIDE/OUTSIDE*, *supra* note 65, at 164 (critiquing the common "presumption that sovereignty, state, and nation are more or less interchangeable terms."). On the other hand, it has also been suggested that the fact that such substitutions are as common as they are "indicat[es] profound theoretical controversy" about the relationship between the terms. WALKER, *supra* note 65, at 186, n.4.

67. This argument has been made by immigration scholars. See, e.g., Johnson, *Los Olvidados*, *supra* note 52; Bosniak, *Exclusion and Membership*, *supra* note 50.

68. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 142-43 (1989); Bosniak, *Immigrants, Preemption and Equality*, *supra* note 14, at 379.

69. Lea Brilmayer, *Carolene, Conflicts, and the Fate of the 'Inside-Outsider'*, 134 U. PENN. L. REV. 1291 (1986). According to Brilmayer, "[t]he individual who does not participate in political processes, but who is nevertheless subject to the results of those processes, is the 'inside-outsider.' Such persons are inside from the perspective of who can be bound but outside from the perspective of who can participate." *Id.* at 1316.

thorized movements of people across national borders. And sooner or later, progressives must face the question not merely of how undocumented immigrants should be treated once they are here, but also of how to approach the fact of their arrival in the first place. Progressives must, in other words, determine their position on enforcement of national borders against undocumented immigrants.

Yet on this question—the question of the legitimacy of enforcement of the nation's borders, it turns out that progressive scholars are far less equipped or inclined (or both) to offer critique.⁷⁰ Such disinclination or incapacity might at first glance seem unlikely, since progressives are committed, as we have seen, to challenging officially-sponsored social exclusions of classes of people; and enforcement of the border against aspiring entrants, which entails a literal, physical exclusion backed by force, could reasonably be described as the ultimate form of social exclusion. When the provenance of the great majority of these aspiring immigrants is taken into account—they are most often from less developed countries with a history of economic and cultural subordination to the United States;⁷¹ they are most often people of color; and they are very often from the laboring classes in their home societies⁷²—their

70. Usually, progressive scholars tend to avoid or otherwise deflect the question because it is so difficult and discomfiting—and this is something for which they have been criticized. *See Statement of David Martin*, 1994 ASIL PROCEEDINGS 461-462 (1994) (inquiring, in response to panel critical of exclusionary immigration rhetoric and policy: "Is there legitimacy for some restriction? What would the panel propose as a base for immigration control, even if it is only a minimalist system?").

71. For discussions of the way in which many current countries of immigration are historically linked to the United States through histories of colonialism or other forms of economic subordination, *see, e.g.,* ALEJANDRO PORTES & RUBEN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 225 (1990) ("The countries supplying these large contingents of [Hispanic] immigrants were, each in its time, subjects of an expansionist pattern through which successive U.S. governments sought to remold [this] country's immediate periphery. This pattern of intervention undermined the framework of social and economic life constructed under Spanish colonial rule and reoriented it toward North American institutions and culture. The restructuring process preceded, not followed, the onset of massive labor migrations that gave rise to today's major Hispanic communities."); Philip L. Martin, *The United States: Benign Neglect Toward Immigration*, in *Controlling Immigration*, *supra* note 20, at 89 ("[M]ost of today's migration streams have their origins in the colonial or labor recruitment policies of industrial countries."); SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* 9 (1988) (arguing that "U.S. business, military, or diplomatic activities were a strong presence in countries that have significant migration to the U.S.").

72. Analysts estimate that the great majority of undocumented immigrants in the United States are from developing countries in the Third World. According to a recent Immigration and Naturalization Service study, 62% of the undocumented population residing in the United States in 1992 were from Central America and the Caribbean (with only one half of these, or 31% overall, from Mexico), 11% from Asia, 6% from South America, 4% from Africa and 13%

exclusion can seem more problematic still.

Yet as it turns out, progressive thought, more often than not, tends to normatively embrace the very national boundary which serves to effect, and justify, the immigrants' exclusion. This embrace takes both explicit and implicit forms. Explicitly, the left has a long history of national protectionist commitments in economic matters, among which immigration protectionism has figured prominently. To this day, much of the American labor movement is committed to restricting unauthorized immigration—even though many unions support a generous legal immigration policy and labor rights for those who are here.⁷³ Many environmental organizations express even more restrictive views,⁷⁴ and

from Europe and Canada. Robert Warren, *Estimates of the Resident Illegal Alien Population: October 1992*, Immigration and Naturalization Service (Aug. 1993).

Furthermore, while many analysts have emphasized that undocumented immigrants are not the very poorest and least educated members of their home societies, see, e.g., Passel, *supra* note 49, at 194, some have suggested that they are nevertheless "unskilled not only relative to the native U.S. population, but also relative to [their home] population." See GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* 69 (1990).

73. For samples of organized labor's positions on immigration regulation today, see, e.g., Statement by Rudy Oswald, Director of Economic Research, AFL-CIO, to the Senate Judiciary Subcommittee on Immigration, Sept. 13, 1995 (on file with the author) ("We believe that United States workers should have a first claim on jobs in the U.S.A. Wages and working conditions in the United States should not be undermined by workers from other lands."); Statement By Markley Roberts, Assistant Director of Economic Research, AFL-CIO, To The House Committee on the Judiciary, Subcommittee on Immigration, Federal News Service, May 17, 1995 (supporting "employer sanctions as the most effective way to deter employers from hiring illegal aliens."). See also Complaints of Immigrants Come From All Colors, Morning Edition, National Public Radio, July 26, 1993 (reporting that William Lucey, President of the Coalition of Black Trade Unionists, is "among a number of black, Hispanic and Korean leaders who signed on to a petition sent to President Clinton last month urging an immediate moratorium on immigration.").

Nevertheless, as I note in the text, many unions have come to embrace the view that undocumented immigrants who are present and working should be organized—on the grounds that not doing so ultimately serves to undermine unions' power. See, e.g., United Electrical, Radio and Machineworkers of America, Worker Unity: Organizing and Representing Undocumented Workers, Nov. 1987; David Bacon, *Unions Take New Look At Immigrants*, PAC. NEWS SERV., Apr. 20-24, 1992; Peter Rachleff, *Seeds of A Labor Resurgency: A Page From History?* NATION, Feb. 21, 1994. Many also support more vigorous enforcement of employment-protective laws as a means of deterring employers from seeking out undocumented immigrants as employees. See Statement of John J. Sweeney International President Service Employees International Union, [now-President of the AFL-CIO], Sept. 19, 1995, Before The House Judiciary Committee (Full Committee Markup, Immigration Overhaul) (urging a "focus on raising labor standards and improving enforcement in order to reduce the attractiveness of undocumented workers to employers."); Statement by Markley Roberts, *supra*. For further discussion of the increasing receptivity of some unions to organizing undocumented workers, see Bosniak, *Exclusion and Membership*, *supra* note 52, at 995-96.

74. See, e.g., NPG Says 'Yes' To Simpson Immigration Control Bill, PR NEWSWIRE, Mar. 14,

some racial and ethnic rights organizations have supported restrictionist policies as well.⁷⁵ The core impulse fueling left protectionism is the de-

1995 ("The national population and environmental organization Negative Population Growth, or NPG, Inc. today announced that it is moving aggressively into the immigration policy front in an effort to advance immigration reduction legislation in the 104th Congress.") Sierra Club Books recently published a volume which calls for drastic reductions in legal immigration and "serious efforts" to "put an end to clandestine immigration." LEON BOUVIER & LINDSEY GRANT, *HOW MANY AMERICANS? POPULATION, IMMIGRATION AND THE ENVIRONMENT* 115 (1994). Nationally, the Sierra Club has been wracked by an internal struggle during the past two years about the policy it will adopt on immigration matters. Edward Epstein et al., *Campaign Watch*, S.F. CHRON., Oct. 7, 1994, at A12; Barbara Ruben, *Coming to America: Immigrants and the Environment*, 26 ENVIRON. ACTION MAG. 23, June 22, 1994. (The organization nevertheless came out against California's Prop. 187 in 1994. See Epstein et al., *supra*). The National Audubon Society has likewise been divided on the issue of immigration. See Ruben, *supra*.

Other national environmental organizations that have made immigration restriction a priority include Population-Environmental Balance and Carrying Capacity Network. See Population-Environment Balance, Letter to Concerned Citizen (undated, received November 13, 1995) (on file with the author) ("For the 263 million residents of the United States, both native-and foreign-born, *America's current immigration policy is a disaster*") (original italics); Carrying Capacity Network Clearinghouse Bulletin (various issues). The major national restrictionist organization, the Federation For Immigration Immigration Reform, or FAIR, describes itself as a "pro-limits population organization" and has its roots in the population control and environmental movements. See Merrick Carey, *Too Many Americans?* WASH. TIMES, Sept. 6, 1995, at A19.

By contrast, some environmental organizations have affirmatively refused to adopt immigration control as a policy goal. According to a spokesperson for the Natural Resources Defense Council, "[i]t is improper, impractical and immoral for developed countries to try to have stability within their own countries without working to improve conditions for other nations." (quoted in Ruben, *supra*) For further critique, see Cathi Tactaquin, *Finding Common Ground: Population and Consumption*, 26 ENVIRON. ACTION 24 (June 22, 1994).

75. See, e.g., Jack Miles, *Blacks vs. Browns*, ATLANTIC MONTHLY, Oct. 1992, at 41, 58 ("In July 1992, the Black Leadership Forum, a coalition headed by Coretta Scott King and Walter E. Fauntroy, wrote to Senator Orrin Hatch urging him not to repeal the sanctions imposed on employers of illegal aliens under the Immigration Reform and Control Act of 1986. 'We are concerned, Senator Hatch,' the group wrote, 'that your proposed remedy to the employer sanctions-based discrimination, namely, the elimination of employer sanctions, will cause another problem—the revival of the pre-1986 discrimination against black and brown U.S. and documented workers, in favor of cheap labor—the undocumented workers.'") See also Howard Jordan, *African-American Doubts About Immigration*, NACLA Report on the Americas, Vol. XXIV, No. 3 (Nov./Dec. 1994) at 36:

The immigration issue [has] divided the African-American community, with one part of the leadership clearly suspicious of the merits of promoting immigrant rights. Sensitive about high unemployment among African Americans, these leaders see Latino immigrants as unwelcome competition for scarce jobs. [For example], when a 1990 Congressional Accounting Office Study found 'a pattern of widespread discrimination against Latino and Asian Immigrants' in the wake of the Immigration Reform and control Act of 1986, the National Association for the Advancement of Colored People (NAACP) refused to join the calls of Latino civil rights organizations for repeal of the law.

On the other hand, African-American civil rights organizations are not alone in expressing concern about undocumented immigration; Hispanic-American and Asian-American civil rights orga-

sire to enforce what might be described as an enabling boundary around the nation-state: in this view, the nation's borders must be enforced—the boundary between inside and outside must be sustained—so that social justice can be pursued within.⁷⁶

But even if progressives do not advocate immigration protectionism per se (and in progressive legal and political theory, few, if any, do),⁷⁷ many still endorse the national border in a subtler fashion. As I argued earlier, most American progressives approach the United States as the fundamental normative universe in their political lives. They tend to view it as the site in which struggles for justice (or inclusion or equality or freedom) take place, and also as a normative community—the community of people among whom such struggles unfold and among

nizations have done so as well. See, e.g., Testimony of Raul Yzaguirre, President, National Council of La Raza, before the House Judiciary Committee, June 29, 1995 (stating in hearings on pending immigration reform legislation that the "NCLR takes the position that the U. S. has a right and a duty to control its borders. We are in agreement with the overall goal of the current policy debate; indeed, the critical question is not, "Should the U.S. control its borders?" but rather, "How do we achieve this goal?")

For other arguments that immigration hurts domestic minorities, especially African-Americans, in economic terms, see Vernon M. Briggs, Jr., *Immigration Policy Sends Blacks To the South*, 5 CONTRACT 270, 271 (1995) ("For much of the nation's urban black population outside the South, immigration policy is but a revised instrument of institutionalized racism. It provides a way to bypass the national imperative to address the employment, job preparation and housing needs of much of the urban black population."); Nicolaus Mills, *Affirmative Action, Immigration Clash*, NEWSDAY, May 29, 1994, at A42 ("[I]mmigrants don't simply take the low-paying, difficult work that nobody else wants. They take a variety of jobs . . . and in recent years they have not only been challenging native-born minorities for entry-level jobs. They have been challenging them for affirmative-action slots . . . Immigration undermines [the] link between past and present when, as is now the case, a newly arrived immigrant who is also a minority-group member is as eligible for affirmative action as an African-American whose roots go back to the 17th Century."). See also Toni Morrison, *On The Backs of Blacks*, TIME, Dec., 1993, at 57 (arguing that the process of incorporation of new immigrants ordinarily entails a symbolic reenactment of blacks' national denigration and marginalization: "Whatever the lived experience of immigrants with African Americans—pleasant, beneficial, or bruising—the rhetorical experience renders blacks as noncitizens, already discredited outlaws . . . It does not matter anymore what shade the newcomer's skin is. A hostile posture toward resident blacks must be struck at the Americanizing door before it will open.").

76. As one progressive commentator recently put it, however compelling the needs of immigrants can often seem, "[t]here is no credible way to talk about compassion for those living beyond our borders when we have so little regard for the needs of our own poor." Nicolaus Mills, *Lifeboat Ethics and Immigration Fears*, *Dissent*, 37, 44 (Winter, 1996). For similar arguments, see MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 319-322 (1995) (articulating a "pro-worker rationale for immigration restriction").

77. The principle, and influential, exception is MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-52 (1983).

whom they matter.⁷⁸ This is often an unspoken commitment, although again, for some writers, it is made more affirmative or explicit.⁷⁹

But the idea of the nation-state, or the United States in particular, as a community is, by its nature, both exclusivist and exclusionary. The concept of "national community" not only entails the notion of group identity grounded in nation-state membership; it also, and correspondingly, presumes the existence of a category of "others" or outsiders to the community, who are non-members of the nation-state.⁸⁰ Progressives' conception of the United States as a normative community, in other words, implicitly entails an assumption of the naturalness—and perhaps the legitimacy as well—of its outer boundaries.⁸¹ Indeed, the very idea that the national society is a community may even require the sense of boundedness and closure that borders provide: in this view, it is the border dividing insiders and outsiders that helps to construct the experience of community for those on the inside in the first place.⁸²

Of course, the fact that progressives assume the existence of a

78. See *supra* notes 60-66 and accompanying text.

79. See *supra* notes 61-63 and accompanying text.

80. The concept of the "nation" "is crucial to the way a state is linked to its subjects, distinguishing them from the subjects of other states, and to the state's larger environment." Katherine Verdery, *Wither Nation and Nationalism?* 122 DAEDALUS 37, 38 (Summer, 1993).

81. As Michael Walzer has written, "[t]he idea of distributive justice presupposes a bounded world within which distributions take place among a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves. That world . . . is the political community, whose members distribute power to one another and avoid, if they possibly can, sharing it with anybody else." See Walzer, *SPHERES OF JUSTICE*, *supra* note 77, at 31. See also Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1446 (1986) ("A 'community' truly open to all comers is almost a contradiction in terms A community without boundaries is without shape and identity; if pursued with single-minded determination, tolerance is incompatible with the very possibility of community.").

82. See Chantal Mouffe, *Democratic Citizenship and the Political Community*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 225, 234-35 (Chantal Mouffe, ed., 1992):

Political life concerns collective, public action; it aims at the construction of a 'we' in a context of diversity and conflict. But to construct a 'we,' it must be distinguished from the 'them' and that means establishing a frontier, defining an 'enemy.' Therefore, while politics aims at constructing a political community and creating a unity, a fully inclusive political community and a final unity can never be realized since there will permanently be a 'constitutive outside,' an exterior to the community that makes its existence possible.

See also Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391, 1446 (1993) (suggesting that "the community's sense of 'social solidarism' today depends precisely on the exclusion of those who are not citizens.").

boundary between nationals and nonnational others does not, by itself, require that they endorse the precise ways these boundaries are drawn nor the precise manner of their enforcement. Indeed, some progressives have offered devastating criticisms of both.⁸³ Yet assuming as given the existence of national boundaries (as the nation-centered orientation of most progressive thought does) means assuming that those boundaries can legitimately be enforced against outsiders under at least some circumstances—for otherwise, how can any boundaries be said to exist at all?⁸⁴ A community's boundaries serve to separate those on the inside from those without, and to the extent their existence is understood as an inevitable fact of life, the basis for normative critique is substantially limited.

This is not to say, once again, that progressives' nation-centered worldview leaves them no room at all for critique of border enforcement. They still may advance procedural critiques and critiques of the magnitude or scope of border exclusion.⁸⁵ They also may respond to immigration restrictionism with the empirical claim that exclusionary measures at the border will inevitably fail to stanch the flow, and that undocumented immigrants will continue to come despite the government's best efforts;⁸⁶ by this last argumentative move, they are able to shift the normative debate back to the easier question of how undocumented immigrants who are already here should be treated. But the practice of national border control, per se, is not so easily criti-

83. Progressive critics of the country's immigration policy and practice often argue for greater openness to immigrants who seek to come to the United States for purposes of family reunification, employment and safe-haven, and for rights of those noncitizens who are here against many forms of discrimination. They also consistently criticize the procedures pursuant to which the federal government enforces the immigration laws. Among other things, they have challenged what they allege to be increasing violence by federal agents at the national border, overly restrictive detention policies, and insufficient due process in administrative deportation and exclusion proceedings. There are a great variety of fora in which such critiques are advanced. Advocacy organizations publish newsletters which set forth these views; examples include *Immigration Newsletter* (Published by the National Immigration Project of the National Lawyers Guild, Boston, MA); *Immigration Policy Matters* (Published by the National Immigration Forum, Washington, D.C.); *Torch For the Immigrant-Services and Resettlement Community* (Published by the New York Association For New Americans, Inc., New York, NY); *Eye On Immigration Policy* (Published by the Coalition for Immigrant and Refugee Rights and Services, San Francisco, CA). Some American immigration law scholarship advances such critiques as well.

84. A boundary, after all, is "[s]omething that indicates a border or a limit." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1992).

85. See *supra* note 83.

86. Bosniak, *Exclusion and Membership*, *supra* note 50, at 1012-19; Johnson, *supra*, note 52, at 1221. See also *infra* note 144.

cized—and it rarely is. Instead, the position of most progressives on the border can best be described as one of basic acquiescence.

Of course, it is precisely this acquiescence to borders which makes undocumented immigrants such a troubling case for progressive thought. For while their social exclusion usually appears to be deeply objectionable to progressives, their territorial exclusion (at least some of the time) seems somehow inevitable—as a precondition for achieving social justice within the community, and, perhaps, as a necessary condition of the political community's existence altogether. Yet because progressives are surely loathe to say anything that might appear to reinforce the current epidemic of anti-immigrant feeling in this country, they are unlikely to air their confusion (assuming they think about it at all). In fact, they are most apt to avoid the subject of border control altogether.

V.

While progressives can therefore offer apparently powerful criticism of measures like Prop. 187 which mandate the social exclusion of those undocumented immigrants who are already here, they cannot so easily criticize efforts to keep undocumented immigrants out of the national territory in the first place—and they may sometimes even endorse such efforts. A breach exists, in other words, between their potentially robust denunciations of government exclusion of undocumented immigrants in the interior and their acquiescence—whether active or passive—in these same immigrants' exclusion at the border. This breach, as we have seen, produces substantial confusion for progressives about when, and even whether, to regard undocumented immigrants as the subjects of their normative concern.

But the breach raises further difficulties as well. For although some analysts would view these contrasting approaches to border and interior as entirely compatible and even mutually required as a matter of justice,⁸⁷ the two positions, in fact, stand in substantial tension with one another. In the first place, progressives' acquiescence to border exclu-

87. Political theorist Michael Walzer, in particular, has made a strong affirmative case for simultaneous commitments to external boundedness and internal inclusion. See Walzer, *SPHERES OF JUSTICE*, *supra* note 77, at 63 (an adequate "theory of distributive justice . . . must vindicate at one and the same time the (limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities."). For a detailed analysis of Walzer's dual commitment to external closure and internal inclusiveness, see Bosniak, *The Difference That Alienage Makes*, *supra* note 32, at 1068-87.

sion ultimately serves to undermine any efforts they might wish to make on behalf of undocumented immigrants who are already here, including any efforts against measures like Prop. 187. At the same time, acquiescence to borders more generally undermines their articulated concern with the construction and subordination of outsiders.

Progressives' general presumption of the legitimacy of national borders serves to thwart any efforts they might make on behalf of undocumented immigrants who are already here because, simply stated, it is precisely enforcement of these borders which produces the immigrants' powerlessness here in the first place. The problem is that the sharp divide that progressive thought tends to presume between the national state's border and its interior is more fiction than reality, especially where undocumented immigrants are concerned. National border enforcement does not take place merely at the physical border, and it is not concerned merely with stopping people at the moment of territorial entry. Instead, enforcement of the border occurs wherever government immigration authorities have jurisdiction to enforce the immigration laws—which in this country is virtually everywhere.⁸⁸ And such enforcement is as concerned with removing from the territory those people who lack legal permission to remain as it is with preventing their entry in the first place.⁸⁹

88. See Bosniak, *Exclusion and Membership*, *supra* note 50, at 987-88: ("The INS [Immigration and Naturalization Service] has deployed the major part of its resources at the border and the largest number of apprehensions occur there. However, much of the agency's enforcement effort has been focused in the interior. Although the INS's interior enforcement powers have been somewhat restrained by the judiciary, agents still detain, question, and arrest people on the street, in their homes, in their cars, in bars, and even on souplines. In recent years, however, the single most significant site of INS law enforcement, after the immediate border area itself, has been the workplace.") (citations omitted).

For a report of recent interior enforcement efforts, see Ronald Smothers, *New Tactic Is Tested on Illegal Immigrants*, N.Y. TIMES, Sept. 26, 1995, at A19 (describing "major sweep of illegal workers in non-border states" called "Operation South P.A.W. (Protecting American Workers)," in which undocumented workers at restaurants, manufacturing plants, food processing operations, and construction sites in the southeast were arrested, and employers fined).

89. The Immigration and Nationality Act designates a great many grounds of deportation for aliens who are present in the United States. Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* (1952 and Supp. 1996). Among those most relevant to the undocumented are the provisions which designate "entry without inspection" a deportable offense, I.N.A. § 241(a)(1)(B), 8 U.S.C. § 1251 (1952 and Supp. 1996), and which render deportable aliens who violated the terms of their initial visas. See I.N.A. § 241(a)(1)(C), 8 U.S.C. § 1251 (1952 and Supp. 1996). Recently the Clinton Administration has signalled its intent to substantially upgrade its interior enforcement efforts. See Smothers, *supra* note 88; Robert Pear, *Clinton Will Seek Spending To Curb Aliens, Aids Say*, N.Y. TIMES, Jan. 22, 1995, at A1 (describing Administration efforts to obtain increased funding to deport criminal aliens).

This means that undocumented immigrants residing in this country are potentially subject to government border enforcement in the form of deportation during virtually every moment of their lives. And as a consequence, they are usually reluctant to avail themselves of any rights they do have for fear of coming to the attention of the immigration authorities.⁹⁰ The result is that even if undocumented immigrants are not specifically denied access to education and healthcare and other social services, as Prop. 187 and similar measures would require, and even if they are not penalized for seeking to avail themselves of these services, the constant threat of deportation will continue to structure their lives in this country, and will ensure their continued marginalization and domination. To the extent that the left's acquiescence to national border enforcement allows this, any critique they may advance of Prop. 187 and other such initiatives is, quite plainly, ineffectual at best.⁹¹

One response to this difficulty is for progressives to argue, as some have done, that by virtue of their participation in and contribution to our society, undocumented immigrants deserve full recognition as members by law; in practical terms, undocumented immigrants would be provided *with documentation*, or legal status.⁹² The legalization argument represents a far stronger and more affirmative case for undocumented immigrants than simple opposition to measures like Prop. 187 does precisely because it would eliminate much of the effect that internal border enforcement has on these immigrants; it would ensure that they would no longer be subject to the constant specter of deportation which so defines their lives here. Yet this argument raises important

90. See Bosniak, *Exclusion and Membership*, *supra* note 50, at 986 ("[E]ven where formal rights exist, the ability of the undocumented to exercise these rights in practice is limited. Undocumented aliens often fear exposing themselves to the exclusionary powers of the state and will often forego the exercise of membership rights in order to avoid such an eventuality. Undocumented immigrants commonly decline to report private or official abuse and are frequently unwilling to pursue civil claims in court or to step forward to receive benefits to which they are entitled.") (citations omitted).

91. I do not mean to suggest that efforts to protect the rights of undocumented immigrants which fall short of demands for their legalization are meaningless or otherwise lacking in value—far from it. My point is simply that without legalization, the undocumented will continue to suffer social exclusion and marginalization notwithstanding any other rights or protections they might be afforded.

92. I should note that this argument is radical by today's political standards, and is virtually never heard in the current immigration debates. However, it was sometimes heard a decade ago during the debates leading to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986), which ultimately included provisions for legalizing a portion of the then-existing undocumented population.

questions in its own right, among them: Would legalization apply only to those undocumented who arrived before a date certain, or would its effect extend forward in time, so that the very category "undocumented alien" would be effectively eliminated in the law?⁹³ If the former—if legalization were a one-time reform—then there is no doubt that a new class of undocumented immigrants would spring up in short order, and would suffer the same sorts of domination and marginalization as those who came before.⁹⁴ But if legalization were ongoing—if the mere fact of making it into the territory of the United States were automatic grounds for acquiring legal status here—then progressives' attachment to national borders would seem to be substantially undermined, since the incentive to come (for those who are otherwise interested) would surely be overwhelming, and this, in turn, would render control of the borders far more difficult.

The point is that progressives' acquiescence to national border enforcement works at cross-purposes with their commitment to defending the interests of the undocumented. For to the extent they retain the attachment, or acquiescence, to borders, they ensure that the immigrants will continue to be marginalized; but conversely, to the extent they effectively attack the marginalization the immigrants suffer, they necessarily must challenge the enforcement of borders as well. The two commitments (against marginalization of persons and for borders around the community) are mutually incompatible, at least where the status of undocumented immigrants are concerned.

But progressives' acquiescence to national border enforcement also undermines their efforts on behalf of the immigrants in another way as well — and here we see that this acquiescence more generally stands in tension with progressives' commitments against social exclusion and subordination. Notice the structure of their argument when they critique Prop. 187's provisions or otherwise advocate on behalf of the undocumented: they are demanding, in effect, that the national community recognize certain rights of membership for a class of people who, they

93. To be exact, "undocumented alien" is not a legal category *per se*. The term is used colloquially to refer to people who entered in violation of immigration law or have violated the terms of their visas once here. People less sympathetic to this group of immigrants tend to use the phrase "illegal alien," although this is as much a term of art as is "undocumented alien."

94. The legalization provisions included in the 1986 Immigration Reform and Control Act (IRCA) more than bear this out. The number of undocumented today (approximately 3.2 million) is virtually identical to the number that existed a decade ago, despite IRCA's provision of legalization to 2.8 million. See MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 21-22, 24 (Urban Institute, 1994).

have also allowed, might legitimately have been barred from access to the territory—and thereby from access to any membership rights altogether—had they been stopped at the physical border.⁹⁵ The critics, in other words, divide the world between those people who have managed to enter or remain in the territory, whose interests they defend, and those who have not managed to enter or remain, whose interests they generally ignore (and whose continued exclusion they sometimes endorse). The territorial bias this position entails may be reasonable from the perspective of the national society (it is a bias American law itself maintains),⁹⁶ but it is far more problematic to the extent that progressives claim to be concerned with the interests and experience of the immigrants themselves. For from the immigrants' point of view, their success at crossing into the national territory and/or remaining here undetected is usually an enormously fortuitous affair, and most undocumented immigrants who are currently here have family members and friends who were not so lucky as they.⁹⁷ Additionally, the composition of the class of undocumented immigrants is changing constantly; among some segments of the undocumented population, people leave the territory, and people return, with relative frequency.⁹⁸

95. I should emphasize here that in legal terms, "the border" is constituted not merely by the physical boundary at the territory's perimeter, but also by those entry points into the territory which are, in fact, often located inside the country's territorial perimeters; airports, for example, are instances of "the border" in the sense I am using the term here (and in the terms of American law as well). See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973) (treating airport as "functional equivalent of the border . . ."). It is important to keep this in mind, because although Americans tend to imagine that undocumented immigrants enter surreptitiously at the physical border (usually at the U.S.-Mexican border), more than half of the undocumented population enters at airports after formal government inspection; they later fall into undocumented status by failure to depart when their visas expire or by otherwise violating the terms of their visas. See also *Fix & Passel*, *supra* note 94, at 25 ("Only 4 out of 10 undocumented aliens cross the border illegally or enter without inspection. Six out of ten undocumented immigrants enter legally—as visitors, students, or temporary employees—and become illegal by failing to leave when their visas expire.").

96. See generally *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the provisions of the fourteenth amendment "are universal in their application, to all persons within the territorial jurisdiction"); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (same); *U.S. v. Verdugo-Urquidez*, 110 S.Ct. 1056, 1063-66 (1990) (both fifth and fourth amendments apply only to aliens who are territorially present).

97. For diverse accounts of the general challenges faced by undocumented immigrants who seek to cross the border into the United States and the various fortuities involved, see generally SARAH J. MAHLER, *AMERICAN DREAMING: IMMIGRANT LIFE ON THE MARGINS* (1995) (especially Chapter 3: "The Trip As Personal Transformation"); TED CONOVER, *COYOTES: A JOURNEY THROUGH THE SECRET WORLD OF AMERICA'S ILLEGAL ALIENS* (1987).

98. *Id.* See also *Borjas*, *supra* note 72, at 62-63 (describing "the transient nature of the immigration for many" undocumented immigrants); ALEJANDRO PORTES & ROBERT L. BACH,

Membership in the class of people who happen to be in undocumented status in the United States at any given time, in other words, is both adventitious and mutable. But this being the case, it becomes clear how arbitrary it is for progressives to champion only those immigrants who are territorially present. Why shouldn't progressives be concerned as well with the status and well-being of people who lived and worked here in the past, or with those less lucky at the border, or with those aspiring to come for the first time—all of whom often possess the same desire to work, to rejoin family, to flee their countries, to construct a new life, as those who are already here possess?⁹⁹ By treating the

LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES 80 (1985) (Mexican immigration has been characterized by a strong return orientation and a cyclical pattern, in which periods of work in the United States alternate with periods of residence in Mexico.); Carlos Monsivais, *Dreaming of Utopia*, NACLA: Report on the Americas, vol. XXIX, No. 3, Nov/Dec. 1995, at 39, 41 ("Mexico has evolved from being a sedentary country to a nomadic one. Villages and towns in the states of Michoacan, Guerrero, Oaxaca, Morelos, Hidalgo, San Luis Potosi and Chiapas empty out every six monthsThe hundreds of thousands of migrant workers who go to the United States and who return every year reconstruct and diversify their country of origin."); Richard Walker, *California Rages Against the Dying of the Light*, 209 NEW LEFT REV. 42, 64 (1995) ("The whole concept of legal and illegal migration is dubious to Mexicans who move in a continuous circuit back and forth across the border, wherein workers return to their villages for holidays, weddings, health reasons, between jobs, and after building a nest egg of repatriated wages to buy a little land. Half of those crossing the border 'illegally' already have jobs in the U.S. to which they are returning."). On the other hand, analysts have suggested that in recent years, the rate of permanent settlement of undocumented immigrants in this country is on the rise. See, e.g., Wayne Cornelius, *Impacts of the 1986 U.S. Immigration Law on Emigration From Rural Mexican Sending Communities*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980s at 227, 238 (Frank D. Bean et al. eds., 1990) ("The long-term trend toward a higher an incidence of permanent settlement by Mexican immigrants in the United States appears to have been reinforced by IRCA.")

For further discussion of the continued links many communities of undocumented immigrants in this country maintain with their home communities, see text accompanying note 146, *infra*.

99. Some scholars have argued that the interests of immigrants, including undocumented immigrants, should be of increasing concern to Americans as the immigrants' "stake" in this country increases. By "stake" they mean particular attachments and commitments and expectations that develop over time through relationship. See generally David Martin, *Due Process and Membership In The National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983). Territorial presence, in this view, would be one indicia, although possibly quite a minimal one, of stake; on this theory, therefore, privileging the interests of those who are territorially present over those who are not might make some kind of sense. (*But see* U.S. v. Verdugo-Urquidez, 110 S. Ct. 1056, 1064-65 (1990), holding that *involuntary* physical presence in the national territory does not entail sufficient "connections with this country" to place a person "among 'the people' of the United States" for purposes of applying fourth amendment protections.)

One might respond, however, that there are many people not territorially present who also have substantial stake in this country, either by virtue of prior residence and labor here, or

mere fact of national territorial presence as morally significant (by defending the interests of the territorially present and not others), progressives overlook the interests of many people whose claim on their concern might otherwise be equally compelling. And to the extent that they grant moral significance to territorial presence, progressives end up privileging with their concern a particular class of outsiders—those who happen to be inside national borders—while leaving the rest precisely where they were.

VI.

I have argued so far that progressive critics of restrictionist immigration policy, including measures like Prop. 187, are hampered and constrained in the arguments they can make on undocumented immigrants' behalf not merely by the pragmatic demands of current political life (although these are substantial), but also by what I have characterized as their own predominantly "national imaginations." The national imagination, as I have described it, treats the national society—in this case, American national society—as the predominant community of normative concern, and presumes the legitimacy, if not the inevitability, of its boundaries. This vision of social life, I have suggested, serves to limit the reach and efficacy of the arguments that progressives can make on undocumented immigrants' behalf, for the social marginalization and domination these immigrants suffer is produced in large part by the enforcement, or threatened enforcement, of the same national borders whose legitimacy progressives tend to presume. While progressives may forcefully argue, therefore, that subjecting a class of people who live and work among us to exclusion from basic human services—as Prop. 187 and its progeny do—is morally

because of the close family connections they maintain with people who currently reside here. Furthermore, some sort of stake in this country might also be said to exist in the case of people who have, for example, been displaced from their land in their home country by a U.S.-owned agribusiness company, or who have been injured by an oppressive government regime armed and supported by the United States; in this latter case, their stake might be said to be the result of "the injury we have done them." See Walzer, *SPHERES OF JUSTICE*, *supra* note 77, at 48.

Yet however broadly or narrowly we might construe it, the "stake" theory assumes the premise that I am seeking to interrogate here: that national borders are morally significant, and that the "we" constituted by national community membership (however broadly construed) deserves normative priority over non-national others.

intolerable, they cannot so easily condemn efforts to keep these immigrants out in the first place, nor can they easily advocate for an end to enforcement of the border against these immigrants altogether. In this respect, undocumented immigrants represent a terribly confounding case for progressives: for these immigrants suffer the kind of social exclusion progressives routinely deplore, yet at the same time, their exclusion from territory and membership quite often seems a necessary, if unfortunate, condition of political life as we have both known and imagined it.

All of that said, however, it may reasonably be argued that the tensions produced by progressives' particularist national commitments are all-but inevitable; for in a world in which "[b]oundaries and categories of some form are inevitable,"¹⁰⁰ what possible alternative to national boundaries is there? The principal alternative in conventional political thought is some version of liberal cosmopolitanism, according to which the concerns of justice should lie with "people in general rather than people living within some particular political jurisdiction."¹⁰¹ Strictly speaking, liberal cosmopolitanism is morally indifferent to national boundaries, and therefore should endorse a policy of open borders; in its view, freedom of movement is "an important liberty in itself and a prerequisite for other freedoms" as well.¹⁰²

Yet it is easy enough to point to this model's limitations. First of all, while liberal cosmopolitanism, in the form of human rights theory, has recently lent real rhetorical, and sometimes practical, support to various movements against subordination around the world,¹⁰³ and

100. Minow, *Making All The Difference*, *supra* note 46, at 390.

101. Robert E. Goodin, *If People Were Money . . .*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY* 6, 7 (Brian Barry & Robert E. Goodin, eds., 1992).

102. Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in Barry & Goodin eds., *supra* note 101, at 25. Most liberals have nevertheless declined to embrace the open borders position absolutely, arguing that where borders are necessary to "protect the ongoing process of liberal conversation," they will support them. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 95 (1980). See also Carens, *supra* at 25 (restrictions on movement "may sometimes be justified because they will promote liberty and equality in the long run or because they are necessary to preserve a distinct culture or way of life.").

103. See, e.g., Robert A. Williams Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 701 ("In the context of the contemporary indigenous struggle for survival and international legal protection, rights discourse has functioned effectively in generating a shared, empowering vocabulary and syntax for indigenous peoples. The discourse of international human rights has enabled indigenous peoples to understand and express their oppression in terms that are meaningful to them and their oppressors."). Richard Delgado & Jean Stefancic, *Cosmopoli-*

while it has helped to loosen the borders around many nation-states by way of the international refugee protection regime,¹⁰⁴ many progressive and critical theorists have themselves importantly challenged it,¹⁰⁵ arguing, among other things, that its universalist and individualist premises are implausibly abstract and ignore the concrete particularity of commitments which actually give shape and meaning to human life.¹⁰⁶ Many contemporary scholars, in fact, have made the affirmative case that particularity of attachments in the form of community represents an important normative good in itself,¹⁰⁷ with political community per-

tanism Inside Out: International Norms and The Struggle For Civil Rights and Local Justice, 27 CONN. L. REV. 723 (1995) ("On a number of fronts, progressive people working on behalf of historically disenfranchised groups have been turning, ever hopeful, to international human rights law as a source of aid.").

104. The United Nations Convention Relating To The Status of Refugees, 189 U.N.T.S. 137 (1951), as amended by the U.N. Protocol Relating To the Status of Refugees, 606 U.N.T.S. 267 (1967), provides, among other things, that state parties may not return persons fearing persecution on account of race, religion, nationality, membership of a particular social group or political opinion to the country of persecution. (Convention, Articles 1 and 33). For arguments that refugee protection should be approached as an international human rights issue, see James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991); LOUIS HENKIN, *THE AGE OF RIGHTS* 48-50 (1990).

105. In addition to the critique presented in the text, progressive critics have also challenged the human rights model on practical and political grounds, arguing, among other things, that the international human rights regime associated with the United Nations is embedded in a "womb of hegemonial and statist logic" and is seriously constrained by lack of enforcement mechanisms due to continued international commitments to state sovereignty. RICHARD FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 47 (1981).

Additionally, some postmodern theorists have advanced an epistemological challenge to the notion of human rights, described by one analyst as follows:

[P]ostmodern theorists ask how we can understand the narrative of human rights when we no longer believe that its claims are true or that metanarratives are even possible.

Instead of searching for first principles and metanorms, postmodernists analyze the discursive form of the notion of rights and read this form as a part of the historically limited Enlightenment project that today has lost its relevance.

Renata Salecl, *Law and the Postmodern Mind, Rights in Psychoanalytic and Feminist Perspective*, 16 CARDOZO L. REV. 1121 (1995).

106. See, e.g., Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990); Mark Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. AND SOCIETY 403, 409-12 (1989); RICHARD RORTY, *CONTINGENCY, IRONY, SOLIDARITY* 59 (1989) (arguing that morality derives from "ourselves as members of a community, speakers of a common language," and rejecting the notion that "there is something which stands to my community as my community stands to me, some larger community called 'humanity' which has an intrinsic nature."). Among the classic texts which have elaborated the critique of liberal premises in such terms are ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* (1979).

107. E.g., ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975); BENJAMIN BARBER, *STRONG DEMOCRACY* (1984); Sandel, *supra* note 106. But see YOUNG, *supra* note 42, at 226-36 (arguing

haps the greatest expression of that good.¹⁰⁸ The nation-state, for better or worse, is the paramount political community of the age and is likely to remain so in the coming years.¹⁰⁹ Some progressive theorists

that "the ideal of community denies, devalues, or represses the ontological difference of subjects, and seeks to dissolve social inexhaustibility into the comfort of a self-enclosed whole.").

108. See, e.g., Walzer, *SPHERES OF JUSTICE*, *supra* note 77, at 29 (the political "community is itself a good—conceivably the most important good—that gets distributed."); Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE*, (Nancy L. Rosenblum, ed. 1989) at 159, 165-66 ("in order to have a free society [one must have] a willing identification with the polis on the part of the citizens, a sense that the political institutions in which they live are an expression of themselves . . . [P]atriotism is based on an identification with others in a particular common enterprise. I am not dedicated to defending the liberty of just anyone, but I feel the bond of solidarity with my compatriots in our common enterprise, the common expression of our respective dignity."). See also Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

For progressive arguments that the communitarian (or the related civic republican) vision possesses "authoritarian" tendencies, see Adeno Addis, *Individualism, Communitarianism and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 645-48 (1991). See also Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); YOUNG, *supra* note 42, at 227 ("The ideal of community . . . expresses a desire for the fusion of subjects with one another which in practice operates to exclude those with whom the group does not identify. The ideal of community denies and represses social difference."); Steven Winter, *For What It's Worth*, 26 LAW & SOC. REV. 789, 795 (1992) ("In post-modernity, all is diversity and heterogeneity; any discourse of 'community' is suspect as a discourse of oppression.").

109. This is Richard Rorty's point in the passage from which this article's epigraph is drawn: Political imagination is, almost always, national imagination. To imagine great things is to imagine a great future for a particular community, a community one knows well, identifies with, can make plausible predictions about. In the modern world, this usually means one's nation. Political romance is, therefore, for the foreseeable future, going to consist of psalms of national future rather than of the future of 'mankind.' Rorty, *supra* note 1, at 343; See also RICHARD RORTY, *IRONY, CONTINGENCY, SOLIDARITY* 189-99 (1989) (arguing that by nature, we experience solidarity with our compatriots far more readily than with humanity in general); Jean Bethke Elshtain *Sovereignty, Identity, Sacrifice*, 20 Millennium 395, 401 (1991) (arguing that nationalism is inevitable "in some form or another, for we must all locate ourselves in a particular place."); Yael Tamir, *LIBERAL NATIONALISM* 6 (1993) (arguing that nationalism appropriately acknowledges "the importance of belonging, membership, and cultural affiliations, as well as the particular moral commitments that follow from them.").

On the other hand, as Sanford Levinson has noted, many communitarians invoke the ideal of "community" with no express reference to the community of the nation. "One does not know if this is an explicit rejection of nationalist claims or, instead, a retreat to euphemism lest one be tarred with the negative associations linked to nationalism (that are presumably absent in regard to family, etc.)." Sanford Levinson, *Is Liberal Nationalism an Oxymoron? An Essay For Judith Shklar*, 105 ETHICS 626, 629-30, n.9 (1995) (citing WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989) and Michael Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765 (1994). Others embrace political community as an affirmative value while denying that such communities must take the nation-state form. See, e.g., Guyora Binder, *The Case For Self Determination*, 29 STAN. J. INT'L LAW 223, 262-70 (1993).

have even suggested that the American nation-state should be actively valued and defended as a community—despite the distaste they might feel for the chauvinistic forms such valuation can take,¹¹⁰ and despite their critique of the relations of power and subordination that often prevails among community members.¹¹¹ It follows, for at least some theorists, that in order for the nation-state (or the United States in particular) to remain a community, it must be free to establish certain boundaries around itself: As Michael Walzer has argued, the “distinctiveness” of national community life “depends upon closure;” and the community’s members must therefore have the right to preserve their distinctiveness by “mak[ing their] own admissions policy, to control and sometimes restrain the flow of immigrants.”¹¹²

Furthermore, even if we dislike the particular sort of normative statist thinking embodied in much communitarian thought, and even if we find the idea of open borders attractive in the abstract, it still may be that at least some degree of national protectionism in the immigration context is a practical necessity under current conditions. For if borders were simply dismantled or otherwise ignored, it seems quite likely that the numbers of people who would choose to come to this country to live and work would be great enough that their arrival would serve to compound the powerlessness of those already residing here “at the bottom.”¹¹³ A great influx of immigrants, for example,

110. Sanford Levinson, for example, writes “I suspect that at least some readers of this essay, especially those (like myself) who are fearful of the ‘new patriotism’ that suffuses much modern political rhetoric, are uncomfortable with the [expression of] intense patriotism But can one imagine a political community without love of country and commitment to what one would hope to be its highest ideals?” Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1441 (1986). (Levinson concludes, however, that he is “much more certain about [his] inchoate feelings of membership in the American community than [he is] about [his] ability to confess to any peculiarly ‘American’ set of faith propositions” *Id.* at 1444).

111. The embrace by some scholars of the concept of national community is intimately linked with a critique of relations of domination and exclusion within that community. *See, e.g.*, KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 173 (1989) (“The American civic culture . . . offers the individual a community of meaning, and thus an identity, that overarches his assortment of group identifications. More specifically, effectuation of the Fourteenth Amendment’s guarantee of equal citizenship reinforces the civic culture’s value of nationalism, nourishing both a national identity and the sense of national community.”); Mari Matsuda, *Voices of America*, *supra* note 46, at 1396 (urging the embrace of an American “nationalism” grounded not in “uniformity [or] pride in America singularly defined,” but based on “a living, moving interactive culture, imaginable as expanding circles of sameness and difference.”) *See also id.* at 1405 (“I still believe we can wash the blood off the [American] flag and wave it proudly.”)

112. Walzer, *SPHERES OF JUSTICE*, *supra* note at 39.

113. Of course, the conventional projections about how all the world would come to the Unit-

almost certainly would drive down wages in some sectors to a rate that only the immigrants themselves could afford to accept—if even they could;¹¹⁴ and under such conditions, it seems likely that those suffer-

ed States in the absence of border control are surely exaggerated; Americans like to think of their country as intoxicatingly, irresistibly, desirable—and everyone outside our borders as desperate to have us. Despite the regressive ideological uses to which this kind of argument has usually been put, however, there is clearly some truth in it: the United States is highly attractive to many people around the world for an array of economic, political and cultural reasons (for a vivid characterization of the idealized images of this country maintained by many prospective immigrants, see MAHLER, *supra* note 97, at 83-104), and there is no denying that in the absence of border controls, the incentive to enter would be great.

114. See, e.g., Joseph H. Carens, *Immigration and the Welfare State*, in DEMOCRACY AND THE WELFARE STATE 207, 212 (Amy Gutmann ed., 1988) ("With open borders, no immigrants would be legally vulnerable in the way that current illegal immigrants are. But intense economic competition among unskilled workers would make welfare-state regulations governing work even more difficult to enforce, and enforcement would only further increase the large and increasing pool of the unemployed. Here is a potential reserve army of unemployed greater than anything Marx could have imagined.").

I should note that some advocates of immigration restrictionism argue that undocumented immigrant workers *already* displace domestic workers both because they add to the overall supply of low-wage workers (thus exercising a depressive effect on wages), and because they will work for wages lower than, or endure conditions less favorable than, those which domestic workers can or will accept. See, e.g., VERNON BRIGGS, MASS IMMIGRATION AND THE NATIONAL INTEREST (1992); VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 158-66 (1984); Donald Huddle, *Immigration and Jobs: The Process of Displacement*, NPG FORUM, May 1992, at 6. Other analysts, however, have refuted the displacement argument with data that shows precisely the contrary. See, e.g., GEORGE BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 91 (1990) (arguing that "the weight of the empirical evidence . . . indicates that immigration has practically no impact on the earnings and employment opportunities of natives."); Frank Bean et al., *Undocumented Mexican Immigrants and the Earnings of Other Workers in the United States*, 25 DEMOGRAPHY 35, 45-46 (1988) (in study of the labor market effects of undocumented immigrants in five southwestern states, authors conclude that "[t]he concern that undocumented immigration may be depressing the earnings of native-born workers is not borne out"). Moreover, many analysts have argued that access to the relatively lower-wage labor undocumented immigrants provide has enabled some economic sectors (including the garments, automotive parts and electronics industries) to continue to produce in the United States rather than relocate abroad, thereby benefitting the national economy (including the labor market) overall. E.g., Peter Dawkins et al., *The Microeconomic Analysis of Immigration In Australia and The United States*, in NATIONS OF IMMIGRANTS: AUSTRALIA, THE UNITED STATES AND INTERNATIONAL MIGRATION 111, 121 (Gary Freeman & James Jupp eds., 1992). Finally, a sizable percentage of legal immigrants are self-employed, and their businesses provide jobs for undocumented immigrants in what are commonly described as ethnic "enclave communities." *Id.* at 119-20. This and other evidence suggests that in the aggregate, the labor market effect of undocumented immigrants with regard to both employment and wages is not deleterious to low-wage domestic workers and may even be positive.

The debate about the labor market impact of undocumented immigrants has yet to be resolved—among other reasons, because no one can "answer the counterfactual question of what would . . . happen[] to technology or employer efforts to recruit and train underclass American workers if immigrants [were] not . . . available." Philip L. Martin, *supra* note 71, at 97, n.8. In my view, the critics have the better argument, at least under current conditions. Nevertheless, it

ing most would be Americans of color.¹¹⁵ These are prospects progressives would understandably wish to avoid.

The limitations of liberal universalism, the attractions (for some) of

seems reasonable to assume that in the (admittedly unlikely) event that national border controls were substantially relaxed or abandoned, some sort of job displacement and wage depression effect would occur, at least in the short-run. Such an outcome seems especially likely if the relaxation or removal of barriers to movement were to take place without simultaneous attention to the massive economic inequalities that exist between the United States and most undocumented immigrants' countries of origin. Simply put, immigrants' incentive to move here would be far weaker to the extent that relatively comparable jobs were available at home. Of course, there are dozens of additional, hard-to-predict factors that would presumably bear on the displacement effect, including the nature of the labor and employment protection laws in place and the vigor with which they were enforced; the nature and availability of a social safety net for unemployed workers; and the state of the economy overall. My point for the moment is simply to suggest that opening up or substantially relaxing national borders to population movements would quite possibly serve to threaten the economic interests of the least well-off domestic workers, at least in the short term.

In addition to the effects that relatively free movement of people might have on the labor market, this country would also surely be faced with pressing questions about the fiscal ability of the state and federal governments to provide basic social services for the newly augmented population. Some analysts contend that undocumented immigrants *already* cost the government far more than it can afford. See Donald Huddle, *The Cost of Immigration*, Carrying Capacity Network, Washington, D.C., Revised July 1993; see also Gary Freeman, *Migration and the Political Economy of the Welfare State*, 487 ANNALS AAPSS 51 (1986). Other analysts dispute these claims, arguing, that undocumented immigrants contribute in taxes more than they receive in tax-funded benefits on a net national level. FIX & PASSEL, *supra* note 12, at 57-67; JULIAN SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 293-94 (1989). Once again, I think the critics have the better view on this question as things currently stand. But if borders to movement were substantially relaxed or dismantled, it seems indisputable that public resources would be significantly strained, at least in the short term, and that those who rely most on public services—i.e., the least well-off—would likely be most affected.

115. Americans of color are disproportionately represented in the low-skilled and low-wage economic sectors in which undocumented immigrants tend to work, see Briggs, *Immigration Policy and the American Labor Force*, *supra* note 114, at 160 (suggesting that in the event of a substantial relaxation of border controls, minority workers would likely feel the competitive effects of an expanded labor pool most strongly.)

Notably, some analysts argue that under the *current* immigration regime, minority workers disproportionately bear the economic brunt of the presence of undocumented immigrants, see, e.g., Briggs, *Mass Immigration and the National Interest*, *supra* note 114, at 211-15. This position, however, is far from universally accepted. For a sample of studies which conclude otherwise, see Frank Bean, Lindsay Lowell & Lowell J. Taylor, *Undocumented Mexican Immigrants and the Earnings of Other Workers in the United States*, 25 *Demography* 35, 46 (1988) (concluding that "the effects of increases in supply of [undocumented workers] are negligible on native-born Mexican-Americans, the group that a priori might be expected to be most affected, both because of the geographic concentration of Mexican Americans in local labor markets receiving the greatest numbers of undocumented Mexicans and because the labor forces of both groups tend to be concentrated in unskilled and semiskilled occupational positions."); George Borjas, *Immigrants, Minorities and Labor Market Competition*, 40 *INDUST. & LABOR REL. REV.* 382, 391-92 (1987) (concluding in study of nation-wide Census data that "black native-born men have, if anything, gained slightly from increases in the immigrant supply.")

communitarian thought, and a pragmatic assessment, in progressive terms, of the alternatives might therefore appear to lead us, however reluctantly, to accept our own acquiescence in the enforcement of national borders—despite its dissonance at times with other values that we embrace. Such an acceptance would require us to live with the tensions and ambiguities that surround progressive efforts to advocate on behalf of undocumented immigrants. It would require us, as well, to acknowledge that when it comes to undocumented immigration, the line between injustice and necessity is exceptionally, and uniquely, hard to place.

Yet before we bow to the weight of the seemingly inevitable, I would like to suggest that we pause briefly and turn a critical eye upon our own conventional ways of viewing the world. In particular, we might consider the injunction of those critical scholars who have urged us to challenge aspects of our social and political lives which have long appeared to us as both necessary and ineluctable. These theorists have criticized the widespread tendency we all sometimes possess to “assum[e] as given institutional structures that ought to be brought under normative evaluation;”¹¹⁶ they have also encouraged close attention to the exercise of power in taken-for-granted arrangements and practices in our society.¹¹⁷ They have urged, above all, that we exercise our imaginations to envision the possibility of alternative social arrangements: As Iris Marion Young has written, “[i]magination is the faculty of transforming the experience of what is into a projection of what could be, the faculty that frees thought to form ideals and norms.”¹¹⁸

116. YOUNG, *supra* note 42, at 3. See also Radin & Michelman, *supra* note 61, at 1048 (“[S]ometimes it is the habitually most taken-for-granted cultural landscape features that most cry out for redescription”); ROBERT W. GORDON, *NEW DEVELOPMENTS IN LEGAL THEORY, THE POLITICS OF LAW* 420 (David Kairys ed.) (revised ed. 1990) (arguing that critical legal scholars are concerned to “use the ordinary rational tools of intellectual inquiry to expose belief structures that claim that things as they are must necessarily be the way they are. There are many varieties of this sort of critical exercise, whose point is to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying.”).

117. See Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987) (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination. Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference. It becomes hard, in the face of such daily practices, to regard glimpses of dominant conceptions as contestable assumptions.”)

118. YOUNG, *supra* note 42, at 6; Boaventura de Sousa Santos, *Three Metaphors For a New Conception of Law: The Frontier, the Baroque and the South*, 29 LAW & SOC. REV. 569, 573 (1995) (urging a utopian scholarly enterprise in which “the imagination [is used] to explore

It seems worth inquiring what implications this injunction might have for us here. Could we, on this advice, begin to consider that our predominantly statist approach to questions of justice might be subject to interrogation and revision beyond what we had thought either necessary or possible? Can we imagine thinking about questions of justice in terms that transcend national borders without resorting to the abstractions of liberal universalism? And what implications might such efforts have for our normative approach to exclusion at the nation's borders?

These are extremely difficult questions, and the task of responding to them is an exceptionally tall order. While some scholars have begun to take some of them on,¹¹⁹ fuller development is a project that, I sus-

new modes of human possibility and styles of will and to oppose the necessity of what exists on behalf of something radically better that is worth fighting for, and to which humanity is fully entitled."); ROBERTO UNGER, *SOCIAL THEORY: IT'S SITUATION AND ITS TASK* 36 (1987) (emphasizing importance of "the role of the imagination of associative possibility in awakening people to the belief that there are uncreated social worlds worth fighting for.") See also Rorty, *supra* note 1 ("[I]f there is social hope it lies in the imagination—in people describing a future in terms which the past did not use.") (Note, however, that this is the same article in which Rorty declared that "political imagination is, almost always, national imagination," see text accompanying note 1, *supra*, a statement which does not, itself, reveal much acknowledgement of imaginative possibility.

119. See R.B.J. Walker & Saul H. Mendlovitz, *Interrogating State Sovereignty* in *CONTENTION: G SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY* 7-8 (R.B.J. Walker & Saul H. Mendlovitz, eds., 1990):

"[Q]uestions about the nature of political life and the contours of political community [are] matters that have long been of concern to students of political theory. Yet . . . [u]nderstandably preoccupied with reproblematising the character of political life within states, political theorists have rarely broached with much confidence the transformative implications of interdependence or world politics [Among some scholars, however, the] increasingly global reach of the processes that affect people's lives is increasingly understood to require sustained rethinking of who 'we' are and of how 'we' might relate to each other. [Some are beginning to] explore the ways that accounts of political community formalized in the principle of state sovereignty are being rearticulated in response to profound structural transformations on a global scale. [They] seek to explore the multiplicity of possible communities that might emerge from contemporary transformations [This work] acknowledges the extent to which contemporary political discourse has been shaped by the presumption that state sovereignty provides the only plausible account of who we are as political beings."

For a brief selection of diverse recent efforts in various disciplines to critically interrogate the presumptive normative statism which undergirds much contemporary political and social thought, see, e.g., David Held, *Democracy, The Nation-State and the Global System*, in *POLITICAL THEORY TODAY* (David Held ed., 1991); Charles Beitz, *Sovereignty and Morality in International Affairs*, in *POLITICAL THEORY TODAY*, *supra*; WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE; DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 198-222 (1991); E.J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* (1990); YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994); ANDREW LINKLATER, *MEN AND CITIZENS*

pect, will be undertaken by many people over many years. For now, I will simply set out a few tentative thoughts and raise some additional questions in the hopes of prompting further discussion.

To begin with, it is important to recognize that despite the pervasiveness of what I have called normative nationalism in much contemporary progressive legal thought,¹²⁰ some progressives have, in fact, been developing alternatives to both nationalist and liberal individualist approaches to questions of social justice. At the level of theory, much progressive scholarship in the field of international law has been devoted in recent years to interrogating and critiquing statist constructions of social and political life. Although this work is exceedingly diverse in methodological and substantive terms, one of its recurrent themes has been to challenge the ways in which statist thinking serves to exclude or occlude or subordinate classes of people whose collective identities or interests transcend or otherwise resist conventional state boundaries.¹²¹ Some analysts, for example, have criticized the denial of legal recognition, self-determination and territory to trans- and sub-national indigenous communities under the prevailing state system.¹²² Others have challenged the ways in which the legal norm of state sov-

IN INTERNATIONAL RELATIONS (1982); ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* (1991); R.B.J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993); BASCH, GLICK-SCHILLER, & SZANTON-BLANC, *NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS & DETERRITORIALIZED NATION-STATES* (1994); Craig Calhoun, Foreword, in MICHELINE ISHAY, *INTERNATIONALISM AND ITS BETRAYAL* (1994); Katherine Verdery, *Whither 'Nation' and 'Nationalism,'* 122 *DAEDALUS* 37 (1993); Michael J. Shapiro, *Moral Geographies and the Ethics of Post-Sovereignty,* 6 *PUBLIC CULTURE* 479 (1994). See also text accompanying notes 121-124, *infra*.

120. See note 66, *supra* for a clarification of my use of the term "normative nationalism" here.

121. I cannot even begin to do justice to this vast and varied literature here. My point is simply to acknowledge that despite the predominance of normative nationalism in progressive scholarly thought, there are some progressive scholars who imagine the social world in ways that are not entirely circumscribed by national borders. In the text and notes following, I give just a few examples of the kind of work I am referring to. For a bibliography of "alternative approaches to international law" which contains references to a broad range of critical and progressive international law scholarship, see David Kennedy & Chris Tennant, *New Approaches To International Law: A Bibliography*, 35 *HARV. INT'L. L.J.* 417 (1994).

122. See, e.g., Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 *STAN. L. REV.* 1311 (1993); Robert A. Williams, Jr., *Encounters On the Frontiers of Interantional Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World*, 1990 *DUKE L. J.* 660. See also Maivan Clech Lam, *Making Room For Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 *CORNELL INT'L L.J.* 603 (1992); Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature From 1945-1993*, 16 *HUMAN RIGHTS Q.* 1 (1994); Gerald Torres & Kathryn Milun, *Translating Yonnonidio By Precent and Evidence*, 1990 *DUKE L.J.* 625 (1990).

ereignty serves to obscure and insulate the oppression of women in the so-called "private" realms from critique and institutional redress.¹²³ These and other critiques, which challenge the exclusionary power of the sovereignty principle and which address the status of communities of people whose interests and identities are distinctly nonconvergent—and are often antagonistic—with those of the nation-state,¹²⁴ provide an instructive contrast to the explicit or implicit statism of much contemporary progressive thought.

123. This critique, part of a broader developing effort to "describ[e] the silences and fundamentally skewed nature of international law" as it relates to women, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 A.J.I.L. 613, 615 (1991), has been articulated in a variety of ways, and has been subject to much internal debate (particularly regarding the coherence of the distinction between private and public in the first place). Among the core arguments is the claim that

"[m]uch of the abuse [suffered by] women can be seen as immunized from international scrutiny by two levels of public/private distinction On the first level, international law involves national states' dealings with other national states; on a second level, international law may become involved to limit particularly brutal treatment of individuals, but only if that brutal treatment is afforded by a nation state. Thus, until the development of human rights law, the abuse of women was not seen as an international matter because women were not national states. Even after the development of human rights law, the abuse of women continued often not to be seen as an international matter because the *abusers* of women were not national states. Insofar as the chief abusers of women are not state actors as such, human rights law may offer inadequate protection to most women.

Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda B. Dallmeyer ed., 1993), *supra*, at 157, 159. For an introduction to the critique and its associated debates, see Charlesworth et al., *supra*; Rebecca J. Cook, *Accountability In International Law for Violations of Women's Rights By Non-State Actors*, in RECONCEIVING REALITY, *supra*, at 93; Karen Engel, *After The Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY, *supra*, at 143; Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 J. TRANSNATIONAL L. & CONTEMP. PROBLEMS 293 (1993); Olsen, *supra*; Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, in RECONCEIVING REALITY, *supra*, at 117.

124. For additional work along these lines, see, e.g., Ruth Buchanan, *NAFTA, Regulatory Restructuring and the Politics of Place*, 2 GLOBAL LEGAL STUDIES J. 371, 379, 374 (1995) (arguing that "the changing nature of borders in the global economy has posed a direct challenge to the old concept of sovereignty" because borders now represent not merely boundaries or dividing lines between states but also "geographical and cultural zone[s] and space[s]" where "populations that live on both sides of the border may find they have more in common with their counterparts 'across the line' than with their national governments."); Perry Dane, *Maps of Sovereignty*, 12 CARDOZO L. REV. 959, 964-65 (1991) (endorsing legal scholarship that "refuses to limit the domain of law to the state" and that "challenge[s] the rigid identification of sovereignty with the state."); Binder, *supra* note 109, at 262-263 (arguing that sovereignty "is just any legally enforceable disposition over the powers of others," and that sovereignty characterizes not merely statehood but also "bounded communit[ies]" of any kind which are dedicated to "the serious pursuit of any moral end.")

At the same time, efforts to forge an alternative path to both nationalism and liberal cosmopolitanism can be found at the level of progressive political practice. Activists in the peace and disarmament, feminist, labor, environmental and solidarity movements, among others, have in recent years begun to organize across borders to achieve their political ends, in a process one analyst has called "globalization from below."¹²⁵ The recent effort waged by activists against the North Amer-

125. Richard Falk, *The Making of Global Citizenship*, in JEREMY BRECHER ET AL., *GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER* 39 (1993), at 47-48. The phenomenon of "globalism from below" has been the subject of increasing commentary in recent years. Describing the process in general terms, Richard Falk writes:

[T]ransnational activism started to become very important for social movements during the 1980's. With respect to the environmental, human rights and women's movements, activism on a transnational basis became prominent for the first time in history. This meant that the real arena of politics was no longer understood as acting in opposition within a particular state, nor the relation of society and the state, but that it consisted more and more of acting to promote a certain kind of political consciousness transnationally that could radiate influence in a variety of directions, including bouncing back to the point of origin. Amnesty International and Greenpeace are emblematic of this transnational militancy with an identity, . . . that can't really be tied very specifically to any one country or even any region but may also be intensely local in its activist concerns These networks of transnational activity, conceived both as a project and as a preliminary reality, are producing a new orientation toward political identity and community. Cumulatively, they can be described as rudimentary, generally unacknowledged forms of participation in a new phenomenon, global civil society.

Falk, *supra*, at 39. See also Catherine L. Thorup, *Citizen Diplomacy and Cross-Border Networks and Coalitions in North America: New Organizational Patterns in the Immigration Arena*, RAND, March 1993 (describing "transnationalization of civil society.").

For further treatments of "globalization from below," see RICHARD J. BARNET & JOHN CAVANAUGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* (1994) ("Local citizens movements and alternative institutions are springing up all over the world to meet basic economic needs, to preserve local traditions, religious life, cultural life, biological species. . . and to struggle for human dignity More and more people who are bypassed by the new world order are crafting their own strategies for survival and development, and in the process are spinning their own transnational webs to embrace and connect people across the world."); Michael Peter Smith, *Can You Imagine? Transnational Migration and the Globalization of Grassroots Politics*, 39 *SOCIAL TEXT* 15 (1994) (describing "new transnational forms of political organization, mobilization and practice" which he terms "transnational grassroots politics"); JEREMY BRECHER & TIM COSTELLO, *GLOBAL VILLAGE OR GLOBAL PILLAGE: ECONOMIC RECONSTRUCTION FROM THE BOTTOM UP* 78-117 (1994); Mary McGinn & Kim Moody, *Labor Goes Global*, *PROGRESSIVE*, March, 1993; Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 *WASH. Q.* 45 (1994) ("Dramatically multiplied transnational contacts at all levels of society have not only resulted in a greater awareness of the global context, but have also created new commonalities of identity that cut across national borders and challenge governments at the level of individual loyalties."). Thalia Kidder & Mary McGinn, *In the Wake of NAFTA: Transnational Workers Networks*, 25 *SOCIAL POLICY* 14 (1995). See also note 127, *infra*.

ican Free Trade Agreement (NAFTA) provides one recent example of such organizing: during the campaign, many grassroots opponents from the United States, Mexico and Canada saw themselves as engaged in what might best be called a transborder communitarian practice,¹²⁶ a form of opposition produced and constituted by cross-border alliances of workers, environmentalists and consumers working commonly against the agreement.¹²⁷ To be sure, opposition to NAFTA overall was dominated by national protectionist thinking, and protectionist views were commonly espoused in this country by traditional liberals as well as by the likes of Ross Perot.¹²⁸ But parts of the opposition movement also

126. A similar phrase is used by Warren Magnusson. See Warren Magnusson, *The Reification of Political Community*, in WALKER & MENDLOVITZ, *supra*, note 119, at 45, 50 (describing "emergent transnational communities, such as those of feminists, environmentalists or pacifists.").

127. See generally Jeremy Brecher, *Global Village or Global Pillage*, NATION, Dec. 6, 1993, at 685:

[T]he struggle against NAFTA generated new transnational networks based on . . . common interests. A North American Worker-to-Worker Network links grass-roots labor activists in Mexico, the United States and Canada via conferences, tours, solidarity support and a newsletter. Mujer a Mujer similarly links women's groups. The Highlander Center, Southerners for Economic Justice, the Tennessee Industrial Renewal Network and a number of unions have organized meetings and tours to bring together Mexican and U.S. workers . . . These new networks are developing transnational programs to counter the effects of global restructuring. Representatives from environmental, labor, religious, consumer and farm groups from Mexico, the United States and Canada [have also worked together.]

See also Thorup, *supra* note 125 at 3 (describing "the networking and coalition-building among a variety of heretofore disconnected individuals and domestic interest groups in the United States, Mexico, and Canada" working against the agreement); John Cavanagh and John Gershman, *Free Trade Fiasco*, PROGRESSIVE, Feb. 1992, at 33 ("Unwittingly, Bush has offered the citizens' movements of the Western Hemisphere a tremendous opportunity. Already, groups in Canada, the United States, and Mexico have formed to oppose the free-trade pact, and they are working together to propose alternative trade and development models."); William Greider, *A 2,000-Mile Love Canal: People On Both Sides Lose With the Free Trade Agreement*, UTNE READER, Jan.-Feb. 1993 (environmental activists are doing "what they were never able to do before—organize citizens on both sides of the border and form alliances for a new kind of cross-border politics."). For a useful historical overview of the development of the tri-national anti-NAFTA coalitions, see Allen Hunter, *Globalization From Below? Promises and Perils of the New Internationalism*, 25 SOCIAL POLICY 6 (1995).

128. ROSS PEROT, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED NOW* (1993). For a characterization of much of the American anti-NAFTA environmental movement as protectionist, see Ileana M. Porras, *Trading Places: Greening World Trade or Trading In the Environment?* 88 A.S.I.L. PROC. 540, 544 (1994):

[I]n the context of NAFTA, many U.S. environmental advocates appeared to have become inward-gazing: gone was the generosity of outlook, gone the concern with neighbors, gone the belief in globalism, gone the promise of interdependence. The dominant rhetoric was one of parochialism. Anti-NAFTA sentiment and activism were incited by images of the effect on *our* jobs, *our* communities, *our* standard of living,

contained the seeds of something else: a new breed of "internationalism," perhaps,¹²⁹ characterized by joint action and felt affinity among similarly situated groups in the three affected countries.¹³⁰

our environmental standards, our environmental health. Confronted with the possibility of eliminating boundaries, the reaction was (original emphasis) to ensure their continuance.

See also Brecher, *supra* note 127 (describing "nationalistic protectionism of some in the labor movement" during campaign against NAFTA.); Hunter, *supra* note 127, at 10 (describing how "the sovereignty 'card' was played by participants in the campaigns against NAFTA and GATT.").

129. The concept of "internationalism," of course, is nothing new for the left. Internationalism is a key aspirational tenet of socialist thought, and during some periods, the idea was a significant feature of socialist politics. See Alejandro Colas, *Putting Cosmopolitanism Into Practice: The Case of Socialist Internationalism*, 23 MILLENNIUM 513 (1994) for a useful historical review. However, both the recent decline of socialism as a viable political alternative in the contemporary world and the widespread intellectual critiques of enlightenment ideologies have together made the notion of international proletarian solidarity seem quaint and outdated even to most progressives. On the other hand, contemporary progressives could be said to be embracing new "internationalisms" in the form of new cross-boundary social movements, including the environmental, feminist, and peace movements. For a discussion of progressive internationalism, old and new, see Peter Waterman, *Internationalism is Dead! Long Live Global Solidarity?* in BRECHER ET AL, *supra* note 125, at 257. For an analysis of the challenges faced by grassroots activists in maintaining an internationalist vision during the anti-NAFTA campaign, see Hunter, *supra* note 128.

Beyond the domain of progressive activism, the concept of "internationalism" has recently begun to receive increased attention at the level of social and cultural theory. For a useful recent overview, see Bruce Robbins, *Some Versions of U.S. Internationalism*, 45 SOCIAL TEXT 97 (1995).

130. Several political coalitions representing hundreds of grass roots organizations from the United States, Mexico and Canada drafted a proposed alternative to NAFTA during the anti-NAFTA campaign in a position paper called *A Just And Sustainable Trade and Development Initiative For North America*. This alternative program would, among other things, guarantee enhanced labor rights for workers in all three countries, tie wage increases to productivity, guarantee the right to toxic-free communities and workplaces, institutionalize democratic accountability of corporate and government decisionmakers, and promote income transfers to the poorer and less developed regions. See Alliance For Responsible Trade, Citizens Trade Campaign and The Mexican Action Network on Free Trade, *A Just and Sustainable Trade and Development Initiative For North America*, December 9, 1994, (available from the Institute For Policy Studies, Washington, D.C.). See also Cameron Duncan, *Trade and Environmental Policy*, Greenpeace, Testimony before the Committee On Foreign Relations, United States Senate on The North American Free Trade Agreement and the Environmental Side Accord, Oct. 27, 1993 ("Greenpeace has participated in a transnational citizens' effort to develop an alternative vision of continental economic integration. This vision is based on the principles of respect for human rights, the promotion of democracy, citizen participation in decisionmaking, environmental sustainability, and the reduction of economic inequalities among and within countries."); *Four Coalitions of NAFTA Opponents Offer An Alternative To Free Trade Pact*, BUREAU OF NATIONAL AFFAIRS LABOR REPORT, Sept. 29, 1993; Brecher, *supra* note 127, at 685 ("Rather than advocate protectionism—keeping foreign products out—many NAFTA opponents urged policies that would raise environmental, labor and social standards in Mexico, so that those standards would not drag down those in the United States and Mexico. This approach implied that people in

It is no doubt premature to characterize this tri-national, grassroots effort against NAFTA as one that entirely transcended the conventional national political imagination. For while forging cross-border alliances entailed in this case a recognition that national borders cannot constrain finance capital and jobs and toxic emissions, and the conviction that the increasingly transnational character of these phenomena must therefore be directly confronted in popular struggles for social justice,¹³¹ the ultimate objective of these alliances still remained that of compelling individual nation-state governments to better protect the interests of nation-state members from the damaging effects of corporate-driven economic globalization. In this respect, the transnational activism that emerged during the anti-NAFTA campaign was likely perceived by a majority of its participants as much as a necessary strategy for pursuing greater justice within the individual states involved than as an intrinsic value in and of itself. Still, what is notable about this and other cross-national political efforts is that their frame of normative reference extends beyond the nation-state and its boundaries; interests and identities other than those defined by national membership, in other words, structure normative political discourse.¹³²

But what of immigration? Even though it is important to recognize the emerging signs of transnational imagination in some progressive theory and practice, does such imagination necessarily entail normative opposition to the enforcement of national borders against transnational population movements? The answer, it seems, is not necessarily. The critique of statism in international legal scholarship so far has yielded little in the way of a sustained and systematic critique of borders to movement, except, perhaps, in the area of refugee protection.¹³³ And

different countries have common interests in raising the conditions of those at the bottom.").

131. See, *A Just And Sustainable Trade and Development Initiative For North America*, *supra* note 130.

132. As Cathryn Thorup writes of the developing cross-national political linkages between American and Mexican activists,

Increasingly, instead of nationally-rooted cleavages with U.S. actors on one side of an issue and Mexican actors on the opposing side, there is now a new configuration with U.S. and Mexican actors on one side of an issue and an opposing constellation of U.S. and Mexican actors on the other side. As the domestic/foreign policy interface blurs, conflict in the bilateral relationship has the potential to become less nationally-grounded and more closely linked to class, issue-based and sectoral interests.

See Thorup, *supra* note 125, at 5.

133. I do not mean to suggest that the migration/immigration issue has been entirely ignored. A recent panel at the Annual Meeting of the American Society of International Law, for instance, took some steps in the direction of developing such a critique. See *Panel: Immigration Politics and Sovereignty: National Responses To 'Bad Aliens,'* 88 A.S.I.L. PROC. 439 (1994).

even if some progressive activists are beginning to approach certain political questions in transnational terms—even if they have begun to organize with their counterparts in other countries, and to envision themselves as part of communities that extend beyond their national borders—there is little indication that they will easily endorse the unobstructed transnational movement of people. Indeed, although immigration was not itself on the table during the NAFTA debates,¹³⁴ one of the central substantive messages that progressive opponents of NAFTA sought to drive home is that simply removing the constraints of national borders without addressing the relationship between the societies those borders divided and the social conditions prevailing within each of them will end up redounding against those who are already the most powerless on either side of the line.¹³⁵ While NAFTA seeks to dis-

But the issue remains distinctly underdeveloped in the literature overall. And although there *does* exist a developing critical immigration law scholarship (for a few relevant sources, *see supra* note 52; *see also* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, Juan F. Perea, ed. 1996) (forthcoming)), its focus is largely domestic, and there has so far been only limited cross-fertilization between the immigration literature and the work of progressive international scholars.

As suggested in the text, progressive international legal scholars have to date devoted more attention to critiquing the international refugee protection regime and state exclusion of refugees under various circumstances. *See, e.g.*, Isabel Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35 (1989-90); Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991); Harold Koh, *Refugees, The Courts and the New World Order*, 1994 UTAH L. REV. 999; Louis Henkin, *An Agenda For The Next Century: The Myth and Mantra of State Sovereignty*, 35 VIR. J. INT'L L. 115 (1994).

134. The transnational movement of labor was kept off the agenda almost entirely by the United States during negotiations, *see* Cornelius, et al., *supra* note 20, at 33; Buchanan, *supra* note 124, at 386-387, and with the exception of a few provisions facilitating the transnational movement of corporate employees, neither the main agreement nor the side agreements address the subject of immigration at all. *Id.* On the other hand, there was a great deal of debate in this country about the immigration consequences of the agreement, with supporters usually claiming that NAFTA would serve to curtail rates of undocumented immigration, and many opponents arguing that it would increase the flows. *See* Buchanan, *supra* note 124, at 387.

135. *See e.g.*, Cameron Duncan, *Greenpeace*, Testimony before the Committee On Foreign Relations, United States Senate on The North American Free Trade Agreement and the Environmental Side Accord, Oct. 27, 1993 ("[Greenpeace has] concluded that the Agreement promotes a brand of economic integration that benefits a small sector in each country at the cost of rising inequalities and continued degradation of the ecosystems on which we and future generations depend."); Elaine Bernard, *What's the Matter With NAFTA?* 25 RADICAL AMERICA 19, 19-21 (1994) ("What is termed 'free trade' in the context of the . . . NAFTA agreement is actually deregulating international commerce There are and will continue to be rules of trade, regardless of what happens with NAFTA. But, NAFTA locks in, on a continental scale, the re-regulation of these rules in a very adverse way for most workers and citizens in all three countries. NAFTA increases the influence and safeguards the interests of multinational corporations in this essentially free investment pact."). *See also* Melvin Burke, *The Human Costs of NAFTA*,

mantle most national barriers to the movement of capital, many critics have argued that it does so in a way that ignores gross inequalities among the parties and their populations and also undermines government social protections from the market for everyone (other than the transnational corporations themselves).¹³⁶ It is, of course, precisely a lack of social protections and the existence of inequalities across borders that often have proved compelling to the corporations and that have prompted them to do business across national boundaries in the first place.¹³⁷ If progressives were to endorse the free movement of people, therefore, they would likely do so only as part of a broader program of transnational integration entailing redistributions of wealth and improvements in social status and social protections both within and across boundaries.¹³⁸

HUMANIST, Sept/Oct. 1993, at 3.

136. For general critiques of NAFTA along these lines, see e.g., Bernard, *supra* note 135, at 19; Burke, *supra* note 135, at 3; Brecher, note 127, at 685.

Many of NAFTA's progressive opponents contrasted the agreement's socially regressive "free trade" vision with an alternative vision they called "fair trade." A "fair trade" agreement would, among other things, provide assistance for development of the less developed parties to the agreement, provide compensatory financing for all parties suffering temporary dislocations and increased financial pressures from integration, and upwardly harmonize labor, environmental and consumer protection regulations. The major tri-national grassroots coalition opposing NAFTA, for example, (see text accompanying notes 126-132, *supra*) stated its support for

"the initiation of new negotiations to craft rules that encourage mutually beneficial trade, investment, and development activities. Our countries can reduce trade barriers and remove some obstacles to investment, as long as we embrace a new framework of initiatives for our hemisphere and for the world that steer trade and investment to promote fair paying jobs, democratic and self-reliant communities, and a healthy environment."

The Alliance For Responsible Trade, et al., *A Just and Sustainable Trade and Development Initiative For the Western Hemisphere*, December 9, 1994, at 1 (original emphasis). For further discussions contrasting the free trade and fair trade visions, see generally George E. Brown, et al., *Making Trade Fair: A Social and Environmental Charter For North America*, 9 WORLD POLICY JOURNAL 326 (1992); Jorge G. Castaneda and Carlos Heredia, *Another NAFTA: What A Good Agreement Should Offer*, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER 78 (1993); *Free Trade: The Ifs, Ands & Buts*, RESOURCE CENTER BULLETIN, Nos. 31/32, Spring 1993 ("Economic integration and expanding trade can be made to serve a broader agenda embracing social values. The goal is to construct a framework for integration that protects human beings, their communities, and the environment, not just the trade and investment decisions of transnational corporations"). See also Raul Hinojosa-Ojeda, *The North American Development Bank: Forging New Directions In Regional Integration Policy*, 60 J. AM. PLAN. ASS'N 301 (1994) (endorsing a "NAFTA-Plus" scenario, a "substantially enhanced NAFTA, which establishes specific institutional mechanisms" for ensuring that "the economic benefit of trade liberalization . . . serve[s] the explicit goals of upgrading the environment and improving communities on both sides of the border.").

137. See e.g., BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 170-178 (1982).

138. As I stated in note 136, *supra*, many of NAFTA's progressive opponents called for an

This sort of transnational integrationist vision, I think, represents a compelling imaginative alternative to the nation-centered vision of social life which has traditionally informed American progressive thought.¹³⁹

integration program which makes the reduction of economic inequalities between countries and regions a priority. On the other hand, few opponents addressed the immigration question directly. Some anti-NAFTA activists and researchers sought to rectify this omission at a conference following NAFTA's passage, arguing that that "a fair trade position consistent with global equity has to support immigrant rights and concern itself with the mobility of people as well as capital and products," Conference Report, *Beyond NAFTA: Toward Equity and Sustainability*, Havens Center, University of Wisconsin, 1994 (Madison Conference)), at 23. The conference called, specifically, for "a solution to the migration problem from an economic and labor vision that recognizes the asymmetries among our countries. Said recognition should consider the creation of compensatory funds for sustainable development which, if administered democratically with broad social participation, can contribute to the generation of social and productive infrastructures that promote jobs and well-being in our communities." *Id.*, at 39-40. Note, however, that this statement is hardly a call for free labor mobility among the NAFTA states; in fact, it could be read to suggest that sustainable development is desirable because it would serve to curtail the incentives for labor migration in the first place. Some supporters of immigration restriction have made just this point; see Philip Martin, *supra* note 71, at 89 (describing efforts of international and multilateral organizations to "relieve[e] the supply-push factors that encourage migrants to leave their countries" through "accelerating growth in emigration nations," and promoting "'stay-at-home' development.").

139. This vision also clearly bears some resemblance to the process of economic and political integration currently ongoing within the European Union. The Maastricht Treaty and other accords provide for free movement for European Union citizens within the territory of the member countries, and guarantee important political rights for those EU nationals who reside in other EU countries. At the same time, Maastricht provides for substantial development aid to the less developed countries in the Union, and the European Community Charter of Fundamental Social Rights of Workers and other instruments guarantee enforcement of certain community-wide workplace and environmental standards, thereby constraining the possibility of a corporate-driven "race to the bottom." These provisions were enacted as part of a broader process of European political and economic integration whose future scope and character remain uncertain. For a comprehensive overview of the European integration process as it pertains to social, environmental and development policy, see e.g., SIMON BRONNITT, FIONA BURNS & DAVID KINLEY, *PRINCIPLES OF EUROPEAN COMMUNITY LAW* 431-442, 527-566 (1995). For an overview of the provisions pertaining to free movement and political rights of EU citizens, see David O'Keefe, *Union Citizenship*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* (David O'Keefe and Patrick M. Twomey, eds. 1994).

It is important to note, however, that in conjunction with a regime of increasingly free movement for European Union citizens within EU territory, the external boundaries of the Union have become increasingly tightened against non-EU citizens, and their status in Europe is expected to suffer. See generally Mehmet Ugur, *Freedom of Movement vs. Exclusion: A Reinterpretation of the 'Insider'-'Outsider' Divide In The European Union*, 29 INT'L MIGRATION REV. 964 (1995); Andrew Convey & Merck Kupiszewski, *Keeping Up With Schengen: Migration and Policy In The European Union*, 29 INT'L MIGRATION REV. 939 (1995); Tony Bunyan, *Borders Go Down, Walls Go Up*, GUARDIAN, Feb. 15, 1995, at 20. For a critical analysis of the reinscription of exclusionary boundaries at the European level through European Community law, see Joseph H. Weiler, *Thou Shalt Not Oppress A Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals—A Critique*, 3 EUR. J. INT'L L. 65 (1992).

Yet seeking its realization for the United States and its neighbors is a long-term project, to be pursued over decades, if it is ever pursued at all.¹⁴⁰ In the meantime, we are faced with different conditions entirely: Formally unauthorized transnational movements of people take place outside the context of any system of formal transnational integration, under conditions of substantial inequality, and with few social protections for most parties involved. Where does this leave progressives on the subject of unauthorized immigration today? Can we begin to imagine alternatives to our fundamentally nation-centered approach to the subject of exclusion at the borders under current conditions as well?

One could well argue that we *must* imagine such alternatives. For the fact is that there are powerful forces at work that bring the immigrants here, including a persistent demand for their labor,¹⁴¹ job scarcity and comparatively poor living standards in their home countries,¹⁴² and the immigrants' close ties to family and other community members that have come before.¹⁴³ It is clear that government border

140. The challenges involved in pursuing such an agenda in the North American context are substantial. For, in the words of one analyst,

[d]evelopment disparities are much wider between North American countries than between any other group of countries that have attempted to integrate their economies. Countries within the European Union and the European Free Trade Association started with far smaller differences in per capita (and total) GDP than what exists between Mexico and the United States. [Furthermore], [i]ncome distribution disparities within the United States and Mexico are also much wider than those within member countries of the European Union.

Hinojosa-Ojeda, *supra* note 136, at 301.

141. See e.g. Cornelius et al, *supra* note 20, at 34 (describing the "persistence [in the United States and other] industrialized economies, of employer demand for low-cost flexible labor - a *structural* demand that has become decoupled from the business cycle.").

142. Note, however, that despite the common conception that it is the poorest and least educated people who come as immigrants to this country, analysts have concluded that "[t]he very poor and the unemployed seldom migrate . . . and unauthorized immigrants tend to have above-average levels of education and occupational skills in comparison with their homeland populations." PORTES & RUMBAUT, *supra* note 71, at 10-11.

143. Analysts have concluded that one of the most significant—and often overlooked—determinants of undocumented immigration to the United States are "immigrant networks"—ties of family and community that link immigrants in this country with compatriots remaining in the home country. See, e.g., PORTES & RUMBAUT, *supra* note 71, at 230-32, 234:

Contrary to the assumption that international labor migration is basically an outcome of individual decisions governed by the law of supply and demand, we argue that the phenomenon is primarily socially embedded. Networks developed by the movement of people back and forth in space are at the core of the microstructures that sustain migration over time [For example], [m]ost recent arrivals from Mexico, including the undocumented, are reported to find jobs within a few days thanks to the assistance of family and friends. The same social networks serve as financial safety nets and as sources of cultural and political information Although [employer

control measures (even assuming their legitimacy) can, at best, slow, but not stop, this process.¹⁴⁴ Mustn't progressives develop a normative politics of the border that takes these ineluctable facts into account?¹⁴⁵

Arguably, the need to develop an alternative border politics is especially urgent given the stated commitment by some progressives to interrogate conventional structures of thought and social organization in light of the experience of the marginalized. The experiences of the marginalized in this case—the immigrants themselves—quite often do not conform with conventional modes of nation-centered thinking at all. Because although undocumented immigrants do live constantly subject to the legal authority of the United States' national border, they also reside in social worlds that simply are not confined by national territorial boundaries. In fact, anthropologists and other social scientists have shown that many undocumented immigrants have constructed lives that traverse political, geographic, cultural and political borders altogether. These immigrants maintain "multiple relationships—familial, economic, social, organizational, religious and political—in both home and host societies . . . [They] take actions, make decisions, and develop subjectivities and identities embedded in networks of relationships that connect them simultaneously to two or more nation-states."¹⁴⁶ These

demand] is likely to activate the potential for migration in the first place, it is the consolidation of social networks that gives the process its self-sustaining and cumulative character.

For more on immigrant networks, see e.g., Douglas Massey, *The Social and Economic Origins of Immigration*, *Annals*, 510, AAPSS at 60, 68-70 (1990).

144. See Cornelius, et al., *supra* note 141, at 36 ("It is easy to be deceived by the apparent short-term efficacy of some of the sweeping changes in the rules of the immigration game now being implemented or considered. There is still no basis for claiming that these drastic remedies have 'worked' where they have been tried, at least in the terms specified by their advocates. Nor are there, necessarily, grounds for believing that with the passage of more time, with more 'fine-tuning,' more public education, etc., such measures will sharply and durably modify patterns of migration and employer behavior in the anticipated way. There are many routes to failure and frustration."). Elsewhere, Professor Cornelius has written (about Mexican undocumented immigration): "Short of a full-scale militarization of the border, no policy will prevent a continued influx into this country of Mexican migrants who cannot meet the stringent criteria for admission as permanent residents, usually because they lack immediate relatives who are U.S. citizens. These people will come legally if they have a legal-entry option, illegally if they do not." Wayne A. Cornelius, *Simpson-Mazzoli vs. The Realities of Mexican Immigration*, in *AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES* 141 (Wayne A. Cornelius and Ricardo Yanzaldua Montoya, eds., 1983).

145. One might argue, moreover, that doing so is particularly necessary in light of the historical relations of domination and subordination between the United States and many of the migrant-sending countries that have contributed to the process of unauthorized immigration in the first place. See text accompanying notes 71-72, *supra*.

146. BASCH ET AL., *supra* note 119, at 7. See also Robert Smith, *Transnational Localities*:

experiences of multiple memberships and deterritorialized identities begin to suggest the increasing inadequacy of conventional normative approaches to the national border.

I would like to think that progressives' substantive normative commitments against subordination and exclusion, and their methodological commitments against regarding the given as necessary, make imagining (and constructing) convincing alternatives to the prevailing system of territorial exclusion possible. Yet I am also less than certain that such alternatives will be easily forthcoming. Progressive or critical political thought is engaged, as political philosopher Iris Young has put it, in articulating "normative possibilities unrealized but felt in a particular given social reality."¹⁴⁷ Political imagination, in other words, develops in response not to abstract conceptions of the right and the just, but to "unrealized possibilities" latent in the imaginer's political culture.¹⁴⁸ But one wonders to what degree our own political culture now contains the unrealized normative possibility of a politics of inclusion at the border. Normative nationalism remains "the most universally legitimate value in the political life of our time."¹⁴⁹ Even for most progressives,

Community, Technology and the Politics of Membership Within the Context of Mexico-U.S. Migration (paper presented to the American Sociological Association Meetings, August 1995) (on file with the author), at 28 (advancing analysis which acknowledges "the simultaneous memberships of migrants and their children, and which can describe the processes of diasporization, the creation of transnational civil society, or transnational community formation."); Rosemary Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791, 795 (1995) (Anthropologists argue that their discipline must address "identities forged in transnational communities by peoples engaged in ongoing 'migratory circuits' that traverse national borders and boundaries;" it must pose "interpretive questions about the tactics and cultural practices of peoples who simultaneously inhabit multiple cultural frames of reference."); Douglas S. Massey, Luin Goldring & Jorge Durand, *Continuities In Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 AM. J. SOC. 1492, 1500 (1994): ("Over time, migrant communities become culturally 'transnationalized' incorporating ideologies, practices, expectations and political claims from both societies to create a 'culture of migration' that is distinct from the culture of both the sending and receiving nation.").

147. YOUNG, *supra* note 42, at 6. See also UNGER, *supra* note 118, at 204 ("The imagination works by a principle of sympathy with the suppressed and subversive elements in experience. It sees the residues, memories, and reports of past or far away social worlds and neglected or obscure perceptions as the main stuff with which we remake our contexts."); MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 33-66 (1987).

148. YOUNG, *supra* note 42, at 6.

149. Anderson, *supra* note 65, at 12. See also JOHN DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* 57, 66 (1979, 1993) ("Nationalism is . . . the very tissue of modern political sentiment, the most widespread, the most unthinking and the most immediate political disposition of all . . . Even at its most ideologically pretentious, the species has not yet conceived a practical form in which to transcend the nation-state); WALKER, *supra* note __, at 179 ("[S]tates

the boundaries of the national state still represent "the conventional limits of our understanding of what political life can be."¹⁵⁰ The ideals and norms that critics articulate "arise from the yearning that is an expression of freedom: it does not have to be this way, it could be otherwise."¹⁵¹ But can it really be otherwise, at least in the short-term, with respect to enforcement of this country's borders against undocumented immigrants? It is not yet clear that our collective political imaginations can or will extend this far.

VII. CONCLUSION

Opposing Prop. 187 and its progeny is a more complex undertaking than it might initially appear to be. This is not to say that the question of whether to oppose such measures is open to any serious question. In fact, Prop. 187 and similar measures provide relatively easy targets of criticism: They are fundamentally xenophobic measures, as their critics have charged, which will poorly serve their own stated objectives of deterring unauthorized immigration and saving taxpayers' money; and to the extent they are enforced, they will produce a broad range of social pathologies in this country besides. Arguing this much is simple enough, though critics have differed among themselves about precisely how to frame each of these arguments for public consumption.

More difficult for the critics, however, is the prospect of arguing that these measures are wrong because they are unfair to their intended objects—the undocumented immigrants themselves. However intuitive the injustice argument might be, it is often a difficult argument for opponents to make, because defending the interests of these accused border violators is commonly viewed as an assault on the integrity of sovereign statehood itself. In political debate, therefore, the critics have tended to stick with more instrumental arguments, and to keep their concerns for the undocumented to themselves.

Yet the difficulty involved in characterizing measures like Prop. 187 as unjust is not merely one of practical politics. I have argued that

have become (second) nature and come to seem inevitable. We have inherited . . . Hobbes' sense that there can be no solution to the difficulties and contingencies of modern life without the eternal presence of the sovereign state."); Charles Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 592 (1983) (arguing that the "national ideal is still dominant in common-sense moral thought").

150. Walker & Mendlovitz, *supra* note 119, at 3.

151. Young, *supra* note 42, at 6. See also Unger, *supra* note 118.

even beyond the immediate pressures of public political discourse, the question of how to articulate what is wrong with these measures poses an important intellectual challenge for progressive thought. Certainly, progressives can, and do, criticize policies which mandate the wholesale social exclusion of a class of people who reside and work here as normatively intolerable. But the problem is that undocumented immigrants are not entirely like other classes of subordinated people whose condition progressives have addressed and whose inclusion they have championed. These immigrants are not merely "inside-outsiders"¹⁵² (although they are this as well); instead, they come to this country from the outside and without formal permission, and the full story of their subordination lies not merely in the social exclusion they face after their arrival, but also in the efforts by government to keep them from coming in the first place and to remove them once they are here. Yet progressives' normative nationalism—whether tacit or explicit—makes them far less able and less likely to criticize the immigrants' exclusion from territory in the first place. The result is a gap—between a politics of inclusion within the national society, and a politics of exclusion, or acquiescence to exclusion, at the society's boundaries. And the trouble with this gap, among other things, is that it renders progressives unable to fully address the distinct reality of the undocumented, whose lives are shaped by compound forms of exclusion, including exclusion at and in relation to the border.

Whether there is any way of bridging this gap is a question I hope progressives will begin to address more directly. Yet posing the question is not entirely easy, not merely because our conventional political imaginations tend to make the issues involved difficult for us to see, but also because doing anything other than criticizing the nasty anti-immigrant mood currently sweeping this country might seem to run the risk of fanning its flames. But it is precisely the recent resurgence of anti-immigrant hostility, including the promulgation of exclusionary measures like Prop. 187, that makes the development of progressive thought on these matters particularly urgent.

Beyond the specific subject of immigration, however, posing these questions is also important for the development of progressive or critical thought more broadly. As we have seen, progressive scholarship defines itself, in part, as an oppositional project concerned with the construction and subordination of outsiders. Undocumented immigration

152. See text accompanying note 69, *supra*.

presents progressive thought with an especially "hard case," for while these immigrants are often understood as quintessential outsiders, their exclusion from the national society can also seem a necessary condition for political life as we have come to know and imagine it. The subject of undocumented immigration represents for progressives a kind of political crucible: it provides both a site in which to examine just how far our commitments against exclusion and subordination extend, and an occasion to explore the possible reaches of progressive political imagination.