

The Law of *Illegal* Peoples: Liberal Political Theory, Undocumented Immigrants, and 21st Century Conceptions of Justice and Citizenship

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In 1971, Roger Nett called the freedom of human movement across the globe “the civil right we are not ready for.”¹ Over three decades later, in the spring of 2006, large immigrant rights protests took place in cities across the United States. Using Spanish and English-language radio, cell-phones, the Internet and word of mouth, thousands of high school and college students, service workers, professionals, the unemployed and full-time parents interrupted their daily lives and marched into the streets of cities like downtown Los Angeles, Chicago, Dallas and New York.² Besides signaling another round of civil rights protests, these events made visible the debates surrounding national identity, citizenship and undocumented immigrant rights like nothing before.³ For many, these events signaled their unique political existence, the birth of a new “citizen,” so to speak. It is this understanding of citizenship—and the problems that it poses to traditional theories of justice, national identity and liberal policies of exclusion—that this dissertation explores.

This chapter, however, focuses the possibility of a domestic theory of the justice that corresponds to the societal pressures and understanding of citizenship presented above. What is the nature of justice in the 21st century? That is to say, how do we think about justice in a society with a population consisting of a “minority-majority,” with dynamic and ongoing “post-racial” *racial* politics (especially after President Obama), and an increasingly migratory or international population? Perhaps most pertinent to this chapter: How does being within the scope of justice, which undocumented immigrants obviously are (contrary to popular belief), constitute a type of political subjectivity within

the state? Those who marched in the protest of 2006, and every Mayday since, ask these questions to *all political philosophers*, not just those of Latino/a backgrounds. For these reasons, I hope to make these open queries for you, my reader, in a way that challenges many of the assumptions pertaining to citizenship within mainstream Anglo-American political philosophy.

What follows are several reconsiderations of justice that inform of more robust and fair understandings of state-membership that do not rely upon formal, legal-status. These reconsiderations focus on the central tenants of liberal political theory and the work of John Rawls.⁴ Of particular importance is the first limitation that Rawls places upon his theory of justice, namely, that it is a theory of justice for a closed society.⁵ My contention is that this constraint provides too much information regarding the persons behind the famed “veil of ignorance”; when formulating the basic principles upon which the structure of society will depend, we may not know if one is rich, poor, black, white, able-bodied or not, male or female, gay or straight, but we *do* know that one will be a citizen (because of the limitation mentioned above). Through this constriction Rawls renders justice to be something limited to those who are official members of the body politic. With this move, upwards of 12 million people are immediately alienated from Rawls’ basic conception of justice, individuals who clean our houses, take care of our children, pay taxes, serve us food and rent the apartment down the hall; although we did not formally invite them into this country (nor did they ask for permission), these are individuals that our national economy has historically turned to for cheap, reliable labor. Unless this first limitation is justifiable, how can the range of justice, in its most basic form, be so narrow?

In the first section of this paper, I provide the philosophical impetus for why political philosophers *today* must think about justice from what I call “the outside of nationality.”⁶ I turn to the work of the prominent Latin American philosopher, Enrique Dussel, in order to add an ethical component to this discussion. The lynchpin of his *philosophy of liberation*, Dussel’s concept of “analectics” supplies a libratory dimension to this discussion that necessitates an engagement with various positions of marginality and vulnerability in thinking about justice and role of the political (which is move that is not foreign to Rawls’ method, e.g. the difference principle).⁷ Dussel understands Rawls’ project as providing the formal conditions that legitimate the authority of the state in the consent of the people—this places Rawls at the second level of the political.⁸ Dussel not only explains the ways in which the institutionalization of power is the actual manifestation or realization of the power of the people (*pueblo*), but he argues that all political institutions are fallible. Since institutions are meant to protect and ensure the continuation of life, when the suffering inherent to them becomes too great, a political transformation must take place. This transformation must begin with the oppressed, marginalized and excluded if it is to be an “analectical” politics of liberation (based on the reason of an Other).

In the second section of this chapter, I hold Rawls accountable to standards that are his own: (1) justice should not rest upon arbitrary or contingent factors and (2) political philosophers must work with conceptions of people as the actually are, within the realm of what is actually possible.⁹ Similar to how Rawls thought that one’s family or class have nothing to do with one’s relation to justice, since these are determinations outside of your control, the place of one’s birth or the family one is born into should not

have any effect on justice (or so I will argue). Moreover, it is increasingly difficult and indicative of a rift between theory and practice to think about justice in its idealized form when one assumes outdated if not impossible conceptions of society and the state as its starting point. In other words, I think it is impossible to think about justice today from the perspective of closed societies. While I understand the importance and limitations of “ideal theory,” I offer some alternatives that argue for parochial understandings of justice and avoid the pitfalls of appeals to human rights or cosmopolitanism.

If I can demonstrate to you that legal-citizenship should not be a factor in the construction of justice, such that Rawls’ initial constraint must be justified or modified, then perhaps, using the difference principle, we can ask *why* some should be “citizens” and *how* others regarded as “noncitizens” benefit from this particular difference in social status—“the difference principle,” the idea that any differences in social or class status among the people in his proposed society should benefit the least advantaged.¹⁰ Once the arbitrary bases for citizenship are included into the list of social and physical contingencies curtailed by the Rawlsian apparatus, then an undocumented immigrant or non-citizen resident become possible life options for persons behind the veil of ignorance.¹¹ This would mean that Rawls’ theory would have to account for “illegal aliens,” or else risk the arbitrary starting point of an enclosed polity.¹²

Undocumented immigrants are to be included in the list of persons subject to justice, and if we are really committed to the central tenants of liberal political theory (i.e., autonomy and equality) then they should also have a say in the construction of justice as well.¹³ Being within the scope of justice—not just a theoretical claim but a historical fact—provides a type of political subjectivity, what is this subjectivity? If it is

not equivalent to “citizenship” then at the very least it is a form of political personhood endowed with an assortment rights. The burden thus falls upon Rawlsian theory to justify this difference in social status.

I believe that Rawls was aware of this line of critique. In *The Law of Peoples* he acknowledges the arbitrary nature of borders on several occasions.¹⁴ Nonetheless, his response to the nature of borders does not resolve the issue, and I will appeal to his difference principle to think through the problems posed above. I attempt to provide what amounts to Rawls’ way out of the above questions. I take strategy this seriously. In the *Lectures on the History of Political Philosophy*, while explaining his approach to teaching philosophers like Hume, Leibniz, and Kant, Rawls writes: “I always assumed...that the writers we were studying were always much smarter than I was. If they were not, why was I wasting my time and the student’s time by studying them? If I saw a mistake in their arguments, I supposed they [the philosophers] saw it too and must have dealt with it, but where? So I looked for their way out, not mine.”¹⁵ Thus, while attempting to rethink the scope and range justice, so as to inform of more adequate models of state membership in the 21st century, I hope to launch a Rawlsian (and Dusselian) critique of Rawls.

I. The Analectical Critique of Justice: Why we must think about justice from “the outside” of nationality

This section offers motivation for thinking about the relationship between Rawls’ work on justice and undocumented immigration. This section also offers opportunity to place mainstream Anglo-American political philosophers into conversation with their Latin American counterparts—one of these thinkers being Enrique Dussel (professor of

philosophy at the Universidad Autónoma Metropolitana, Iztapalapa, Mexico City).¹⁶ Best known for the *Philosophy of Liberation*, Dussel is political exile to Mexico from Argentina where in 1970's paramilitary forces bombed his home.¹⁷ A student of Emanuel Levinas and Paul Ricoeur, Dussel is part of a generation of South American philosophers who placed the subject of colonialism and the legacy of colonial oppression against women, children, African slaves and the indigenous at the forefront of philosophical analysis.¹⁸ Inspired by liberation theology, a branch of Roman Catholicism that maintains a tenuous relationship with the Church due to its political commitments and social activism, the philosophy of liberation is one of the only segments of Latin American philosophy considered to be an autochthonous school of thought that attempts to think in and about the colonial experience (with much to say about the nature of philosophical discourse in Europe).¹⁹

Dussel's most current and important contribution to the field of political philosophy (not just Latin American philosophy) is a large three-volume work entitled *The Politics of Liberation: Critical World History, Architectonic and Critique*.²⁰ This project is a thorough description, reorientation and analysis of the theoretical landscape of the history of all political philosophy (from ancient Babylon and China to George Washington, Simón Bolívar and the Zapatistas). In addition, this work supplies a normative account of the purpose and overall structure of the concept of the political and the practice of politics. A more modest piece, *Twenty Theses on Politics* is a synopsis and heuristic for the above-mentioned *magnum opus*, in which Dussel attempts to summarize his massive project into twenty individual theses (written in three weekends, of course).²¹

According to Dussel, there are three levels or stages required in describing the concept of the political, not to mention three corresponding principles that suggest normative ideals that bring these levels about. In its most basic formulation, the purpose of the political is the preservation, enhancement and continuation of the life of the *pueblo* (i.e., the people or community).²² At this first stage, Dussel's understanding of the political implies a "material" component aimed at ensuring *the continuation of human life* (which includes an account for why nonhuman life is equally important). The political is central or necessary to the material conditions that provide for the possibility of human existence. In its original form, *political power* consists of the will-to-life of the *pueblo*. If it is to be effective in ensuring the survival of the people in ways that realize human potential, this will-to-life requires the institutionalization of power and the establishment of government. Dussel explains this as the move from *potentia* (power as potential) to *potestas* (actualization or institutionalization of power).²³ Here, Dussel warns of the fetishization of power, the ultimate corruption of politics, where a governing-will or political ruler views their individual authority as the source of political power and separate from the will-to-life of the people.²⁴

Dussel recognizes a second level of the political while guaranteeing preventative measures against the corruption of politics, the legitimating sphere (this is where people like Rawls enter the discussion). Through such ideas as overlapping consensus, or even in a broader sense the "social contract," political philosophers of the second level ensure the legitimacy of political institutions. Dussel also calls this the formal or procedural-normative sphere.²⁵ Again, at this level the purpose of political philosophy is to explain the legitimacy of particular forms of government and law.

The third and final level of the political is the actual application and feasibility of political action. This is where political administrations arise and the actual practicing of politics takes place. Dussel calls this the feasibility level because it pertains to what political institutions can actually do, i.e. the efficacy of legitimate forms of governance.²⁶ It is at this last level where certain limitations become obvious: being the work of imperfect human beings, all political institutions will cause victims; even the best or most just political theories and institutions will be unfair to someone, somewhere.

For Dussel, although they may be imperfect, political institutions are indispensable. He writes, “For a critical and realistic politics, institutions are *necessary* despite their imperfection; they are entropic and as such there *always* arises a moment in which they need to be transformed, changed, or destroyed.”²⁷ Entropy, here, refers to institutions that do not have any novel, productive growth as a result of confronting the inevitable forms of oppression and suffering aimed at marginalized individuals. Instead, entropic institutions ignore the possibility for political transformation by interpreting novel claims for justice as the latest form of a previous accepted criticism. For example, the sentiment “Universal healthcare is just another form of socialism,” reifies early to mid-20th century fears of socialism. Attempting to avoid war or revolution as much as possible, Dussel argues that political transformations are all that remain possible in a world where military power is concentrated in the way it is (i.e., if one wishes to take on the political power of place like the United States). In order for political transformations to cause a rupture within the political hegemony, in order for them not to result in reactionary politics or reaffirm mainstream political platforms, *those persons suffering at the hands of oppression and exclusion, people outside the ontological horizon of politics,*

must engender the transformative moment. Thus, Dussel provides the conditions necessary for an *analectical* critique of justice, the type of which I perform within the work of Rawls.²⁸

Put into the context of contemporary political organization, analectical politics helps to formulate a conception of the political that ventures beyond the workings of mainstream politics by providing the opportunity for alienated or marginalized perspectives to serve as the source for political change—this is the liberating component of Dussel’s political work. If political institutions are to be just at all they must aspire towards the liberation of the human, the necessary starting point is the oppressed members of society. This is to be an ongoing process. Dussel writes:

It is true that the bourgeois Revolution spoke of *liberty*, but what is necessary now is to subsume that liberty and speak instead of *liberation* (as in North American pragmatism, one does not speak of *truth* but *veri-fication*). So now we do not refer to liberty but instead to liber-ation as a process, as the negation of a point of departure, and as a tension pressing towards a point of arrival.²⁹

From the perspective of the dominant group or corrupt ruler, anti-hegemonic analectical praxis will always be “illegal” or outside the law. In this framework, if positive law is meant to support and establish the status quo, then anything that transcends or challenges the status quo will be “unlawful.” Building from this, “the Law of Illegal Peoples” refers to the fact that as analectically situated, undocumented people are as illegal as Miguel Hidalgo, the father of Mexican independence and a criminal in the eyes of Spain, as illegal as George Washington, a criminal in the eyes of colonial Great Britain, as illegal as runaway slaves (the first “illegal peoples”), as illegal as Dr. Martin Luther King Jr. and his famous letter from Birmingham jail.³⁰

A conclusion to be drawn at this point is that although theories of justice, like that provided by Rawls, are positive steps in thinking about the overall structure of society

and the principles meant to regulate the fair terms of social cooperation, they must always be improved. Part of this improvement requires that our conceptions of the state (and justice) become ongoing processes, not static or fixed. We do not simply achieve something like social “equality” or “fairness,” these are ideals that we are constantly striving towards. Thus, how does the reality of undocumented immigration challenge common held conceptions of justice and force growth within the United States political atmosphere? The next hurdle for mainstream theories of justice requires the confrontation with the assumptions built into the idea of citizenship and the question of undocumented immigration. These challenges afford the opportunity to take political liberal theory to the next level, closer to a theory of justice in a more globalized, migratory world.

II. Towards a Theory of Domestic Justice without Nationality or Citizenship as the Starting Point

In *The Browning of America and the Evasion of Social Justice*, Ronald Sundstrom notes that liberal political theory often begins *within* the nation-state and assumes bordered polities as its starting point.³¹ This presumptive “nationalist” orientation forces political philosophers to think about justice in more *global* or *cosmopolitan* terms when confronting the question of immigration or the rights of people in other parts of the world. This is a strategy in the right direction. Yet, as I argue below, it is problematic. If true to their beliefs, someone committed to the ethical equality of all human beings cannot help but think about the lives of those outside of one’s national boundaries. In the mid-1980’s, James L. Hudson argued that any attempt to limit a moral framework in terms of nation-states runs the risk of arbitrarily handicapping its ethical commitments, adequate justification is required.³² Along these lines, as Phillip Cole reminds, most liberal theorists hold that the question of national belonging and political membership

rests upon answers that satisfy liberal principles. When one stops to reflect on these answers, however, they increasingly seem to defy the equal worth of all human beings.³³

Hudson writes,

The philosophical discussion of immigration restriction has thus largely been a discussion of the merits of nationalism. The issue is not finally settled, but nothing has yet been done to rescue nationalism from the dubious company of racism and sexism. The thesis that we should give priority to fellow citizens, like the similar thesis with respect to members of our own racial or sexual group, requires some strong support if it is to be credible. It has not yet been given such support, and the prospects are bleak.³⁴

This nationalist orientation makes the question of undocumented immigration notoriously difficult to think about from within the liberal framework. What type of moral consideration do we owe unauthorized, informal immigrants? You would think that justice for undocumented immigrants should be easier to figure compared to justice for those who remain outside of the national boundaries. However, as I will show through an examination of the work of John Rawls (undoubtedly the most influential political philosopher of the 20th century), it remains equally difficult to think about justice for undocumented people inside of closed polities.

At the onset of a *Theory of Justice*, Rawls argues that his main object of inquiry is justice, the basic structure of society. As such, Rawls seeks a simple conception of justice and limits his project in two crucial ways: First, after noting that he is “concerned with a special case of the problem of justice,” he writes “I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.”³⁵ Rawls reemphasizes this limitation in later works but adds that “this position views society as closed: persons enter only by birth, and exit only by death.”³⁶ Rawls’s second limitation is that he wishes to “examine the principles of justice that would regulate a well-ordered

society.” He continues, “Everyone is presumed to act justly and to do his part in upholding just institutions.”³⁷ This is called strict compliance theory. There is an assortment of volumes, journals and books focusing on the second constrictor. In fact, most Rawlsian literature explores the question of whether or not a well-ordered society implies that people share common conceptions of the good as well as whether or not people would behave justly if presented with the opportunity to do so.

For obvious reasons, my concern is with the first limitation (justice for a closed system). I take two issues: The first is that it renders the question of social justice for undocumented people an afterthought; only after we settle justice for citizens can we think about justice for immigrants or those outside the nation. I find this analogous to saying that we need to figure racial justice among whites first, and interracial justice second—how can the basic conception of justice not immediately pertain to 12 million people in the United States? One may attempt to pacify this concern by appealing to the fact that Rawls is working with ideal theory, which supplies the most perfect form of justice possible and then uses this as the rubric by which to judge existing societies.³⁸ In response, I turn to Charles Mill’s and his work on racial justice and the pitfalls ideal theory. My second issue with justice for a closed-society is that it reveals some knowledge about the individuals behind the veil of ignorance: although people behind the veil may not know if they are poor, rich, Black, White, Gay, able-bodied, etc., they know that they will be citizens. This violates the main reasoning and motivation for the original position and veil of ignorance, which is to ensure the principles of fairness that allow for equality and liberty to be simultaneously possible. I will explore this second concern first.

The closed-society limitation is *warranted* but *unjustifiable*. Closed political systems allow for the proper dispersal of burdens and benefits. They also ensure that individuals will exhibit prudence, since it is assumed that the citizenry cannot leave whenever they choose to do so. In *The Law of Peoples* Rawls holds that a government should be an effective means of making citizens respect their environment; they cannot trash the place and then just pickup and leave.³⁹ From a theoretical point of view, arriving at a basic conception of justice for a closed society allows for the vantage point necessary that can be used to think about theories of justice on a global scale. It makes sense that Rawls would recreate the theoretical scenario that provides for the foundations of justice inside of a closed polity on a more global perspective. However, Rawls did not do this but instead appealed to the idea of the Society of Peoples (where there is a form of the original position but it is a bit more open). His reasoning is that one will have to consider the existence of illiberal governments as well as reasonably just institutions that remain religiously structured or monarchical.⁴⁰

Rawls is clear that essential to the basic structure of a well-ordered society is fairness. Political institutions should be fair and the product of well-reasoned beliefs checked by moral intuitions as well as methods of universalization. Reviving the social contract tradition, Rawls holds that consent is crucial to the formulation of systems of government. Being a Kantian, Rawls thinks universality, in terms of the scope of justice for citizens, should also be present in a theory of justice *as* fairness. Using the famed “veil of ignorance,” Rawls asks the members of a hypothetical society to create the conditions for justice by formulating the overall structure and rules of society without knowledge of who they will be in the end result. Assuming that humans are unwilling to

risk that they will become the richest, most privileged member of society, Rawls thinks that reasonable persons would not favor gross disparities in wealth or standard of living (given that they are ignorant of their own social positioning). At the end of the experiment, any differences amongst the lives of citizens should benefit the most disadvantaged or worst-off groups. Rawls calls this the difference principle. The end result of this thought experiment, and hence a theory of justice in an ideal setting, would result in an overlapping consensus on the basic structure of society that leaves room for reasonable disagreement on moral, metaphysical and political ideas.

According to Martha Nussbaum, Rawls differs from other social contract theorists by not assuming any type of natural rights in the original position (which Rawls intended to serve as his version of the state of nature).⁴¹ Whereas Hugo Grotius, Samuel von Pufendorf and Francisco Vitoria influence Thomas Hobbes and John Locke in terms of international law and natural rights, Rawls makes no concessions in this regard. In addition, Rawls maintains the possibility of certain moral intuitions, stemming from his Kantian influence, which inform or check the hypothetical procedure whereby the basic structure of society is determined. Both the procedural orientation and the appeal to moral intuitions ensure that human interests can best be served by a social contract that “divest human beings of the artificial advantages some of them hold in all actual societies—wealth, land, social class, education and so on,” as Nussbaum writes.⁴² In Rawls’ own words:

[T]he reason why the original position must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principles of political justice between free and equal persons must eliminate the bargaining advantages which inevitably arise within background institutions of any society as the result of cumulative social, historical, and natural tendencies. These contingent advantages and accidental influences from the past should

not influence an agreement on the principles which are to regulate the institutions of the basic structure itself from the present into the future.⁴³

If Rawls is concerned with contingencies of birth like class, race and gender (a generous reading with the last two), why does he not recognize that *place* of birth or the family to *whom* one is born are equally contingent? These “politics of birth” are matters of luck that violate the rationality principle, i.e. the idea that as rational beings, humans can solve political problems without reference to arbitrary decisions.

Peter H. Schuck and Rogers M. Smith argue that *jus soli* and *jus sanguinis* are ascriptive elements of state membership lacking consent, the cornerstone of the social contract. This lack of consent should render these illegitimate within the contractarian tradition.⁴⁴ Nonetheless, without an understanding of state membership based on the politics of birth the entire liberal project cannot get off the ground. The theoretical argument for state membership work as follows: Being social animals, human beings require formal institutions and political organizations in order to realize human capabilities and ensure the wellbeing of individuals; these institutions and organizations require various levels of complexity and longevity, in addition to an effective means of regulating the distribution of political power, often with reference to such ideals as liberty, autonomy, equality, community and fairness (to name a few); part of the historical efficacy of political groupings is there less-than-global, that is parochial, nature; for this reason we live in a world of political *communities* (plural); from this perspective some form of state membership is required to allow for the differentiation of one community from another; “citizenship,” in turn, provides an efficient means of designating the range and scope of a particular state’s authority and responsibility, in addition to the duties and benefits shared amongst its people.⁴⁵ This is, of course, aside

from discussions about the origins of citizenship associated with the rise of unskilled labor in light of the industrial revolution, and the shift from networks of religious communities based on faith to communities based on blood.⁴⁶ It is only through the idea of bounded political units that political communities are possible. The determination of membership status is of the utmost importance. The need for political stability outweighs the need for non-arbitrary, well-reasoned arguments.⁴⁷ Thus, the best argument for ignoring the fact that the politics of birth are historical contingencies rest upon utilitarian grounds: without the existence of political boundaries such ideas as autonomy and equality are impossible.

While it is one thing to argue that borders and political communities are necessary, this does not provide an account for why borders *as they exist now* are the products of fair or well-reasoned decisions. Because we need borders for political communities to be possible does not tell us why we should accept those currently in existence, the product of historical contingency (and some would add war—which instead would assume a Hobbesian state of nature). In the *Law of Peoples*, Rawls tells us:

It does not follow from the fact that boundaries are historically arbitrary that their role in the Law of Peoples cannot be justified. On the contrary, to fix on their arbitrariness is to fix on the wrong thing. In the absence of a world-state, there *must* be boundaries of some kind, which when viewed in isolation will seem arbitrary, and depend to some degree on historical circumstances. In a reasonably just (or at least decent) Society of Peoples, the inequalities of power and wealth are to be decided by all peoples themselves.⁴⁸

Rawls continues by saying that in a global society of liberal and decent peoples the common sources for migration go away. He writes, “The problem of immigration is not, then simply left aside, but is eliminated as a serious problem in a realistic utopia.”⁴⁹ All political philosophy is “realistically utopian when it extends what are ordinary thought of as the limits of practical political philosophy.”⁵⁰ Rawls is not advocating for a world

government or global-demos; he stands in agreement with Kant that such place would not allow for effective forms of governance (think in terms of logistics) and result in frequent civil war. Rawls simply believes that under ideal circumstances the causes of immigration would cease, similar to how under ideal circumstances no one would be an undocumented immigrant inside of a domestic polity.

Here is where the argument for ideal theory comes in to play, as does the work of Charles Mills. Mills' project is to try and figure Rawls' position of racial justice. At best, Rawls never really thought much about race, and at worst he willfully ignored this subject.⁵¹ Mills argues for two forms of ideal theory, that which attempts to prevent such things as immigration or racial injustice, and that which tries to rectify past injustices or historical contingencies by creating ideal theories that consider non-ideal factors. Mills thinks that the omission of racial justice affects the nature of justice in a variety of ways. Most important, it would require such things as an intergenerational concept of justice both for reparations and as means of curtailing racial tension for posterity.⁵² Yolanda Wilson argues that omitting the question of racial justice is not a fault in Rawlsian theory. Rawls is dealing with ideal theory, non-ideal theory may require one to engage questions of racial justice, but we cannot hold Rawls accountable for such an omission.⁵³ Similarly, in terms of my project, one may object that just because Rawls does not entertain the question of social justice for undocumented immigrants that this omission is not a fault on Rawls' end.

However, Mills is quick to argue that even in ideal conditions a theory of justice that takes into account racial justice, as a variable that may change the end result of such a hypothetical situation, will appear drastically different from an ideal theory which does

not. The ideal scenario that includes racial justice does not amount to the same ideal conditions that leave this question aside. Furthermore, the purpose of ideal theory was always to serve as a rubric for justice in the real world; what good is ideal theory, Mills asks, if it cannot respond to or measure up to the goal racial injustice at all? Mills has a temporal point; we cannot start over when thinking about justice, but instead must begin from where we are and then posit the ideal to be achieved. The past must be accounted for and not just pushed aside for the sake of contemplating perfection. Cole reminds of this when he writes:

The relation between states and the borders between them are the product of a history, and that history gives rise to ethical conclusions: for example there may have been a colonial relationship between the two states. Too often liberal political philosophy is written against the background of a fictional history in which colonial exploitation never occurred. But once we bring this historical element into our considerations, it has a profound impact upon our ethical reasoning concerning migration.⁵⁴

In terms of space, the question of justice for undocumented persons does to Rawls's project what Mills attempts in terms of time (remember the intergenerational point). It is no longer possible to understand social justice in its most basic form within closed frameworks. Migration, trans-national corporations and multinational people challenge the possibility of formulating theories of justice that ignore the international elements of 21st century societies. Likewise, given the legacies of social oppression visible within gender or racial differences, questions of reparations, affirmative actions policies and other redistributive procedures, a trans-historical approach to justice is required.⁵⁵ As Nelson Maldonado-Torres, Ramon Grosfugel and Jose Saldívar write, "The old way of thinking about migration is obsolete today given the compression of space and time."⁵⁶ One cannot think of national space as enclosed or isolated nor can time be viewed outside of the causal relationships that generate each particular moment. In

considering the nature of justice, these new ideas of time and space must be acknowledged.

There is another consideration that appeals to ideal theory must take into consideration when thinking about justice only for citizens. As T. Alexander Aleinikoff argues, most of the rights that non-nationals or undocumented immigrants have inside of first world countries like the United States are products of the Constitution and not international human rights law.⁵⁷ This is particularly apparent in the language of the 14th Amendment, seeing how it grants legal protections to “persons” not “citizens.”⁵⁸ This proves equally problematic to cosmopolitans and post-citizenship thinkers who often assume a general human rights platform when thinking about social justice for all people in the world. If anything, as Kristen Hill Maher argues, human rights may have an influence on how a state will recognize the rights of its *own* citizens, but this does nothing for noncitizens. For Maher, “human rights norms have generally been enacted within the nation-state system and administered as the rights of citizens.”⁵⁹ Worse, cosmopolitanism and theories of global justice problematize the reality of undocumented immigration. While individuals like Thomas Pogge may think that legal cosmopolitanism is possible in theory, in a way modeled after the European Union, the fact that this would impinge on state sovereignty makes it difficult to imagine.⁶⁰ In a world of global citizens no person can be “illegal.” Thus, the question of undocumented citizenship, as it exists today, is a nonissue from the perspective of cosmopolitan theory just as it is for Rawls.

Even though the category “citizen” is a dated concept reliant upon a Westphalian model of the state and national autonomy, citizenship is not going away. Although the world is increasing becoming globalized and interconnected—such that individuals like

Seyla Benhabib, Yasemin Nuhoglu Soysal, and Peter Spiro view citizenship to be outdated—I doubt that the significance of this concept will lessen given the existence of militaries and the state tendency to avoid sacrificing national sovereignty.⁶¹ Citizenship must be refigured in ways that are attentive to the contemporary concerns of 21st century societies, but nonetheless informed by the workings of the real world, cautious of utopian or idealistic fetters.

Rethinking the nature of justice from the perspective of “illegal” peoples necessitates new or reformulated models of political membership and state-boundaries that are more fluid and porous; *again, the assumption is that rethinking the subject of justice, those to whom justice is due, will inform of new types of political membership.* While I am hesitant to advocate for an open doors policy as a resolution to the undocumented immigration issue, since I think this would be impractical on several levels (namely the efficacy of political communities will be called into question), I do believe that we can do a better job with handling the reality of unauthorized immigration. This starts by fostering domestic social atmospheres conducive to the rights of persons and not official members of the body politic, as well as making *legal-citizenship* an easy and open means towards achieving the ability to participate in the construction and reconstruction of the nation, what I call *national-citizenship*.

Will Kymlicka and Wayne Norman differentiate legal-citizenship from national-citizenship in the following: “[T]here are two different concepts which are conflated in these discussions: citizenship-as-legal-status, that is, as full membership in a particular political community; and citizenship-as-desirable-activity, where the extent and quality of one’s citizenship is a function of one’s participation in that community.”⁶² In this chapter

I am concerned with legal-citizenship, i.e., the actual having or lack of proper forms documentation and identification. Its origins are found in the Roman understanding of citizenship (where the Latin term *civitas* is derived) as the guarantee of certain civil liberties throughout the empire (think in terms of negative rights). The idea of national-citizenship, or “citizenship-as-desirable-activity,” is related to Greek conceptions of citizenship where citizens are those capable of taking part in the construction (and reconstruction) of the public good (think positive rights).⁶³ It is the second understanding of citizenship that is at work when we uphold a member of the political community as an “outstanding citizen.” While I avoid conflating the two, both of these models are interrelated, as Nick Stevenson, Cole and subsequently Kymlicka point out.⁶⁴ In short, as stated above, legal-citizenship is the means to which national-citizenship is the end. Most people think of legal citizenship as the end of one’s political life, the highest level of political participation possible. However, this is only the means towards being able to impact the political atmosphere in ways that reflect “the desirable activity” mentioned above. Legal-citizenship provides rights that endow one with the ability to actively take part in the construction of governance.

We can broaden the rights associated with legal-citizenship while preserving the rights of nation-citizenship if there are rational arguments (non-arbitrary reasons) for why we need “nationals” in the first place. This will fit the two main principles of justice, as articulated by Rawls:

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).⁶⁵

Of the above, “a” is constitutionally guaranteed by the 14th Amendment to all people who happen to be in the United States. “B” must be argued for. A rational argument can be made insofar as the pathways to national-citizen are open, relatively easy, and subject to the interrelatedness of states (which would satisfy the first clause of this principle). In addition, non-citizens must benefit from their specific status (the second condition). My goal is not to favor the “right” over the “good,” a common criticism of Rawls, but instead to argue that both are related in ways that are not easily divided. Again, we can preserve the positive rights associated with national-citizenship (i.e., voting) if naturalization law is transparent, easily accessible, in addition to there being a wider distribution of the rights associated with legal-citizenship (e.g. the right to health care, various civil protections like renters rights, union rights, public education, *habeas corpus*). This is a common sentiment among individuals working on the issue of immigration and justice.

Matthew Lister preserves citizenship as a political activity but thinks that this requires open and easy naturalization processes.⁶⁶ Nonetheless, Lister maintains the utilitarian argument for the politics of birth. In addition “citizenship” must be grounded upon civic virtues that reflect explicit political values that are not necessarily culturally or nationally homogenous (Lister does not argue for this well). Schuck and Smith argue that there should be a significant interpretive overhaul to the 14th Amendment, so as to refine what is meant by “birth-rite citizenship,” but they maintain that there can be a preservation of citizenship based on consent (as active participation) while respecting the

ascriptive dimensions of state membership. Their solution: birth-rite provides nominal citizenship status that must be declared upon the age of consent.⁶⁷

Kymlicka argues for legal-citizenship as the means to national-citizenship while comparing the alienage law of the United Kingdom, the United States and Canada.⁶⁸ He writes, “the success of efforts to revalue citizenship in an age of migration will depend not just on the nuts and bolts of citizenship policy, but also on broader attitudes towards immigration and multiculturalism. The likelihood of gaining a strong public consensus on citizenship policy may depend on developing a stronger consensus on immigration and multiculturalism (and vice versa).”⁶⁹ For Kymlicka, we can preserve national-citizenship if we are clear that this is not a culturally homogenous core but instead a community of beings acting in a way that expresses the interests of all people. Immigration policy, a commitment to multiculturalism or multi-nationalism, and citizenship policy are a “three legged stool” that must be properly balanced.⁷⁰ Few will consider immigration policy or restrictions as unfair if the state (1) has an open and positive attitude towards the rights of immigrants (formal or not) and (2) strives to achieve a culturally plural atmosphere. While the state may impose immigration restrictions, this should not lessen the quality of life for noncitizens.

Nick Stevenson presents a similar idea: any plausible conceptualization of legal-citizenship requires a clear stance from the country proposing it regarding their efforts to increase, maintain and “recognize” a culturally diverse national populous.⁷¹ In addition, immigration policies and immigrant rights must be transparent and not arbitrary. Put differently, this time drawing from Jean Hampton, “a state’s policy on immigration is connected to its sense of itself and its own identity.”⁷² If a state’s “sense of self” is plural

in terms of culture and nationhood, the legal rights that immigrants have will promote a healthy integration that takes place on equal terms, which should assuage fears of nation-balkanization or heavy handed assimilation. In the next chapter I explore these concerns and national-citizenship in more detail in the context of what is called “multicultural citizenship,” or what I term “the ethics of political recognition.”

Last, in order for our theories of justice and network of rights to become more inclusive towards noncitizen residents, we must rethink the nature of states themselves (another assumption of many of the above theorists). While states exert sovereignty over their domain, they exist in a world of other states, “a political community of states,” so to speak. As an analog take the atomistic subject. While modern, enlightened thinkers like Kant viewed the self as a solipsistic subject, autonomous and independent, subsequent philosophers challenged this understanding of the self and demonstrated how this *individual* is only possible within a network of other subjects who together provide the material conditions for life. As feminists, phenomenologists and post-colonial philosophers argue, the modern subject only exists in a world with slavery, the oppression of women and minorities, and colonization. Thus, the modern *subject* became *inter-subjected*. In his *Cartesian Meditations*, Edmund Husserl argues that thinking things (Descartes *cogito*) only exist insofar as they are thinking about something; the objects of thought (even if they are an illusion) provide the conditions for the possibility for thought and self-realization in the first place. Thus, human consciousness is consciousness-of-something. There is no “thought” by itself but only thinking-about-something.⁷³ This does not mean that self or modern subject has no autonomy, but the split between autonomy and heteronomy is not black or white, gray areas are everywhere.

We need to think about states similar to how the modern subject is now viewed: the sovereign state as the “inter-state” (I do not mean a freeway). Rousseau comes close when he writes (excuse the long quote),

The state, in contrast, since it is an artificial body, has no fixed measure and is never sure of its proper size. It can always expand, and yet always feels weak as long as there are other states that are stronger than itself. Its security, its defense, demand that it try to appear more powerful than its neighbors; and it can only grow, feed itself and test its strength at their expense. Even if it does not actually need to seek its subsistence beyond its borders, it is ceaselessly on the lookout for new members who might give it a stable base. For the inequality of men has limits put in place by the hands of nature, but the inequalities of states can grow incessantly, until one absorbs all the others.

Its powers being purely relative, the political body is forced ceaselessly to compare itself in order to know itself. It depends on its surroundings, and must take an interest in all that happens there. For in vain might it wish simply to keep to itself without risking gain or loss; whether a state becomes small or great, weak or strong, depends on whether its neighbor expands or pulls back, adds to its forces or reduces them.⁷⁴

Being an “artificial body” the state is the work of human beings. Constructing the state is an art that remains ongoing (“it has no fixed measure...”). As national collectives, states are aware of others and gain their sense of self through comparison with others. The growth of one usually means the constriction of another. While Rousseau argues for this to be a cause of war, I wish to interpret this in the following way: one can never know where national interests end, thus the United States has some investment in Mexico and Canada (and now Libya!). Our immigration policy and theories of domestic justice, while they should “open” a bit, could do more to reflect the actual workings of states.

¹ Roger Nett, “The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth, *Ethics* 81 (1971), p. 212.

² Most but not all of these people were “Hispanic.” I am not interested in fussing over the meaning of ‘Hispanic’ or ‘Latino/a’ in this chapter. While debates over these terms are important in regards to self-determination and respect, I do not think that they are meaningless referents and thus I will use them interchangeably. For more on the importance of group names see Jorge J. E. Gracia, *Hispanic/Latino Identity: A*

Philosophical Perspective (Malden: Blackwell, 2000). I will use of national markers such as ‘Peruvian’ or ‘Honduran’ when possible.

³ These events took place between March and May. Estimates suggest that over one million people took to the streets on 1 May 2006, “Mayday.” See Laura Pulido “A Day Without Immigrants: The Racial and Class Politics of Immigrant Exclusion,” *Antipode* Volume 39, Issue 1, p. 1-7.

⁴ By “liberal political theory” I mean that tradition of thought descending from political philosophers such as Thomas Hobbes, John Locke and John Stuart Mill to procedural-constructivists like John Rawls. I also have in mind offshoots and interlocutors of liberalism, i.e. libertarianism and communitarianism. As Phillip Cole reminds, it tends to be the case that with communitarian thinkers who focus on issues of nationality, immigration and citizenship, such as Michael Walzer or David Miller, it is hard to tell whether they represent “communitarianism-on-liberal-foundations” or “liberalism-on-communitarian-foundations.” See Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), p. 61.

⁵ John Rawls, *Theory of Justice* (Cambridge: Belknap, 1971), p. 7-8.

⁶ This sentence and the title of my dissertation, *Thinking about Justice from the Outside of Nationality*, is a turn of phrase on Dussel’s “the underside of modernity.” Dussel argues that one cannot fully understand the origins and significance of modernity and modern philosophical thought without the European colonial enterprise in America. Put in stronger terms, the material and philosophical conditions which led to modernity include the experience of conquest, thus the “I conquer” comes before the “I think.” See Dussel, *The Invention of the Americas: Eclipse of the Other and the Myth of Modernity*, M.D. Barber (Trans.) (New York: Continuum ([1992] 1995). My point is to argue that one cannot understand nationalism and legalized constructions of citizenship without reference to those outside of nationality.

⁷ Transliterated from the ancient Greek terms *ana* (other) and *logos* (rational account of/reason), *analectics* is “the reason from another” (an-Other). I will explain this idea more in the next section.

⁸ See Enrique Dussel, “Six Theses Toward a Critique of Political Reason: The Citizen as Political Agent,” *Radical Philosophy Review* (Vol. 2, no. 2), pp. 79-95.

⁹ See *Justice as Fairness: A Restatement*, (Cambridge: Harvard University Press, [2001] 2003), pp. 14-18.

¹⁰ For more on the difference principle see Rawls, *Justice as Fairness*, pp. 42-43. The modification: still assume a closed (“domestic” is better) society, but undocumented people are taken into the consideration as a possible life option for those performing the famous thought experiment. The bargaining advantage of the politics of birth are thus removed.

¹¹ The arbitrary bases for citizenship are place of birth (*jus soli*) and parents to whom one is born (*jus sanguinis*).

¹² Cole offers four responses to the nature of borders in this respect (see Cole, 2000: p. 6).

¹³ Jean-Jacque Rousseau makes a similar point. In the *Social Contract*, Rousseau writes: “Laws are, properly speaking, only the conditions of civil association. The people, being subject to the laws, ought to be their author: the conditions of the society ought to be regulated solely by those who come together to form it.” (Book 2, Chapter 6) I thank Michael Davis for this reminder.

¹⁴ See John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 5 & 39.

¹⁵ This quote is taken from Samuel Freeman’s foreword to Rawls’ *Lectures on the History of Political Philosophy*, Samuel Freeman (Ed.) (Cambridge: Harvard University Press, 2007), (pp. xiii-xiv).

¹⁶ It is worth noting that most of what is considered “Latin American philosophy” maintains an overt political dimension, such that the phrase “Latin American *political* philosophy” is a pleonasm at best a tautology at worse. This is opposed to what is often referred to as the *history of philosophy in Latin America*, a tracking of Western canonical philosophical topics and currents of thought in the Ibero-American world, e.g. the history of Scholasticism in Peru, the history of logic in Brazil or analytic philosophy in Mexico. For more on the political orientation of Latin American philosophy see Grant J. Silva, “Towards a Latin American Political Philosophy of/for the United States: From the Discovery of America to Immigrant Encounters,” *APA Newsletters: APA Newsletter on Hispanic/Latino Issues in Philosophy*, Ed. Bernie J. Canteñs (Spring 2010: Volume 9, Number 2), pp. 2-6. That essay is a synopsis of a larger project entitled, *The Political Nature of Latin American Philosophy: Nation-Building, Nation-Fixing, Nation-Transcending* (forthcoming manuscript).

¹⁷ Enrique Dussel, *The Philosophy of Liberation* (New York: Orbis, 1989). For a great account of the major events in Dussel’s life and his intellectual lineage, see Linda Martín Alcoff and Eduardo Mendieta, “Introduction,” *Thinking from the Underside of History: Enrique Dussel’s Philosophy of Liberation* (Lanham: Rowman & Littlefield, 2000), pp. 13-25.

¹⁸ For more on this generation, with an insightful critical analysis of Dussel’s early work, see Ofelia Schutte, “Origins and Tendencies of the Philosophy of Liberation in Latin American Thought: A Critique of Dussel’s Ethics,” *The Philosophical Forum* (Volume XXII, No. 3, Spring 1991).

¹⁹ For an overview of the philosophy of liberation see David Ignatius Gandolfo, “Liberation Philosophy,” *A Companion to Latin American Philosophy*, Ofelia Schutte, Susana Nuccetelli and Otávio Bueno (Malden: Blackwell, 2009); see also N.L. Solís

Bello-Ortiz, J. Zúñiga, M.S. Galindo and M.A. González Melchor, “La filosofía de la liberación,” *El pensamiento filosófico latinoamericano, del Caribe y “latino” [1300-2000]: Historia, Corrientes, Temas, Filósofos*, Enrique Dussel, Eduardo Mendieta, Carmen Bohórquez (Eds.) (México, D.F.: Siglo Veintiuno, 2009), p. 399.

²⁰ Enrique Dussel, *Política de la liberación. Historia mundial y crítica* (Madrid: Editorial Trotta, 2007); *Materiales Para Una Política de La Liberación* (Mexico City: Plaza y Valdes Editores, 2007); *Filosofía de la Cultura y de la Liberación* (Mexico City: UACM, 2006). The first volume was recently published in English, see Dussel, *Politics of Liberation: Critical World History*, Thia Cooper (Trans.) (London: SCM Press, 2011).

²¹ Enrique Dussel, *Twenty Theses on Politics*, Trans. George Ciccariello-Maher (Durham: Duke University Press, 2008). For the Spanish see Dussel, *20 Tesis de Política* (Mexico City: Siglo XXI, 2006).

²² Dussel, *Twenty Theses*, pp. 43-46 (Thesis 6)

²³ Dussel, *Ibid*, pp. 18-19 (Thesis 3).

²⁴ Dussel, *Ibid*, pp. 30-35 (Thesis 5).

²⁵ Dussel, *Ibid*, pp. 50 (Thesis 8).

²⁶ Dussel, *Ibid*, p. 46.

²⁷ Dussel, *Ibid*, p. 45.

²⁸ Let me add at this point that Dussel is not immune from this line of criticism as well. Dussel implicitly places a lot of weight on the category “citizen” when arguing for the source of political power: political power comes from the will-to-life of the *pueblo*, the people. But how does one distinguish one *pueblo* from another? Thus, there needs to be some means of differentiating political membership. See chapter IV of this dissertation for comments of this nature—note: this chapter is to be published as Grant J. Silva, “Enrique Dussel’s Political Theory of The Trans-national State and Its Transmodern Basis: Analysis and Critique,” *Radical Philosophy Review* (Forthcoming, 2012).

²⁹ Dussel, *Twenty Theses*, p. 137 (emphasis in original).

³⁰ Dussel, *Twenty Theses*, pp. 103-107 (Thesis 16). I am thinking of including a section here that shows how positive law transforms in accordance with moral sentiment. The later tends to be first. Building on the moral-formal dilemma, especially as framed in Robert Cover’s *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), in light of 150 years of civil rights movements, such thing as the *Runaway Slave Act* as appalling (for the most part). As Cover reminds, even 19th century justices who upheld such things as the *Runaway Slave Act* (for utilitarian reasons) were morally against this law (hence the moral-formal dilemma). The claim I would like to make is that this will be the case with undocumented immigration, especially in light of

the changing demographic of the country, “the Hispanization” of the United States. Thus, the “*law* of illegal people” is prophetic—it has yet to come, but when it does it reminds us of our fundamental moral obligations.

³¹ See Ronald R. Sundstrom, *The Browning of America and the Evasion of Social Justice* (Albany: SUNY PRESS, 2008), pp. 3 (n7), 139-140.

³² See James L. Hudson, “Philosophy of Immigration,” *The Journal of Libertarian Studies*, Vol. VIII, No. 1 (Winter, 1986), p. 53.

³³ Cole, *Philosophies of Exclusion*, p. 2.

³⁴ Hudson, “Philosophy of Immigration,” p. 59.

³⁵ Rawls, *Theory of Justice*, p. 6-7.

³⁶ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 26. See also John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly (Ed.) (Cambridge: Belknap, 2001.), pp. 11-14

³⁷ Rawls, *Theory of Justice*, p. 8.

³⁸ For more on Rawls use of ideal theory see A. John Simmons, “Ideal and Nonideal Theory,” *Philosophy & Public Affairs* 38, no. 1 (Wiley Periodicals, 2010).

³⁹ Rawls, *Laws of Peoples*, p. 8 & 39.

⁴⁰ Rawls, *Ibid*, p. 59.

⁴¹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2006), p. 12.

⁴² *Ibid*, p. 10. It is worth noting that the human interests being maximized are those who take part in the construction of justice (citizens of the political community). This is Nussbaum’s main critique: liberal theorists assume the universal ability to participate in the creation of the social contract. Historically, the primary subjects of justice are those who assist in the creation of the social contract. Those behind the veil are also those who benefit from it. In this sense, where do animals, the mentally and physically impaired, and people such as third world laborers fit into the basic structure of just institutions? Leaving out these agents, one can have a perfectly just society that exploits a significant percentage of the world or ignores vast numbers of non-rational agents inside of the polity; justice is thus nationalized. See *Ibid*, p. 16.

⁴³ John Rawls, “Justice as Fairness in the Liberal Polity,” *The Citizenship Debates: A Reader*, Ed. Gershon Shafir (Minneapolis: University of Minnesota, 1998), p. 62. Also in John Rawls, “Justice as Fairness: Political Not Metaphysical,” *Philosophy and Public Affairs* 14 (Princeton University Press, 1985).

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- ⁴⁴ Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press, 1985), p. 12.
- ⁴⁵ I am indebted to Enrique Dussel's *Twenty Thesis on Politics* (Durham: Duke, 2009) for this brief argument for citizenship and Matthew Lister's schematic in "Citizenship in the Immigration Context," *Maryland Law Review* (Volume 70, Issue 1, 2010), p. 8.
- ⁴⁶ See Walter Dignolo, "Citizenship, Knowledge, and the Limits of Humanity," *American Literary History*, [Editor, volume number, etc.] (Oxford: Oxford University Press, 2006)
- ⁴⁷ Cole, *Philosophies of Exclusion*, p. 6.
- ⁴⁸ Rawls, *The Law of Peoples*, p. 39.
- ⁴⁹ Rawls, *The Law of Peoples*, p. 27.
- ⁵⁰ Rawls, *Ibid.*, p. 6.
- ⁵¹ Charles Mills, "Rawls on Race/Race in Rawls," *The Southern Journal of Philosophy* (Spindel Conference Supplement), Vol. XLVII (2009), p. 169.
- ⁵² See Carole Pateman and Charles Mills, *Contract and Domination* (Malden: Polity Press, 2007).
- ⁵³ Yolanda Wilson, "When is an Omission a Fault? Or, Maybe Rawls Just Isn't That Into You," *The Southern Journal of Philosophy* (Spindel Conference Supplement), Vol. XLVII (2009), pp. 185-190.
- ⁵⁴ Cole, *Philosophies of Exclusion*, p. 14.
- ⁵⁵ For an recent and thorough legal/philosophical argument for reparations, particularly for African Americans and Native Americans in the United States, see J. Angelo-Corlett, *Heirs of Oppression* (Lanham: Rowman & Littlefield Publishers, 2010).
- ⁵⁶ Maldonado-Torres, Nelson; Ramon Grosfugel, Jose Saldívar, *Latin@s in the World System: Decolonization Struggles in the 21st Century U.S. Empire*, (Boulder: Paradigm Publishers, 2005), p. 10.
- ⁵⁷ T. Alexander Aleinikoff, "Between National and Postnational: Membership in the United States," *Towards Assimilation and Citizenship: Immigrants in Liberal Nation-States*, Christian Joppke and Ewa Morawska (Ed.) (Hampshire: Palgrave Macmillan, 2003), p. 111.
- ⁵⁸ Section 1 of Amendment XIV to the Constitution of the United States: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws. *The Declaration of Independence and the Constitution of the United States of America* (Washington D.C.: Cato Institute, 2002) p. 48.

⁵⁹ Kristen Hill Maher, “Who Has Right to Rights? Citizenship’s Exclusions in an Age of Migration,” *Globalization and human rights*, Alison Brysk (Ed.) (Berkeley: University of California Press, 2002), p. 19.

⁶⁰ Thomas Pogge, “Cosmopolitanism,” *A Companion to Contemporary Political Philosophy 2nd Edition Volume II*, Robert E. Goodin, Philip Pettit, and Thomas Pogge (Eds.) (Malden: Blackwell, [1993] 2007), p. 314.

⁶¹ For more on the decline of citizenship see Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago, 1994); Seyla Benhabib, *The Rights of Others* (Cambridge: University Press, 2004); Peter J. Spiro, *Beyond Citizenship: American Identity After Globalization* (Oxford: University Press, 2008).

⁶² Will Kymlicka and Wayne Norman, “Return of the Citizen: Survey of Recent Work on Citizenship Theory,” *Ethics*, Vol. 104, No. 2 (Chicago: University of Chicago Press, 1994), p. 353. <http://www.jstor.org/stable/2381582>

⁶³ For more on the Greek and Roman influences, see Darren J. O’Byrne, “The Dimensions of Global Citizenship: Political Identity Beyond the Nation-State (Portland: Frank Cass & Co. Ltd, 2003) pp. 10-11. I draw out this distinction in greater detail in the following chapter when dealing with the communitarian, multicultural, national strain of citizenship and such figures as Charles Taylor, James Tully and more of Kymlicka’s work. For an excellent treatment of the difference between negative and positive rights see Isaiah Berlin, “Two Concepts of Liberty” in *Contemporary Political Philosophy: An Anthology 2nd Edition*, Eds. Robert G. Goodin and Philip Pettit (Malden: Blackwell, 2006), pgs. 367-386.

⁶⁴ Cole, *Philosophies of Exclusion*, 7-11; Will Kymlicka Will Kymlicka, “Immigration, Citizenship and Multiculturalism: Exploring the Links,” *The Political Quarterly Publishing Co. LTD* (Oxford: Blackwell, 2003); Nick Stevenson, “Cosmopolitanism, Multiculturalism and Citizenship,” *Sociological Research Online* (Vol. 7, No. 1.), §3.1.

⁶⁵ Rawls, *Justice as Fairness*, p. 42-43.

⁶⁶ See Lister, *Citizenship in the Immigration Context*, p. 18. Lister’s views resemble and draw upon the work of Michael Walzer, and to a lesser extent David Miller. As I explore in the next chapter, these communitarians are entrenched within a debate over the importance of nationality and the need for a core culturally homogenous political constituency grounded in the rights of self-determination.

⁶⁷ Schuck and Smith, 1985: p. 116-118.

⁶⁸ Kymlicka, “Immigration, Citizenship and Multiculturalism: Exploring the Links,” pp. 199 & 202.

⁶⁹ Kymlicka, *Ibid*, p. 204.

⁷⁰ *Ibid*, p. 200.

⁷¹ Nick Stevenson, “Cosmopolitanism, Multiculturalism and Citizenship,” *Sociological Research Online* (Vol. 7, No. 1.)

⁷² Jean Hampton, “Immigration, identity, and justice,” *Justice in Immigration*, Warren F. Schwartz (Ed.) (Cambridge: Cambridge University Press, 1995), p. 67.

⁷³ Edmund Husserl, *Cartesian Meditations: An Introduction to Phenomenology*, Dorion Cairns (Trans.) (Martinus Nijhoff Pub, 1977).

⁷⁴ Jean-Jacques Rousseau, “Appendix A,” *Rousseau’s Unfinished Manuscript “On the State of War,”* p. 191.