
Spring 2017

“Illegal” Migration Is Speech

Daniel I. Morales

DePaul University College of Law, dmorale9@depaul.edu

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Recommended Citation

Morales, Daniel I. (2017) "“Illegal” Migration Is Speech," *Indiana Law Journal*: Vol. 92 : Iss. 2 , Article 8.
Available at: <https://www.repository.law.indiana.edu/ilj/vol92/iss2/8>

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“Illegal” Migration Is Speech*

DANIEL I. MORALES†

Noncitizens must comply with immigration laws just because citizens say so. The citizenry takes for granted its monopoly on immigration control, but the legitimacy of this arrangement has been called into question by cutting-edge political theorists. One prominent theorist argues, for example, that basic democratic principles require that noncitizens living outside the United States have a say in the formation of immigration law since they must obey it. This Article provides a legal response to these political theory developments, assimilating them, along with the facts on the ground, into an account of “illegal” migration as First Amendment speech.

If noncitizens’ voices are unjustly excluded from the immigration law conversation, then “illegal” migration is speech of necessity—there is no other way for noncitizens to be heard. Protest speech occurs every time a migrant crosses a border without permission and every time a noncitizen chooses to overstay a visa: these defiant actions declare the illegitimacy of immigration law. In turn, the individual speech acts of millions of “illegal” migrants help to foment an immigrants’ rights consciousness and enable groups of migrants to engage in core, protected forms of dissent, like marching in the streets shouting “NOT ONE MORE DEPORTATION” and tweeting #NotIMore.

By speaking in these disruptive and unorthodox ways, the undocumented force the citizenry to grapple with the serious constriction of noncitizens’ lives that immigration laws cause. If these millions of protesters had respected our immigration laws by staying at home, pining for—but failing to seize—a better life in the United States, citizens could not know concretely how immigration laws limit noncitizens’ lives, nor learn whether our legal and political system is resilient enough to accommodate millions of people the citizenry did not ask for. Thus, “illegal” migration makes the immigration law conversation more consistent with American free-speech values than it would otherwise be.

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† Associate Professor of Law, DePaul University College of Law. B.A. Williams College; J.D. Yale Law School. Many thanks to Ana Aliverti, Susan Bandes, Ben Cannon, Jennifer Chacón, Jessica Clarke, Kristin Collins, Jack Chin, Richard Delgado, Ingrid Eagly, Blake Emerson, Margareth Etienne, Jill Family, Pamela Karlan, Greg Mark, Mark Moller, Hiroshi Motomura, Alessandro Spena and Rachel Rosenbloom for helpful comments. Thanks also to the participants in the Immigration Law Teacher’s Workshop, Works in Progress Session: Jennifer Chacón, Michael Churgin, Audrey Macklin, Hiroshi Motomura, Gemma Solimene, Rebecca Sharpless, Michael Santomauro, David Thronson, and Yolanda Vázquez.

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INTRODUCTION

“Illegal”¹ migration² is an act that speaks.³ It speaks a dissent from a noncitizen’s exclusion from the United States. Because migrating without permission speaks this message and lays the groundwork for traditional protest movements—like the DREAMers⁴ (an immigrants’ rights group led by undocumented people brought to the United States as children) and #Not1More[Deportation]⁵ (an organization

1. On nomenclature: I use the term “illegal” migration interchangeably with undocumented migration throughout. I place “illegal” in quotation marks to reflect my agreement with critiques of that label which render ambiguous the state’s right to so label a person who migrates without permission. I utilize “illegal,” rather than rely exclusively on undocumented, irregular, or unauthorized migration because the speech theory of “illegal” migration offers a way for the act of “illegal” migration to fundamentally challenge the state’s legal right to so label a person. I also use the term alien, which most scholars have eschewed in favor of noncitizen, a term I also use. I use alien to mirror the terminology in immigration statutes and as a means of engaging readers who have not already accepted critiques of the sharp legal distinctions drawn between aliens and citizens. Alien also carries a connotation of foreignness which dovetails with the argument I make about noncitizens’ formal exclusion—alienation—from the polity. By using these terms I aim to emphasize the reality that these categories exist and have force while critiquing the government’s ability to make good on those categories without the consent and voice of aliens themselves.

2. In this paper “illegal” migration refers to the acts of knowingly crossing the border without permission, knowingly overstaying visas, or otherwise knowingly seeking to avoid immigration authorities in cases where a migrant knows he is deportable.

3. *See infra* Part II (illustrating how the act of migrating without permission can be conceptualized as speech).

4. The DREAMers are undocumented people born outside the United States, but raised and reared in the United States. *See infra* Part II.B

5. *See infra* Part II.C (discussing immigrants’ rights movements).

demanding the cessation of all deportations)—it is a constructive force.⁶

"Illegal" migration is not a simple sign of legal breakdown, this Article argues; it is also a mechanism for the formation of a more democratically legitimate immigration law, law that considers the voices of those subject to it—aliens—not just those of the citizens who enforce and author it.⁷ The persuasive force of undocumented migrants' speech is reflected in President Obama's executive actions on immigration, which have modified immigration enforcement practices to make it easier to remain in the United States without permission.⁸

This Article is the first to advance a speech theory of "illegal" migration. Unlike other arguments that explain why "illegal" migration is more than simply lawbreaking,⁹ the speech theory is grounded in our First Amendment values, focusing attention on the political work of undocumented migration. The First Amendment recognizes that American law makes a weak claim to adherence when those subject to it lack a voice or vote in its construction.¹⁰ By migrating without permission, the undocumented protest immigration law's failure to meet these basic standards of legal legitimacy. This political work is obscured in other accounts; it becomes visible by analogy to free speech.

First Amendment scholar Robert Post has written that our free-speech tradition requires "all possible objectives, all possible versions of national identity, be rendered problematic and open to inquiry."¹¹ By "illegally" migrating, the undocumented articulate a version of national identity where the citizenry does not control who, with peaceful intentions, may enter and remain present within U.S. borders. This is an experimental mode of political organization that I call the choose-yourself model.¹² The debate between this model and the orthodox we-choose-you

6. See *infra* Parts I & II. For an argument illustrating the productive quality of illegal action in property law, see Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1095 (2007) (showing how "property" lawbreakers "have enabled the reevaluation of, and . . . productive shifts in, the distribution or content of property entitlements").

7. See *infra* Part I.

8. See *infra* Part III.

9. See *infra* note 22 and accompanying text.

10. See *infra* Part I. Heather Gerken has similarly shown how "illegal" actions—like San Francisco's issuance of invalid marriage licenses—can enhance First Amendment values. See Heather K. Gerken, *The Supreme Court, 2009 Term – Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 42–43 (2010).

11. Facilitating and tolerating "illegal" migration renders the prevailing model of autocratic control of membership norms and laws "problematic and open to inquiry." See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1119 (1993).

12. See *infra* Part II. Choice is a problematic concept in this and other areas. I conceive of migration without permission as a choice in a thin sense that acknowledges the structural factors that push and pull migrants into the United States. These structural factors predominate in the decision calculus of people who migrate "illegally." Still, choice has some descriptive purchase that most theories of "illegal" migration seek to de-emphasize. Though structural factors press on all noncitizens, only a minority of aliens subject to such conditions choose to migrate without permission. This minimal level of agentic difference between those who stay and tolerate poor conditions and those who migrate is what I mean by "choice" in this Article.

model¹³ is sparked and sustained by “illegal” migration. Including the voice of aliens in this debate in this flawed way makes immigration law more legitimate because doing so gives aliens subject to immigration law a voice in its formulation.¹⁴

This does not mean, however, that the choose-yourself model should prevail or that the deportation power is null.¹⁵ “Illegal” migration is speech that contests the we-choose-you model. The citizenry can then answer this protest with deportation, tolerance, weaker enforcement, amnesty, or some combination of all of these. We might pick one or another “answer” precisely because of the persuasive work that undocumented migrants have done while present without permission.¹⁶ Through this sub-ideal democratic process, we constitute the border and renegotiate sovereignty over aliens. Thus far, “illegal” migrants have been persuasive. Despite Donald Trump’s rise, 65% of Americans currently support a path to citizenship for the undocumented, a number that has *increased* from 59% in 2007.¹⁷

Ultimately, this unorthodox discussion may reveal that the United States needs some version of the we-choose-you model of membership in order to secure the social cohesion¹⁸ required for it to thrive. But the case is not open and shut. Decades of experience incorporating the undocumented into the American social fabric belie the necessity of the we-choose-you model. And, more importantly, the citizenry cannot know the necessity of the we-choose-you model¹⁹ on the First Amendment’s own terms—through robust debate and dialogue—without providing some mechanism through which aliens can register their views on immigration laws. Under current conditions, where aliens have no formal voice or vote in immigration law, “illegal” migration and presence is the sub-ideal way that aliens make their voices heard in this debate.²⁰ If we ever “open the floodgates” and effectively abolish immigration law, as Kevin Johnson has advocated,²¹ it will be in part because of the persuasive speech of “illegal” migrants.

The speech theory breaks new ground. Classic theories of undocumented migration and amnesty emphasize forgiving or forgetting the immigrant’s transgression but do not undermine a migrant’s illegality or the state’s right to exclude.²² Newer

13. The notion that the United States had open borders for most of its history and that the passage of the quota acts in the 1920s was a stark break from that tradition is largely a myth. Aristide Goldberg has shown that the some combination of federal, local and state government policies have actively regulated immigration from the colonial period to the present. *See generally* ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006).

14. *See infra* Part I.

15. *But see infra* notes 72–73 (discussing open borders).

16. *See infra* Part II.E.

17. *See* Jeffrey M. Jones, *65% Favor Path to Citizenship for Illegal Immigrants*, GALLUP (Aug. 12, 2015), <http://www.gallup.com/poll/184577/favor-path-citizenship-illegal-immigrants.aspx> [<https://perma.cc/BZ6G-4QC5>].

18. *See* HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 92 (2014) (urging that the we-choose-you model is necessary to secure national social cohesion and internal equality).

19. *See infra* Part I.D.

20. *See infra* Part I.D.

21. *See generally* KEVIN JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2009).

22. Legal scholar Linda Bosniak has grouped theories of undocumented migration and

theories problematize the illegality of undocumented migrants but accept the legitimacy or desirability of the we-choose-you model. Legal scholar Hiroshi Motomura, for example, argues that the deliberate underenforcement of immigration law for many decades created an implied contract between "illegal" migrants and the United States that requires migrants' legalization.²³ No such obligation would have arisen, on Motomura's theory, had the United States robustly enforced immigration law all along. In this way, Motomura, like many other legal theorists, finds no inherent legal problem with the we-choose-you model and does not illustrate how undocumented migrants contest that model and change it.²⁴

The speech theory closes these gaps in our understanding. By showing how undocumented migration can be understood as legitimate protest speech, the speech theory articulates a legal problem with the we-choose-you model (no alien voice or vote in immigration law formation) and offers a new way to undermine the illegality of undocumented migration ("illegal" migrant protestors are not simply lawbreakers).

The speech theory also challenges immigration law scholars to look at "illegal" migration as a productive force—not just a pathology. This perspective is novel. The legal scholarship tends to portray "illegal" migration as any other legal problem, as

amnesty into those that "forgive" or "forget." She opposes these theories to newer "vindictory" theories which would acknowledge in some way that undocumented migrants were in the right by migrating. Forgiving and forgetting both seek to wipe the slate clean, re-instantiating border regulation from a position of zero error. They erase the regulatory mistakes of the past by incorporating the current undocumented population into the body politic, or the legal alien population, and then perfecting immigration regulation for the future so that an undocumented population does not reemerge. See Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 344, 361, 363–64 (2013) (citing and discussing AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009); MICHAEL M. WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); Hiroshi Motomura, *What Is "Comprehensive Immigration Reform"?: Taking the Long View*, 63 ARK. L. REV. 225 (2010); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J. L. & HUMAN. 110 (2011) [hereinafter Shachar *Property Lessons*]).

By contrast, a vindictory theory of "illegal" migration and amnesty would flow from: (1) the state's forfeiture of sovereign rights to exclude—through, say, open tolerance of the undocumented, (2) the fact that the state benefits from a migrant's toil in the receiving country, (3) a kind of reparations framework that views liberalized migration as a substitute for cash compensation for colonialist wrongs, and (4) "the receiving state's role in producing calamitous political or economic consequences abroad which propelled portions of the sending state's population to depart." *Id.* at 359–61 (citing the theories of scholars Hiroshi Motomura, Michael Walzer, and Rogers Smith, and of activist Alex Franco); see also MOTOMURA, *supra* note 18 (refining theory of undocumented migration and amnesty as contract) (reviewed in Stephen Lee, *Book Reviews: Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015)); Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359 (2012).

The speech theory of "illegal" migration is a vindictory theory that adds to existing theories by emphasizing the constructive, norm-generating work of "illegal" migration, and by grounding the right to migrate outside the law in the free-speech flaw in immigration law, rather than in any action or inaction by the state. See *infra* Part I.

23. See MOTOMURA, *supra* note 18 at 106–07.

24. See *id.*

something to be solved and eliminated through rational legal reform,²⁵ a symptom of imperfect regulation that ought to be fixed.²⁶ But this frame leaves out the persuasive work of undocumented migration, the way it has forced positive revisions in our thinking about membership in the United States.²⁷ Absent those who migrate without permission, scholars and citizens would not have discussed the foundational flaws in our immigration laws or our conception of sovereignty over aliens. We would never have invented ways of earning citizenship,²⁸ formulated tolerance of undocumented migration as an implied contract,²⁹ or thought hard about how our immigration laws constrict the life chances of millions of people outside our borders.³⁰ Nor would the Supreme Court have extended equal protection rights to undocumented children.³¹ Undocumented migrants have forced the global implications of our national immigration policies onto the legal and political agenda. The speech theory accounts for this constructive work and contemplates the normative development that we would lose in an immigration system that remained restrictively governed by citizens, but with perfect enforcement and due process—a system that erases the “illegal” migrant.

This point about erasure is more important than ever. As Donald Trump taps latent

25. For a general argument against the tendency of legal scholarship to offer solutions rather than a thorough understanding of the context of any given legal problem, see Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 *YALE J. L. & HUMAN.* 141 (2001).

26. David Martin’s work is emblematic of the broader scholarly faith in the perfectibility of immigration law administration. See, e.g., David A. Martin, *Eight Myths About Immigration Enforcement*, 10 *N.Y.U. J. LEGIS. & PUB. POL’Y* 525 (2007). Recent experience with comprehensive immigration reform undermines the notion, expressed by Martin and others, that better enforcement will lead to an expanded visa supply and more total immigration. The 2013 bill that came closest to cashing out the traditional immigration reform model—with more low-wage visas, more border enforcement, and amnesty for those undocumented already present—was projected to *lower* total future immigration (legal and “illegal”) when compared to the status quo. See Matthew Yglesias, *Obama Is Finally Making the Case for Immigration, Not Just “Immigration Reform,”* *VOX* (Nov. 21, 2014 11:00 AM), <http://www.vox.com/2014/11/21/7257643/case-for-immigration> [<https://web.archive.org/web/20160423013951/http://www.vox.com/2014/11/21/7257643/case-for-immigration>] (citing *RELEASE: CAP Releases Current and Estimated Future Immigration Numbers Based on S. 744*, *CTR. FOR AM. PROGRESS* (May 2, 2013), <https://www.americanprogress.org/press/release/2013/05/02/61935/release-cap-releases-current-and-estimated-future-immigration-numbers-based-on-s-744/> [<https://perma.cc/D6AQ-3GLL>]).

27. See MOTOMURA, *supra* note 18, at 172–208 (discussing legalization of “illegal” migrants and the addition of a guest worker program as long-term solutions to undocumented migration). *But see* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809, 813–14 (2007) (arguing that “illegal” migration coupled with deportation of those convicted of crimes is a more efficient system for facilitating migration of low-skill workers than a visa system that selects persons *ex ante*); *cf.* Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail*, in *NOMOS: IMMIGRATION AND EMIGRATION* (Jack Knight ed., 2015) (urging that global agreements to facilitate free movement of mail offers a cooperative international model for decriminalizing migration and facilitating free movement of persons).

28. See Shachar *Property Lessons*, *supra* note 22, at 121–22.

29. See MOTOMURA, *supra* note 18, at 105–12.

30. See *infra* Part I.B.

31. See *Plyler v. Doe*, 457 U.S. 202, 209 (1982).

anti-immigrant animus, it is easy to think that citizens and aliens would all be better off if "illegal" migration would simply disappear. And perhaps the citizenry, and its chosen few noncitizens, would be better off if "illegal" migration were eradicated. But perfect administration would surely deny many millions of people access to the transformative power of life in the United States. The citizenry's monopoly on immigration control means that legal visas are likely to remain under-supplied relative to demand from aliens. The last Senate-passed comprehensive immigration reform bill illustrates this problem: it would have significantly lowered total immigration to the U.S.—legal plus "illegal"—because its stepped-up enforcement measures would have reduced "illegal" migration by far more than the visa supply expanded.³² Under these political conditions preserving a space for "illegal" migration is essential for those who think the material welfare and horizon of opportunity of all human beings are of equal moral concern.

For citizens and citizen scholars, the speech theory acknowledges the validity of their doubts about the feasibility or desirability of open borders while pushing them to grapple with the fundamental injustice of making laws that apply to aliens without their input. It encourages citizens not to "forgive and forget"³³ undocumented migrants' trespass of U.S. borders, but to question our power to make those laws for aliens and aliens' duty to obey them; to see that aliens *might* have the right to trespass our immigration laws because such laws significantly narrow their life chances and were made without their input.

The speech theory also helps citizens see what they gain from the speech of the undocumented: the opportunity to witness how our political community can successfully accommodate people who we did not expressly want or ask for, and how our understanding of sovereign power over aliens can evolve to embrace those who breached that power. We would not be able to assimilate concrete evidence of our social, legal, and political adaptability if aliens had not violated our immigration laws and asked to become members nonetheless. Embracing this kind of evolution—giving a voice to aliens—can help to place the United States at the vanguard of democratic politics.

For aliens, the speech theory offers agency, moral authority, and recognition of their contribution to American democratic legal development. The broken families, the stress of living in the shadows, and the risk of death in crossing a border—all of that suffering was not just an effort to enhance the material welfare of migrants' families; it was also to protest the injustice and arbitrariness of how birthplace fixes one's life chances. The undocumented chose themselves to join the American community rather than allow the happenstance of birthplace to shape their destinies and those of their children forever. They were not just pushed and pulled by economic and geopolitical forces out of their control; they were not just exploited by employers who want their labor with no strings attached. The undocumented also have fought these forces in an effort to take control of their own futures. For that they deserve credit. The speech theory, unlike others, acknowledges and celebrates these facts.

I develop the argument in three parts. In Part I, I describe what I call the free-speech flaw in immigration law: the exceptional fact that immigration law is made

32. See Yglesias, *supra* note 26.

33. See Bosniak, *supra* note 22, at 347–48.

by citizens to apply solely to aliens. Using First Amendment theory and the philosophy of Jürgen Habermas, I argue that “illegal” migration as practiced in the United States is a form of sub-ideal political speech. In Part II, I show how “illegal” migration is speech in a way that is similar to how actions of the civil, gay, and women’s rights movements were speech. Specifically, I show how the subordination of those groups of citizens required initial illegal actions in order ultimately to conduct a political dialogue that sounds more like the traditional core of protected First Amendment political speech. Because the Supreme Court vindicated some such actions as speech, I argue that the act of “illegally” migrating can be similarly conceptualized. In Part III, I analyze President Obama’s recent executive actions and suggest that they show that “illegal” migration has persuasive power. Both the fact that Obama took significant political and legal³⁴ risk³⁵ for a controversial group of nonvoters, and that many of those actions make it easier to live as an undocumented person, show that “illegal” migration has a persuasive force similar to traditional forms of rational argument.

Theories are critical to legal and social change because they light the way forward. I offer my speech theory of “illegal” migration as a supplement to other accounts. I hope that the speech theory, even if in error, sparks new discussions and ways of thinking that help to move immigration law in the direction of justice.

I. THE FREE-SPEECH FLAW IN IMMIGRATION LAW

Immigration law is exceptional in so many ways,³⁶ and here is another one: aliens lack a formal voice or vote in immigration law, even though such laws apply only to

34. See *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (enjoining the Department of Homeland Security from granting a temporary reprieve from deportation to millions of undocumented migrants), *aff’d* 809 F.3d 134 (5th Cir. 2015), *aff’d* 136 S. Ct. 2271 (2016). Though an equally divided Supreme Court left in place an injunction staying Obama’s executive relief for some undocumented, the defined enforcement criteria discussed in Part II.D, *infra*, will stand, as they went unchallenged. *Id.* Moreover, my claim that undocumented migration has had persuasive force still holds. This ruling, which forecloses expanded deferred action, is a blow to migrants, but it will not silence them; instead the decision will move the conversation onto a different institutional stage. States and localities, for instance, now appear ready to lead the fight to protect the undocumented.

35. See *infra* Part III. See generally *President Obama’s Unilateral Action on Immigration Has No Precedent*, WASH. POST (Dec. 3, 2014), http://www.washingtonpost.com/opinions/president-obamas-unilateral-action-on-immigration-has-no-precedent/2014/12/03/3fd78650-79a3-11e4-9a27-6fdb612bff8_story.html [<https://perma.cc/J9X8-H6QU>].

36. Where immigration law is concerned, “the normal rules of constitutional law simply do not apply.” STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 113 (5th ed. 2009). The modern federal immigration power is constitutionally exceptional in two distinct but interrelated aspects. First, the authority to regulate immigration derives not from any enumerated power, but it is rather “an incident of sovereignty belonging to the government of the United States.” *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). “Second, the federal government’s adoption and enforcement of immigration laws is buffered against judicially enforceable constitutional constraints.” Matthew J. Lindsay, *Disaggregating “Immigration Law,”* 68 FLA. L. REV. 178, 187 (2016).

them and not to the citizens who pass them.³⁷ Yet, law in a democracy earns our fidelity by our having had a voice and vote—a free-speech say—in its articulation.³⁸ Under these conditions of formal exclusion from our borders and from the debate *about* our borders, “illegal” migration becomes the only means by which aliens can gain an effective voice, if not a vote, in the formation of immigration law. “Illegal” migration forces the democratic community to debate *the boundary of that community* in a more robust, more inclusive way—in a way that begins to approximate the way that it debates any other law.³⁹ This sort of contestation cannot adequately occur where only citizens speak in the immigration debate to other citizens: aliens must speak for themselves too.⁴⁰

The Congressional powers to exclude and to deport aliens have been held to be ‘plenary’ . . . ‘Over no conceivable subject,’ the Supreme Court has repeatedly said, ‘is the legislative power of Congress more complete.’ When regulating immigration, Congress may discriminate on the basis of race. It may discriminate on the bases of gender and legitimacy. It may restrict aliens’ political speech without having to establish a clear and present danger. With some qualifications, Congress may disregard procedural due process when excluding aliens.

STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 178 (1987); *see also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995). The discretion that the executive branch and the immigration agency may exercise over aliens and in the enforcement of immigration has also been exceptional. *See generally* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

37. *See* Arash Abizadeh, *Democratic Theory and Border Coercion: No Right To Unilaterally Control Your Own Borders*, 36 POL. THEORY 37, 41 (2008). Abizadeh argues that the border control laws of existing democratic societies, including immigration laws, are illegitimate because they are not democratically constituted by the aliens subject to them. Immigration law could legitimately bind aliens if, under stringent conditions of democratic participation, aliens democratically authorize the borders they are subject to. Absent this democratic consent, the democratic state acts illegitimately when it enforces sovereignty against aliens who have not democratically consented to it. Abizadeh’s is an ideal theory; a pantomime of alien approval will not do. For borders to be democratically legitimate, all persons subject to the border regime “must have the opportunity . . . actually to participate in the political processes that determine how power is exercised, on terms that . . . are consistent with their freedom and equality.” *Id.*

38. *See infra* Part I.A.

39. “[T]here is ‘practically universal agreement’” that one “core norm” of the First Amendment “is democracy.” James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497 n.37, 498 (2011) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

40. It is difficult for oppressed people to speak to power and be heard through asymmetric power relations, as a number of theoretical literatures relate. Feminist legal theorist Catherine MacKinnon famously argued that pornography silences women in a way that violates free speech. *See* CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 193 (1987); *see also* Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 294–98 (1993) (using J.L. Austin’s speech act theory to describe how the subordinated

Aliens speak when they migrate in violation of the law⁴¹ and then advocate for their legal inclusion nonetheless. By speaking the illegitimacy of their unconsented exclusion from our borders, the undocumented provide citizens with the opportunity to discuss and overcome one of the last remaining tensions in our democracy: the regulation of membership in democratic government by undemocratic means.⁴² Ironically, then, the protest speech of “illegal” migration, and the United States’ relative tolerance for it,⁴³ make immigration law more legitimate by—quite imperfectly—filling in this gap in voice.

can be silenced by structural conditions—including pornography—which prevent the empowered listener from comprehending the subordinated speaker’s intended meaning). The postcolonial literature and legal scholarship building on it, offer similar accounts focused on the silencing that occurs in the postcolonial relationship, where overlapping power differentials (empire, race, gender) radically constrict the means of communication for subjugated persons. *See, e.g.*, Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1411 (2003) (citing Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 296–97 (Cary Nelson & Lawrence Grossberg eds., 1988) (asking whether the subordinated can effectively communicate in the face of multiple layers of distorting power)); *see generally* EDWARD W. SAID, *ORIENTALISM* (1979). Still, the oppressed do manage to find ways to be heard, and some legal scholars and political scientists have focused on documenting the strategies that enable subordinated groups to speak through power and resist it. *See generally* JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 29–31 (1985) (theorizing strategies like “foot dragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, [and] sabotage” as “weapons of the weak”: the means by which oppressed people resist power, as well as cultivate and maintain an oppositional consciousness.); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 953 (1997) (“Disruptive noncompliance is the quintessential form of subordinated group power. Lacking the informational, organizational, and financial resources to compete with elites in the representative political process, subordinate groups exercise direct power by withholding cooperation from existing institutions.”); *see also* PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos, trans., 1970) (emphasizing the agency of subordinated groups to contest power structures); JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1990).

41. *See infra* Part I.A–I.B and Part II for discussion of how the act of migrating without permission can be conceptualized as speech. *See also* JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 24–25, 43–44 (1997) (describing J.L. Austin’s Speech Act theory, which describes and taxonomizes the communicative content of actions).

42. As the first nation-state to adopt a theory and practice of sovereignty grounded in the anarchic, collective of “the People,” the United States has unique cultural and legal resources with which to ask the question of who ought to decide who the People should be. America, as our revolutionary history and the discussion *infra* Parts II and III show, is fertile ground for the contestation of sovereignty norms. Our national interest in embracing rather than resisting that fertility is political evolution. *See* Daniel I. Morales, *Undocumented Migrants as New (and Peaceful) American Revolutionaries*, 12 DUKE J. CONST. L. & PUB. POL’Y 135 (2016) (describing the radical social strains that motivated American revolutionaries and analogizing them to the circumstances and position of the undocumented).

43. For discussion of tolerance of undocumented migration see MOTOMURA, *supra* note 18, at 86–112.

A. Legal Legitimacy and Free Speech

Free speech and democracy go hand-in-hand; their bond is so strong that we think a democracy without free speech scarcely a democracy at all. In the United States “[t]he free speech clause of the First Amendment has become the ground-norm of the entire constitutional edifice. So much so that there are arguments that it is beyond the possibility of amendment.”⁴⁴ Put another way, the operation of free speech is a *de facto* predicate to legal legitimacy in our constitutional system. A law adopted in the absence of free speech would have a lesser claim to our adherence—or perhaps none at all—even where it was otherwise passed following constitutional procedures (bicameralism, presentment, etc.).⁴⁵

This domestic tie between legal legitimacy and free speech strongly resonates with the legal theory of Jürgen Habermas. For Habermas, law is legitimate where it is the product of the “unforced force of the better argument.”⁴⁶ The ideal aspiration of his theory is to have democratic deliberation—a very strong, egalitarian form of free political speech⁴⁷—produce binding law, so that coercion is grounded in reasons

44. See PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 150 (2011) (citation omitted).

45. The claim is not that immigration law is not law in the positivist sense because it lacks democratic authorization. See SCOTT J. SCHAPIRO, *LEGALITY* 1–35 (2011) (discussing the definition of legal positivism). Rather, my claim is that immigration law makes a weaker claim to obedience—it is *less* legitimate—than other categories of United States law because it is in serious tension with free-speech norms. I base this claim in part on a sociological observation that most American citizens would agree that laws passed in liberal democratic societies with robust free-speech rights have stronger claims to legitimacy than laws passed where those rights did not obtain. See KAHN, *supra* note 44, at 148. These same citizens make an exception for immigration law. Aliens are expected to obey immigration laws despite their being denied a free-speech say in their formation. Following Abizadeh, this exception is indefensible for a democracy. See Abizadeh, *supra* note 37. It is particularly indefensible in the United States context given the revolutionary history of our democracy and the special place of immigration in the socio-historical fabric. See *supra* note 42 and accompanying text.

46. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 306 (Williams Rehg trans., MIT Press, 1998) (1992) [hereinafter *BETWEEN FACTS AND NORMS*]. This ideal formulation of the procedural predicate to legitimate democratic law has influenced legal scholars in a variety of ways. See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1171 (2008) (using Habermas’s ideal to bolster claim that search engine manipulation is wrong); A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 752 (2003) (arguing that the rulemaking procedures of the Internet Engineering Task Force meet “Habermas’s notoriously demanding procedural conditions for a discourse capable of legitimating its outcomes”); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686 n.6 (1992) (using Habermas to unpack legal scholars’ use of “communitarian values”); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 647 (2008) (describing the applicability of Habermas’s ideal conditions for free speech to campaign finance law).

47. See JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 163–64 (Ciaran Cronin trans., MIT Press, 1993) (1991) (specifying that the set of

that all affected persons could accept. The result is law that we respect because it has been rationally formulated with our input and in our interest, not because the sword of Damocles hangs over us or our basic economic security⁴⁸ depends on our adherence to law's commands.⁴⁹

Habermas's theory of legal legitimacy was applied systematically to First Amendment doctrine by American legal theorist Lawrence Solum.⁵⁰ Solum claimed that the speech-legitimacy tie fits critical aspects of First Amendment doctrine and "provides a coherent justification for the freedom of speech,"⁵¹ indeed, a more coherent justification and a better fit than other possibilities.⁵² Advocacy of violent revolution, to take one important example, is permissible under the First Amendment per Solum because the government's claim to a monopoly on the legitimate use of violent force must itself be justified through open dialogue with the people subject to it. The only way to challenge this monopoly on violence is through "implicit justification or explicit advocacy of illegal action, either of nonviolent civil disobedience or of violent revolution."⁵³ "Such fundamental challenges must be allowed" in order to maintain that our government's monopoly on violence is legitimate.⁵⁴ "If government does not allow discourse which challenges its legitimacy [in this way] . . . [s]ocial consensus on government legitimacy might be maintained through force," but that force would remain illegitimate for repressing speech with the sword.⁵⁵ In this way, the right to robust—even radical—dissent that could produce actual violence fortifies law's claim to our fidelity.

The legitimating work of speech might seem superficial from this telling; if we let people say what they want, then laws are legitimate. In fact, Habermas has advanced stringent criteria that attend an "ideal speech situation"⁵⁶ where law is most fully legitimate. These criteria include the substantive, social, and legal equality of discussants and deliberative democratic procedures designed to ensure that all perspectives are heard.⁵⁷ These background assumptions ensure that the "unforced force of the better argument" actually prevails in law, rather than unspoken power differentials.

procedural conditions for the formation of perfectly legitimate law set in the "ideal speech situation" is aspirational).

48. See BETWEEN FACTS AND NORMS, *supra* note 46, at 122–24 (discussing how the guarantee of basic social welfare to participants may be required for debates to produce legitimate agreements); *id.* at 103, 266 (discussing the all-affected principle).

49. See Froomkin, *supra* note 46, at 761–64 (discussing "Hobbesian predators" as an oppositional threat to ideal Habermasian debate).

50. See Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 119–22 (1989).

51. *Id.* at 55.

52. *Id.* at 68–85.

53. *Id.* at 122.

54. *Id.*

55. *Id.*

56. *Id.* at 96–99 (discussing the procedural characteristics of the ideal speech situation).

57. For society to come to collective agreements that are legitimate, persons subject to the decision must be granted certain "basic rights that citizens must mutually grant one another if they want to legitimately regulate their life in common" BETWEEN FACTS AND NORMS, *supra* note 46, at 118.

Of course, we are never in the “ideal speech situation.”⁵⁸ As with aspirational constitutional norms, we are always working from below looking up. From this vantage point, the tie between speech and suffrage elaborated by canonical First Amendment theorist Alexander Meiklejohn is quite useful. Free speech, politics, and legitimate lawmaking are intertwined for Meiklejohn because “public issues shall be decided by universal suffrage.”⁵⁹ Speech has persuasive force—the “unforced force of the better argument”—in the context of its relationship to the ballot.⁶⁰ The New England town hall meeting is Meiklejohn’s “ideal speech situation”; in it, robust, decorous discussion combines with the vote to form legitimate law.⁶¹

But, writing in 1948, Meiklejohn recognized the dramatic extent to which his town-hall ideal did not obtain. He called that pre-civil-rights-movement reality “alien government” and described it as follows:

Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers. . . . [T]o an unforgivable degree, citizens of the United States are still subjected to decisions in the making of which they have had no *effective* share. So far as this is true, we are not self-governed; we are not politically free. We are governed by others. And perhaps worse, we are, without their consent, the governors of others. . . . Alien government . . . [is w]hen one man or some self-chosen group holds control, without consent, over others, the relation between them is one of force and counterforce, of compulsion on the one hand and submission or resistance on the other.⁶²

At the time, and still today,⁶³ African Americans and other marginalized groups were subject to “alien government.”

58. *Between Facts and Norms* and *The Theory of Communicative Action* have relaxed the procedural and substantive criteria to form legitimate law. See Froomkin, *supra* note 46, at 767–68.

59. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

60. *BETWEEN FACTS AND NORMS*, *supra* note 46, at 306. Free speech and politics are intertwined, flowing from the basic democratic principle that “public issues shall be decided by universal suffrage;” speech has force precisely because of that relationship. MEIKLEJOHN, *supra* note 59, at 27. The reverse holds true too: the free speech of aliens is less efficacious for having no direct relationship to electoral power.

61. See HABERMAS, *supra* note 47, at 163–64. Of course, these are not Meiklejohn’s terms, but they fit key aspects of his theory of the First Amendment. I draw connections between Habermas, Solum, and Meiklejohn in an effort to strengthen the tie between free speech and legitimate lawmaking for an audience of lawyers. Illustrating how domestic free-speech thinkers dovetail with Habermas’s universal theory, I aim to particularize some of Habermas’s claims to the American context.

62. MEIKLEJOHN, *supra* note 59, at 3–5 (emphasis added).

63. The numerous incidents of violence against African Americans at the hands of the state, most recently publicized by the #BlackLivesMatter movement, are among the most prominent ways in which African Americans are denied their “effective share” in self-governance. See BLACK LIVES MATTER, blacklivesmatter.com [<https://perma.cc/MRA6-PVZ6>]; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF*

To be sure, even then, such groups had a token or symbolic “share” in governance: in 1948 some African Americans did stand and speak on the soapbox and, to an even more limited degree, at the ballot box. But their share in self-governance was not “effective.” Government was “alien” to African Americans because, though citizens properly entitled to full rights of self-governance, they stood in the position of aliens—political outsiders ruled by force and compulsion—when they were denied their “effective share” in self-governance.

If free speech is the New England town hall meeting, African Americans and other subordinated citizens living under alien government are unheard because they are kept out of the hall; they are denied voice and the vote, just like the aliens immigration law excludes from the political community.

B. Immigration Law as Alien Government, or Rule sans Voice and Vote

What of the alien who wishes to migrate but is excluded? He is always living under alien government, yet we barely notice. How can we maintain that aliens must respect laws in which they have had no “effective share”?

Immigration law is made in opposition to the town hall or the “ideal speech situation.” It is made, self-consciously, “in the shadow of force.”⁶⁴ Constitutional immigration and citizenship law is profoundly comfortable with granting Congress—and to a lesser extent, the executive—unfettered power to admit and deport aliens on whatever substantive grounds they wish⁶⁵ and absent the suffrage and free speech predicates that legitimate other laws.⁶⁶ Yet the Constitution does not mandate this exceptional authority. The constitutional plenary authority doctrine, and all of the immigration law doctrines made in its shadow, were found by the Supreme Court to be implied in a nineteenth-century theory of sovereignty.⁶⁷ That theory was

COLORBLINDNESS (2010); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57–69 (2014). The historical and ongoing economic violence done to black communities strongly suggests that the United States lacks the conditions of substantive equality required for just lawmaking under a Habermasian theory of legitimacy. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/> [<https://perma.cc/LRE9-AGD8>] (describing the systemic and continuing destruction of black wealth by the United States government).

64. KAHN, *supra* note 44, at 136.

65. See *supra* note 36 and accompanying text.

66. We formulate immigration law without any formal voice for those it applies to. Aliens do not vote in our elections, even if they live with our permission within our borders. And aliens not present within our borders, but who wish to migrate yet are excluded, are also denied a voice in the formulation of the rules that govern who may enter or be excluded from the United States. See generally Abizadeh, *supra* note 37.

67. “[T]he authority to regulate immigration does not derive from any enumerated power, but is rather ‘an incident of sovereignty belonging to the government of the United States.’” Lindsay, *supra* note 36, at 187 (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)). T. Alexander Aleinikoff and David Martin have argued that:

(a) The overall constitutional structure reveals an intent to place the federal government of the United States on an equal footing with the central governments of other nations, and the latter have the power to exclude noncitizens; and

grounded, in turn, in monarchical, pre-democratic thought.⁶⁸

Yet this exceptional state is utterly natural to us. To understand just how natural, consider that American political philosopher John Rawls validated the status quo on immigration exclusion⁶⁹ even though he used the arbitrariness of one's material circumstances at birth as the pivot point for his entire egalitarian political theory.⁷⁰ Is not the accident of citizenship as arbitrary a material endowment as being born a Rockefeller⁷¹—a problem for social justice that Rawls did take seriously? Indeed,

(b) The framers must have intended to authorize the federal government to define who we are as a people.

LEGOMSKY & RODRIGUEZ, *supra* note 36, at 125 (citing T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS & POLICY* 16–18 (1st ed. 1985)).

Michael Scaperlanda has shown the historical contingency of the theory of sovereignty that plenary authority continues to nourish to this day:

Plenary power developed in this era of "absolute" sovereignty, when no global legal infrastructure existed to harness the power of an individual nation-state within its own domain. Additionally, although the international legal framework ordered relations among independent sovereigns, it lacked concern for the status of individual human beings. Persons were objects, not subjects, in the international arena; they lacked rights and duties. This picture informed the Court's view of the constitutional rights of noncitizens, and it still informs the Court's view today. This snapshot is but a single frame in a much larger international drama that continues to unfold. The Court's plenary power cases, however, continue to cling to the faded still photography of last century, failing to acknowledge sovereignty's motion, including drastic changes in international human rights law in our century.

Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 970–71 (1993) (emphasis omitted).

68. Allison Brownell Tirres notes how the plenary authority doctrine is "cast as pre-modern, a throwback to sovereignty in a time of monarchy, not democracy, when constitutions could not, or did not, fully control sovereign prerogative." Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU. L. REV. 1563, 1602 (2013). Criminal law theorist Markus Dubber has noted a similar tension in the American criminal law, arguing that the United States has retained a monarchical criminal law that has not been reconstituted in light of democratic political theory. See Markus D. Dubber, *The State as Victim: Treason and the Paradox of American Criminal Law* 5, 7–8 (Dec. 21, 2009) (unpublished manuscript).

69. Rawls defines the "liberal peoples" that make societies behind the veil of ignorance as those who share a hereditary lineage. See JOHN RAWLS, *THE LAW OF PEOPLES* 23 (2d ed. 1999) [hereinafter *THE LAW OF PEOPLES*].

70. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed. 1999); Leif Wenar, *John Rawls: Two Guiding Ideas of Justice as Fairness*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 24, 2013), <http://plato.stanford.edu/entries/rawls/#TwoGuiIdeJusFai> [https://perma.cc/SJR3-BVBN].

71. The income of the average migrant increases an average of 125%, or about \$10,798, by moving to the more productive nations of the developed world. See John Kennan, *Open Borders*, 16 REV. ECON. DYNAMICS L1, L11 (2013) (all estimates are in 2012 dollars and adjusted for purchasing power); see also LANT PRITCHETT, *LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY* 33 (2006).

The wealthy nations not only offer migrants more hard cash, but a litany of institutions and other collective investments—education, health care, clean water, plumbing—that materially increase well-being, but are not captured in migrants' paychecks. If, following Rawls, what we really care about is potential for self-actualization, then among nearly all indicia that human

before Rawls took this position on immigration law, Joseph Carens, in perhaps the most cited article ever written on citizenship and nationality, extrapolated from Rawls's premises in his early work that "the right to migrate" was as essential to Rawls's theory as any other right owed to all persons in a just Rawlsian state.⁷²

Rawls's ultimate, relatively uncritical⁷³ refusal⁷⁴ to include liberalized immigration in his theory of the just state reflects the profound degree to which exclusive control of entry and exit by sovereigns—democratic or not—has been naturalized.⁷⁵ Nearly every reader will share Rawls's intuition that nations need exclusive control over entry and exit of persons, and that laws which effect this power are exempt from the normal legitimacy predicates operative in a democratic state. We think alien government is just fine—for aliens.

C. Legitimizing Alien Government with "Illegal" Migration

Just because alien government for aliens standing at the border is natural, does not mean it is right.⁷⁶ Solum saw part of the constitutional problem with requiring

beings care about, migration extends the horizon of possibility for migrants in dramatic fashion. See Wenar, *supra* note 70.

72. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 258 (1987).

73. Political theorist Jacqueline Stevens criticized Rawls for adopting without analysis John Stuart Mill's view that to "exist as a political community, people need to have the 'common sympathies' found in 'race and descent.' Only political societies formed on this basis, Rawls infers from Mill, share the requisite 'community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past.'" JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* 33–34 (2010) (citation omitted) [hereinafter *STATES WITHOUT NATIONS*].

74. See *THE LAW OF PEOPLES*, *supra* note 69; text accompanying note 69.

75. Stevens criticizes other political theorists and philosophers—Rawls, Walzer, and Raz, among others—for failing to see and explore the incompatibility of "ancestral paradigms of membership" with liberalism. See *STATES WITHOUT NATIONS*, *supra* note 73, at 31–37.

76. The theory of "illegal" migration as speech shares important characteristics of a "critical theory," a mode of scholarly argument associated most prominently with the Frankfurt School, and that has gained traction in the legal academy via the related critical legal studies and critical race theory movements. See generally *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 3d ed. 2013) (collecting canonical and contemporary contributions to Critical Race Theory); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys, ed., 3d ed. 1998) (collecting seminal writings of the critical legal studies movement); James Bohman, *Critical Theory*, *STAN. ENCYCLOPEDIA OF PHIL.* (Mar. 8, 2005), <http://plato.stanford.edu/archives/spr2015/entries/critical-theory/> [<https://perma.cc/9AVK-JVD6>] ("[A] critical theory provides the descriptive and normative bases for social inquiry aimed at decreasing domination and increasing freedom in all their forms.").

My central claim that "illegal" migration is speech—and moreover, a kind of speech that makes immigration law more legitimate than it would otherwise be—is an example of a form of Frankfurt School social criticism called "ideology critique." Ideology critique "help[s] reveal contradictions and injustice in the reigning ideologies and worldviews of liberal democracies, notably the problems of economic, legal, and ideological domination." Froomkin, *supra* note 46, at 768 (citing JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 36–37, 142–43 (Thomas McCarthy trans., 1975)). My claims also follow in critical theory's tradition of

aliens to follow laws without a voice or vote, arguing that aliens "within the physical confines of a political community" must be granted a robust form of freedom of speech that impliedly includes voting rights,⁷⁷ since "[n]o decision concerning noncitizens can be fully rational [a criterion of legal legitimacy for Habermas] if the decision is made on the basis of an agreement that was reached only because noncitizens were not given the right to participate in discourses which affect them."⁷⁸

There is no good reason why Solum's concern should not extend to aliens *not* present within our borders, at least with respect to immigration laws, since they are affected negatively by the exclusion those laws enforce.⁷⁹ The negative effects of immigration law on aliens are robustly documented. Immigration law is a problem for democratic law and free speech, because immigration law demands the obedience of aliens without a voice or vote.⁸⁰ It is a problem from a materialist perspective because it causes substantial and avoidable material suffering among billions of

consciousness-raising. *See* Bohman, *supra* ("[A] theory is critical to the extent that it seeks human 'emancipation from slavery', acts as a 'liberating [. . .] influence', and works 'to create a world which satisfies the needs and powers' of human beings."). The speech theory of "illegal" migration aims to showcase to legal scholars the constructive qualities of "illegal" migration in an effort to help scholars see the political potential and political work of undocumented migration more clearly, and, in turn, to help steer legal reform towards the preservation of those constructive elements of undocumented migration and away from the legal practices that silence migrants' speech. Eventually, perhaps, some version of this theory might be adopted, appropriated, or critiqued by the undocumented themselves, or those who—with the permission of the undocumented—represent their interests.

77. Solum says only that aliens must be granted the "freedom of communicative action." Solum, *supra* note 50, at 111 n.210. But "communicative action," Habermas's term, would seem to require voting rights in the sub-ideal institutional settings where Solum means his theory of the First Amendment to apply. This point has been clarified in Habermas's later work. *See* Froomkin, *supra* note 46, at 774 ("It would be perfectly consistent with [Habermasian] discourse ethics . . . for a group to agree that it will decide disputed questions by majority vote, given the need to make decisions in real time, so long as the 'decision[s]'" conform to other key procedural criteria, like being "rationally motivated." (quoting BETWEEN FACTS AND NORMS, *supra* note 46, at 449–50)).

78. Solum, *supra* note 50, at 111 n.210.

79. First Amendment Scholar Timothy Zick has thoroughly considered the place of aliens' interests in the First Amendment scheme. The First Amendment, Zick urges, ought to protect, among other things, "the right to associate with aliens at home and abroad" and "foreign visitors" should not be excluded on the basis of speech or association. *See generally* TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE LIBERTIES* (2014). But Zick's normative concerns have more to do with ensuring Americans' access to global, informational, and associational interchange than the formation of law that is just from a global point of view. Accordingly, Zick's theory would appear to accept that aliens have a right to say something about our immigration policy, but would seem to reject the idea that migrating "illegally" has speech content of concern to the First Amendment or that we should embrace the way such actions facilitate a conversation about the power to exclude. His theory would, I venture, imagine aliens' contestation of autocratic immigration law as a process that should happen in the university seminar room, rather than the big tent of political protest movements.

80. *See* Abizadeh, *supra* note 37; *supra* Parts I.B & I.C.

humans.⁸¹ It is a problem for liberalism because restrictions on free movement of

81. Economists' best (though necessarily quite speculative) estimates of the global economic gains that would accrue in a world of free migration hover around one hundred percent of global GDP. That is, global GDP would double if people could move where they wanted to, an increase of 77.6 trillion dollars. See LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY 33 (2006). In 2004 U.S. dollars, see *Global Gross Domestic Product (GDP) at Current Prices From 2004 to 2014*, STATISTA, <http://www.statista.com/statistics/268750/global-gross-domestic-product-gdp/> [<https://perma.cc/3E9F-X7YD>]. A modest five percent increase in the labor force of developed countries would increase global GDP by 571 billion dollars by 2025, an amount twice that of Norway's 2013 annual GDP. See DOMINIQUE VAN DER MENSBRUGGHE & DAVID ROLAND-HOLST, HUMAN DEVELOPMENT RESEARCH PAPER SERIES, *Global Economic Prospects for Increasing Developing Country Migration into Developed Countries* 23 (2009) (The number is in 2006 U.S. dollars corrected for purchasing power.); see also *Norway*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html> [<https://perma.cc/ZB6Y-8MCM>] (2013 dollars PPP) (last updated Sept. 7, 2016). While the new migrants allowed into rich countries would gain the most from the change, 299 billion dollars, the natives who sign off on an increase in migration stand to gain much as well, 190 billion dollars. Even more would be gained if migration to rich countries rose by eight percent. That scenario would yield a global increase of 874 billion dollars, 297 million for natives of rich countries and 577 billion dollars for migrants and their home countries. See van der Mensbrugghe & Roland-Holst, *supra* at 24–25. And the benefits to the rich countries are still greater than these huge numbers imply, since migrants generate taxable income in the rich countries that can be used for public investments that increase welfare directly, or by goosing the economy to make public investments that allow it to grow more quickly and robustly. With eight percent growth in migrants to the rich world, the tax base of rich countries would grow by 734 billion dollars. That these enormous economic gains can be left unrealized is a sign of just how rich the rich countries are. Though an eight percent increase in migration to the rich world would result in a significant global increase in GDP, and a radical change in wealth for migrants themselves, the United States would capture \$145 billion of that growth or just .65% of projected U.S. GDP in 2019. See *United States: Gross Domestic Product Based on Purchasing-Power-Parity Share of World Total*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=34&pr.y=2&sy=2012&ey=2013&scsm=1&ssd=1&sort=country&ds=.&br=1&c=111&s=PPPSH&grp=0&a=> [<https://perma.cc/JM2N-8GQ4>] (In PPP terms, the United States represents about 16.6% of global GDP); *World Economic Outlook Database: October 2014*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=18&pr.y=12&sy=2014&ey=2019&scsm=1&ssd=1&sort=country&ds=.&br=1&c=156%2C158%2C132%2C112%2C134%2C111%2C136&s=PPPGDP%2CPPPPC%2CPPPSH&grp=0&a=> [<https://perma.cc/JEF7-G9F4>] (Projected U.S. GDP 2019). The gains are substantial for the developing world because migrants remit a portion of their wages to family members who remain in sending states. In 2012, the World Bank estimated that American migrants alone sent 123 billion dollars abroad in remittances, an amount that exceeds the entire GDP of the Dominican Republic by 23 billion dollars, and is 10 billion dollars shy of New Zealand's. See *Bilateral Remittance Matrix 2012*, THE WORLD BANK, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDEC PROSPECTS/0,,contentMDK:22803131~pagePK:64165401~piPK:64165026~theSitePK:476883,00.html> [<https://perma.cc/UT38-FX8Y>] (This value is nominal and taken from the World Bank's dataset.). In a number of developing nations, remittances amount to a substantial proportion of GDP. Twenty-nine percent of Nepal's GDP consists of cash remittances and a number of American neighbors post numbers at or above ten percent of GDP, including

persons are unjustifiably illiberal.⁸² It is a problem for the just allocation of the Earth's resources because many persons' basic needs are not met in the places they are born.⁸³

D. Showing Epistemic Modesty About the Immigration Power by Preserving Space for "Illegal" Migration

It may be that we can ultimately justify the harms that citizen-made immigration law causes, or arrive at reforms—short of open borders—that meet aliens' objections to the current regime. But given the scope of the harms that unilateral control of borders cause, we owe aliens a justification for the regime more robust than the current backstops: tradition,⁸⁴ fear of the unknown, and might makes right.⁸⁵ And we cannot formulate a more robust justification unless the power to control borders is breeched by aliens and we, with their input, assess the ramifications of this forced suspension of full control over our human composition.⁸⁶ "Legal" immigrants cannot

Honduras (16.9%), El Salvador (16.4%), Jamaica (15%), and Guatemala (10%). See the World Bank Statistics on remittances as a percent of Nominal GDP for 2010-14, *Personal Remittances, Received (% of GDP)*, THE WORLD BANK, <http://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS> [<https://perma.cc/TW3D-2LWT>].

82. See generally STATES WITHOUT NATIONS, *supra* note 73.

83. Political philosopher Matthias Risse argues that because all humans in the state of nature owned the earth as a collective, every person owns a share in the earth's resources, and the state system as a whole has an obligation to permit all humans to cash out these shares. If a person is not a legal resident of a state where her basic needs are met, then she is not being granted her just entitlement to her share in the original ownership of the earth. Since the share entails a property right, the migrant in such a position, unlucky by dint of birth, may migrate to a parcel of the earth where her basic needs can be met. MATHIAS RISSE, ON GLOBAL JUSTICE 89–151 (2012).

84. Relying on Rawls, Walzer, and other defenders of bounded democratic states, Hiroshi Motomura justifies his embrace of bounded democratic communities for the way they maintain "civic solidarity." MOTOMURA, *supra* note 18, at 92. The civic solidarity argument is a version of defending the immigration power status quo based on tradition. This is so because the evidence for the importance of civic solidarity relies on past practice. Exclusive citizen control over borders has coincided with democratic citizens trusting each other over time, so it may be a necessary predicate for civic solidarity to obtain. Jacqueline Stevens has rebutted the solidarity argument by pointing out the ways that solidarity maintenance is compatible with the choose-yourself model. See STATES WITHOUT NATIONS, *supra* note 73, at 136–52. Moreover, in defending "civic solidarity" as a justification for the we-choose-you model, Motomura does not appear to consider that civic solidarity has not collapsed in the face of a large undocumented population, evidence that cuts against the necessity of the we-choose-you model for the maintenance of civic solidarity. In any event, my ultimate point is that the civic-solidarity position ought to be tested in a democratic way. Doing so requires "illegal" migration under current political and legal conditions.

85. See STATES WITHOUT NATIONS, *supra* note 73, at 34–36.

86. This process is a very sub-ideal version of what Habermas terms "practical discourse," a kind of discourse less demanding than the ideal speech situation, but which is still capable of creating legitimate law. Despite its serious deficits, the discourse that does occur when aliens migrate without permission is better than if the discourse never happened at all and immigration exclusion was perfectly administered. See Froomkin, *supra* note 46, at 773

adequately do this work because the citizenry chose them. Without the concrete knowledge from experience that “illegal” migration provides, we are just speculating when we say, like Rawls, that the unilateral power to control borders is necessary for human flourishing in societies.⁸⁷

Concededly, tradition and fear of the unknown are appropriate objections in the face of the demand for open borders. The unprecedented nature of having sovereign states relinquish their control over their human composition means that open-borders advocates, like Kevin Johnson,⁸⁸ cannot provide *decisive* evidence that their theory is compatible with societal flourishing. Still, the status quo has an obligation to epistemic modesty, too. We should be modest about the legitimacy of our immigration power because sovereign-controlled immigration law is such an outlier in the body of democratic law, and because it causes a serious degree of harm to aliens from many normative vantage points.

How then to resolve this impasse of legitimacy and knowledge?⁸⁹ Democratic deliberation and the democratic knowledge⁹⁰ it produces offers a way to bridge both. We can know the legitimacy of borders on democratic politics’ own terms⁹¹ by, ideally, requiring all persons subject to immigration law and called to respect the United States border to “have the opportunity . . . actually to participate in the political processes that determine how [the immigration] power is exercised, on terms that . . . are consistent with their freedom and equality.”⁹² Doing so would produce law that could legitimately bind aliens and produce robust knowledge of what a border regime that promotes the flourishing of all humans looks like.

Back in the real world, one way to approximate this ideal debate and gain *some* of the legitimacy and informational benefits that a true global discussion would accrue is to adopt the wish list of mainstream immigration scholars. This group *does not* by and large advocate open borders,⁹³ but rather, advocates more limited and

(“Practical discourse . . . is ‘a procedure for testing the validity of norms that are being proposed and hypothetically considered for adoption.’”) (quoting Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 103 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990)).

87. See *supra* notes 73–74.

88. See JOHNSON, *supra* note 21.

89. First Amendment scholar Robert Post has written that the First Amendment guarantees a politicized version of the enlightenment spirit of inquiry. Free speech, properly articulated, allows “all possible objectives, all possible versions of national identity, be rendered problematic and open to inquiry.” Post, *supra* note 11, at 1119. Facilitating and tolerating “illegal” migration renders the prevailing model of autocratic control of membership norms and laws “problematic and open to inquiry.” *Id.*

90. See Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 72 (2013) (discussing and defining “democratic knowledge” in the context of debates about immigration law), *republished in* 34 IMMIGR. & NAT’LTY L. REV. 123 (2014) (Gabriel J. Chin, ed.).

91. That is, without considering the voice of “all affected” by the border regime we do not know whether the border regime is legitimate in the way that democratic polities generally know what is good or right. See *supra* Part I.A.

92. In this formulation, Abizadeh borrows from Habermas. See Abizadeh, *supra* note 37, at 41.

93. See Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT’L SOC. & POL. PHIL. 344, 355 (2013) (arguing that very few legal scholars

targeted efforts at immigration enforcement—including deportation—than current policy dictates, better due process for noncitizens, as well as the legalization of the undocumented population. Mainstream immigration scholars also staunchly defend the existing interpretation of the Fourteenth Amendment's birthright citizenship clause, which grants citizenship to the children of the undocumented.⁹⁴ These modal views—especially the call to ratchet down the technology of immigration enforcement⁹⁵ and the maintenance of birthright citizenship⁹⁶—in effect, advocate for policies which ensure that the ongoing, sub-ideal conversation about the immigration power continues and that its quality (the degree to which it approximates orthodox civic discourse) improves. The adoption of such reforms could also signal the persuasion of the citizenry by the undocumented and immigration activists.

Mainstream reforms improve the immigration debate, I show in Part III, by lowering the cost and consequences of "illegal" migrating and remaining present unlawfully—of protesting immigration exclusion. This leaves more room for migrants to migrate in protest of their exclusion and to form, over time, an immigrants' rights consciousness that can articulate dissent in a more traditional form. The slogans and movements entitled "No One is Illegal" and #Not1More[Deportation], for example, are recent products of this burgeoning consciousness and exemplify the power of undocumented migration to spur protest movements of the traditional kind.

"Illegal" migration also destabilizes the term "illegal alien." By migrating without permission and creating lives (citizen children, homeownership) that are indistinguishable from the lives of aliens who migrate *with* permission—and even citizens themselves—the undocumented raise the question whether the category of "illegal" migrant, and the immigration law power that makes that category, are necessary or useful at all.

These actions by migrants create a sub-ideal conversation about the immigration

have adopted the open borders position); *see also* STATES WITHOUT NATIONS, *supra* note 73, at 37 (explaining that scholars, like law professor Ayelet Shachar, wish to mitigate the harms of immigration exclusion but "want to maintain the prerogative of nation-states to exclude"). *But see* JOHNSON, *supra* note 21.

94. The call by Professors Peter Schuck and Rogers Smith to end this longstanding interpretation of the Fourteenth Amendment was met with immediate and forceful criticism from immigration scholars. *See, e.g.*, Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 486 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)). I am aware of no American immigration law professor who supports eliminating birthright citizenship for the children of the undocumented.

95. *See generally* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AMERICAN CRIM. L. REV. 105 (2012); Juliet Stumpf, *The Immigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

96. Maintaining birthright citizenship for the children of the undocumented is critical to the maintenance of the sovereignty conversation that I am describing in this article. When this rule operates under conditions of undocumented migration, it converts, inter-generationally, a trespass of sovereignty into citizenship—the highest form of formal membership. In doing so, it seriously undermines the state's sovereign right to choose members. It also becomes the pivot point for noncitizens connected to birthright citizen children to make the claim for their belonging. Birthright citizenship is a political flashpoint for precisely this reason.

power that treats the demands of ideal free speech theory like a lodestar—the same way we treat constitutional commands like the equal protection of laws. Migration without permission is, in this way, an act that speaks. This speech and the structures and reforms that enable continued protests (continued “illegal” migration and the conversion of those speech-acts into a traditional protest movement) partially improve the legitimacy of immigration law and create conditions amenable to further legitimation, that is, movement towards the ideal of immigration laws constituted with the voice and vote of all affected by them.

E. Conclusion

This Part established that immigration law is less than fully legitimate due to its free-speech flaw, and suggested a way that “illegal” migration partially alleviates its illegitimacy: by sparking and maintaining a sub-ideal conversation between aliens and citizens about the exceptional, autocratic power to make immigration law.

The next Part further elaborates the speech analogy by drawing comparisons to the unorthodox speech of subordinated groups, like African Americans and LGBTQ persons. The Supreme Court modified its view of free speech to capture the actions of these subordinated groups: our definition of constitutionally protected speech became more elastic to cover their message-bearing acts. The definition of free speech should be at its most elastic when the question up for discussion is the immigration power. This is so because aliens lack direct access to the claim of alien government, the most basic instrument of American emancipation struggles, since they are not citizens, and because their speech is necessary; they are the only group that can adequately raise and defend an oppositional view of the sovereign power to make immigration law. Unlike canonical civil rights movements, the argument against the we-choose-you model, or for immigrants’ rights, does not begin with the claim that citizens are being unjustly denied their “effective share” in democratic governance. The practice of democratic citizenship posits that aliens are not owed any share in governance *at all*. To make headway, then, aliens must first destabilize the alien/citizen binary by unlawfully seizing rights reserved for citizens and invited guests; only then can they begin to contest the power that excludes in more orthodox ways.

By migrating without permission—crossing the border with the freedom a citizen would—migrants are contesting the alien/citizen binary in the only way that citizens make possible. “Illegal” migration is speech because exclusion forecloses the usual routes for law-legitimizing dissent.

II. “ILLEGAL” MIGRATION AS SPEECH

Every time a migrant crosses the border without the state’s permission, or decides to remain resident in the United States after the expiration of a visa, that migrant stakes a challenge to a core aspect of sovereignty, the right of the state to determine unilaterally who may enter, exit, or remain in its territory and on what terms. By knowingly violating the state’s sovereign selection criteria, the undocumented migrant necessarily declares: “I choose myself to belong to your political community.” In declaring this, she challenges the orthodoxy that legal and political order, and their fruits, depend on governments reserving this right to choose for the citizenry alone.

Undocumented migration contests the prevailing we-choose-you model of political organization and tests⁹⁷ a choose-yourself substitute.⁹⁸

As one by one, crosser after crosser, visa-violator after visa-violator, make their lives in the United States, bear citizen children, and resist the coercive forces of the state that seeks to break the bonds that time, children, and other human relationships attach to United States territory, these millions who choose themselves to belong undermine the power of selection and removal that the state asserts through unconsented laws backed by the threat of jail or deportation. Doing these things, migrating "outside the law,"⁹⁹ choosing yourself to belong to our political community is an act that speaks.¹⁰⁰

In this Part, I develop the descriptive and normative case for regarding undocumented migration to the United States as political protest speech by comparing "illegal" migration to the atypical speech of the Civil Rights, Gay Rights, and Occupy movements. Through these comparisons, I show that the silent acts of crossing the border or overstaying a visa have speech content.¹⁰¹

97. See MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 86, at 103 (discussing how political debate tests proposed definitions of the collective good).

98. This liberal model of political organization tracks with Joseph Raz's "ideal of personal autonomy . . . [which involves] 'the vision of people controlling, to some degree, their own destiny,' such that they are able to pursue their own projects and see themselves as 'part creators of their own moral world . . .'" Abizadeh, *supra* note 37, at 39 (citing JOSEPH RAZ, THE MORALITY OF FREEDOM 154–55 (1979)). The analogy between migrating without permission and protest speech is also bolstered by the fact that migrating without permission does no harm. See Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1277–89 (2014) (showing that migration without permission does no concrete harm and that whatever harm inheres in such act is dispatched on deportation).

99. See generally MOTOMURA, *supra* note 18.

100. Speech Act theory has eroded the hard distinction between actions and speech. See, e.g., JUDITH BUTLER, EXCITABLE SPEECH, A POLITICS OF THE PERFORMATIVE 2–3 (1997) (describing J.L. Austin's Speech Act Theory).

101. Speech is an intentional act, yet the undocumented are often portrayed as mere victims of circumstance, rather than agentic human beings. My focus on the willfulness of undocumented migration and my claim that these silent acts "speak" is not to deny the salience of the structural factors which motivate migration, like higher American wages, or poverty, or violence in the country of nationality. Such structural factors often motivate protest movements without diminishing the agency of the protestors. Push-and-pull incentives undoubtedly play a principal role in the migration calculus. But the agency of migrants—their knowing defiance of state prerogatives—is equally undeniable. In a world where 150 million people say they wish to migrate to the United States, Jon Clifton, *150 Million Adults Worldwide Would Migrate to the U.S.*, GALLUP (Apr. 20, 2012), <http://www.gallup.com/poll/153992/150-million-adults-worldwide-migrate.aspx> [<https://perma.cc/4W49-K7D6>] (providing several tables regarding migrant workers), and only a small fraction of that population has done so, it is incomplete to claim that those who are present without permission are simply pulled or pushed, like atoms ruled by the force of gravity. The population of undocumented has stood between eleven and twelve million people from 2007 to 2014 after climbing by nine million persons from 1990 to 2007. Jeffrey S. Passel, D'Vera Cohn, Jens Manuel Krogstad & Ana Gonzalez-Barrera, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, PEWRESEARCHCENTER (Sept. 3, 2014), <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/> [<https://perma.cc>

A. *Getting Heard Under Conditions of Exclusion*

For alien government to be overcome—however imperfectly—the excluded had to break into the town hall to be heard. Achieving social and legal change through the “unforced force of the better argument”¹⁰² on its own is impossible under conditions of political and legal subordination, since “an important part of a group’s subordination consists in silencing”¹⁰³ And even if such groups manage to speak, dominant groups can wield their powers of interpretation to silence them. For example, the dominant group may characterize whatever the subordinated says as out of order, or, as Kenneth Karst puts it, without reason. “[L]acking Reason, the outsider is unqualified for full membership in the community of equal citizens.”¹⁰⁴ That is, where the powerless do not adopt the norms and premises—the language—of dominant groups, their speech can be manipulated, co-opted, or suppressed by the empowered audience that oppresses.¹⁰⁵ Such conditions require speech of a different sort, speech that is inoculated as much as possible against perversion by power.

It helps when power also lends a helping hand. The Supreme Court’s decision to protect more than “reason,” more than “speech” that sounds in the town hall mode, helped to facilitate the Civil Rights Movement’s successes. For instance, the Court rejected segregationist claims that sit-ins were criminal breaches of the peace—that they were not “speech.” To do this doctrinally the Court translated the protesters’ mute actions into a “public oration delivered from a soapbox at a street corner.”¹⁰⁶ That strained analogy rationalized constitutional embrace; the silent action of sit-ins was plainly not the speech of the town hall, or a protest march—it was more potent than that. “The demonstrators [at sit-ins] were not just offering an opinion that they were entitled to equal treatment; they were . . . claiming their equal citizenship with

/W6XJ-83J3]. From 1990 to 2013, about one million people a year became legal permanent residents. See *Legal Immigration to the United States, 1820–Present*, MIGRATION POL’Y INST., <http://www.migrationpolicy.org/programs/data-hub/charts/Annual-Number-of-US-Legal-Permanent-Residents> [https://perma.cc/X6H4-HBEL]. When we add the approximately four-million people who were deported, we get a total of twenty-nine million people who migrated to the United States over thirteen years, one-fifth of the 150 million who wish to migrate. See Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEWRESEARCHCENTER (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/> [https://perma.cc/V7N3-TPC4]. The undocumented, just like those “legally” present, acted on their desire to migrate, while others did not; they willed themselves here and actively seek to remain; in doing so they speak. They speak their disapproval of the regime that excludes them.

102. BETWEEN FACTS AND NORMS, *supra* note 46, at 306.

103. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 109 (1990); see also Langton, *supra* note 40, at 293 (using Speech Act theory to describe how the subordinated can be silenced by structural conditions that prevent the empowered listener from comprehending the subordinated speaker’s intended meaning).

104. Karst, *supra* note 103, at 109.

105. See MACKINNON, *supra* note 40, at 193; Langton, *supra* note 40, at 293. See generally GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON* (1999).

106. *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring).

their bodies."¹⁰⁷ Indeed, we might say they were seizing equal citizenship, in part by means of a legal breach, at least as understood in their localities at the moment that civil rights protesters acted. Still, these actions were utterly discursive. They bore messages designed to resist misinterpretation by the audience of the politically empowered they were meant to persuade.

The achievements of the Gay Rights Movement would also have been impossible without the will of gay men and women to engage in illegal acts. At the most basic level, the consummation of gay sexual desire was unlawful in many jurisdictions until 2003.¹⁰⁸ Had LGBTQ people followed the law, never acting on their desires, a gay community capable of demanding recognition and rights—a gay consciousness—would never have been constituted.

The actions of the plaintiffs in *Lawrence v. Texas* were the apogee of the political and legal power that could be mobilized by strategically challenging the criminal proscription of gay sex. According to a recent account,¹⁰⁹ the Lawrence plaintiffs, on the strategic advice of powerful civil rights lawyers, pleaded no contest to a baseless sodomy charge (no one was having sex when the police entered Lawrence's apartment) in order to convert that charge into a criminal conviction they could challenge all the way up to the Supreme Court. This staging of gay sex¹¹⁰ led to the reversal of settled constitutional precedent, paving the way for further expansions in gay rights.¹¹¹

Unlike sit-ins, of course, the private gay sex criminalized in the decades prior to *Lawrence* was not labeled speech,¹¹² but the "sex" in *Lawrence* nonetheless spoke, it defiantly rejected prohibitions on the consummation of gay sexual desire. And the predicate to *Lawrence*'s public staging of illicit gay sex was the innumerable acts of gay people, sexual and otherwise. These private and public acts spoke too; they quietly but defiantly spoke a rejection of the state's proscription of gay love. Without these acts and their eventual publication, the divergence between social norms and law that made *Lawrence* and its progeny possible could not have occurred.

To see that mass lawbreaking was an essential and legitimate predicate to the Gay Rights Movement's ultimate success, try and imagine a Gay Rights Movement without lawbreaking. No one could credibly say that gay men and women should have sought legal change by engaging in "town hall" discourse and while remaining law abiding (i.e., by abstaining from sex) until the heterosexual majority was persuaded—by the words of gay women and men alone—that the criminalization of sodomy was wrong. No one could credibly say this, in part, for an epistemic reason: the democratic evidence for the wrongfulness of criminalization had to be adduced through years of gays defying the law and social norms in the quest to love and be treated as human on their own terms. It was only when the world failed to fall apart in the face of openly defiant and "illegal" gay love and family life, when the evidence

107. Karst, *supra* note 103, at 96.

108. *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

109. See DALE CARPENTER, FLAGRANT CONDUCT 80 (2012).

110. See *id.*

111. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015) (finding Ohio gay marriage bans and refusal to recognize gay marriage in other states unconstitutional).

112. The ruling, of course, was anchored in the Court's substantive due process doctrine. See *Lawrence*, 539 U.S. at 572–75.

became overwhelming that homosexuality was not a pathology, that the law finally moved.

“Illegal” migration has been similarly essential for challenging the sovereign power to exclude aliens. The decades-long presence of a massive population of undocumented people—eleven million who chose themselves to belong to our community—provides a significant quantum of evidence for the viability of the choose-yourself model. Once you see that undocumented migrants are rejecting and testing the we-choose-you model, then the fact that our society has not collapsed under the weight of these breaches—of these people whom citizens did not ask for¹¹³—provides evidence for the feasibility of choose-yourself political organization. And the evidence is substantial. Our political system has negotiated with activist members of this group and bent to accommodate their self-selected membership in our local and national communities;¹¹⁴ our national identity has carried forward and adapted; our material and economic resources remain ample; our citizenry is mostly employed;¹¹⁵ the progeny of the undocumented assimilate to the same impressive extent as their legal peers;¹¹⁶ English remains the national language and violent crime has dropped, especially in areas with a large population of Latino migrants.¹¹⁷ We could not receive and process this knowledge of our national adaptability to the choose-yourself model in any other way, and that is partly why we should think of “illegal” migration as speech.¹¹⁸

Just as homosexuality could not have been normalized and legalized without the open defiance of social and legal proscriptions on homosexuality, so the we-choose-you model of political organization cannot be discredited or modified in the political arena without “illegal” migration.

The willingness to break laws, and the law’s plastic accommodation—through

113. This characterization of the citizenry’s intent only works at the level of the citizenry’s explicit knowledge. As Hiroshi Motomura has pointed out, immigration law by design produces an “illegal” population vastly in excess of the capacity to deport. Arguably the citizenry “knows” just what it is doing. *See* MOTOMURA *supra* note 18, at 106–07. *See generally* Gerald P. López, *Don’t We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012).

114. *See infra* Part III.

115. For arguments on the economic pros (higher capital utilization rates, creation of new jobs, and dramatic increases in wages for immigrants) and cons (displacement and wage decreases in tradable industries) of immigration for citizens see PRITCHETT, *supra* note 71, at 105–38. *See also* Gihoon Hong & John McLaren, *Are Immigrants a Shot in the Arm for the Local Economy?* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 21123, 2015) (finding that from “1980 to 2000 . . . [e]ach immigrant creates 1.2 local jobs for local workers, most of them going to native workers, and 62% of these jobs are in non-traded services. Immigrants appear to raise local non-tradables sector wages and to attract native-born workers from elsewhere in the country. Overall, it appears that local workers benefit from the arrival of more immigrants.”).

116. *See* PEW HISPANIC CTR., *HISPANICS: A PEOPLE IN MOTION*, 17–19 (Jan. 2005), <http://www.pewhispanic.org/files/reports/40.pdf> [<https://perma.cc/MYA9-3G9R>] (discussing high Latino assimilation rates).

117. *See* ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 251–53 (2012).

118. The democratic informational benefits of free speech informs many theories of the First Amendment. *See* ZICK, *supra* note 79, at 13–39.

courts, legislation, or executive action or nonenforcement—of some of those defiant acts, appears central to legal change, and central to creating the conditions where the speech of reason can do its work. Long before the movements of recent memory, suffragist “Susan B. Anthony and fifty other women” “spoke” in 1872 by casting “ballots in an . . . election in Rochester, New York . . .” In doing so, “they faced arrest, jail and conviction for the federal offense of ‘knowingly, wrongfully, and unlawfully voting.’”¹¹⁹ Reflecting on the suffragettes’ actions, Martha Minow observed: “the legal system itself needs people who are willing to break the law for political reasons. Such people provide one of the checks on the system’s otherwise effective and often well-placed curbs on social change.”¹²⁰ To fail to embrace these illegal acts as speech is to create a free speech doctrine or theory that denigrates and silences the subordinated—who can speak and be heard in no other way.¹²¹

B. The Speech in the Act of Undocumented Migration

Speaking to power requires speaking in strategic ways. African Americans, women, and gays had to communicate in ways that deviated substantially from the decorum of the town hall because of the structural conditions of their subordination. Yet, when considered in relation to the position of aliens who wish to migrate but are prevented from doing so by laws in which they had “no effective share,”¹²² these groups had two significant advantages: they were and are *de jure* citizens (meaning, among other things, that they are nondeportable) and they are already present within the boundaries of the political community. African Americans, LGBTQ persons, and women may have had to break in to the town hall, but at least they were and are firmly planted inside the border.

The alien standing outside the border seeking entry faces, before anything else, the thick practical legitimacy of autocratic exclusion and the stunning amount of force deployed to vindicate it. The speech of reason, urging that the alien’s exclusion is illegitimate, cannot penetrate the border absent the alien’s presence. The alien cannot effectively ask for an equal voice in the constitution of border norms and laws a continent away in her country of citizenship; she must choose herself and migrate in order to gain the standing to speak and be heard.¹²³

119. Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 734 (1991).

120. *Id.* at 741; *see also* Peñalver & Katyal, *supra* note 6, at 1097.

121. This is a normative theoretical claim in the critical theory tradition. *See supra* note 76. However, the speech theory does not claim to displace other theories of undocumented migration. Rather, it seeks to add to them and explain aspects of undocumented migration that are elided or underdeveloped in other theories.

122. MEIKLEJOHN, *supra* note 59, at 3.

123. Moreover, any negotiation between “sending” nation states and “receiving” nation states on this issue would be skewed by a gross asymmetry in bargaining power that strays very far from the ideal conditions posited by Abizadeh or Habermas. And whatever interests poorer nation states may have in capturing remittance flows from wealthy states, the interstate system begins with the hard premise that sovereignty over people, and nearly anything else, is essential. “Choosing yourself” is a nonstarter in formal, sovereign to sovereign negotiations.

Just as the predicate to gay rights was the raising of a defiant gay consciousness via the commission of illegal or non-normative acts, at first surreptitiously and then with increasing openness; and just as the predicate to effective rights for African Americans was the rejection of their internal subordination, and then engagement in defiant strategic action meant to speak through distorting layers of power; the predicate to contesting the sovereign right to exclude is illegal migration. Without “illegal” migration, the question of the border’s legitimacy cannot escape the seminar room and be posed and contested in the political arena.

Even if it seems implausible that aliens actually believe themselves to be migrating without permission to engage in a political project, or send a political message, when they do so in sufficient numbers, the undocumented form a community where consciousness raising can occur; their individual defiant acts give birth to the possibility of migrant political action. Atomized across the world, pining for a life elsewhere, the community of those who would contest the state’s right to exclude cannot effectively form that consciousness. Only when the inarticulate urge to move—to go elsewhere—is acted out, against the law of the state which the migrant enters, can conditions for the articulation of grievances against the we-choose-you model occur.¹²⁴

Indeed, we are now at the stage in this process of politicization where this oppositional message—previously spoken just through the acts of migrating and surreptitiously remaining—has been made public and explicit. The “No One is Illegal”¹²⁵ and #Not1More[deportation] movements embrace the choose-yourself model, and the DREAMers, brought by their parents to the United States unlawfully as children, have begun calling their parents the “original DREAMers.”¹²⁶ In doing so DREAMers explicitly reject the way that their parents’ guilt (for knowingly migrating “illegally”) has been used to construct the child-migrant DREAMers’ own

Forcing the conversation about the way that sovereignty radiates undemocratic power far beyond its territorial boundary—power that stunts the horizons of possibility for those who wish to migrate—requires that initial, knowing and defiant act of crossing the border (or overstaying a visa) without permission.

124. While immigrants with legal status can and do join in solidarity with the undocumented, their privileged status as immigrants whom citizens chose makes it far less likely that noncitizens with legal status will mount a challenge to the we-choose-you model on their own. Of course, immigrants with formal legal status are highly likely to challenge practices that affect them directly, like crime-based deportation.

125. No One is Illegal was “[i]nitiating in Montreal in the early 2000s [and] . . . spread to other major cities and began engaging in aggressive campaigns against deportations.” CHRIS DIXON, *ANOTHER POLITICS: TALKING ACROSS TODAY’S TRANSFORMATIVE MOVEMENTS* 49 (2014). #Not1More[Deportation] has translated the sentiment and consciousness of No One is Illegal into the U.S. context. See generally #NOT1MORE, <http://www.notonemoredeportation.com/> [<https://perma.cc/6VPR-J22R>].

126. See, e.g., Cristina Jim, *DREAMers to Congress: Don’t Mess With Us*, ABC NEWS (June 13, 2013), http://abcnews.go.com/ABC_Univision/Politics/dreamers-congress-mess-us-immigration-reform-opinion/story?id=19390168 [<https://perma.cc/XL4U-Q4VU>] (“We are fighting for our families, our communities, and our parents, who we know are the original dreamers who sacrificed so much for our futures.”); *Celebrating Parents, The Original Dreamers*, DEFINE AMERICAN: BLOG (Mar. 14, 2013), <http://www.defineamerican.com/blog/post/celebrating-parents-the-original-dreamers> [<https://perma.cc/Q28K-73ET>].

innocence.¹²⁷ If the DREAMers' parents—who, unlike their children, knowingly broke the law—deserve the same accommodations by the United States as the DREAMers themselves, then the DREAMers are asking the nation to validate the choose-yourself model. If the DREAMers' parents are not illegal, then no one is.

Echoing the logic of the "original DREAMers" and of the choose-yourself model, a DREAMer attending Dartmouth College explained why she was petitioning the college to remove "illegal alien" from its subject headings: "This term, and the way people used it to criminalize the choices our parents made in order to provide us with better lives, completely detracts from the brave choices and obstacles we overcame in order to survive . . . I'm not illegal. I'm a survivor that continues to work toward a better future."¹²⁸

C. Presence as Speech: Occupy Wall Street and Undocumented Migration Compared

For those who accept the idea that illegal action may be a predicate for the subordinated to engage in the speech of reason, but remain unpersuaded that these predicates ought themselves be labeled speech, an analysis of the speech content of Occupy Wall Street's "Occupation" of Zuccotti Park, Manhattan, may be instructive.

Self-selected presence in the park during the Occupation was an essential and discursive component of the speech of the Occupy protest. The Occupiers' nearly two-month presence, persevering through harassment and arrests in the center of the world's largest financial center, secured the Occupation's great achievement: placing the question of unequal economic power on the national agenda. Three years later, these questions are still being digested.¹²⁹ By migrating without permission and strategically acting to remain, the undocumented have similarly forced immigration law onto the national agenda.

To build the analogy to "illegal" migration, consider the way presence in Zuccotti Park functioned during the Occupation. Under the conditions set by anarchist political organization, stepping into the park meant immediate and substantive enfranchisement in the construction of the message of the Occupation.¹³⁰ Protestors were

127. See *Plyler v. Doe*, 457 U.S. 202, 202 (1982) (discussing the wrongfulness of migration without permission alongside the innocence of minors brought to the United States at an undocumented parent's behest).

128. Jasmine Aguilera, *Another Word for 'Illegal Alien' at the Library of Congress: Contentious*, N.Y. TIMES (July 22, 2016), <http://www.nytimes.com/2016/07/23/us/another-word-for-illegal-alien-at-the-library-of-congress-contentious.html> [https://perma.cc/FY9L-AC8E].

129. See generally W.J.T. MITCHELL, BERNARD E. HARCOURT & MICHAEL TAUSSIG, *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* (2013); see also Chris Cillizza, *What Occupy Wall Street Meant (or Didn't) to Politics*, WASH. POST: THE FIX, (Sept. 17, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/09/17/what-occupy-wall-street-meant-or-didnt-to-politics/> [https://perma.cc/22B4-H8SW].

130. The Occupation began on September 17, 2011. The protest was intentional and organized, but in the anarchist style. The two initiators had the goal of "getting the [Occupy Wall Street] meme out there," but they did not intend to "control what happens." This secession of control meant that the meme, Occupy Wall Street, would be defined and propagated by these self-selecting members. The initiators simply set the conditions of possibility for Occupy. Mattathias Schwartz, *Pre-Occupied: The Origins and Future of Occupy Wall Street*, NEW

enfranchised in two different ways. First, internally: the commitment to voice through the deliberative procedures of the General Assembly—the Occupation’s democratic organ—meant that the views of all present would be considered in nearly every aspect of the Occupation’s actions, from basic functional matters to the text of the Declaration of the Occupation (the official public statement of the protest).¹³¹ Second, presence individually and collectively is what constituted the Occupation of “Wall Street.” The Occupation, quite apart from the Declaration, was the message. Moreover, to keep the message going, people had to continue to remain present in the park. Abandoning the park meant the cessation of the Occupation and a halt to its speech.

And what did the Occupation say exactly? The message was really a diagnosis. The Occupation located Wall Street as the source of the economic malaise that millions of Americans felt in the aftermath of the world financial crisis. Presence in Zuccotti Park, then, was both the message itself and the means of articulating the malaise that motivated protestors to join the Occupation.¹³²

Presence in the United States without permission similarly constitutes and articulates a “message.” Mass undocumented presence sets the stage for the articulation of a global malaise. The fertility of the United States for the contestation of the we-choose-you model is as unique as the features of Zuccotti Park that made it fertile ground for the Occupation of Wall Street. Legal regimes play an important part in both stories. While most city parks were permitted to close at dusk, or impose curfews, Zuccotti Park was privately owned, but subject to a zoning law that required “Zuccotti’s owner to keep the park open for ‘passive recreation’ twenty-four hours a day.”¹³³ Similarly, unique legal norms make the United States fertile ground for the contestation of sovereignty norms that obtain globally. Federalism allows for migrants to magnify their voices in sanctuary cities and states, where the choose-yourself model has blossomed, as discussed in Part III.D.1. Birthright citizenship allows an “illegal” migrant to correct, in the next generation, for the injustice of her having been born in a country where she could not thrive. Robust protection of traditional forms of protest allows the undocumented to convert their initial act of protest into a more orthodox movement for immigrants’ rights. Crossing the border into Zuccotti Park or the United States permits the constitution of political speech that would otherwise not exist or go unheard.

As with Occupy, to continue to protest, to avoid deportation, requires remaining

YORKER (Nov. 28, 2011), <http://www.newyorker.com/magazine/2011/11/28/pre-occupied> [<https://perma.cc/7NER-LTU9>].

131. On the twelfth day of the Occupation, the General Assembly adopted a Declaration of the Occupation. The document condemned corporate economic power and specified a range of ills that it attributed to the exercise of that power. *Id.*

132. The sense that the Occupation had tapped the zeitgeist and begun to specify its content was bolstered its first week when an anonymous Occupy supporter registered the domain wearethe99percent.tumblr.com and it went viral. The publicity was particularly important in the early days of the Occupation since the mainstream media ignored the protestors or radically misrepresented their intentions. See Kevin M. DeLuca, Sean Lawson & Ye Sun, *Occupy Wall Street on the Public Screens of Social Media: The Many Framings of the Birth of a Protest Movement*, 5 COMM. CULTURE & CRITIQUE 483, 483 (2012).

133. Schwartz, *supra* note 130.

present, and remaining present requires thoughtful strategic action. Occupiers, for their part, had to improvise logistics: how to feed, shelter, and provide sanitation for the occupiers. Failure to do so meant the encampment's collapse, or eviction. Remaining in the United States as an undocumented person requires strategic action too. Moving to a state or locality with more permissive laws, hiding one's undocumented status, avoiding interactions with the police, and when and where possible emerging from the shadows and advocating for laws that make being "illegally" present easier—all these actions facilitate continued contestation of the we-choose-you model. The undocumented cannot contest the border in the speech of reason if they have all been deported.

The mixed, inconsistent, and apolitical motives of individual migrants do not defeat the idea that migrating without permission is a kind of speech, just as the mixed motives of occupiers did not defeat the unity of the message of the Occupation. In both cases, the parameters of joining and remaining present in a place ineluctably define the political speech character of that act, irrespective of motive. For example, I could have joined the Occupation to engage in an anthropological investigation, but because of the conditions of meaning set by the location of my investigation, in conducting that investigation (in being present over the course of the Occupation), I would, by definition, be an Occupier. I would, through my presence alone, irrespective of intention, help constitute at least a part of the message of the Occupation.

Similarly, the eleven million undocumented migrants living in the United States surely have innumerable apolitical motives for migrating unlawfully. But because the United States has clearly made their migration illegal and they have knowingly disregarded that legal prohibition, their act, no matter their individual motives, is ineluctably—in part—political speech. The content of that speech is partly defined by their act's negation of the state's power to exclude that individual. Migrating without permission means "I choose myself" because the state says with force "we have the exclusive right to choose"¹³⁴ and you were not chosen.

As the Civil Rights protesters did, migrants present without permission are seizing the membership that is formally denied them. These acts are inherent challenges to the legal and political power that excludes. They are political acts that speak. As one organizer for No One is Illegal put it:

When I think of migration patterns and how those are unfolding right now—even as more restrictive measures are being put in place—I think

134. Concededly, this means that the citizenry is limiting what undocumented migration can mean. But these limitations are the limitations of all struggles to liberate subordinated groups. *See supra* notes 103 and 105 and accompanying text. Even so, adopting an explanation of undocumented migration that is consistent with migrants' agency and fits descriptively with the norm-changing effects of their act is superior to adopting a theory of undocumented people's actions that erases or radically deemphasizes that agency.

Additionally, there is sociological evidence that what subordinated groups actually intend is largely unknowable by academic (or other empowered) observers because subordinated groups are always speaking strategically to the powerful. James C. Scott calls these hard-to-observe conversations of the subordinated "hidden transcripts." *See generally* JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1990).

that the ways that people . . . are navigating these systems is amazing. . . . [D]espite the restrictive and dehumanizing structures that are set up, people find ways to fuck with them—out of necessity but also out of a desire to not put up with bullshit and seek a better life. People find ways to take down or go around all barriers. For me, these moments illustrate really amazing examples of resistance to the oppressive systems we live under.¹³⁵

If we deny the speech in these acts of resistance, we deny the voice of the subordinated because we deny the political value of the only manner in which the subordinated can speak in the sovereignty conversation, the only way they can register their objection to the laws that exclude them, and the only way the United States can internalize their critique of immigration law. Choosing to label these actions speech acknowledges the agency of those who choose themselves, while showing epistemic modesty to both sides of the open borders debate.¹³⁶

Descriptively, thinking of undocumented migration as speech accounts for the principal success of the undocumented: getting immigration law onto the national agenda. Once on the agenda, “illegal” migrants’ actions and words have prompted public discussion of, and reflection on, sovereignty and the categories of inclusion and exclusion that it creates. Just as we have been digesting Occupy Wall Street’s agenda-setting message, so we have been reflecting on the sovereignty problem that eleven million undocumented have so vividly presented.

As with sit-ins and the Occupy movement, the immigration power discussion has been facilitated by the way that the mass of undocumented migrants has provoked the state to react—through a massive increase in deportations, perversions of traditional understandings of the separation between the civil and criminal law, and the triggering of local immigration enforcement actions, among other things. These reactions to the people who chose themselves have allowed the undocumented, and their allies, to expose the violence of immigration exclusion and enforcement in courts, agencies, and before the public. That violence has always operated, but could only be seen and heard once local and national governments started to get serious about speaking back to undocumented migrants; the persistence of the undocumented’s “occupation” provoked this exposure of immigration law’s unseen violence. The millions of deportations effected through this reaction allowed the undocumented who remained to publicize the violence of the regime and use that violence to make arguments for a more cosmopolitan—a choose-yourself—sovereignty.¹³⁷

135. DIXON, *supra* note 125, at 117.

136. *See supra* Part I.C. Again, the speech theory is critical in the sense that it privileges, to some degree, the normative dimension—especially the emancipatory potential—of theorizing over description. Nonetheless, the speech theory captures a descriptive dimension—the willfulness of migrants’ trespass—that is missing from most progressive theories of undocumented migration. *But see* MOTOMURA, *supra* note 18, at 106–07; Bosniak, *supra* note 22, at 347 (discussing “vindicatory amnesty”).

137. I am not saying or implying that these deportations were just or necessary. Rather that, as Foucault observed, sites of state violence inherently create opportunities for resistance. *See, e.g.,* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOL. 1: AN INTRODUCTION* 95 (Robert Hurley trans., Random House, Inc. 1978) (1976) (“Where there is power, there is resistance . . .”).

This is not unlike the strategy of civil rights protestors, who sought to provoke violent reactions by the state and its officers, but trained themselves to react peacefully to violent state actions. Through these strategic actions, civil rights protestors conveyed to the American polity their victimization by Jim Crow;¹³⁸ a victimization and violence that was always present, but never seen by those with the power to change it until African Americans' defiance forced southern states to publicly and dramatically demonstrate that violence.

D. Speech? Really?

Admittedly, my argument adds up to a view of "speech" much more capacious than the First Amendment accommodates right now, and it is difficult to imagine the doctrine ever moving that much. Still, the First Amendment has bent to accommodate speech that is not "reason" before, and, as the decriminalization of sodomy shows, the First Amendment is not the only constitutional means of validating speech acts. Gay sex, for instance, had a discursive component similar to "illegal" migration while it was criminalized, and the Supreme Court eventually validated that "speech" sub rosa by means of an expansion of the right to privacy.¹³⁹ We can acknowledge the speech element of certain acts with norm-changing, conversation-sparking potential without vindicating them doctrinally in the First Amendment.¹⁴⁰

Even if First Amendment doctrine is an unlikely vehicle for the recognition of "illegal" aliens' discursive contributions, it is still essential for a contemporary theory of "illegal" migration to see and to validate this discursive element. By labeling migration without permission speech, however unorthodox or attenuated, our theory of "illegal" migration can reject the layers of subordination that, for example, cause many citizens to label migration without permission an act of invasion, or as the state always labels it, an unambiguously illegal act, while acknowledging the fact that most of the undocumented knowingly broke immigration laws. Moreover, and unlike any other extant theory of "illegal" migration in the legal literature, the speech theory recognizes the norm-changing contributions of the undocumented, the political and legal work that an undocumented migrant does *in the moment* that she breaks the law by migrating without permission.¹⁴¹ We should privilege the speech label over other

138. DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 24–28 (2014) (discussing the way nonviolent protesters in Selma goaded the police to violence and the discipline that was instilled in protestors not to retaliate in order to showcase the violence of Jim Crow).

139. *See* *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

140. That the institution of the Supreme Court may never acknowledge this symmetry or validate it via the First Amendment does not weaken the point. There are many constitutional norms that are underenforced and unarticulated by the Court. Indeed, immigration law in general is a conspicuous example of that phenomenon. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 548 (1990) (arguing that the Supreme Court vindicates constitutional norms silently through pro-migrant interpretations of statutes).

141. Other theories do give migrants some agency, but do not emphasize how the undocumented make productive contributions to the immigration law dialogue. *See supra* note 22 and accompanying text.

labels because it acknowledges this constructive work—the way in which “illegal” migration is not *just* a problem to be solved. Doing so is also consciousness raising in the same way that “No One is Illegal” is. Labeling undocumented migration speech offers a distinct way for an alien to talk about “illegally” migrating without remorse and in a way that ties into robust American democratic and legal values. Other frames, like earned membership or forced migration, are valuable and persuasive too, but they have a hard time contesting an argument like, “what part of illegal don’t you understand?”

But “illegal” migration and the free speech flaw in immigration law are still also problems to be solved, and the speech theory captures these aspects of undocumented migration too. The speech metaphor reflects an openness to the possibility that migration without permission is wrong, that it may be that the state ultimately *can* properly exclude people from its borders. The speech theory acknowledges this possibility without devaluing “illegal” migration. Migrants are both justified in migrating without permission, adding speech value by doing so, and also may be wrong on the merits. Democracies may in fact need exclusion—perhaps even autocratic exclusion¹⁴²—in order to survive and thrive. But, we cannot know the answer to this question on democracy’s own epistemic terms without “illegal” migrants’ contributions to the democratic dialogue. The speech theory of “illegal” migration captures this critical and overlooked fact.

E. What Does Deportation Say?

Deportation also has something to say. Just as criminal law theory has imagined punishment as a conversation with the offender,¹⁴³ deportation can be imagined in similar terms. Deportation says in the clearest possible way to aliens who speak by crossing the border: we reject your contention that you can choose yourself to belong to our community; you may no longer remain a part of our society; you are banished.

Deportation is as necessary for the operation of the sub-ideal sovereignty conversation as migration without permission. “Illegal” migration without deportation is just the full acceptance of the choose-yourself model. But the wildly disproportionate power of the state *vis-à-vis* the undocumented migrant means that the power to deport has to be dramatically tamed in order for even the roughest approximation of a political conversation to occur. The simultaneous necessity of deportation and the need to check deportation in order to facilitate the sovereignty conversation is another way of accounting for the seeming paradox that many legal scholars suggest or imply some legitimate scope for deportation, yet nearly every contribution to the literature critiques any effort by the state to make deportation a more regular, less expensive occurrence.¹⁴⁴ Though the violence of deportation may be minimally

142. If it turns out society collapses, or moves significantly towards collapse, under the weight of undocumented migration, then the we-choose-you model, or something in between, would be vindicated.

143. See R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 53, 191–93 (2007).

144. David Martin is one of a few immigration scholars who pointedly emphasizes how immigration enforcement is normatively desirable. See, e.g., Martin, *supra* note 26.

justifiable¹⁴⁵ on the grounds of epistemic modesty, the rest of the coercive apparatus is more problematic. Curtailing as much as possible these nondeportation forms of legal violence, like immigration detention¹⁴⁶ for example, appropriately lowers the toll the United States' imposes on aliens' dissent.

F. Conclusion

The immigration law literature mostly accepts that deportation and migration restriction are legal, but also urges that migrating without permission is not exactly wrong. Framing "illegal" migration as, in part, an act of protest rationalizes scholars' intuitions and arguments in a way that ennoble migrants rather than victimizes them. It rejects the idea that "illegal" migration is criminal, the treason of the global order, but remains open to the possibility that migrants may be *mistaken* in their view that "sovereignty" should bend to the choose-yourself model they advocate by migrating. In short, the speech theory allows for two things: (1) that undocumented protestors are not wrong for protesting—migrating without permission—and (2) that they may be wrong about the answer to the question that their actions pose. The speech theory holds that migrants may not have the right to migrate without permission, but do have the right to question the we-choose-you model—by migrating without permission.

In the legal literature the impulse is usually to portray undocumented migration as a regulatory failure that creates numerous victims and that ought to be solved. The aspiration is to have immigration regulation without the "illegal." By illustrating the productive quality of undocumented migration—it forces a conversation about an otherwise uncritical deployment of state-sanctioned violence—I mean to focus scholars on what we have gained for migrants' efforts.

Another thing immigration advocates gain by recognizing "illegal" migration as speech is a new way of engaging in a dialogue with opponents of "illegal" migration. The speech theory offers a new response to citizens who object to "illegal" migration as simple lawbreaking. Now we can say the following:

Yes, migrants are breaking the law by migrating without permission, but note that border laws are very different than other laws. Those who migrate illegally, as you say, never asked to be born in their home countries and were never asked to participate in the formation of the immigration laws that directly restrict them—not us. You might be right that we can legitimately exclude or deport them nonetheless, but you must at least remain open to the possibility that we might be wrong to do so. In any case, we will never really consider the issue democratically unless some people put our border laws to the test. "Illegally" migrating leads to conditions where we can actually have a debate about immigration law and policy that takes into account the views of those who are most affected by those laws. This is the only way that we allow aliens to have a voice in the formation of these laws—which again, apply only to them. So, yes, aliens are willfully breaking our laws, but those laws are ours, not theirs. It seems right to have a real discussion about such an important issue, and we

145. See Morales, *supra* note 98, at 1314–24.

146. See generally César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017).

just can't have that discussion under current conditions unless migrants voice their views. Unfortunately, the only way that we've left them to do that is by allowing for "illegal" migration.

Note how this account neither fully approves nor fully disapproves of migrating without permission. It neither says that migrating without permission is a "legal" act in the sense of the "No One is Illegal" organizer nor does it concede that the act is illegal—criminal—in the sense meant by the objector. Still, it meets head on the objector's view of the fact of illegal migration. Instead of painting the migrant as the victim of push-and-pull factors, it concedes the willfulness of a migrants' "illegal" migration, but offers reasons, not "to forgive, or forget"¹⁴⁷ an "illegal" migrant's speech, but to question the moral and legal foundation of the law that made that migrant's act illegal in the first place, and to question the necessity of such laws.

III. THE PERSUASIVE FORCE OF THE UNDOCUMENTED

The speech of the undocumented has been persuasive. The we-choose-you model has accommodated the decision of the undocumented to choose themselves to a significant extent. This fact, the persuasive force of the undocumented, is often lost in the literature's emphasis on the citizenry's expanded and increasingly punitive "answer" to migrant's protests, like the dramatic escalation in deportations, expansion of immigration detention, or the militarization of the United States southern border.

Yet, the undocumented and their "speech" have persisted and persuaded, despite the citizenry's violent answer to their protests. The population of undocumented—eleven million—has barely budged from its peak. Previously deported migrants continue to return, and aliens with no prior history in the United States continue to choose themselves for membership in protest of their exclusion.

And these quiet forms of protest speech have increasingly been translated by migrants into the "speech of reason" to significant success. When local governments grant undocumented migrants driver's licenses and pay for their kidney transplants,¹⁴⁸ when President Obama grants a temporary reprieve from immigration prosecution to millions of undocumented people, migrants who chose themselves gain indicia of membership—of citizenship or legal belonging—from local and national governments. These concessions mean the choose-yourself model has had persuasive force. Migrants are persuading some groups of citizens, and some key political actors, through a sub-ideal version of "the unforced force of the better argument." Moreover, some of these policies, like President Obama's executive actions, have structural effects that fortify migrants' ability to contest the we-choose-you model into the future.

This Part illustrates some ways in which the United States has been persuaded to partially adopt the choose-yourself model and how undocumented migrants have forced that shift. Absent the willful acts of undocumented migrants, our sovereign power to choose members would not have been challenged or renegotiated.

147. See Bosniak, *supra* note 22, at 347–48.

148. Meredith Rodriguez, *Immigrants in State Illegally To Get State-Funded Kidney Transplants*, CHI. TRIB. (Dec. 29, 2014, 5:26 AM), <http://www.chicagotribune.com/news/ct-immigrant-kidney-transplant-law-met-20141226-story.html> [https://perma.cc/5WCG-P8VA].

A. Evidence of "Illegal" Migration's Persuasive Force

The persuasive force of "illegal" migration reveals itself when we evaluate legal and political developments for how they support or undermine our power to pick and choose migrants. Under this rubric, the shift towards the choose-yourself model and the role of undocumented migrants in securing that shift becomes clear.

Let us begin by acknowledging that the logic of sovereignty over aliens makes access to any and all goods under the control of the state subject to the state's consent. And the state reserves, through sovereignty, the right to pick and choose who accesses those goods—territory, education, medical care, etc. Accordingly, every legal accommodation to the undocumented population represents a shift, however small or contingent, in sovereignty norms, since people who chose themselves to be part of our community—people whom we explicitly excluded through law—are granted access to rights and privileges that the logic of sovereignty says we may reserve only for the invited.

Not only does the substance of accommodation signal a shift in sovereignty norms, but the unprecedented *means* by which those accommodations are granted by government show just how anti-we-choose-you these actions are. Bending numerous traditional methods of governing to accommodate a class of people who—in violation of our sovereignty—have chosen themselves to belong to our community sets a structural political and quasi-legal precedent for similar or more expansive anti-sovereign shifts in the future. Obama's recent executive actions on immigration are a significant example of this phenomenon.

B. The Persuasion of President Obama

President Obama is now one of the persuaded.¹⁴⁹ His recent executive actions make it easier to choose-yourself for membership in the political community. In his speech introducing these new policies, President Obama indicated approval of the choose yourself model and made an effort to persuade all Americans of its viability:

My fellow Americans, we are and always will be a nation of immigrants. We were strangers once too. And whether our forebears were strangers who crossed the Atlantic or the Pacific or the Rio Grande, we are here only because this country welcomed them in and taught them that to be an American is about something more than what we look like or what our last names are or how we worship. What makes us Americans is our shared commitment to an ideal – that all of us are created equal and all of us have the chance to make of our lives what we will.¹⁵⁰

149. Prior to his executive actions, President Obama was frequently portrayed by immigration activists as the "deporter-in-chief." *Barack Obama, Deporter-In-Chief*, *ECONOMIST* (Feb. 8, 2014), <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama> [<https://perma.cc/5H62-EJAE>].

150. Barack Obama, U.S. President, Address to the Nation on Immigration Reform (Nov. 20, 2014), in 2014 DAILY COMP. PRES. DOCS. No. 201400877, Nov. 2014, at 4.

“What makes us Americans is . . . the chance to make of our lives what we will”—a more elevating endorsement of those who choose themselves, I cannot imagine. It is the undocumented, after all, who contested their exclusion—declaring that not even the sovereignty of the world’s most powerful nation would keep them from making what they would of their lives. In this formulation, those who chose themselves are the most American of all because they risked everything—and continue to do so—without any assurances, just for a chance at the American dream for themselves or their children.

President Obama’s rhetoric and executive actions are particularly significant for a speech theory of “illegal” migration because they are evidence of “illegal” migration’s persuasive force. The President’s position evolved over time and in response to his experience enforcing immigration laws, cajoling Congress to act, and interacting with migrant activists.

While Obama has long championed a pathway to citizenship for the undocumented, he also escalated significantly the volume of deportations over his years in office in a bid to signal enforcement seriousness to the Congress that would need to sign off on normalizing the status of the undocumented. This play did not work. Congress failed to pass a bill normalizing the status of the undocumented and the human suffering caused by telegraphing enforcement seriousness with deportation—broken families, stunted horizons—became undeniable. In the face of this evidence, President Obama changed course; his executive actions meaningfully rationalize and deescalate immigration enforcement and attempted to quasi-legalize millions of undocumented—all on the President’s own authority.

In the rest of this Part, I will show how Obama’s executive actions are evidence of the partial but significant extent to which “illegal” migration, and the activism it spurred, has persuaded the President to support the choose-yourself model.¹⁵¹

1. What Are Obama’s Executive Actions?

After years of seeking a legislative solution to our “broken immigration system,”¹⁵² President Obama changed course on November 20, 2014, issuing a series of legal memoranda¹⁵³ that alter the means, strategy, and substance of immigration regulation in the United States.

The Administration issued ten memos in all and claims that the memoranda achieve, respectively, the following goals: (1) strengthen border security; (2) revise removal priorities; (3) end Secure Communities and replace it with new priority enforcement program; (4) personnel reform for Immigration and Customs Enforcement officers; (5) expand deferred action for childhood arrivals; (6) extend deferred action

151. My aim here is not definitively to prove causation, but rather to show how migrants who migrated “illegally” can plausibly claim credit for the President’s shift. Other accounts can then seek to falsify or nuance mine. *See, e.g.*, STATES WITHOUT NATIONS, *supra* note 73, at 225.

152. Press Release, Office of the Press Sec’y, White House, Fact Sheet: Fixing our Broken Immigration System so Everyone Plays by the Rules (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> [<https://perma.cc/L4NN-2ZME>].

153. All the Memoranda are publicly available at DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/immigration-action> [<https://perma.cc/R5SS-WE87>].

to parents of Americans and lawful permanent residents; (7) expand provisional waivers to spouses and children of lawful permanent residents; (8) revise parole rules; (9) promote the naturalization process; (10) support high-skilled businesses and workers. The bulk of these, as I will show, fortify the choose-yourself model. The first priority, strengthen border security, hews to the border-enforcement-first formulation of past legislative grants of legal status, but the increased enforcement measures at the geographical border are outweighed by the moves to roll back some of the technologies—like Secure Communities—which facilitated a massive increase in deportation demand and capacity. On balance, then, these actions represent a choose-yourself shift in sovereignty norms; they make life better for those who chose themselves.

C. Deferred Action Vindicates the Choose-Yourself Model

Obama’s executive actions vindicate the choose-yourself model.¹⁵⁴ Most clearly, the promise of a reprieve from deportation¹⁵⁵ directly and substantially benefits the undocumented people who chose themselves to become part of our political community. The reprieve from deportation offers both a substantive and a procedural benefit. Substantively, it offers protection from deportation and the psychological comfort of a period certain during which the migrant will not have to live with the threat of exile. This is a repose that the we-choose-you model does not permit—there is no statute of limitations for immigration law violations.¹⁵⁶

Procedurally, these expansions of deferred action do a few things. They further root—and with a legal imprimatur¹⁵⁷—the five million beneficiaries in the United States by buying them more time in the country. This legalized rooting is significant

154. See Zoltan L. Hajnal, *The Democrats’ Immigration Problem*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/opinion/the-democrats-immigration-problem.html> [<https://perma.cc/SKM4-HAGN>] (deploying social science evidence to argue that President Obama’s executive actions are bad politics). That President Obama’s actions are bad politics underscores that the choose-yourself constituency is the principal beneficiary.

155. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents to León Rodríguez, Dir., U.S. Citizenship & Immigration Services, Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t & R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot. 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<https://perma.cc/SRR2-BCES>].

156. See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 60 (2004).

157. The President cannot confer actual legal status on the undocumented. The legality of his actions hinges on this distinction between legal status and the promise not to prosecute for time certain. See Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, on The Department of Homeland Security’s Authority To Prioritize Removal of Certain Aliens Unlawfully Present in the United States and To Defer Removal of Others to the Sec’y of Homeland Sec. & to the Counsel to the President 2 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/Q4A7-XWY2>].

because “time and ties”¹⁵⁸ to the United States are arguments with significant traction in political debates about migration and in the immigration statute itself.¹⁵⁹ Accordingly, even though a new Administration has the right to undo the promise not to deport, or fail to extend the length of the reprieve (should Congress continue to defer legislative action), the logic of “time and ties” will at least guarantee that any unwinding of these benefits by a subsequent administration will be viewed as a more violent and inhumane shift than would have been the case had the status quo of immigration inaction continued. This gives undocumented migrant activists and their allies a stronger foothold from which to protest any rollback.

Obama’s memoranda shifted the burden of persuasion to opponents of legalization and undocumented migration by fortifying existing arguments for legal status for those who choose themselves and added a new argument: that the leader of the free world believed granting some form of legal status to a large swath of the undocumented was important enough to risk a major backlash.¹⁶⁰ These moves all support the choose-yourself model.

Additionally, just as the decisions of prior presidents to shield large groups of aliens from deportation provided legal ballast for Obama’s current move, Obama’s actions set a new precedent that future groups of undocumented may use to assert their interests. And the unprecedented scope of Obama’s order¹⁶¹ means that he created another, stronger, “weapon of the weak”¹⁶² than existed previously.

An equally divided Supreme Court upheld without opinion an injunction barring this reprieve from deportation, but the lower court opinion has been widely criticized as erroneous. While the decision was a blow to a signature piece of President Obama’s executive actions,¹⁶³ the precedent of presidential action will nonetheless lie in wait to be mobilized by other groups of aliens at a strategic moment in the future, especially if a majority of democratic appointees emerges on the court. Whatever happens, Obama’s expansion of deferred action marks “illegal” migration’s persuasive force, if not its current legal efficacy.

D. Defined Enforcement Criteria Fortifies the Choose-Yourself Model

The expansion of deferred action has been the most controversial of President Obama’s executive actions because it is the most legible way that Obama rejected the sanctity of the we-choose-you model. Yet the Administration’s changes in deportation enforcement practices also vindicate the choose-yourself membership

158. Bosniak, *supra* note 22, at 353 (discussing Shachar).

159. See generally Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175 (2010).

160. See *Texas v. United States*, 787 F.3d 733, 734 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016); Hajnal, *supra* note 154; *President Obama’s Unilateral Action on Immigration Has No Precedent*, *supra* note 35.

161. See *President Obama’s Unilateral Action on Immigration Has No Precedent*, *supra* note 35.

162. See JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985).

163. See *Texas v. United States*, 86 F. Supp. 3d 591, 676–77 (S.D. Tex. 2015), *aff’d*, 787 F.3d 733 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016).

model and, unlike deferred action, these changes were not challenged in court.¹⁶⁴ With these memoranda, the persuasive force of undocumented migrants is now law in practice.

The shift to firm definite criteria for crime-based deportation from a system that engaged in a significant amount of untargeted enforcement creates another weapon of the weak by carving out a kind of safe harbor for those who manage to cross the border or overstay their visas. With definite enforcement criteria in place, a migrant can conform her behavior to the executive’s written priorities and have some assurance that the state will respect, in a limited way, the migrant’s choice to become a member.

To appreciate the import of this change, consider the efficiency benefits of random enforcement in a world of scarce resources. Randomness multiplies every act of enforcement by projecting to others engaged in the same unlawful behavior that they could be next. If the enforcement target is unpredictable, then it will be difficult for violators to ensure that they will not be targets of enforcement *except* by ceasing the targeted illegal behavior. In this way, untargeted enforcement multiplies the deterrent effects of an instance of law enforcement—at least when no other countervailing factors are considered.

In practice, of course, the behavioral calculus is much more complicated. In the case of undocumented migrants, untargeted enforcement on its own is likely insufficient to persuade masses of undocumented to “self-deport,”¹⁶⁵ since the reasons for remaining (family, higher wages, debts to smugglers, promises to send remittances home) in most cases swamp the negative psychological effects of untargeted enforcement, and the risk of actually being deported (which remains low since the amount of deportations that may be effected in a given year is a small percentage of the undocumented population). Still, even if untargeted enforcement doesn’t “work” in this case, it imposes psychological suffering on migrants who chose themselves *for* choosing themselves; by doing so, it operates as a psychological punishment directed at all undocumented people because they violated our sovereignty.¹⁶⁶

With this background, a shift away from untargeted enforcement to defined criteria is choose-yourself friendly in a few ways. First, doing so implicitly acknowledges that the imposition of a psychological punishment incapable of actually correcting the sovereign violation—that is, forcing the migrant to leave—is gratuitous. A retributive logic—one which viewed the sovereign violation as morally wrong—would instead approve of the psychological toll of untargeted enforcement because it would

164. This and other challenged DHS memoranda unrelated to deferred action *were not* challenged in federal court. *See id.* at 677.

165. *See* Adam Serwer, “*Self-Deportation*”: *It’s a Real Thing, and It Isn’t Pretty*, MOTHER JONES (Jan. 23, 2012, 11:59 PM), <http://www.motherjones.com/mojo/2012/01/romneys-self-deportation-just-another-term-alabama-style-immigration-enforcement> [<https://perma.cc/SEE3-XXCL>].

166. *See* Julia Preston, *For Immigrants, Fear Returns After a Federal Judge’s Ruling*, N.Y. TIMES (Feb. 20, 2015), <http://www.nytimes.com/2015/02/21/us/for-immigrants-fear-returns-after-a-federal-judges-ruling.html> [<https://perma.cc/66CY-4SB8>] (explaining that after the issuance of a district court injunction halting the expansion of deferred action, an undocumented person eligible for the reprieve reflected “I’m back to this sense of insecurity, of being afraid every day, every hour, every minute”).

help to make the wrongness of that act real for the migrant who chose herself.¹⁶⁷ Imposing this quasi-punishment makes the we-choose-you model real even as the migrant violates it through her presence.

Second, setting out and actually holding to¹⁶⁸ definite criteria for enforcement means that a migrant can conform her behavior to those criteria and have some assurance that her decision to choose herself for admission will be respected by the state. For example, convicted felons are one of the highest priorities for deportation.¹⁶⁹ By avoiding felonious conduct and multiple misdemeanor offenses, along with the other avoidable behaviors cataloged in other parts of the memorandum, the migrant can have some significant degree of assurance that he will not face deportation.¹⁷⁰ Moreover, during the time that a migrant conforms his behavior to these criteria, he builds further “time and ties” to the United States and thus increasingly qualifies for the exercise of *favorable* discretion by immigration enforcement agencies.¹⁷¹ When coupled with the changes Obama made to make these written criteria real in practice,¹⁷² the new policies mean that if you have selected yourself to become part of our community we have set out a legal framework for you to follow in order to avoid deportation.

These changes, considered cumulatively, constitute a very limited alien-directed de facto deferred action, achieving similar—though far from identical—results for those who conform strictly to the criteria. The clearest difference is that those granted deferred action have been given an explicit promise. Another difference is that those who create de facto deferred action for themselves will not receive authorization to work legally, and many of the ways in which the undocumented seek work (using false documents to prove legal eligibility to work, for example) can leave them criminally liable in a way that would render them a deportation priority.¹⁷³

Even here, however, the difference in practice will depend on how the agencies administer and interpret the normative thrust of Obama’s reorientation of immigration enforcement practices. Obama’s speech introducing the American

167. See Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1301 (2014).

168. The Obama Administration made prior attempts to achieve targeted enforcement, but was met with resistance in the enforcement agencies. The new framework makes *departures* from the criteria subject to supervisory approval helping to ensure these criteria have much more force than prior efforts. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t (Nov. 20, 2014) [hereinafter Johnson, Enforcement Priorities Memorandum], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/8XSK-CC9T>].

169. *Id.*

170. Social scientists have established that migrants commit significantly fewer crimes than predicted by their socioeconomic status. See ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 251–58 (2012). While Sampson urges that Latino migrant culture may be protective, that culture may itself be shaped by a fear of deportation.

171. Johnson, Enforcement Priorities Memorandum, *supra* note 168, at 5.

172. Supervisors must approve deviations from any of the enforcement priorities. *Id.*

173. See, e.g., 18 U.S.C. § 1028A (2012) (criminalizing identity theft); 18 U.S.C. § 1546(a) (2012) (criminalizing the use of other false employment documents); 42 U.S.C. § 408(a)(7)(B) (2012) (criminalizing using a false social security number).

public to his directives was notable for framing undocumented peoples' work as an indicia of membership rather than one of wrongdoing—stealing jobs. "Over the past years, I have seen the determination of immigrant fathers who worked two or three jobs without taking a dime from the government and at risk any moment of losing it all, just to build a better life for their kids."¹⁷⁴ Obama acknowledges that Americans worry about "job theft," but he emphasizes what economists have emphasized—migration is good for the American economy as a whole.¹⁷⁵

I know some worry, immigration will change the very fabric of who we are or take our jobs or stick it to middle class families at a time when they already feel like they've gotten the raw deal for over a decade. I hear those concerns. But that's not what these steps would do. Our history and the facts show that immigrants are a net plus for our economy and our society.¹⁷⁶

If this rhetoric is translated into policy, it means that enforcement of prohibitions on employing undocumented people, and prosecution of the undocumented who gain employment through false documents, will be deemphasized, with the downstream effect that fewer migrants will be deported for committing those crimes.¹⁷⁷

Even absent a shift away from employer enforcement, the undocumented will still retain access to the growing number of jobs that make up the informal or "gray" economy¹⁷⁸—where much undocumented work already happens. Undocumented migrants who tread carefully can thus carve out a semi-stable, if stunted, de facto deferred action without actually qualifying for that status.¹⁷⁹

174. Obama, *supra* note 150.

175. *Id.*

176. *Id.*

177. Whether this will happen or not is difficult to predict, but there is evidence showing that administrations shape agency priorities by appointing leaders and communicating to those leaders nonpublic priorities. If the President's public words provide clues into enforcement priorities that the Administration prefers not to make explicit to the public, we might reasonably expect agencies to de-emphasize the criminalization of undocumented migrant work. If it turns out to be just rhetoric, it will still have an impact because it articulates an argument for migrant belonging that has become distinctly unfashionable in politics since undocumented migrant work was framed as theft in the late 1970s. See WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1120 (5th ed. 2014) (stating that DHS is an agency that is highly responsive to executive control).

178. See James Surowiecki, *The Underground Recovery*, *NEW YORKER* (Apr. 29, 2013), http://www.newyorker.com/talk/financial/2013/04/29/130429ta_talk_surowiecki [<https://perma.cc/2H7Z-UJX9>] (collecting social science evidence showing significant growth in the informal economy prior to and during the Great Recession).

179. This does *not* mean that these moves guarantee that an undocumented person will not face deportation. Rather we should think of de facto deferred action as probabilistic. Each step that a migrant takes that conforms to the lowest stated priority for deportation will lower the probability that the migrant will be deported. And of course, this has been true for some time. It is the withdrawal of untargeted enforcement that lends the enterprise a predictably great enough for me to label it a kind of de facto deferred action.

1. Choose-Yourself Enforcement Federalism

The memorandum modifying the much-maligned “Secure Communities” program is perhaps the most significant shift in support of the choose-yourself model, and it happened as a result of the defiance of national prerogatives by local communities—such as Chicago, San Francisco, Los Angeles, and New York—with large undocumented populations. In these jurisdictions, migrants used the speech of reason to persuade local officials to adopt positions that resisted the national government’s efforts to conscript local law enforcement resources in service of national immigration enforcement efforts. The memorandum overturning this force-multiplying federal enforcement program illustrates how the local speech of the undocumented can have national effects.

a. What Was the Secure Communities Program?

Secure Communities was an innovation of the Bush (G.W.) Administration and was carried forward and expanded by the Obama Administration. For many years, state and local law enforcement have forwarded fingerprint data to the FBI. Under Secure Communities, that information would be forwarded on to DHS, where it would be checked against DHS’s database of 140 million individuals, including visa applicants, travelers whose fingerprints are scanned at ports of entry, and immigrants who have violated immigration laws. Where there was a match between the two databases, ICE “review[ed] a series of databases in an attempt to ascertain the individual’s immigration status and criminal history.”¹⁸⁰ If this review suggested that the alien may be deportable, ICE notified “the originating law enforcement agency and the relevant ICE field office, which decides, based on enforcement priorities and other factors, whether to interview the individual or issue a detainer requesting that the agency hold the individual”¹⁸¹ so that DHS could take custody. ICE would often take custody of the migrant while the person was out on bond, and localities knew this.

In this way, contact with local law enforcement—just an arrest—triggered federal review for deportability, amplifying significantly DHS’s ability to know aliens’ whereabouts and activities and deport them based on that knowledge. The program’s reliance on arrests to trigger deportation review meant that the “discretion that matter[ed]”¹⁸² was the arresting officer’s choice to arrest. Because ICE has limited tools to impose backend discretion not to deport a migrant that is within the agency’s sights, an arresting officer’s choice triggered an information cascade that usually resulted in deportation. Absent the arrest, the migrant remained one of the tens of millions of aliens, undocumented or not, that were off of DHS’s radar. The automaticity of deportation following an arrest also gave local arresting officers the effective power to control whom in their jurisdictions was deported. In numerous jurisdictions, officers arrested people for pretextual crimes that would facilitate booking, allowing the officer to flip the switch on the information cascade and produce a deportation.

180. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1128 (2013).

181. *Id.*

182. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

b. Local Resistance Becomes Federal Policy

A number of municipalities found this program so abhorrent to local immigration and community policing values that they refused to cooperate with ICE, refusing to honor ICE requests to detain migrants after their release from criminal custody. The Johnson memo largely consolidates the non-cooperating jurisdictions position in federal policy. Communities on the right of immigration issues will have their power to dictate immigration restrictionist aims curtailed in a few ways. First, arrest alone will be less likely to trigger the deportation cascade. The memo specifies that ICE should seek to take custody of an alien flagged as a “match”¹⁸³ by ICE’s database where that alien has been *convicted* of crimes specifically enumerated in the memorandum setting out new priorities “for the [a]pprehension, [d]etention and [r]emoval of [u]ndocumented [i]mmigrants.”¹⁸⁴ Those crimes include felonies “other than a state or local offense for which an essential element was the alien’s immigration status,” or “three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien’s immigration status.”¹⁸⁵

The basic shift to convictions from arrests increases the cost to municipalities who wish to game federal immigration priorities. The further narrowing of federal immigration interest to felony prosecutions and multiple misdemeanors—and excluding minor traffic offenses—increases the costs of localities wishing to pursue their “own [restrictionist] immigration policy”¹⁸⁶ even further. Since mere contact with the criminal justice system will not suffice to effect a deportation, the wheels of criminal justice will actually have to turn in order for a locality to achieve the deportation it seeks. As a single misdemeanor arrest or conviction will no longer suffice, a municipality determined to effect its own immigration priorities will have to triple its misdemeanor arrest rate among local populations with a higher probability of being immigration law violators.¹⁸⁷ The same is true for felonies.

The memo also changes which institutional actors can pursue sub rosa immigration enforcement. Now prosecutors will play a more significant gatekeeping role. While there are certainly some municipalities willing to absorb the increased costs of affecting a local deportation policy, the numbers will be significantly lowered by this change. The exclusion of minor traffic crimes makes things still more difficult, since this was a primary way that police funneled migrants into the deportation system.

Moreover, by deprioritizing deportation of aliens convicted of a “state or local offense for which an essential element was the alien’s immigration status”¹⁸⁸ the memorandum cuts off yet another method states had deployed to further their own restrictionist deportation policy: the passage of criminal laws specifically aimed at migrants. As local interest in immigration regulation escalated, a number of states, including Arizona and Alabama, turned to the criminal law as a method of penalizing

183. Kalhan, *supra* note 180.

184. Johnson, Enforcement Priorities Memorandum, *supra* note 168, at 1.

185. *Id.* at 3.

186. *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

187. Pursuing such profiling tactics also, of course, leave municipalities open to civil rights lawsuits.

188. Johnson, Enforcement Priorities Memorandum, *supra* note 168 at 3.

undocumented migrants, and securing their deportation, either to their countries of origin, or to states and localities more hospitable to migrants.

Many of these criminal laws were struck down as a conflict or obstacle preempted by the Supreme Court in *Arizona v. United States*.¹⁸⁹ But some survived judicial scrutiny and remain on the books. For instance, an Alabama law prohibits “unlawfully present aliens from entering, or attempting to enter, into a ‘public records transaction’ with the state or a political subdivision thereof.”¹⁹⁰ Violators face up to ten years imprisonment, and leave prison convicted felons. The new memorandum will not prioritize deportation of migrants convicted of felony crimes like this one, since unlawful presence is an element of the crime. The Obama Administration has thus nullified the immigration consequences of these criminal laws, even though it was not able to achieve preemption in court.¹⁹¹

Still, the exemption for state laws targeting aliens does leave room for continued state control. For example, in Missouri, a person may be charged with a felony on her third misdemeanor conviction for driving without a license.¹⁹² The statute applies to all persons within Missouri’s jurisdiction—alienage is not an element of the crime. But, because Missouri unlike a few other states will not confer driver’s licenses on undocumented residents, an undocumented person who drives without a license is not showing any disregard for licensing laws, but rather driving out of perceived necessity (for employment, for example) in a context where the state refuses to confer that privilege on him, no matter what his qualifications to drive, because the alien does not have legal status. In this way, as applied to undocumented people, a seemingly neutral and natural exercise of Missouri’s police power can, with federal cooperation, turn into an instrument of immigration regulation.

There is room to interpret the memorandum in a way that would exclude such crimes as deportation priorities. But whether DHS formally adopts expanded language, the thrust of the memoranda, and the reasons for their adoption (immigration advocacy), suggest that in practice criminal convictions resulting from disabilities imposed by undocumented alienage will be deprioritized. The choice to exempt crimes where alienage is an element reflects a preference for nationally uniform deportation priorities. The exception defangs existing state crimes turning on alienage, and thereby disincentivizes the creation of more state crimes that turn on alienage. The result is that this category of crimes will not be respected by ICE as reliable proxies of undesirability for membership.

The Obama Administration’s reform of how it uses information gleaned from local arrests and prosecutions is a pro choose-yourself shift. By adopting regulatory positions that consolidate the policies of the more choose-yourself friendly immigration localities, and by embracing a form of choose-yourself rhetoric, the Obama Administration is further catalyzing local choose-yourself reforms. By dampening the deportation effects of local laws and practices with restrictionist aims, Obama is disincentivizing local efforts to defend the we-choose-you model.

189. 132 S. Ct. at 2492.

190. *United States v. Alabama*, 691 F.3d 1269, 1278–79 (11th Cir. 2012).

191. *Id.* at 1301.

192. *See* MO. ANN. STAT. § 302.321 (West 2015 & Supp. 2016).

CONCLUSION

If undocumented migrants have persuaded us to adopt choose-yourself shifts in sovereignty norms, they have also fortified the we-choose-you model in the most literal sense: the fence—virtual and physical—that spans thousands of miles of our southern border is the most durable reaction to migrants' protest against the we-choose-you model.¹⁹³ Obama's executive actions, and his actions earlier in the Administration, have not altered this dynamic; they have reflected and amplified it. Additionally, we might see the continued failure of Congress to enact a pathway to citizenship for the millions of undocumented, the rise of Donald Trump, and, indeed, the failure of Obama's executive actions explicitly to protect the entire group of undocumented people as signals that sovereignty norms have in fact moved in the other direction. After all, in 1986, a democratic congress passed—and Reagan signed—comprehensive immigration reform legislation that ultimately regularized 2.7 million undocumented people. If executive action is all that migrants' work has yielded today, have sovereignty norms really shifted in a cosmopolitan direction? Even if they have shifted, how durable is that shift, given the vehement congressional,¹⁹⁴ judicial,¹⁹⁵ and political backlash? Can the conversation over the autocratic power to exclude continue in the face of this harder border?

Linda Bosniak described America's attitude towards undocumented migrants as "hard on the outside, soft on the inside."¹⁹⁶ Post Obama's executive actions, the outside is harder and the inside is softer for all the reason I've discussed in my prior analysis. Indeed, if we read Bosniak's metaphor back onto the dawn of numerical immigration restriction and the first attempts to calcify the southern border, we can locate the beginnings of this seemingly contradictory state of affairs in the 1920s.¹⁹⁷

Placing Obama's actions in this broader historical frame shows how the political work of undocumented migrants has been persistent and slow burning. And while the hot-blooded backlashes by citizens have come just as regularly, the norm-changing work the undocumented have catalyzed has continued. It may be unimaginable today that we might "open the floodgates"¹⁹⁸ and explicitly allow any human being to choose themselves to belong to our community, but it was equally unimaginable that the neo-city-states of New York, Los Angeles, San Francisco, and Chicago, would explicitly declare themselves sanctuary cities—temples of the choose-yourself model. Now it seems unimaginable that these localities would reverse course and join the Arizonas, citadels of we-choose-you. This history of

193. See Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147 (2012) (citing Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23–87 (2009), *republished in* 30 IMMIGR. & NAT'LITY L. REV. 547 (2009) (Gabriel J. Chin, ed.)).

194. See Ashley Parker, *Concerns Mount as Homeland Security Shutdown Looks Likely*, N.Y. TIMES (Feb. 23, 2015), <http://www.nytimes.com/2015/02/24/us/concerns-mount-as-homeland-security-shutdown-looks-likely.html> [https://perma.cc/5MEE-TK7Y].

195. See *Texas v. United States*, 86 F. Supp. 3d 59 (S.D. Tex. 2015).

196. Bosniak, *supra* note 22, at 364.

197. See NGAI, *supra* note 156.

198. See JOHNSON, *supra* note 21.

sovereign contestation by the undocumented is more durable than this Congress, this Supreme Court, or even Donald Trump.

Moreover, there is a gaping hole in the hard exterior that will be difficult to close. Though the term “undocumented migrant” always conjures people crossing the Rio Grande, forty-percent of migrants are visa overstayers.¹⁹⁹ And while the DHS has dramatically improved its capacity to know whether people actually exit the country after they arrive, calcifying the soft inside will face many more legal barriers than building Trump’s wall. The post-September eleventh period, which led to the effective curtailment of student and travel visas, has subsided, and while terrorism continues to inspire fear, there are few serious calls for restrictions on those modes of entry. Thus, as the exterior gets harder, the face of those who contest sovereignty norms may begin to shift, but the contest is likely to continue.

The sovereignty calcifying reactions to undocumented migration, real and harsh as they are, are thus better read as efforts by the state to signify paper sovereignty’s reality; they are not a reflection of the we-choose-you model’s strength, but of its increasing weakness. Though the citizenry is not now persuaded of the choose-yourself model’s viability, we ought to start recognizing the growing evidence in its favor, and credit undocumented migrants for forcing these shifts; they have done more than anyone else to give the choose-yourself model—open borders—life.

199. See Sara Murray, *Many in U.S. Illegally Overstayed Their Visas*, WALL ST. J. (Apr. 7, 2013), <http://www.wsj.com/articles/SB10001424127887323916304578404960101110032> [<https://perma.cc/8BRC-JBJJ>].