

Inclusive Membership as Fairness? A Rawlsian Argument for Provisional Immigrants

Esma Baycan-Herzog

Baycan-Herzog, E. (2022). Inclusive Membership as Fairness? A Rawlsian Argument for Provisional Immigrants. *Danish Yearbook of Philosophy*, 1–20.

<https://doi.org/10.1163/24689300-20221058>

The web link to the full article: <https://brill.com/view/journals/dyp/aop/article-10.1163-24689300-20221058/article-10.1163-24689300-20221058.xml>

Abstract

Infamously, Rawls assumed a democratic society to be “a complete and closed social system,” in that “entry into it is only by birth and exit from it is only by death.” Since the beginning of the present millennium, however, debates about the ethical issues related to immigration have been prominent. In this context, these methodological departure points seem long outdated, if not simply biased. This paper will rework Rawls’s theory of migration for application to the case of provisional immigrants by reworking its theoretical underpinnings. I will argue that once his assumptions are adjusted, Rawlsian notions of ‘stability’ in conjunction with his idea of a ‘society understood as a fair system of cooperation’ justify inclusive membership regimes. In other words, Rawlsian domestic justice requires inclusive membership regimes for provisional immigrants.

Keywords: John Rawls; social justice; ethics of migration; methodological nationalism, border policies, ideal and non-ideal theory

Acknowledgments

This research was conducted at the University of Geneva and supported by the National Center of Competence in Research (NCCR) – On the Move, funded by the Swiss National Science Foundation. The author is grateful to Emanuela Ceva, Michael Blake, Kasper Lippert-Rasmussen, Lasse Nielsen, Dario Mazzola, Sune Lægaard, and an anonymous reviewer for written comments on previous versions of this work. Thanks should also be extended to Jonathan Seglow and Nat Rutherford, the organizers of the Association for Social and Political Philosophy’s 2021 online workshop; to all the members of the Geneva Colloquium in Political Theory; the Good Integration Consortium; the Pluralism, Democracy and Justice research group at the Arctic University of Norway; and to the members of the Centre for the Experimental-Philosophical Study of Discrimination (CEPDISC) at the University of Aarhus for their virtual and in-person hospitality during my academic visit in spring and fall 2021.

Introduction

“When states claim the right to exclude [immigrants], they are not simply saying that they have the *effective power* to keep unwanted foreigners out. [...] Rather they are claiming that they have, *as a matter of justice*, the right to keep those people out.”¹ Christopher Bertram rightfully identifies the key ethical question regarding migration as whether states have unilateral discretion to control their borders. While it is true that this question has been at the core of significant political polarization among the citizens of immigrant-receiving countries since the beginning of the 2000s—even leading to such dramatic events as Brexit and the fall of the Belgian government in 2019—the question of what unilateral border coercion means for membership policies within the state’s borders has not yet received sufficient attention. This paper will focus on ‘provisional immigrants,’ i.e., immigrants who *are* within the territory of the receiving state and are *currently* subjected or who could *potentially* be subjected to coercive border policies there. Focusing on this group will better allow me to rework John Rawls’s approach to immigration.

In 2021, Rawls’s work on migration ethics reads rather oddly. Infamously, Rawls presupposed that a democratic society is a “complete and closed social system.”² In addition, he considered immigration to be a *non-ideal theory* issue that is “eliminated as a serious

¹ Christopher Bertram, *Do States Have the Right to Exclude Immigrants?*, Political Theory Today (Cambridge, UK: Polity Press, 2018), 36. Emphases mine.

² John Rawls, *Political Liberalism*, expanded ed., Columbia Classics in Philosophy (New York: Columbia University Press, 2005), 40–41.

problem in a realistic utopia.”³ Moreover, what matters for Rawls is *ideal theory*: “the nature and aims of a perfectly just society [is] the fundamental part of the theory of justice.”⁴

Therefore, it would not be preposterous to say that Rawls disdains the issue of migration by placing it in the realm of non-ideal theory.⁵ While these methodological presuppositions hinder Rawlsian theory from guiding real-world action regarding migration ethics, they might be better understood as ‘bad idealizations’⁶ rather than matters of non-ideal theory. This paper takes these ‘bad idealizations’ as opportunities to rework the Rawlsian approach.

What is wrong with these methodological presuppositions? More importantly, what do we owe to migrants who are already within a specific country and who intend to stay for an indefinite period, according to a reworked Rawlsian theory? In other words, how should a just state treat its provisional immigrants? There is no novelty to the claim that political theory

³ John Rawls, *The Law of Peoples: With “The Idea of Public Reason Revisited”* (Cambridge, MA: Harvard University Press, 2003), 9.

⁴ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 8.

⁵ An objection might be that ‘relegating an issue to non-ideal theory is not disdainful but only a methodological choice.’ While I will not focus on various methodological possibilities here, my argument will claim that, as a matter of stability, the domestic scope of justice applies to provisional immigrants (and not only to citizens), therefore their case cannot be distinguished from the main concerns of ideal theory, i.e., whether or not principles of justice are stable in the relevant way. I am grateful to Sune Lægaard for stressing *inter alia* this point that, I think, merits more engagement than I offer here.

⁶ Laura Valentini, “On the Apparent Paradox of Ideal Theory*,” *Journal of Political Philosophy* 17, no. 3 (September 2009): 332–355.

is biased by ‘methodological nationalism’⁷ to the extent that it treats nation, state, and citizenship as equivalent to society, social cooperation, and membership. The normative inconsistencies of such a bias have been partially explained with respect to Rawls’s concept of ‘peoples,’⁸ yet how they lead to an irresolvable tension threatening stability and fundamental ideas sustaining a liberal democratic ethos has not been critically evaluated. Regarding the second question, even if there is a disagreement concerning would-be immigrants’ admission, there is also a consensus that already existing immigrants should be included in the receiving society and should become full members. ‘Provisional immigrants’ are certainly different from permanent residents, who—as some argue—should become citizens in a mandatory manner,⁹ because they are still subject to immigration control. However, I will claim that their specific case merits a *sui generis* normative evaluation. While various arguments defend the inclusion of territorially present immigrants on the basis of both ‘jurisdictional theory’¹⁰ and ‘democratic membership,’¹¹ they remain ambiguous regarding the case of provisional immigrants. Against the backdrop of this ambiguity, I will claim that it is

⁷ Alex Sager, “Methodological Nationalism, Migration and Political Theory,” *Political Studies* 64, no. 1 (2016): 42–59.

⁸ Seyla Benhabib, “The Law of Peoples, Distributive Justice, and Migrations,” *Fordham Law Review* 72, no. 5 (2004): 1761–1787.

⁹ Helder De Schutter and Lea Ypi, “The British Academy Brian Barry Prize Essay: Mandatory Citizenship for Immigrants,” *British Journal of Political Science* 45, no. 2 (April 2015): 235–251.

¹⁰ Michael Blake, *Justice, Migration, and Mercy* (New York: Oxford University Press, 2020).

¹¹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 2008).

possible—desirable even—to argue that inclusive membership regimes are justified because of the requirements of Rawlsian ‘domestic’ justice. This paper offers a twofold contribution. First, even though the negative influences of border controls on domestic justice are increasingly noticeable,¹² no account has been given yet concerning how a state should treat provisional immigrants. Second, when properly readjusted, Rawlsian theory can guide actions regarding the case of provisional immigrants.

My argument can be summarized as follows: First, I will claim that Rawls’s methodologically nationalist presuppositions, as bad idealizations, fail to issue coherent justice-enhancing recommendations in the real world. This motivates a reworking of Rawls’s theory, starting with two relevant facts concerning immigration, namely the territorial presence of immigrants and the existing political hostility regarding immigration. I will show that when these facts are taken into consideration, the principle of stability will issue opposing recommendations, both in favor of and against the inclusion of provisional immigrants. In cases where the principle is unable to issue justice-enhancing recommendations in a coherent way, I will argue that Rawls defends privileging fundamental ideas of a liberal democratic ethos—particularly ‘society conceptualized as a fair system of cooperation.’ I will claim that the stability requirement, in conjunction with the requirement to sustain a fair society, justifies treating provisional immigrants gradually as full members of society under an inclusive

¹² Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2008); Chandran Kukathas, “On David Miller on Immigration Control,” *Critical Review of International Social and Political Philosophy* 20, no. 6 (2017): 712–718; José Jorge Mendoza, “Latino/a Immigration: A Refutation of the Social Trust Argument,” in *Migration Policy and Practice: Interventions and Solutions*, ed. Harald Bauder and Christian Matheis (New York: Palgrave MacMillan, 2016), 37–57.

membership regime. This weakens Rawls's justification of unilateral state discretion regarding immigration and draws attention to the fairness of domestic justice, a collective issue for *all* members.

I. Basic Notions

This section will clarify basic notions that will guide the paper. Let me start with *unilateral state discretion*. Traditionally, unilateral state discretion is discussed in relation to state border policies.¹³ Recently, however, scholars recognized that state discretion also determines what admitted migrants may do once inside.¹⁴ The widening of this concept is partially accounted for by theorists having in recent years removed their methodological nationalist bias, according to which borders are only about territorial admission, do not apply inside of the territory, and are able to seal a society from its outside. This wide concept applies to provisional, permanent, temporary, irregular, naturalized, actual, and future 'voluntary'¹⁵

¹³ Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36, no. 1 (2008): 37–65, <https://doi.org/10.1177/0090591707310090>; David Miller, "Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh," *Political Theory* 38, no. 1 (2010): 111–120.

¹⁴ Bertram, *Do States Have the Right?*; Bosniak, *Citizen and the Alien*; Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," *The Review of Politics* 49, no. 2 (1987): 251–273; Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); Kukathas, "On David Miller."

¹⁵ While this partially applies also to refugees, their morally grievous case merits a specific analysis separate from the one offered in this paper. Their case and Rawls's views on the 'duty of assistance' found in *The Law of Peoples* will not be discussed in this paper.

immigrants. In current state practice, unilateral discretion establishes a two-tiered system of differential rights: the Swiss Federal Law on Foreigners and Integration, for example, assigns radically different rights and duties to foreign residents than it does to citizens in the domestic sphere.

This widened understanding of unilateral state discretion, I claim, requires us to focus on the group whom I call *provisional immigrants*. This is a legal category including immigrants who are territorially present in the receiving society, but nevertheless subject to border enforcement. Focusing on them singles out the effects of border policies within the domestic sphere. In some respects, they are similar to temporary migrants: they might have initially *chosen* to emigrate from their home country as part of their life plan; this is standardly the case for international students, guest workers, and so forth.¹⁶ However, their defining feature, as a group, is twofold: (1) they are subject to unilateral border coercion within the state—i.e., various legal categories that restrict their agency; and (2) the purpose of their stay is often to reside in the receiving country for longer than just a short, defined period, such as a six-month exchange.¹⁷ These make them act in some ways like ‘social members’¹⁸ of the society, despite having restricted autonomy in terms of organizing their life plans as

¹⁶ Valeria Ottonelli and Tiziana Torresi, “Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma,” *Journal of Political Philosophy* 20, no. 2 (2012): 202.

¹⁷ I am grateful to Michael Blake for drawing my attention to more specific cases, such as foreign military personnel and diplomats being present in a given territory. These should not count as provisional immigrants, because they simply represent their countries abroad as government agents.

¹⁸ Joseph H. Carens, *The Ethics of Immigration* (New York: Oxford University Press, 2013), ch. 8.

they wish. Once we take this as a defining feature, all immigrants, except for those present for short stays of less than a year (such as visiting students), are provisional immigrants until they receive a permanent residence permit. This group includes *durable* and *non-durable* provisional immigrants.¹⁹ This status is, indeed, ‘provisional’ for some provisional immigrants, such as family members of citizens: their residence has been a ‘durable residence’ from the start, and it is only a matter of time until it is transformed into permanent residence. Residence is and remains *non-durable* for others, such as students, even if they were to remain for a very long time; it is not an open track for further rights, unless it is complemented by marital and professional developments in the immigrants’ life. Moreover, this category includes temporary workers who are willing to reconsider their life plans, family members of citizens, irregular immigrants, and so forth. It merits particular attention because their case crystallizes the tension between the universal and particularist commitments of liberal democratic states, an issue that is interesting to discuss in relation to Rawlsian theory.

Two basic Rawlsian notions need clarification. The first is ‘society understood as a fair system of cooperation.’²⁰ Rawls claims that cooperation, unlike socially coordinated activity, needs to respect certain normative requirements. First, its rules should be recognized publicly as regulating the conduct of all; second, its terms should be fair. That is, they should be terms “that each participant may reasonably accept, provided that everyone else likewise accepts them”²¹ while *also* including people’s rational interest. This, with companion

¹⁹ This distinction was inspired by article 34, §4, of the Swiss Federal Law on Foreigners and Integration, which distinguishes *séjour* (residence) from *séjour durable* (durable residence).

²⁰ John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), 5–8; Rawls, *Political Liberalism*, 15–22.

²¹ Rawls, *Political Liberalism*, 16.

fundamental ideas such as ‘the idea of citizens as free and equal persons,’ as well as ‘a well-ordered society,’ are *normative* starting points “implicit in the public political culture of a democratic society”²² that are *already* widely shared in a reasonably pluralist society. This endorsement means that once they are built into a freestanding political conception of justice, they are likely to receive wide support from people with conflicting comprehensive doctrines. Notice here that these ideas are both descriptive and normative.

Finally, *stability* is a feature of a conception of *domestic justice* in Rawlsian theory, one that motivates citizens to act according to what is *right* (duties of justice), rather than what is *good for them* (their rational self-interest). A conception of justice is stable when it generates its own support, by balancing right and good, and does not significantly rely on enforcement. Moreover, stability is an important requirement for a conception of justice, because it is located at the level of justification.²³ As Rawls put it: “A conception of justice is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it.”²⁴ Ideally, a stable conception of justice should identify circumstances under which reasonable and rational capacities of persons are complementary²⁵ and eliminate circumstances—or adjudicate various conceptions of justice,

²² Ibid., 13.

²³ Lior Erez, “Anti-Cosmopolitanism and the Motivational Preconditions for Social Justice,” *Social Theory and Practice* 43, no. 2 (2017): 252; Paul J. Weithman, *Why Political Liberalism? On John Rawls’s Political Turn*, Oxford Political Philosophy (Oxford: Oxford University Press, 2010).

²⁴ Rawls, *Theory of Justice*, 398.

²⁵ Rawls, *Justice as Fairness*, 18–19; Rawls, *Political Liberalism*, 19, 103.

if necessary—to avoid a situation where these two capacities come into conflict.²⁶ Stability is also both descriptive and normative.

Claiming that these two notions of ‘society understood as a fair system of cooperation’ and of ‘stability’ are both normative and descriptive might strike some readers as odd, but for a theory that aims to guide action in the real world, a fact-sensitive reading is essential to some extent. This is not to say that there are no *outcome-oriented readings* of Rawls’s work.²⁷ A *fact-sensitive reading* encourages taking the truth claims about the world seriously, to some extent, and guides this paper’s argument.²⁸ In the end, providing an action-guiding theory for the case of provisional immigrants obliges me to engage in a fact-sensitive reading of Rawls’s work, even as he sometimes pursues *fact-insensitive* reasoning that, in my view, remains inconsistent with his own aims.

2. Provisional Immigrants in Theory and Practice

Rawls’s overall normative argument justifies unilateral state discretion regarding immigration, but his stance remains underdeveloped.²⁹ This section will reconstruct Rawls’s main argument and explain how he, other scholars, and states approached the case of

²⁶ Jon Garthoff, “Rawlsian Stability,” *Res Publica* 22, no. 3 (2016): 295,

<https://doi.org/10.1007/s11158-015-9292-z>; Rawls, *Theory of Justice*, 567–577.

²⁷ G. A. Cohen, “Facts and Principles,” *Philosophy & Public Affairs* 31, no. 3 (2003): 211–245.

²⁸ Samuel Richard Freeman, *Rawls*, Routledge Philosophers (repr.; London: Routledge, 2010); Garthoff, “Rawlsian Stability”; Weithman, *Why Political Liberalism?*

²⁹ Michael Blake, “Migration,” in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David A. Reidy (Cambridge University Press, 2014), 496–498.

provisional immigrants. I will argue that a reworked Rawlsian argument based on the requirements of *domestic* justice is a normatively more desirable answer for the case of provisional immigrants.

According to Rawls, even if people may decide to admit immigrants, “a people has at least a qualified right to limit immigration.”³⁰ At first glance, he seems to accord societies a relatively generous right of self-determination.³¹ Nevertheless, this right serves states as they discharge their duties to citizens. *Territorial duties* require people to regulate their territory in perpetuity, preventing its deterioration. Rawls admits that borders are arbitrary, but claims that this is irrelevant for justice.³² *Political duties*, in turn, oblige people to protect the constitutional principles and political culture embedded in a society. Rawls seems to argue that stability requires successfully and continuously discharging these duties, and claims that this is incompatible with immigration. Rawls’s main argument goes as follows:

1. Societies have a right to self-determination in order to discharge their duties toward their citizens.
2. These include territorial and political duties.
3. Discharging these duties is necessary for stability (‘the stability requirement’).
4. Stability is an important good requiring protection against various challenges.
5. As one such challenge, unlimited immigration is incompatible with the stability requirement.

³⁰ Rawls, *The Law of Peoples*, 39.

³¹ Some understandings of the right to self-determination suggest that the border question should be left out. Carens, *Ethics of Immigration*.

³² Rawls, *Law of Peoples*, 39.

Therefore, states have a right to unilateral discretionary control over migration.

Rawls epistemologically separates the scopes of *domestic*³³ and *global justice*³⁴ and assigns most migration-related questions to the domain of global justice. In addition, social justice at the domestic level is more demanding than global justice. Rawls's main argument is that domestic justice requires limiting immigration,³⁵ and the fifth premise is of particular importance here, as without it, the first four premises could be interpreted in ways that are conceptually compatible with immigration. What would this argument imply for provisional immigrants?

There is at least one intuitive and popular reading that I will discard at this stage—i.e., the claim that Rawls's argument inevitably justifies exclusive policies regarding provisional immigrants. One might think provisional immigrants could be considered similar to would-be immigrants, and if the latter were to be excluded from the territory, then the former should be excluded from equal rights or access to citizenship. This is an intuitive reading, and would also be supported by other, more specific, trust-based arguments that Rawls offers when defending the exclusion of would-be immigrants. He argued that uncontrolled immigration weakens trust in the receiving society and is therefore incompatible

³³ Rawls, *Theory of Justice*; Rawls, *Justice as Fairness*; Rawls, *Political Liberalism*.

³⁴ Rawls, *Law of Peoples*.

³⁵ It is true that certain 'duties of assistance' grounded in global justice might require allowing asylum seekers to enter a state, but given that (1) asylum seekers are not voluntary immigrants; and (2) the assistance duties can be discharged also by other ways than territorial admission, e.g., humanitarian aid, this possibility is irrelevant to the present argument.

with the stability of liberal democratic institutions.³⁶ For Rawls, trust requires reciprocity in domestic justice: when one acts according to what justice requires, one needs to know that others will do so as well.³⁷ Even if this used to be an established argument, more recent literature has consistently shown that the trust-based argument yields empirical and normative problems of its own. To summarize, when the incompatibility between immigration and trust is understood as an empirical claim, then the evidence is inconclusive.³⁸ It risks becoming counterproductive when understood as a normative claim.³⁹ Trust notwithstanding, is it true that the justification of unilateral state control over migration leads to the exclusion of provisional immigrants?

³⁶ Rawls, *Law of Peoples*, 39.

³⁷ Erez, “Anti-Cosmopolitanism”; Weithman, *Why Political Liberalism?*, 43–51.

³⁸ Nils Holtug, “Immigration and the Politics of Social Cohesion,” *Ethnicities* 10, no. 4 (2010): 435–451; Nils Holtug and Andrew Mason, “Introduction: Immigration, Diversity and Social Cohesion,” *Ethnicities* 10, no. 4 (2010): 407–144; Nils Holtug, “Does Nationhood Promote Egalitarian Justice? Challenging the National Identity Argument,” in *Liberal Nationalism and Its Critics: Normative and Empirical Questions*, ed. Gina Gustavsson and David Miller (New York: Oxford University Press, 2019), 78–95; David Miller and Ali Sundas, “Testing the National Identity Argument,” *European Political Science Review* 6, no. 2 (2014): 237–259.

³⁹ Mendoza, “Latino/a Immigration”; Esma Baycan Herzog, “Immigration, and Common Identities: A Social Cohesion-Based Argument for Open Borders,” in *Migration, Stability and Solidarity*, ed. Corinna Mieth and Wolfram Cremer (Baden-Baden: Nomos Verlagsgesellschaft, 2021), 155–186, <https://doi.org/10.5771/9783748924890-155>.

Rawls's argument, summarized above, cannot be interpreted as defending the exclusion of provisional immigrants, simply because it cannot theoretically apply in their case. The argument operates against a background assumption that represents society as a closed system, where *there is no migration* and *therefore no provisional immigrants* are present in the domestic sphere. If this is so, then a theory making such an idealization has *nothing* to say to guide actions regarding what a just state owes to provisional immigrants. This is certainly something that needs to be adjusted, because Rawls himself expects his work to guide actions in the real world.⁴⁰ In what follows, I will provide an overview of how scholars and states have approached the case of provisional immigrants.

Many who argue for restrictive policies in the case of would-be immigrants also argue for the inclusion of existing immigrants. For example, Michael Blake grounds the right of exclusion with reference to the extra obligations that immigrants generate for states, which must protect their human rights.⁴¹ Even if would-be immigrants could be justifiably excluded, such a line of argument would not justify expelling existing citizens who had arrived as immigrants or their descendants.⁴² Certainly, cases of citizens with a migration background or permanent residents is different from that of provisional immigrants. Blake's position regarding the latter remains ambiguous;⁴³ it shifts between their inclusion, based on the concept of mercy, or their exclusion, based on how would-be immigrants are treated. A different normative argument actually defends the lifting of immigration control and the related rights restrictions for a sub-category of provisional immigrants, namely guest workers.

⁴⁰ Valentini, "On the Apparent Paradox of Ideal Theory*," 336.

⁴¹ Blake, *Justice, Migration, and Mercy*, ch. 4.

⁴² *Ibid.*, 87.

⁴³ *Ibid.*, ch. 7.

This argument is based on the idea of equal political membership, something that is suitable for a democratic society. Equal political rights should be accorded to all people who are present in the state's jurisdiction and are, therefore subjected to its authority.⁴⁴ According to this argument, the permanent rightlessness of a group of people simply destroys the democratic ethos, no matter how small or big the group of politically rightless people is. Michael Walzer writes about "tyranny" in the short term and the possibility of a "caste system" in the long term, when it goes on for generations.⁴⁵ While this argument defends the inclusion of certain provisional immigrants, such as guest workers, whether it would equally apply to all provisional immigrants—*inter alia*, international students—remains ambiguous. In other words, these arguments tell us little about how a state should treat provisional immigrants. How do states treat provisional immigrants at present?

Similar to the normative arguments, states offer more rights to provisional immigrants than to would-be immigrants. The EU wants to 'retain international talents' by encouraging its member states to offer a work-seeker visa to third-country students. We should observe that international students—non-durable, provisional immigrants—are radically included by such a law, compared to their would-be immigrant fellow co-nationals who lack such access. Some countries offer return visas to their provisional immigrants, allowing them access to unemployment benefits when the overall conditions are met, or sometimes extending their residence even when they are absent from the state's territory for a specific period. I do not suggest that some states do not exclude provisional immigrants at all. In the United States, for example, the border patrol is authorized to search for foreigners within a 'reasonable' distance of one hundred miles from any external boundary. This

⁴⁴ Walzer, *Spheres of Justice*.

⁴⁵ *Ibid.*, 62.

regulation allows state agents to benefit from the extended authority that border control allows for international borders within the domestic sphere. The point here is that states, as well as scholars, often evaluate treating provisional immigrants more inclusively than would-be immigrants, yet their case also remains ambiguous.

In what follows, I will argue that Rawlsian theory, when reworked, is able to offer an inclusion argument for the case of provisional immigrants based on its requirement of domestic justice. My argument is an internal critique of the Rawlsian theory, because Rawls wants his normative theory to be action-guiding in the real world. I will claim that a reworked Rawlsian theory justifies the gradual inclusion of provisional immigrants as full members, on the basis of what stability and the society, understood as a fair system of cooperation, jointly require in normative terms. This will not only increase Rawlsian theory's relevance for the ethics of migration, but will also clarify how states should treat provisional immigrants normatively; after all, this remains an ambiguous point in the literature at present.

3. Methodological Nationalism, Stability, and Idealizations

This section will identify and demonstrate the shortcomings of Rawlsian theory by focusing on the claim that uncontrolled immigration is incompatible with stability. I will argue that reworking Rawls's theory requires a consideration of two relevant facts that are central to the phenomenon of migration: (1) 'at least some immigrants are present in the society'; and (2) 'there is a political unwillingness to be inclusive toward would-be or existing immigrants by refusing to extend rights and benefits to them.'

What kind of theoretical underpinnings are necessary to a kind of normative theorizing that is able to guide actions undertaken in the real world? Laura Valentini claims that certain idealizations are unhelpful, specifically those that fail to start from assumptions

that properly reflect central facts about the phenomenon under investigation.⁴⁶ Such *badly idealized* theories fail to guide action in the real world. For Valentini, this failure occurs when it becomes obscure how the distance between theory and reality might be bridged.⁴⁷

Sometimes this is recognized: when “we apply principles developed under ideal conditions to real-world circumstances [...] we [...] obtain morally counterintuitive results.”⁴⁸ In addition, I think that it is also possible to obtain potentially opposing recommendations because of the distance between theory and reality. A well-idealized theory should minimize this distance by taking the relevant facts into account. This cannot be done without having an appropriate epistemological stance that excludes biases.

Methodological nationalism is an epistemic bias with normative implications. Originating in research in the social sciences,⁴⁹ critiques of methodological nationalism have recently found their place in normative political philosophy. As an epistemic stance, it conceptualizes nation, state, and citizenship as equivalent to society, social cooperation, and membership. In turn, the normative assessment built on these categories privileges the nationalist worldview by, for instance, treating its moral claims as more salient than the moral claims of migrants, mobile people, NGOs, civil society, companies, and so forth. Building on this critique, its opponents argue that removing this bias requires adjusting these epistemic

⁴⁶ Valentini, “On the Apparent Paradox of Ideal Theory*.”

⁴⁷ *Ibid.*, 342.

⁴⁸ *Ibid.*, 341.

⁴⁹ Andreas Wimmer and Nina Glick Schiller, “Methodological Nationalism and Beyond: Nation-States Building, Migration and the Social Sciences,” *Global Networks* 2, no. 4 (2002): 301–334.

categories to match factual claims about the world, which is a precondition for a well-informed normative assessment.

Rawls is a ‘reiterative’ methodological nationalist by virtue of his *choice* of migration-proof assumptions such as that ‘society [is] as an independent system of cooperation’ and ‘its members join by birth/leave by death.’ These are clearly chosen, oft-repeated but also heavily criticized epistemic biases.⁵⁰ A methodologically nationalist conception of stability, for instance, is *a priori* incompatible with immigration. This is because stability, inspired by system theory in the natural sciences,⁵¹ presupposes that a given system is at an equilibrium ‘state’ without outside influences. As ‘intervening outside influences,’ immigrants *by definition* undermine stability. The absurdity of this methodologically nationalist view becomes apparent upon further reflection; after all, no justification is provided for the claim that changes that stem from outside a state’s territory are by definition problematic. As scholars have claimed, similar changes also occur from within societies with the arrival of children.⁵² As such, if the former are problematic by definition, so too should the latter be.

Once we reconsider the argument, starting with the assumption that some immigrants are *already* resident in a society, we can see that the principle of stability issues

⁵⁰ Benhabib, “Law of Peoples.”

⁵¹ Garthoff, “Rawlsian Stability,” 286–287; Rawls, *Theory of Justice*, 456–458.

⁵² Jan Brezger and Andreas Cassee, “Debate: Immigrants and Newcomers by Birth—Do Statist Arguments Imply a Right to Exclude Both?,” *Journal of Political Philosophy* 24, no. 3 (2016): 367–378; Tim Meijers, “Justice in Procreation” (PhD thesis, University of Louvain, Louvain, Belgium, 2016), ch. 4, <https://timmeijers.files.wordpress.com/2018/05/2016-a5-justice-in-procreation-meijers-clean.pdf>.

recommendations that are advanced both in favor of and against the inclusion of provisional immigrants. These opposing recommendations result from two alternative readings. Let me begin with the arguments in favor of inclusion.

Reading 1: Inclusive Membership Regime

According to this reading, provisional immigrants should be included as soon as possible with similar duties and rights as citizens, because otherwise unilateral state discretion concerning immigration risks hindering stability.

A well-idealized conception of stability not only requires taking the presence of provisional immigrants in society into account, but also recommends their gradual inclusion as members thereof. Recall that Rawls's conception of stability requires paying attention to the real world and the socio-psychological conditions of human beings to some extent; otherwise it cannot adjudicate a conception of justice according to its potential to generate circumstances in which two human capacities of 'rational (good)' and 'reasonable (right)' are complementary, or at least not in diametrical opposition. A stable conception of justice "generates its own support in a suitable way by addressing *each* citizen's reason,"⁵³ and avoids "bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions."⁵⁴ Provisional immigrants, unlike tourists or would-be immigrants, are functioning members of the society, with two moral capacities, and are shaped by society's basic structure.⁵⁵ If a Rawlsian conception of justice is going to generate its own support, then these requirements apply to *all* who possess these qualities and require their support. The

⁵³ Rawls, *Justice as Fairness*, 186.

⁵⁴ *Ibid.*, 186.

⁵⁵ I am grateful to the anonymous reviewer for stressing this point.

claim here is that the necessity to include provisional immigrants stems from the action-guiding conception of stability that Rawls adopts—it is an *internal critique*. From this perspective, it may still be true that unlimited immigration and stability are incompatible, but the reason is *not* that provisional immigrants are a threat to stability *per se*, but rather that stability requires inclusive policies that consider their perspective. But what actual policies apply to provisional immigrants?

State policies currently include provisional immigrants more than would-be immigrants, but they still fall short of the normative requirement of inclusion that is dictated by Rawlsian stability. States (1) justify a ‘differential membership regime,’ (2) claiming that there is nothing wrong in subjecting foreigners “to coercive exclusion in terms that cannot be justified from a perspective those outsiders can share.”⁵⁶ A differential membership regime is one in which citizen-members and provisional immigrants do not have the same rights. Provisional immigrants are subject to the Swiss Law on Foreigners, which determines what a foreign resident may do once within the receiving society according to her residence status: what kind of work, how many hours, whether she will be able to change employer, get permission to marry a citizen, and so on. All of these actions require the state’s permission. The existence of provisional immigrants is thus unlike that of citizens, who are free and equal in the domestic sphere and have a larger body of rights and duties. Despite this situation, immigrants might prefer other goods that migration facilitates, e.g., ‘advancing their careers’ or ‘pursuing romantic relationships.’⁵⁷ However, this choice does *not* mean that they are not being *forced* to abide by these terms rather than more favorable terms that they could

⁵⁶ Bertram, *Do States Have the Right?*, 75.

⁵⁷ Kieran Oberman, “Immigration, Citizenship, and Consent: What Is Wrong with Permanent Alienage?,” *Journal of Political Philosophy* 25, no. 1 (2017): 103.

reasonably agree to—terms that truly take their interests and perspectives into account. While failing to take their interests and perspectives into account is illegitimate, to the extent that “unilateral coercion expresses *might* rather than *right*,”⁵⁸ my point here is that it fosters instability because it cannot generate its own support by addressing immigrants’ concerns. Thus, for immigrants, the tension between what Rawlsian justice requires—‘right’—and what rational interests require—‘good’—will become significantly important. To the extent that the stable conception is supposed to generate its own support, it is unreasonable to expect that this support would come from immigrants, according to the normative argument that Rawls makes, given their relative lack of equality and freedom. In addition, a differential rights regime established as part of the basic structure of a society gives citizens perverse incentives; for example, it can justify treating immigrants less favorably. The differential rights regime can be understood as an ‘expressive harm’ for immigrants’ membership, a message from the state to its citizens that the unfavorable treatment of foreign residents is legitimate. Indeed, if the state views differential treatment of immigrants as legitimate, why should its citizens not do likewise?

Reading 2: *Differential Membership Regime*

Despite the reasons that hinder stability, explained in the first reading, according to a second reading, the conception of justice might remain ‘sufficiently stable’; therefore, the differential rights regime should remain the same or be only slightly reformed.

A well-idealized conception of stability might also recommend the exclusion of provisional immigrants. It would claim that even if the former reasons might be harmful to stability to some extent, nonetheless, the conception of justice would remain ‘sufficiently

⁵⁸ Bertram, *Do States Have the Right?*, 75.

stable.’⁵⁹ First, this is because Rawlsian theory does not always require *perfect* stability.⁶⁰ Second, and more importantly, the fact of immigrants’ presence is not the only relevant fact for a well-idealized theory of immigration. It needs to be placed within a political context that is hostile to immigration and is marked by an unwillingness to extend rights and benefits to them. These two reasons justify why Rawlsian theory should recommend the exclusion of provisional immigrants, and they also justify the existing differential membership regimes to some extent.

It is not clear which of these two above readings is plausible, i.e., better aligned with underlying Rawlsian normative principles, once we remove the epistemic bias of methodological nationalism. To the extent that stability is supposed to adjudicate between different conceptions of justice, these contradictory reasons need to be resolved. Rawls discusses similar dividing cases such as abortion to argue that finding what stability requires leads us to the fundamental normative ideas of liberal democracies that form normative preconditions of stability. In the next section, I will show how the idea of a society understood as a fair system of cooperation leads us to defend inclusive membership regimes.

4. A Liberal Democratic Ethos, Immigration, and Membership

Immigration is not the only politically polarizing phenomenon that reminds us of the “fact of profound and irreconcilable differences in citizens’ reasonable comprehensive religious and philosophical conceptions of the world.”⁶¹ To deal with these kinds of issues, Rawls suggests remembering the normative preconditions of justice as fairness, namely, those ideas that are

⁵⁹ Rawls, *Justice as Fairness*, 89.

⁶⁰ *Ibid.*, 37.

⁶¹ *Ibid.*, 3.

widely shared fundamental ideas constituting the backbone of a liberal democratic ethos. In what follows, I will present one such fundamental idea, namely, ‘society understood as a fair system of cooperation,’ and argue that, together with stability, it is able to justify inclusive regimes for provisional immigrants. I will briefly explain one practical principle that might guide these regimes and I will also respond to a potential objection.

Rawls suggests that for a society to be conceptualized as a fair system of cooperation, it should respect what I call requirements for *legitimacy*, *reciprocity*, and *rational interests*.⁶² For a society to be legitimate, publicly recognized rules and procedures that those cooperating endorse as appropriate to direct their conduct should guide social cooperation. A fair society should offer terms that each participant may reasonably accept, and sometimes *should* accept, if everyone else accepts them. It should also have a place for participants’ rational interests. The important idea underlying these requirements is that *all* participants are free and equal persons—another fundamental idea in Rawls’s theory.

The moral ground of *justice as fairness* is the idea of a society understood as a fair system of cooperation. This basis is both descriptive and normative: descriptive because it is a widely shared idea, despite the irreconcilable disagreements present in a reasonably pluralist society, and normative because it is “[t]he most fundamental idea”⁶³ for Rawls’s *freestanding* political conception of justice. ‘Justice as fairness’ and the companion fundamental ideas are the backbone of a liberal democratic ethos that *should* prevail, should there be any growing disagreements on any given subject. All the other steps of Rawlsian theory, such as principles of justice and the basic structure of the society, serve these fundamental ideas by *specifying*

⁶² Ibid., 6.

⁶³ Ibid., 5.

and *implementing* the fair terms of cooperation.⁶⁴ Hence the name ‘justice as fairness.’ It is this idea that makes Rawls “fix, once and for all, the basic rights and liberties, and assign them a special priority. Doing this takes these guarantees off the political agenda of political parties [to put] them beyond the calculus of social interests.”⁶⁵ The question is whether fairness would justify a *differential* or an *inclusive* membership regime.

Recall that stability on its own is unable to adjudicate the conception of justice regarding the membership regime. *Fairness*, with its three normative requirements, is what decides the matter in favor of the inclusive as against the differential regime. In all good faith, provisional immigrants in the domestic sphere cannot be considered autonomous and at the same time be reasonably expected to (1) endorse the rules guiding their actions; (2) accept the offered terms as reciprocal, given the substantial limitations they face compared to citizens; and (3) be convinced that their interests are being considered. In turn, citizens are condemned to live in a society in which the basic structure is in conflict with the morally grounding idea of fairness. Take the reason why Rawls removed basic rights and liberties from the political sphere: it was to prevent political parties from instrumentalizing them to their ends, which might be incompatible with fairness. Right-wing political movements, for instance, gain electoral support by playing on the basic rights of minorities.⁶⁶ The populist rhetoric present

⁶⁴ Ibid., 7.

⁶⁵ Ibid., 115.

⁶⁶ Esma Baycan, “Flemish Pro-Independence Parties and Immigrants: Friends or Foes?,” in *Pro-Independence Movements and Immigration*, ed. Johanna Mitterhofer Medda-Windischer, Patricia Popelier, and Johanna Mitterhofer Medda-Windischer (Leiden: Brill, 2016), 86–117, https://doi.org/10.1163/9789004294394_005; Esma Baycan Herzog and Matteo Gianni, “What Is Wrong with the Swiss Minaret Ban?,” in *Religion and Political Theory: Secularism*,

in the United States in the Trump administration, for example, narrowed the citizen body to ‘true’ people.

One might object that the existing political polarization around migration and membership could be settled in favor of differential membership regimes, given the political unwillingness regarding immigration—the second relevant fact that a well-idealized theory should consider. The proponent of a differential membership regime might claim that given that there is an irreconcilable political divide between citizens of nationalist and cosmopolitan orientation, a compromise should be found according to their respective *political power* to settle the issue. Such a compromise would include provisional immigrants, to some extent, but would still exclude them, similar to the current status quo. Rawls is clear that such a strategy of ‘striking a balance of political powers’ is *not* what justice as fairness requires, because “that would make the political conception political in the wrong way.”⁶⁷ “Instead,” he writes, “it elaborates a political conception as a free-standing view working from the fundamental idea of society as a fair system of cooperation and its companion ideas.”⁶⁸ Therefore, the clear Rawlsian response to the citizen with an anti-immigration attitude is that (s)he should respect the membership of provisional immigrants nevertheless, given that this is a requirement of living in a fair society. In short, when it comes to Rawls’s theory, provisional immigrants’ inclusion is a feature of a society that is understood as a fair system of cooperation; protecting this fundamental idea is more important than pragmatically preventing

Accommodation and the New Challenges of Religious Diversity, ed. Jonathan Seglow and Andrew Shorten (Lanham, MD: Rowman & Littlefield, 2019), 175–194.

⁶⁷ Rawls, *Justice as Fairness*, 37.

⁶⁸ *Ibid.*, 189.

a populist backlash. What are the more specific normative principles that follow from the requirements of stability and fairness?

Autonomy is the main practical principle for inclusive membership regimes that are required by a stable conception of justice in societies understood as fair systems of social cooperation. We might recall that a stable conception of justice should generate its own support in a suitable way by addressing *each* member's reason, thereby creating circumstances in which the two human capacities of interests and duties come together harmoniously. This implies that provisional immigrants' perspective regarding their life plans counts, and that the state should avoid coercing them in a significant way. Similarly, fairness requires that fair societies offer terms that each participant might reasonably accept. The *autonomy* principle guides an inclusive membership regime that would assign the state the duty to consult with immigrants regarding their life plans at the moment of their registration. Certainly, those who are not interested in permanent residence could revise their decision at a later moment, but those who consider it, should be offered support for a successful integration, e.g., language courses, basic courses presenting the society, and so forth. In this initial period of adjustment, provisional immigrants could be given fewer rights; political rights, for example, may be temporarily withheld because autonomous choices of societal importance require a certain basic knowledge of the values, norms, and rules of the receiving society. This initial period needs to be short and clearly delimited (e.g., a year or two, or perhaps longer; this will depend on the context of the society and the complexity of its rules). In terms of implementation, I think that two sub-principles might help to create an autonomy-enhancing context. Here I draw inspiration from the current migration policies that sometimes discredit de facto residence of certain kinds, or that *defend* the diminution (or reversibility) of certain rights thereafter, such as receiving welfare benefits. To prevent all of these arbitrary, autonomy-harming exceptions, it is important that *all* provisional immigrants, who are de

facto in the state's territory and whose life activities are centered there, should qualify as provisional immigrants. Lastly, a reduction of rights should be prevented, or residence and accompanying rights should be non-reversible. This sub-principle concerns policies, such as permit degradations or withdrawal of nationality. These practices can even happen to naturalized immigrants, who may be suspected of criminal activity or simply resented because they have benefited from social assistance. The non-reversibility principle encourages equal treatment. Thus, the state can punish its members if they bring harm to others, but it *cannot* punish *some* more or differently than others. This, at least, is how a stable and fair society would work, according to the reworked Rawlsian theory.

While it is possible to specify which concrete policies and rights might stem from the principle of autonomy, I will conclude by situating inclusive membership in the literature about integration and naturalization. It would be helpful to note here that there are at least two understandings of integration and naturalization in the literature. First, there is a *right-based* notion that favors the inclusion of immigrants as a right that follows from residence over time. Second, there is a *duty-based* notion that takes the inclusion and further integration of immigrants as conditional upon them discharging their duties of adjustment to the receiving societies.⁶⁹ While these notions are actually reconcilable, they ultimately emphasize different aspects of integration and membership. I think that, overall, Rawlsian argument about provisional immigrants, which I have defended in this article, tilts toward a right-based integration, although it still includes certain 'duties' or 'conditions' that the autonomy principle requires and that are essential for the functioning of immigrants in the receiving

⁶⁹ Kristian Kriegbaum Jensen and Lasse Nielsen, "Reconciling Automatic and Conditional Immigrant Naturalisation," *Journal of Ethnic and Migration Studies* 47, no. 1 (2021): 208–226.

society. These conditions include learning the language of the receiving society and the basics of its political life. In the end, these duties are essential to both immigrants' autonomy and agency in a fair and stable society.

Conclusion

The moral ground of membership for provisional immigrants should be *domestic* justice. I justified this stance by arguing what stability and fairness require in conjunction with a reworked Rawlsian theory. The reworking required removing the epistemic bias of methodological nationalism and some unhelpful theoretical underpinnings found within Rawls's theory. On this reading, both fairness and stability require treating all members as free and equal persons, recognizing their personal autonomy to safeguard the liberal democratic ethos of a society understood as a fair system of cooperation. One challenge that I hope to address in the future concerns the territorial admission of immigrants in relation to domestic justice.