

MEMORANDUM

To: Harvard Law Review

From: [REDACTED]

Date: October 22, 2020

Re: Vol. 135 Foreword Candidate: Professor Cristina Rodríguez

EXECUTIVE SUMMARY

Described by her colleagues as “brilliant” and “humble,”² Cristina Rodríguez “is the nation’s leading theorist of immigration law”³ and the first tenured Hispanic professor at Yale Law School. She is a prolific scholar of constitutional law and theory, immigration law and policy, administrative law and process, language rights, and citizenship theory.⁴

Anchoring Rodríguez’s work across subject matter is an abiding faith in decentralization, which can “shape political consensus and channel ideological diversity,” thereby facilitating sustainable nationwide immigration policy and more broadly “promot[ing] national integration and national problem solving.” For Rodríguez, decentralization is a means by which we as a polity shape our preferences and realize contradictory aims. Her focus on federalism hinges less on structure than it does on processes: through their unique features of accommodation and decentralization, “federalism and localism amplify the polity’s capacity for politics.” The benefits of decentralization manifest not just in federalism, but in the socio-cultural: she advocates for giving legal effect to language rights as a means of integrating immigrants into political and civic life, seeing multiplicity of languages, viewpoints, and public conversations in a society as conducive to democratic growth.

Rodríguez’s most-cited works involve federalism and separation of powers in immigration law. In two articles and a book co-authored with Adam Cox, she examines the President’s role in shaping immigration law through the exercise of enforcement power. A thorough historical account reveals that, as a functional matter, we have given the President tremendous power over immigration policy through the “de facto delegation” of enforcement discretion. For that reason, Rodríguez argues, many controversial presidential immigration actions (think DACA or the travel ban) are constitutional, at least on separation-of-powers grounds.

For Rodríguez, this concentration of power in the executive is a good thing. While decentralization may serve democratic and humanitarian interests in many contexts, and even in many areas related to immigration, enforcement policy is different. Centralized immigration enforcement policymaking authority promotes accountability without sacrificing expertise. And the alternative, lodging more significant discretion with the career bureaucrats who make on-the-ground enforcement decisions, would simply preference the politics of those bureaucrats over those of the American people.

¹ Most of this memo was written by [REDACTED] for Volume 133’s Foreword selection. [REDACTED] updated the memo last year for Volume 134’s Forward selection. My main contributions include editing the memo to comport with the requirements of SCO-5, and adding discussion of Rodríguez’s newly published book, *THE PRESIDENT AND IMMIGRATION LAW*.

² <https://law.yale.edu/yls-today/yale-law-school-videos/cristina-rodriguez-president-immigration-law-and-politics-constitutional-structure>

³ <https://law.yale.edu/yls-today/news/cristina-rodriguez-00-join-yale-law-school-faculty-professor-law>

⁴ Perhaps of note is that Rodríguez has never been published in the *Law Review* (although she has written for the *Harvard Latino Law Review* and the *Harvard Civil Rights-Civil Liberties Law Review*). She has been published in the *Yale Law Journal* multiple times.

This argument, however, does not mean power needs to be concentrated in the hands of the President. In related works, Rodríguez has suggested an institutional design that places policymaking authority in an independent administrative agency, which would offer more transparent and regularized power over immigration. Nor does it mean that we must accept the immigration policies of the Trump administration. Rodríguez argues both that President Trump's actions expose the need for political, legislative immigration solutions, and that courts should be empowered to do more to restrain Presidents when they take enforcement actions that are irrational, arbitrary, or inhumane.⁵

BIOGRAPHY⁶

Cristina M. Rodríguez is the Leighton Homer Surbeck Professor of Law at Yale Law School, where she has been teaching since 2013.⁷ She has also taught as a visiting professor at several other law schools, including New York University, Columbia, Harvard, and Stanford. She was a visiting scholar at Berkeley Law School in 2015 and at the University of Toronto in 2015-16. Immediately prior to joining the Yale faculty, Rodríguez worked at the Department of Justice, serving as Deputy Assistant Attorney General with the Office of Legal Counsel from 2011 to 2013. While at that position, she received the Attorney General Award as part of the DOJ team charged with implementing the Prison Rape Elimination Act.

Rodríguez grew up in San Antonio, Texas, but “New York City is probably the place where [she] feel[s] most at home.”⁸ She received a B.A. in History from Yale in 1995, from where she also graduated law school in 2000. Between college and law school, she was a Rhodes Scholar at Oxford, earning a Master of Letters in Modern History in 1998. After graduating from YLS, Rodríguez clerked for Judge David Tatel of the D.C. Circuit and Justice O'Connor of the Supreme Court. Rodríguez is many things besides a law professor: she is a fan of Junot Diaz, a “wonderful chef” and “magnificent salsa dancer,” and bilingual.⁹ If selected, Rodríguez would be the third woman of color, and the first Latino/a scholar, to write the Foreword.

AUTHOR'S SCHOLARSHIP

Professor Rodríguez is primarily a scholar of immigration law, administrative law, and federalism. The themes that she explores in her work include **immigration policy, decentralization of decision-making authority, federalism, and the relationship between diversity and political participation.** As one may imagine, all these themes interact with each other heavily in her work.

Viewed chronologically, Rodríguez's scholarship shows both constancy and evolution. Throughout her work, Rodríguez's primary interests continue to include immigration policy, the relationship between an individual's cultural life and political life, and the role of diversity and negotiation between conflicting agendas. However, her framing of those issues has changed over the years: while she previously explored those topics in the context of language rights and associated legal and civic rights, she now tends to use them to assess broader operations such as federalism, separation of powers, and decentralization of decision-making authority.

⁵ <https://democracyjournal.org/magazine/specialissue/closing-the-nations-doors/>

⁶ Adapted from <https://law.yale.edu/cristina-rodriguez>.

⁷ Prior to her current post, she was a visiting professor at YLS in Fall 2009.

⁸ <http://rhodesproject.com/cristina-rodriguez-profile/>.

⁹ <https://law.yale.edu/yls-today/yale-law-school-videos/cristina-rodriguez-president-immigration-law-and-politics-constitutional-structure>.

Rodríguez started her significant scholarship in the field of language rights. In a triad of articles, Rodríguez advocated for civil and legal protections for language diversity, not just as a matter of individual rights, but as a matter of strengthening political participation and democratic growth. She began to identify decentralization and diversity in public discourse as a source of democratic strength by the mid-2000s writing. Later, she shifted her focus to more conceptual explorations of how federalism benefits all levels of government, largely due to its ability to provide a productive outlet for negotiation, compromise, and contradictory policies. She co-wrote two articles and a book with Adam Cox about the role of executive power in immigration policy (spoiler alert: she both identifies and supports a high degree of executive control over immigration) and proposed institutional redesign at the federal level to improve immigration policy. She has also written very briefly about affirmative action.

Rodríguez has a high tolerance for, and even an embrace of, contradiction and tension between levels of government on issues of national scope, particularly immigration. This directly impacts her vision of federalism: one in which there is a constant dialogue and compromise among all levels of government, where states and localities can and often should adopt policies directly in opposition to federal ones. To that end, she tends to look for solutions to institutional problems not in nationwide policy or congressional action, but in executive authority, administrative design, and state- and local-level independent initiatives. She sees divisiveness in democracy as inevitable, and rebuffs any theories of uniformity. Her federalist stance also relates to her support of decentralization in nearly every arena of social, cultural, legal, and political life. She pays a great deal of attention to the local and mid-level entities and institutions that inform most of a citizen's (and immigrant's) daily life, and is particularly keen on assessing when and where those smaller institutions are better suited to managing interests traditionally understood as federal ones.

Specific areas of scholarship

1) *Language rights with respect to political participation and democratic growth*

Rodríguez's first several scholarly articles were about language rights and the relationship between diversity and democracy. She situates the language right in a constitutional framework, analogizing it not to race but to religion in arguing that the state should practice accommodation to linguistic difference as it does to religious difference to preserve and protect a decentralized, multicultural vision of citizenship and the polity. In these early works, Rodríguez's argument is straightforward: institutions should embrace bi- and multi-lingualism in both legal and non-legal spheres in order to "sustain the vitality of public and social institutions." For Rodríguez, bolstering the status of bi- and multi-lingualism as a discrete legal category (as understood in the constitutional law context) is essential to preserving the civic engagement and full political life of all citizens. The first article listed under "Representative Works" provides a representative example.

2) *Federalism and decentralization*

Since these themes are so salient throughout her work, I won't repeat myself too much here. Suffice it to say that Rodríguez's later work begins to engage more and more with federalism, seeing its primary structural feature as decentralization of decision-making to the benefit of all levels of government and the public. This decentralization allows for the simultaneous operation of contradictory policies and laws that help sustain national consensus and compromise, which would be impossible otherwise. To provide some concrete examples of this very abstract idea now, think of federal and state divergences in immigration policy, drug laws, or even gay marriage (pre-*Obergefell*). Rodríguez examines those phenomena to pick apart precisely how apparent conflict

produces platforms for negotiation and compromise on issues that require experimentation and development, or that may need to manifest differently depending on the unique character and needs of a particular level/branch of government. Dean Gerken put it better than me when describing Rodríguez's vision: decentralization through federalism "*amplif[ies] the polity's capacity for politics. [State and local venues] provide the means for challenging federal enforcement priorities [and] sparking the debate necessary to consolidate a group status. Political pluralism [occurs] through policy making pluralism*" . . . and state and local sites *[facilitate] the management of cultural change writ large.*"¹⁰ Articles 2 and 3 in "Representative Works" provide examples.

3) *The role of the President and executive power in immigration policy*

Rodríguez and Cox challenge the traditional principal-agent model of immigration where the President is the faithful agent of Congress, and advance the reality that the President is also a principal actor. The authors believe that the basic parameters of executive discretion in immigration law permit the President to act in such a way, and that immigration policy will be improved in operation and goals by setting more power to the executive, or at least making transparent and rule-based the power the executive already has. In a later version of their co-written article, they examine Obama's immigration relief policies and find in them support for their earlier arguments. Rodríguez also proposes changes to regularize and make transparent much of the Presidential power that already exists in immigration policy, including creation of an entirely new independent agency. Her work is partially aimed at curing two evils in current immigration policy: stasis and obscured prosecutorial discretion.

In a November 2017 lecture at YLS, Rodríguez explicitly confronted Trump's use of executive power to dismantle Obama's immigration platforms, asking, "how do we make sense of the power of the presidency . . . in a way that can veer so dramatically from one pole to the next?" As is characteristic of Rodríguez, her response was an optimistic one. She noted the courts' increasing role in shaping the reality on the ground, and ultimately "express[ed] a hope for public and political deliberation." While acknowledging that the restrictionists have captured the executive branch for now, she rejected the contention that the country is living in a nativist moment, and credited both the power of popular mobilization and historical examples of responsive government as potential safeguards.¹¹

4) *Affirmative action*

It feels important to note that Rodríguez has written specifically about affirmative action in higher education, since the issue will more likely than not end up at the Court's door in the next few Terms. Her unexpected take on how educational institutions should consider diversity is detailed in "Important Works" below. Essentially, she argues that admissions officials and/or the state should not be given the power to make authenticity judgments about the content of a particular racial or ethnic category, but that individual members of those categories should be able to self-define on their own terms without being compelled to perform a particular narrative that agrees with stereotypical conceptions of what "counts" as, say, Latino identity.

¹⁰ <https://law.yale.edu/yls-today/yale-law-school-videos/cristina-rodriguez-president-immigration-law-and-politics-constitutional-structure>.

¹¹ *Id.*

REPRESENTATIVE WORKS

1. *Language and Participation*, 94 CALIF. L. REV. 687 (2006). Cited by 47 articles and two cases.

This article is from early in Rodríguez’s career, and concerns language rights, a field she appears to have largely left behind. While it appears to have little relationship to her later work on federalism and separation of powers in immigration, her prevailing theme of decentralization emerges even in the context of language rights and multiculturalism.

In this and similar articles, Rodríguez staunchly defends the tide of bilingualism and multiculturalism in the United States, arguing that language rights should be given social, political, and legal protections, from the workplace to the courtroom. Simply put, promoting multilingualism will enhance “democratic participation” by encouraging non-English speakers to engage with public and political life. Rodríguez is not concerned merely with the protection of individual rights and the preservation of culture that asserting language rights will provide. Rather, “[a] multilingual conception of participation will better advance two important objectives of American democracy: social investment by minority language groups and personal control or autonomy over matters of deeply personal concern, including cultural destiny.”

Rodríguez notes that the American legal system’s approach to language rights is limited to the “paradigm case” of the “immigrant seeking assimilation on nondiscriminatory terms,” a framing that she feels is insufficient. Reliance on anti-discrimination law is not enough, and cabins the influence of multilingualism on democratic participation. Instead, she advocates moving beyond the “remedial” model of protection into actively promoting participation in civil life by all linguistic minorities, national or immigrant (again, paying attention to discrete sub- groups and interests *within* linguistic groups). Integration of linguistic diversity into a society’s institutions — schools, offices, local government — will inspire a willingness to participate. This in turn will promote democratic interests, and better reflect the makeup of the polity.

Through this argument, Rodríguez once again rejects the concept that citizens’ access to public discourse must exist in one unified conversation, and advocates for decentralization even in the less explicitly political arena of civic life. Since any adequate theory of democratic participation in a society as large and diverse as the U.S. “must be based on principles of decentralization,” she encourages multiple forms of participation and associated conversations in multiple levels of venue — i.e., not just the national, but the low and mid level institutions that govern much of an individual’s daily life. Importantly, this method of integration also allocates cultural burden among citizens, because it will require *all* people to sometimes tolerate conversations they cannot understand, not just immigrant or minority populations.

Language and Participation has been cited by the Court in support of the proposition that “linguistic diversity can complement and support, rather than undermine, our democratic institutions.”¹²

2. *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008). Cited by 283 articles and one case.¹³

¹² *Horne v. Flores*, 557 U.S. 433, 515 (2009).

¹³ If you want a nice TL;DR complement to this and the following article, look no further than https://www.washingtonpost.com/posteverything/wp/2014/06/30/the-only-way-to-fix-immigration-put-states-in-charge/?noredirect=on&utm_term=.bb27fbc40b62.

The Significance of the Local has been described as “the leading article on immigration federalism.”¹⁴ It also represents one of the first instances in which Rodríguez broadens her interest in immigration and political life, bringing her prior work into dialogue with federalism more generally. Pointing to shifting demographic changes and the heightened lawmaking activity of states and localities to regulate immigration, Rodríguez argues that the time is ripe for a “reformulation” of the persistent assumption that “immigration control is the exclusive responsibility of the federal government.”

Rodríguez begins by arguing that, as a doctrinal matter, federal exclusivity was neither specified by the Constitution nor used as an original practice. Rather, the concept emerged through Supreme Court doctrine for a functional, structural reason — the perceived need for a strong sovereign management of foreign affairs. Rodríguez then describes the variety and breadth of lawmaking activity by state and localities in the immigration area, claiming that the range of measures reflects not only the “de facto obsolescence” of federal exclusivity, but also the unsuitability of a strictly federal response to immigration. From this, she argues: the federal exclusivity principle, “in all of its legal and rhetorical permutations, does not map well onto reality on the ground.”

Specifically, Rodríguez claims that different levels of government have different functions in immigration policy, making a shared power structure more logical. While federal immigration policy may set a national standard for admission and removal, states and local immigration policy functions to integrate immigrants into the public life. (In a nod to her prior work on language rights, she recalls that the function of the sub-federal with respect to immigration is to “integrate immigrants into the body politic and thus to bring the country to terms with demographic change.”) These two functions coincide with each other, but remain distinct enough that each level of government should have the authority and independence to pursue its own priority — even when those priorities may be in direct contradiction with each other.

Rodríguez invokes an expertise point that will become familiar in her later work on administrative law: states and localities are better able to assess how to incorporate immigrants into the life of a place because of their greater familiarity with the public institutions and structures that will be affected by a demographic change. Additionally, state and local policymakers can respond to influxes of immigration more quickly and flexibly than Congress; Rodríguez cites several statements by sub-federal lawmakers that they cannot “wait around” for a universal, national immigration response before dealing with the changes in their own jurisdictions.

Rodríguez offers a workable pathway for a new relationship between federal and local in immigration regulation. She provides specific recommendations for how courts, federal lawmakers, and local lawmakers should recalibrate their thinking to acknowledge and facilitate this multi- sovereign, internally contradictory reality. These recommendations include: challenging the federal exclusivity principle; encouraging courts to recalibrate their views on preemption in the immigration context; encouraging federal and state lawmakers to similarly shift to presumptions of anti- preemption; and rethinking features of alienage law and limiting Congress’ authority to regulate in some areas. Such changes can give rise to “de facto power sharing” that better reflects the unique reality of nation-wide immigration policies.

¹⁴ <https://law.yale.edu/yls-today/yale-law-school-videos/cristina-rodriguez-president-immigration-law-and-politics-constitutional-structure>

Rodríguez's argument clearly requires a tolerance for disagreement and contradiction among the levels of government. In a claim that will become a prevailing theme in her work, she explicitly embraces this tension, stating that internal conflict and negotiation is inevitable and even desirable. This includes not just conflict between federal and sub-federal, but among municipalities themselves: she notes that the wide variety of local-level responses to immigration will produce "ambivalence" at the state level, a result that she accepts as a built-in feature of federalism without much criticism. We again see her faith in decentralization: she is not interested in "regulatory uniformity," and does not believe that a singular "conversation" on immigration is either ideal, or even possible, given the "diversity of interests at stake."

Importantly, Rodríguez does not extoll the virtues of either inclusive or exclusive local responses: she devotes equal attention to both ends of the spectrum with minimal value judgments. (Based on her other work, she clearly has a pro-integrationist stance, but that stance stays off-stage here.) This prevents her decentralization argument from acting as a pro- or anti- immigration platform directly. Rather, she views any variation of response as preferable to the total inability of Congress to come to any sort of coherent immigration policy, whether inclusive or restrictive. Ultimately, Rodríguez advocates for "a relationship between the levels of government that is based on dialogue and compromise"; indeed, she seems to see this dynamic as the only way to avoid stagnation under a federal exclusivity principle.

3. *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014). Cited by 53 articles.

In *Negotiating Conflict*, Rodríguez revisits and refines her working understanding of federalism that first emerged in *The Significance of the Local*, this time focusing primarily on how federalism provides a platform for ongoing negotiation and disagreement in a manner that promotes national integration. Once more, "diversity" rather than "uniformity" will best serve the federal interest and the local interest. She uses the conflict between federal drug policy (through the CSA) and individual states' relaxation or abolishment of marijuana prohibitions to demonstrate the beneficial ways in which federalism manages conflict between levels of government. The goal of the work is to serve as a "challenge to the . . . suspicion of the sub-federal" through a "demonstration of how decentralization can serve national and integrative ends."

In contentious issues such as immigration and drug policy, where the federal government is virtually unable to reach consensus and be a "prime mover," it may in fact "benefit from states and localities fighting out the gory details of how to conceptualize" solutions to those problems that have widely varied interests and stakeholders. Indeed, instances where the federal government *has* taken on a unitary and ideological position, such as same-sex marriage, "were precipitated by decentralized developments throughout the country." Rodríguez also minimizes the apparent conflict between federal and state in the opposite direction, recasting the federal government as the "bearer of benefits" in the states' eyes rather than a "rival." Furthermore, federalism provides opportunities for state and local officials through various political and rhetorical avenues. Finally, citizens themselves benefit from federalism, albeit to a lesser and more variegated extent given the sheer diversity factor: Rodríguez identifies the "creation of multiple electorates" that accommodate "multiple and contradictory preferences" as the clearest value of federalism from the popular point of view.

Ultimately, federalism is a "framework for national integration" because it facilitates "ongoing negotiation of disagreements large and small" — unsurprisingly at this point, diversity of preference, opinion and ideology on every level of government wins as the value most to be protected.

4. *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (with Adam B. Cox); *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (with Adam B. Cox). Cited by 111 articles and one case and by 190 articles and 4 cases, respectively.

I included these two articles in one section because the 2015 article functions as a recap of the 2009 article's arguments, plus a retrospective of how developments in the Obama administration (DAPA and DACA) bolstered the arguments and proposals articulated in the original article. The authors' core claim in the 2009 article was a historical one: that a series of developments over the last century had effectively given the President great control over immigration policy, particularly in powers of determining who would remain and who would be removed. These developments, particularly the creation of "de facto delegation," "constituted one of the most important features of modern immigration law." In the 2015 article, the authors move beyond this descriptive account into a series of normative questions, including, "what (if anything) constrains executive branch choices about which immigrants will be protected through the exercise of enforcement discretion?" Turns out, according to Rodríguez and Cox, that any real effort to constrain presidential enforcement authority is doomed to fail. They're not too worried, though: "there are reasons to accept, and even to endorse, presidential policymaking through enforcement." The executive is able to do many things that Congress cannot do with respect to immigration. It can "address the unanticipated costs and epistemic limits of ex ante congressional lawmaking, calibrate the policies enacted by Congress to changed circumstances, provoke constructive and innovative policy reforms in both branches, and guard against the perils of legislative stasis." Indeed, the authors praise the Obama-era immigration initiatives for making the exercise of executive discretion "more rule-like, centralized, and transparent." They also approvingly discuss the institutional redesign changes that helped "constrain and control the use of the enforcement power in an immigration regime that today gives the Executive capacious authority."

It seems important to situate this work within Rodríguez's larger body of scholarship, despite its "hot take" status. Whereas Rodríguez's previous articles examined separation of powers among levels of government regarding immigration, this limits itself to the federal level, and within that level, breaks down where the true power currently rests, and where the balance should ideally lie. We see Rodríguez's comparative lack of faith in Congress' ability to respond to changes in immigration and execute viable policies, making executive speed and flexibility a more appealing option.

The 2009 article has been cited in several cases that discuss immigration policy and executive authority, most notably in the 2017 Ninth Circuit *Trump* opinion.¹⁵

5. THE PRESIDENT AND IMMIGRATION LAW (with Adam B. Cox)

Rodríguez's book updates her identically-titled articles for the Trump era, elaborating the history that gave rise to the President's vast immigration power, as well. Rodríguez describes the confluence of overbroad laws and increasing immigration that gives rise to a "shadow system" that "render[s] Congress's intricate, detailed code of immigration rules ever less central to defining the content and character of our immigrant population." Instead, the executive branch gets to make immigration policy by choosing when and where to enforce formal immigration law.

In addition to arguing that the executive, not Congress, has authority to set immigration policy, Rodríguez makes a separate but related argument that, within the executive, immigration policymaking is better centralized in the executive than dispersed among line agents and local

¹⁵ 878 F.3d 662, 698 n.25 (2017).

agencies, making their everyday discretionary decisions. This is because a President who effectively makes immigration policy will inevitably develop a “high-level awareness of the bureaucracy’s inner workings and high-level involvement in organizing those choices.” And Presidents, unlike career bureaucrats, are politically accountable. Rodriguez elaborates:

“While the line between the illicit and acceptable motivations for enforcement choices is often contested and difficult to draw, the sort of large-scale enforcement policymaking we defend is at least more amenable to criticism and therefore accountability than diffuse and individualized judgments. More important, our immigration story underscores that the bureaucracy itself does not stand apart from politics; it can have an ideology, too. In law enforcement, in particular, line agents may more readily “buy into” the agency mission — the enforcement imperative — than political officials who have not spent a career immersed in agency culture. Insulating the judgments of line-level agents thus does not divorce decision-making from politics and ideology.”

This robust defense of centralized executive control of immigration policy, of course, initially seems at odds with the elephant in the 2020 room: President Trump’s immigration policy. Rodriguez addresses the moment in a few ways. First, she discusses the possibility that, though executive discretion in immigration policy is a good thing, the President has simply accumulated too much discretion. “After all,” she writes, “much of the current administration’s turn toward enforcement maximalism is perfectly legal; it is an escalation, albeit a dramatic one, of removal and detention policies that have been central to presidential immigration law across administrations. The underlying logic of our enforcement system may thus render the management strategies we propose a form of tinkering at best, and a means of facilitating large-scale humanitarian tragedies at worst.”

Second, Rodriguez argues that the current crisis in immigration policy is one precipitated not by an inadequate separation of powers, but by inadequate substantive review, by courts, of presidential enforcement decisions. She writes that “the reason-giving requirements embodied in various doctrines of administrative law can be applied productively to enforcement decision-making” and that “precedential and historical resources exist for courts to fashion meaningful restraints that still leave the Executive with the policy flexibility that is its hallmark and virtue.” The President, in other words, should get to set immigration policy as long as he or she doesn’t do anything irrational, arbitrary, or inhumane. The problem with the Trump administration’s immigration policy, in her view, is that it’s done all three without adequate constraint by courts.

6. *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787 (2010). Cited by 36 articles.

Constraint Through Delegation presents an experimental, innovative side of Rodríguez’s work: her interest in institutional redesign comes out through the exploration of practical application, not just theoretical posturing. Taking the current reality of high levels of “unauthorized” immigration as a given, Rodríguez proposes a redesign that will promote greater effectiveness and transparency in immigration policy. In her redesign, 1) Congress delegates control of immigration policy to an independent administrative agency and 2) the President’s power over immigration policy is made more transparent and shifted to front-end control rather than obscured back-end manipulation — specifically, through the regulation and control of existing executive prosecutorial discretion and through the power to set ex ante admissions standards. Her proposed construction is straightforward:

Congress [should] create an independent agency or commission subject to the

requirements of the Administrative Procedure Act and additional congressional controls, including report-and-wait requirements and deadlines. To maintain independence, the commission should be located outside existing immigration agencies, but the commission's decisionmaking process should include consultation with the Departments of Labor, State, and Homeland Security. The framework statute for the agency ought to include requirements that the agency set the number of visas for labor immigration by a certain date in the fiscal year and that the agency base its visa-limit judgments on collection and evaluation of particular types of data, along with the public comments submitted during notice-and comment procedures.

This delegation to the executive through “vertical integration” would advance two objectives: it would constrain prosecutorial discretion, and improve the accuracy and quality of the decision-making process by “breaking through the stasis” of the current system. Again, Rodríguez compares institutional capacities and features with a final outcome that favors the executive/administrative over the legislative: she argues that at the very least, congressional monopoly over immigration policy should be discontinued. Relatedly, she highlights the oft-neglected fact that successful immigration policy requires not just moral and value judgments, but “technical and data-driven determinations.”

Acknowledging the ambition of her proposal, Rodríguez devotes the final portion of the article to a feasibility inquiry on whether such a new agency would actually succeed in addressing the current system's dysfunction. While she acknowledges that “the risk of agency inaction or underregulation in this context might be high,” as with all agency issues, she maintains that “the creation of [such] a new decisionmaking structure could still have benefits by making more regular adjustment institutionally possible . . . [and] heighten[] the executive's accountability for core policymaking.” She bolsters her argument with a favorable comparison to the Refugee Act of 1980, which gave similar power to the executive in immigration determinations to positive outcomes. She acknowledges that her proposal is “counterintuitive,” relying on *more* delegation of power to the executive in order to constrain that power, but the benefits of greater transparency and rule-making seem powerful, especially when viewed in conjunction with her two versions of *The President and Immigration Law* that examine similar changes in the Obama administration.

7. *Against Individualized Consideration*, 83 IND. L.J. 1405 (2008). Cited by 10 articles.

This work does not represent one of Rodríguez's more cited or “significant” works (or, for whatever it's worth, its prestige value as measured by publication venue). However, I am including it for its robust defense of a mode of affirmative action that has come under recent heavy attack: the mechanical award of a certain number of “points” for applicants who self-identify as part of a particular racial or ethnic group. Responding to cases such as *Grutter* and *Bakke*, Rodríguez endorses this mode of affirmative action over “individualized consideration,” in which admissions officials judge applicants' diversity on a case-by-case basis. She argues that while the former system appears on first glance to be more harmful in advancing racial and ethnic stereotypes and categorical assumptions, it is the latter individual consideration that “gives state actors the power to make authenticity judgments concerning the identities of both individuals and groups.” This power to decide the “content” of a racial category engenders greater harm by dictating both what the accepted definition of a population should be and what an applicant's “performance” of that particular identity should look like. In contrast, mechanical consideration leaves the power of definition to the individual, and frees them of any unspoken requirement to conform to a particular sub-category.