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## Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another

Cristina M. Rodríguez<sup>†</sup>

The presence of over eleven million unauthorized immigrants in the United States<sup>1</sup> has generated a wide-ranging and charged debate in recent years over the need to overhaul our immigration laws. Among the suggested reforms, the most novel (for the United States) and controversial has been the proposal that we adopt a large-scale temporary worker program to address current labor needs and channel future flows of unskilled migrants, who come primarily from Mexico and Latin America. Since his first term, President Bush has been calling for some form of guest worker program,<sup>2</sup> and many of the bills that have emerged from both houses of Congress in the last few years have included a temporary worker program as a key component of comprehensive immigration reform.<sup>3</sup> A guest worker program has become the measure favored by those who eschew enforcement-

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<sup>1</sup> See Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the United States* 1 (Pew Hispanic Center, Mar 7, 2006), available at <<http://www.pewhispanic.org>> (last visited Jan 20, 2007).

<sup>2</sup> See, for example, Gustavo Mohar, *Mexico-United States Migration: A Long Way to Go* (Migration Policy Institute Mar 1, 2004), available at <<http://www.migrationinformation.org>> (last visited May 7, 2007) (discussing joint statement issued by President Bush and Vicente Fox in 2001 expressing commitment to developing a temporary worker program as part of their commitment to “forging a new and realistic approach to migration to ensure it is safe, orderly, legal and dignified”); Jim Rutenberg, David S. Cloud and Carl Hulse, *The Immigration Debate: The Overview; President Calls for Compromise on Immigration* NY Times A1 (May 16, 2006) (quoting a speech the president gave the previous day: “I support a temporary worker program that would create a legal path for foreign workers to enter our country in an orderly way, for a limited period of time.”).

<sup>3</sup> See, for example, Eliot Turner and Marc R. Rosenblum, *Solving the Unauthorized Migration Problem: Proposed Legislation in the U.S.*, (Migration Policy Institute Sept 1, 2005), available at <<http://www.migrationinformation.org>> (last visited May 7, 2007) (discussing legislation introduced during the 109th Congress in 2006 that would have adopted a guest worker program); STRIVE Act, HR 15 110th Cong, 1st Sess (Mar 22, 2007), available at <<http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1645>> (last visited May 7, 2007).

only strategies in favor of reform that accommodates the market realities that have generated the unauthorized population. Advocates of a guest worker program acknowledge that the legal admissions system, as currently designed, cannot manage the patterns of migration generated by these market forces. A temporary worker program would address current institutional limitations by creating new legal mechanisms for channeling the migration likely to persist in the future, no matter how long or high a border wall Congress resolves to build. A guest worker program thus represents a critical forward-looking complement to legalization programs that would permit millions of unauthorized migrants already in the United States to become lawful residents, ultimately obviating the need for large-scale legalization programs in the future.

This need to devise a solution to the problem of unauthorized migration, that recognizes the limitations of enforcement-only strategies in an integrated hemisphere, is urgent. Unsurprisingly, powerful interest groups and public officials in both the United States and Mexico support a temporary worker program.<sup>4</sup> Such a program seemingly would suit the labor market needs of the U.S., satisfying domestic employers and consumers, and the development needs of Mexico, which depends heavily on remittances from abroad.<sup>5</sup> In addition, the regularization of cross-border traffic appeals to our humanitarian impulses by providing a legal avenue of migration for those who otherwise are willing to risk their lives by crossing the Arizona or Texas deserts illegally. Similarly, regularization promises to protect immigrants from exploitation by smugglers and employers, as well as from the general anxiety typical of undocumented migrants' lives. Temporary worker programs also appeal to current and potential migrants by providing them with legal means to support their families in the short-term or raise money to finance home construction or business ventures in their countries of origin. Add to these promises the allure of cosmopolitanism, or the desire to have our immigration policy reflect the fact that we live in an increasingly globalized world in which people travel back and forth across borders carrying more than one set of political and social allegiances, and it is easy to see why diverse parties on both sides of the U.S.-Mexico border support a policy that facilitates temporary or cyclical migration.

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<sup>4</sup> See, for example, Michael S. Teitelbaum and Philip Martin, *No such thing as 'temporary workers,'* *Christian Sci Monitor* 9 (Dec. 12, 2005) (explaining that a guest worker program is being pushed because "some employer and ethnic lobbies expect to benefit" and that "small, concentrated, and well-financed interest groups . . . expect to profit significantly in the short term"); Francisco Alba, *Mexico: A Crucial Crossroads*, (Migration Policy Institute Mar 2004), available at <<http://www.migrationinformation.org>> (last visited May 7, 2007) (describing history of Mexico's efforts to negotiate a temporary worker program with the United States).

<sup>5</sup> See Multilateral Investment Fund, *Sending Money Home: Leveraging the Development Impact of Remittances* 1 (Inter-American Development Bank 2006), available at <<http://www.iadb.org/IDBDocs.cfm?docnum=823579>> (last visited May 9, 2007).

Despite the idea's appeal, however, I argue in this Article that we should resist the temptation to adopt a large-scale guest worker program, because such a program is likely to fail on two interrelated counts: It will fail to achieve the short-term objectives supporters claim for it, and it will thwart what should be the long-term goals of our immigration policy. On the first count, the implicit promise of the guest worker program is that it will satisfy the United States' labor needs while reducing illegal immigration, thus restoring the rule of law to the system and enabling the government to better track immigrants to the U.S.<sup>6</sup> As studies of guest worker programs consistently reveal, however, though a guest worker program may address labor market demands, it will do so at the risk of compounding the illegal immigration problem and perpetuating the poor treatment of migrant workers.

But second, and more importantly, though a guest worker program may satisfy many short-term interests, in the long term it will compromise our ability to integrate immigrants effectively into the American body politic, in large part precisely because it will fail to prevent the emergence of a new undocumented population. This insight has not been clearly articulated in the debate over the guest worker idea, but it should be central to the discussion. Important participants in the current immigration debate have emphasized that the United States can no longer do without a meaningful integration policy to complement our immigration control measures.<sup>7</sup> But whether the U.S. should adopt a separate integration policy or not, it is critical that the system of immigrant admissions and controls itself reflects integrationist aspirations. Proposed reforms should be judged in part by whether they will facilitate the incorporation of immigrants and their descendants into American social and civic life. In this Article, I make the case that a guest worker program fails this test.

Both of these conclusions depend on the assumption that many of the migrants who are now here illegally, as well as their counterparts in the future, have or will form the intent to remain in the United States for prolonged periods of time, if not permanently, for reasons that implicate Americans' own needs and preferences as much as the migrants' aspirations.<sup>8</sup> Because of this intent to remain, guest worker programs designed to

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<sup>6</sup> See, for example, Rutenberg, Cloud, and Hulse, *The Immigration Debate*, NY Times (cited in note 2) (reviewing President Bush's speech defending guest worker programs as a means of reducing human smuggling, replacing illegal workers with lawful taxpayers, and making certain we know who is in our country and why).

<sup>7</sup> See Spencer Abraham, et al, *Immigration and America's Future: A New Chapter* xix–xx (Migration Policy Institute 2006), Executive Summary available at <[http://www.migrationpolicy.org/task\\_force/new\\_chapter\\_summary.pdf](http://www.migrationpolicy.org/task_force/new_chapter_summary.pdf)> (last visited Jan 20, 2007).

<sup>8</sup> See, for example, Marta Tienda, *Be Our Guest?*, Am Prospect 19 (Nov 2005) (“Unskilled immigration is likely to continue—through legal or clandestine means—owing to brisk growth in industries requiring limited skills, the exodus of native workers from declining industries, and the powerful role of social networks in recruiting fellow compatriots eager for a share of the American wage pie.”).

admit workers for limited periods of time are likely to prevent the emergence of an undocumented population only temporarily. And because of migrants' intent to remain, it is essential that our admissions policies reflect our long-term interest in ensuring the assimilation<sup>9</sup> of immigrants and their children into American society.

Temporary worker programs ultimately thwart this incorporation objective, because they erect undesirable and otherwise avoidable obstacles to the integration process by constraining the two key mechanisms of immigrant integration: mobility and reciprocity. Incorporation depends on immigrants having mobility—the ability to move freely among society's various sectors as well as in and out of ethnic communities. Receiving societies logically and rightly expect immigrants to adapt to their new surroundings, but immigrants cannot make good on that obligation without mobility. This mobility depends on immigrants' ability to emerge from immigrant sectors of the economy and to develop the social and cultural capital necessary for interacting with people and institutions at large—both of which depend on the security of what I call the right to remain, or the security of a continued presence in the U.S. that guest worker programs do not provide.

Incorporation also depends on extant members of the receiving society displaying a reciprocal willingness to adapt to the presence of immigrant communities.<sup>10</sup> A society's failure to adapt blocks immigrant assimilation by preventing immigrants from becoming part of important social institutions and community relations. The failure to treat immigrants as potential members also reflects an absence of the spirit of social cooperation that should characterize a democratic society. Implicit in this concept of reciprocity is another important assumption I defend throughout this Article. The role the United States and her citizens have played in generating the forces that produce migration, through our trade, immigration, and foreign policies, as well as our economic preferences, coupled with our resulting dependence on immigrants from Mexico and Latin America in particular, gives rise to the need for an obligation to adapt to immigrant presence.

Guest worker programs ultimately fail to encourage either mobility or reciprocity. They impose bureaucratic requirements that constrain immigrant mobility in the economy and therefore in society at large. Indeed, guest worker programs historically have compounded immigrant isolation

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<sup>9</sup> The term "assimilation" carries a lot of freight. I use it interchangeably with the terms "integration" and "incorporation" and define what I mean by these concepts in Part I A.

<sup>10</sup> In its 1997 recommendations, the U.S. Commission on Immigration Reform emphasized the reciprocal obligations immigration creates. "Immigrants must accept the obligations we impose—to obey our laws, to pay taxes, to respect other cultures and ethnic groups. At the same time, citizens incur obligations to provide an environment in which newcomers can become fully participating members of our society." United States Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* 7 (1997).

and resulted in serious exploitation, both in the U.S. and in other societies.<sup>11</sup> These restraints are exacerbated by the uncertainty guest workers experience regarding their long-term prospects in the United States. What is more, by treating the immigrant as a temporary fix for the domestic economy's current labor needs, guest worker programs encourage the receiving society to treat immigrants as mere means to an end rather than as potentially permanent members of their communities. The treatment of the immigrant as a temporary guest contributes to a climate of inflexibility and intolerance vis-à-vis the cultural pluralism immigrants inevitably generate—a belief that immigrants should be temporary and should not change the “character” of our communities. Temporary worker programs thus give the receiving society no incentive to adapt to demographic changes or to incorporate immigrants into mainstream institutions. The United States' relative success at assimilating large groups of immigrants over time has depended on our willingness to treat immigrants as potentially permanent members of our society, but current guest worker proposals attempt to address a large demographic phenomenon without calling upon that willingness.<sup>12</sup>

Of course, various guest worker models exist, and some models are more likely to compromise the incorporation objective than others. We can think of immigrant admissions policies as existing on an integration continuum, with the status quo of high levels of illegal immigration on one end and the admission of immigrant workers for permanent residence on the other. Closest to the illegal immigration model, under which workers' complete lack of legal status dramatically compromises their ability to integrate, is the sort of program advocated by the White House in the 2007 incarnation of its immigration proposals. The program would allocate temporary visas to workers for a maximum of six years, require guest workers to leave the country every two years for six months at a time, and prohibit workers from bringing spouses and children with them.<sup>13</sup> This model closely resembles the guest worker programs of the infamous Bracero era

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<sup>11</sup> Martin Ruhs, *Temporary foreign worker programmes: Policies, adverse consequences, and the need to make them work*, 6 *Perspectives on Labour Migration* 10–15 (2003), available at <<http://www.ilo.org/public/english/protection/migrant/download/pom/pom6e.pdf>> (last visited Jan 20, 2007) (analyzing the consequences of major temporary foreign worker programs adopted by several societies in the recent past, including creation of immigrant sectors in the economy and conditions of exploitation).

<sup>12</sup> A guest worker program could include a path to permanent residency and citizenship, of course; the McCain-Kennedy bill proposed in the spring of 2006, for example, would have permitted guest workers to apply for adjustment of status at the end of their visa cycles. See Secure American and Orderly Immigration Act, S 1033/H R 2330 (109th Congress). Without question, no guest worker program should be adopted without the possibility of adjustment to permanent status, and the path should be relatively clear of bureaucratic obstacles. Though this possibility of adjustment would address directly the dangers I identify, I remain skeptical (for reasons given below) that this solution would ensure that a guest worker program does not create an outsider class or second class of workers.

<sup>13</sup> See *Talking Nonsense: Bush Administration's Plan on Immigration Is Divorced from Reality*, Wash Post A14 (Apr 2, 2007).

in the U.S.<sup>14</sup> and the models adopted by various developed nations around the world. The histories of these programs suggest that they create as many problems as they solve.<sup>15</sup>

But an alternative model that more closely resembles admission for permanent membership does exist, in the form of a provisional worker program that gives visa holders the opportunity to adjust to lawful permanent status, putting workers on a path to citizenship as long as they meet certain criteria. This option has been advocated by Senators Edward Kennedy and John McCain in their proposed legislation and is less likely to impose integration costs than the sort of program currently advocated by the White House. What is more, within this model institutional design can make the program more or less conducive to integration: adjustment to permanent status can be made easy or difficult, and features such as portability of visas from employer to employer and the ability to sponsor spouses and children will help determine the success of guest worker programs. In other words, in considering whether to adopt a guest worker program, the choice is not of the all-or-nothing variety; some guest worker programs will be more likely than others to thwart integrationist objectives.

That said, even if superior institutional design or other ameliorative adjustments might address some of the failures common to guest worker policies adopted in other times and places, those experiences provide us with powerful cautionary tales that should not go underappreciated. What is more, even a guest worker program that successfully reduces undocumented immigration might not meet the criteria of fairness. The United States' adoption of a large-scale guest worker program in response to the current crisis of undocumented immigration would signal an important and risky shift in our conceptualization of immigration—from an immigration policy designed to create permanent members to a policy dependent on temporary and ad hoc solutions to inescapable problems.<sup>16</sup> This paradigm shift may be satisfying in the short-term to immigrants and employers, but it represents a troubling turn for a democratic society based on principles of social cooperation. The structure of the guest worker program is not consistent with the political obligations we owe to those who, in Michael Walzer's terms, do "socially necessary work,"<sup>17</sup> and with whom we voluntarily associate because of our economic preferences. Though my primary aim in

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<sup>14</sup> See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 127–66 (Princeton 2004) (detailing the history of the Bracero program of the 1940s, 50s, and 60s). I discuss the Bracero experience in Part II B.

<sup>15</sup> For a discussion of this point, see Part II.

<sup>16</sup> Though our immigration system currently supports a number of small-scale temporary worker programs, presenting a large-scale guest worker program as a solution to the unauthorized migration crisis would signal a departure from an important commitment to constructing our immigration policy to create permanent forms of membership.

<sup>17</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 60 (Basic Books 1983).

this Article is to demonstrate how guest worker programs threaten immigrant integration and are therefore questionable policy, I also take the guest worker debate as an opportunity to open up a new and crucial line of inquiry into the political obligations we owe both current and future migrants.

To establish why we should resist the shift toward the type of temporary solutions embodied by the guest worker program, I explore the practical and theoretical dimensions of this question in turn. In Part I, I define integration and assimilation by considering what the process of incorporating immigrants into American life entails for both the immigrant and the receiving society. I identify the types of mobility crucial for immigrants as well as the forms of reciprocity that facilitate successful incorporation. In so doing, I consider the extent to which reciprocity is required as both a practical matter and as a matter of obligation. In Part II, I consider the ways in which a temporary worker program would frustrate immigrant mobility and social reciprocity and argue that we should respond to the apparent breakdown of the immigrant admissions system by substantially increasing the number of permanent visas available to semi-skilled and unskilled workers. Of course, political support and administrative capacity might not exist for such a reform, and the status quo of high levels of unauthorized migration is untenable: undocumented immigrants are not mobile, and their presence erodes support for immigration, making reciprocity difficult to achieve. I therefore give brief consideration to how a temporary worker policy should be designed as a second best solution with features that will prevent our immigration policy from losing sight of the long-term objectives of immigrant assimilation.

This inquiry into the relationship between guest worker programs and immigrant integration requires the reconciliation of two apparently contradictory ideas. On the one hand, we must acknowledge that we are not in complete control of our borders; labor markets and transnational social networks are beyond the capacity (and will) of the U.S. government to fully regulate. As the result of these forces, migrants develop transnational identities, forging lives and affiliations without complete respect for borders. On the other hand, national citizenship remains a vital institution—an essential framework for grounding belonging and organizing political and social cooperation. Our vision of who qualifies as a citizen must take into account the social and market forces that produce migration, both legal and illegal. And the policies we implement to manage that migration at the entry stage must not lose sight of the need to produce an integrated body politic that mirrors the complexities of migration.

In assessing guest worker programs for their compatibility with the integrationist objective, I am not suggesting that our admissions policies should not also serve other important goals, nor do I mean to imply that each of the components of mobility and reciprocity I identify must be a part of any admissions policy. We certainly should strive through the im-



migration laws to harness the benefits of immigration to our economy and our social life, and matters of political viability and cost will limit the extent to which the components of integration can be fully realized. At the same time, however, our admissions policies should reflect who is seeking entry and why—the only way truly to address the problem of unauthorized migration. Lawmakers should approach the issue in a decidedly pragmatic way and ask: Taking certain amounts and types of immigration as a given (low-skilled and family-oriented immigration predominantly from Latin America), how do we devise an immigration system that ensures effective absorption of immigrants in the long-term?

Though this approach can be used to frame debates about nearly every aspect of our immigration system, I focus in this Article on the compatibility of one major policy proposal with the incorporationist objective. Because guest worker programs are designed to address one particular type of immigration, my observations regarding integration are made with this particular group in mind, which is defined by the three interrelated features of class, culture, and geography. The migrants who are undocumented today and who would become guest workers consist of low-skilled workers and their families who are responding to the imperatives of a semi-integrated hemispheric market. Though migrants from all over the world continue to come to the United States, immigration since 1965 has been overwhelmingly Latin American and Asian,<sup>18</sup> and the unauthorized migration that proposed guest worker programs would address is predominantly from Mexico and other parts of Latin America.<sup>19</sup> Thus not only is this migration enabled by the labor market, but geography also contributes to its persistence. Because the United States has an extended and largely flat land border with Mexico, migrants are able to cross into the United States with regularity, the Border Patrol notwithstanding. At its core, then, the current debate over guest workers is of a piece not only with discussions of the rights of workers, but also with consideration of the dramatic growth of the Latino population and what that means for the future of American society. Much of my discussion will be applicable to other types of migration and to other societies, but the characteristics of current unauthorized migration

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<sup>18</sup> See Marcelo M. Suárez-Orozco, *Everything You Ever Wanted to Know About Assimilation But Were Afraid To Ask*, in Marcelo M. Suárez-Orozco, Carola Suárez-Orozco, and Desirée Baolian Qin, eds, *The New Immigration: An Interdisciplinary Reader* 67 (Routledge 2005) (explaining that today more than 50 percent of all immigrants are from Latin America and 27% are from Asia). At this stage, an obvious but extremely underappreciated point should be made. Latin American immigration is not strictly a post-1965 phenomenon, and the Latino presence in the United States is not exclusively the result of immigration. Rather, the current wave of immigration is adding to and changing a long-entrenched and politically powerful population marked by a complex but identifiable “ethnic” (for lack of a better word) character. This dynamic underscores that the issue of how to incorporate a Latino population into American life is not a strictly transitional matter, in the sense that immigration from Eastern Europe, Germany, or Italy has been.

<sup>19</sup> Passel, *Size and Characteristics of the Unauthorized Migrant Population* at i–ii (cited in note 1) (noting that 56 percent of the unauthorized population of 11.5–12 million comes from Mexico, and another 22 percent comes from the rest of Latin America).

to the U.S. render skepticism regarding guest workers particularly warranted.

#### I. MOBILITY, RECIPROCITY, AND SOCIAL CHANGE THROUGH INTEGRATION

Before considering what immigrant incorporation entails, it is important to establish why incorporation should be our goal. After all, guest worker programs are arguably designed with the explicit intention of preventing immigrants from integrating into the body politic. Though it is fine to debate the moral legitimacy of immigration controls—to have the open borders debate—and to contemplate whether we should prefer high-skilled, English-speaking immigrants, certain realities require a reorientation of the admissions debate. First, some demographers suggest that a substantial amount of immigration by unskilled or low-skilled individuals and their families, particularly from Latin America, will persist into the future.<sup>20</sup> As sociologists Alejandro Portes and Rubén Rumbaut have emphasized, social interconnectedness survives economic imperatives. “Once migrant networks have consolidated, they can become sufficiently powerful to sustain the movement *in the absence* of the original economic incentives.”<sup>21</sup> Of course, some new research suggests that the push factors emanating from Mexico may dissipate in the next decade.<sup>22</sup> But whether that proves to be the case, our need for labor is likely to persist. As Dowell Myers explains in his new study of the relationship between immigration and the aging baby boomers, immigrant workers across the skilled to unskilled spectrum are essential to our economy’s future.<sup>23</sup> Any policy discourse or normative theorizing regarding the objectives of immigration policy in a liberal state that proceeds without these realities at its center is destined for irrelevance.<sup>24</sup>

<sup>20</sup> See Mary C. Waters and Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 *Ann Rev Sociol* 105, 107 (2005) (“The social, political, and economic forces that spur and perpetuate migration appear to be well entrenched, and we believe that there will be a resulting replenishment of immigrants that is likely to be a defining characteristic of American immigration for years to come.”).

<sup>21</sup> See Alejandro Portes and Rubén G. Rumbaut, *Immigrant America: A Portrait* 18 (California 3d ed 2006). See also Douglas S. Massey, Luin Goldring, and Jorge Durand, *Continuities in Transnational Labor Migration: An Analysis of Nineteen Mexican Communities*, 99 *Am J Sociol* 1492, 1500 (“Migration also changes the cultural context within which decisions are made, and international movement becomes increasingly attractive for reasons that are not purely economic.”).

<sup>22</sup> See, for example, Shannon O’Neil, *Will we have enough workers?* *Palm Beach Post* 12A (Apr 9, 2007) (citing study by Organization for Economic Cooperation and Development indicating that over the next ten years roughly five million fewer workers will enter the United States, suggesting that “demography may accomplish what border enforcement has not”).

<sup>23</sup> See Dowell Myers, *Immigrants and Boomers: Forging a New Social Contract for the Future of America* 37–38 (Russell Sage 2007).

<sup>24</sup> By emphasizing this reality, I do not mean to suggest it would be illegitimate for immigration policy makers or theorists to consider creating incentives for certain types of immigrants, namely high-skilled immigrants, to come to the United States, or that it would be illegitimate or ill-advised to set caps on the numbers of immigrants permitted to enter each year. Of course, our efforts to attract highly-skilled immigrants raises another vexing moral issue concerning the extent to which such policies

Given these realities, a focus on integration would promote social peace. It is in our interest to acknowledge that migrants are here to stay and to facilitate their becoming functional and well-adjusted members of our society. As Myers contends in calling for a new social contract between immigrants and Americans, investing in the integration of immigrants today will create the workers and taxpayers we will depend on in the future.<sup>25</sup> And as Hiroshi Motomura has emphasized, the European societies that recruited foreign workers in the 1960s and '70s without making a corresponding commitment to integrating them into their societies now face serious social cleavages as a result.<sup>26</sup>

A focus on integration is also proper as a political matter. As I develop in detail in Part II of this Article, the people to whom guest worker visas would be made available are people to whom we have associative obligations. Their migration is inspired not simply by the lack of employment or development in their home countries, but also by choices Americans have made at the level of trade policy, as well as by the more quotidian desire for the less expensive consumer goods that immigrant labor facilitates. These economic choices give rise to social relationships whereby immigrant workers become connected to lawful residents and U.S. citizens. By virtue of our participation in the creation of these forms of association, we have a political duty to take account of and cooperate with these social networks, which means incorporating immigrants into our society as more than laborers. Hemispheric economic integration is giving rise to a need for political union of some kind marked by a sense of shared governance and

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compromise the ability of developing countries to continue their development. Whether "brain drain" always impedes development is debated, and the relationship between migration and development is complex. But efforts by receiving countries to attract high-skilled workers from developing countries must be understood as raising substantial moral concerns. In addition, it may be that temporary worker programs that provide incentives for migrants to return to their home countries are optimal from a development perspective—an outcome that should inform our own policy and sense of obligation. The connections between migration, development, temporary worker programs, and remittances are just now coming to be understood. For a discussion of the links between temporary migration programs and development, consider Dovelyn Agunias, *Linking Temporary Worker Schemes with Development*, (Migration Policy Institute Feb 1, 2007), available at <<http://www.migrationinformation.org/Feature/display.cfm?id=581>> (last visited Apr 3, 2007); Peggy Levitt and Ninna Nyberg-Sørensen, *Global Migration Perspectives: The transnational turn in migration studies* (Global Commission on International Migration 2004), available at <<http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%206.pdf>> (last visited Apr 3, 2007); Raul Delgado-Wise and Luis Eduardo Guarnizo, *Migration and Development: Lessons from the Mexican Experience* (Migration Policy Institute 2007), available at <<http://www.migrationinformation.org/Feature/display.cfm?id=581>> (last visited Apr 3, 2007).

<sup>25</sup> See Myers, *Immigrants and Boomers* at 258 (cited in note 23) ("A[n important] step in building the hopeful future is to accelerate the rate of integration of immigrants into the mainstream of U.S. society and the U.S. economy. We need to assist their economic advancement and their full participation in our society, including early incorporation into our democratic political process. . . . [Another] necessary step is for citizen-voters and taxpayers to embrace the homegrown strategy and increase their investment in the education of the next generation.").

<sup>26</sup> See Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 *Stan L Rev* 857, 869–70 (2007).

reciprocal political rights and duties. One way to make these broader forms of cooperation possible is to integrate into our political and social institutions those individuals who have relocated to the U.S. and thus participate in the person-to-person contact that creates the need for forms of political engagement across borders and without respect to legal citizenship status.

Finally, striving to integrate new populations into existing political and social structures is itself worthwhile. It is important to avoid overinvestment in the cultural or demographic status quo, or in insulating ourselves from the change that integration inevitably brings.<sup>27</sup> As I have explained in previous work, cultural evolution is not only unavoidable, it represents an inherent good—not just for the assimilating immigrant, but for the receiving society, which depends on the regular infusion of striving immigrants for its continuing vitality.<sup>28</sup> As I make clear below, I am agnostic with respect to what American society ultimately should look like as an aesthetic and cultural matter. The point is that we should not resist the political imperatives that require integration in an effort to stop the change that immigrant incorporation produces, in part because that change produces value.

#### A. Incorporation as Process

Before we can establish how guest worker programs threaten immigrant incorporation, we must explore in more detail what incorporation entails. The process by which immigrants become Americans has been described using various terms. The term “assimilation” has an inescapably political dimension, and attempts to define and critique the concept fill volumes.<sup>29</sup> At the level of public discourse and ideology, “assimilation” is synonymous with a melting pot narrative according to which immigrants shed the customs of their homelands as they become true Americans. For some, assimilation is inexorable and romantic. For others, the melting pot narrative oversimplifies a process that is complex and involves change that is not necessarily linear for either the immigrant or society. For still others, the association of “assimilation” with the melting pot view of American identity renders it a loaded word, redolent of a historical tradition of coer-

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<sup>27</sup> Compare K. Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* 101, 113 (W W Norton & Co 2006) (discussing the value of cultural contamination, in the context of the debate over the effects of mass culture on local traditions, and noting that “[w]e do not need, have never needed, settled community, a homogeneous system of values, in order to have a home. Cultural purity is an oxymoron.”).

<sup>28</sup> I have discussed my view of the instrumental and democracy-promoting value of cultural challenge in change elsewhere. See Cristina M. Rodríguez, *Language and Participation*, 94 Cal L Rev 687, 726–28 (2006).

<sup>29</sup> See, for example, Richard Alba and Victor Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration* 17–66 (Harvard 2003) (describing and critiquing various assimilation theories). Consider Suárez-Orozco, Suárez-Orozco, and Qin, eds, *The New Immigration* (cited in note 18).

cion, xenophobia, and disrespect for the cultural differences embodied by immigrants and minority communities in the United States.

But assimilation is also descriptive. I invoke it in this Article alongside the terms integration and incorporation to describe a process of inevitable change—a conception of assimilation highlighted in a recent report of the Pew Hispanic Center, which noted that the term “is now broadly accepted as a way to describe the ways that immigrants and their offspring change as they come in contact with their host society.”<sup>30</sup> When used in this way, assimilation “does not imply any superiority in the host society’s views or a particular value to the changes in attitudes and behavior among immigrants across generation [sic].”<sup>31</sup>

Current sociological use of the term takes this focus on change one step further by emphasizing its bidirectional nature. Sociologists define “assimilation” as a two-way phenomenon, as opposed to a linear and complete absorption of the immigrant into a static and extant culture, and use assimilation to describe “the process by which the characteristics of members of immigrant groups and host societies come to resemble one another.”<sup>32</sup> In other words, assimilation is a phenomenon that changes immigrants and the host society alike.

Of course, from a policymaker’s perspective, simply describing the process of change might be beside the point. He or she might want to identify an acceptable endpoint to the assimilation process to know when it has occurred and to direct the process toward the socially desired objective. Classical assimilation theory identifies such an endpoint. It describes immigrants as “following a ‘straight-line’ convergence,” according to which they increasingly resemble the host society as time passes, beginning with “close social relations” with members of the host society, “followed by large-scale intermarriage,” and ending in “ethnic identification” with the mainstream.<sup>33</sup> This definition presupposes the existence of an identifiable mainstream, and it suggests that it is possible to measure the success or failure of assimilation by comparing the current state of members of an immigrant group to the Americanized end state they are supposed to achieve through assimilation.

But, of course, the “mainstream” is elusive. Even contemporary “melting pot” theorists<sup>34</sup> emphasize that the assimilation process changes the host society, making it difficult to identify assimilation’s endpoint.

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<sup>30</sup> See Pew Hispanic Center, *Assimilation and Language: Survey Brief 1* (Pew Hispanic Center March 2004), available at <<http://www.pewhispanic.org>> (last visited Jan 20, 2007).

<sup>31</sup> *Id.*

<sup>32</sup> Susan K. Brown and Frank D. Bean, *Assimilation Models, Old and New: Explaining a Long-Term Process* 1 (Migration Policy Institute Oct 1, 2006), available at <<http://www.migrationinformation.org/Feature/print.cfm?ID=442>> (last visited Jan 20, 2007).

<sup>33</sup> *Id.*

<sup>34</sup> For an example of contemporary melting pot theory and an attempt to revive and redefine the concept of assimilation, consider Alba and Nee, *Remaking the American Mainstream* (cited in note 29).

Immigration ensures that a society's mainstream evolves, taking on characteristics that originally would have been ascribed to the immigrant.<sup>35</sup> As a result, defining the assimilated endpoint of a given immigration wave is largely a retrospective project for historians, not an aspirational project for policymakers. The latter lack adequate tools to shape culture to fit predetermined conceptions of the desired outcome. Attempts by policymakers to identify the mainstream into which immigrants should be assimilating are likely to be beset by nostalgia, artificiality, or coercive attempts to recapture a world that no longer exists.<sup>36</sup>

In devising policies that promote assimilation, then, the real concern for policymakers should not be whether immigration policy is sustaining the status quo<sup>37</sup> or producing a preferred cultural outcome. Instead, the focus should be on whether a given policy will help the bidirectional process of assimilation unfold successfully—whether it will help integrate immigrants into political and social institutions and enhance their chances for success. Successful assimilation, in turn, should be defined by immigrants becoming full participants in the country's economic, social, and cultural life—by their becoming not only contributors, but also equals. Success further depends on whether immigration is absorbed with minimal social cleavages and inter-group competition. To achieve this success, policymakers should attempt: (1) to reduce obstacles to the immigrant's successful navigation of each of the different measures of assimilation; and (2) to normalize the presence of immigrants and their descendants in society at

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<sup>35</sup> See, for example, Massey, Goldring, and Durand, 99 *Am J Sociol* at 1502 (cited in note 21). The authors explain:

As migrants become part of established communities in the host country, they adapt themselves to the local setting. Whether or not they have legal documents, they send their children to school, learn a minimum of the host country's language, and use financial institutions and social services. Over time the local landscape of the receiving community is transformed. . . . the migrants contribute to the creation and growth of a market for specialized foods, entertainment, and cultural products. The formation of ethnic neighborhoods represents a process of socioeconomic adaptation and transformation that permits many "foreign" practices to be maintained in the new setting.

Id (citations omitted).

<sup>36</sup> In a country as large and historically diverse as the United States, it is inevitable that incorporation will occur on different terms in different regions depending on the characteristics and history of the resident population, despite decisions made by the federal government with respect to immigrant admissions.

<sup>37</sup> It is worth noting that when Congress adopted national origin quotas for immigration during the 1920s, it was trying to accomplish precisely this objective: to ensure that subsequent immigration would mirror the population as it then stood. See Thomas Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, eds, *Immigration and Citizenship: Process and Policy* 158–59 (West 2003), citing Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Staff Report (1981). In formulating the quotas, Congress relied on the 1890 Census, rather than the Census of 1910, because the former reflected a population with more "desirable" cultural characteristics. Id. This reliance resulted in a reduction of the Italian, Polish, and Greek quotas and increased quotas for Northern European countries. Id. Congress sought to use the immigrant admissions system to shape the cultural character of American society, thus feeding a Nativist ideology that denigrated certain groups of immigrants in service of a nostalgic view of American society. Id.

large with minimal social and political conflict over the adaptations that the existing society must undergo to make this possible.

In the end, there are two plausible answers to the question: what sort of society do we want to have at the end of the process? First, the answer is political, not cultural. We should insist on an outcome where the people who live here are equal participants, but it would be futile to insist on cultural particularities. Second, we cannot know what sort of society large-scale immigration will produce, and we should temper the inevitable impulse toward defining our ideal immigration endpoint with this realization. The best we can do is to enforce consistently the premise that a mutuality of obligation exists as we negotiate this process. Immigrants and citizens alike bear the burden of ensuring that immigrants become members. It is precisely because guest worker programs make these obligations difficult to fulfill that we should be wary of adopting such programs.

#### B. Immigrant Adaptation and Mobility

Immigrant adaptation can be measured by considering the trajectories of different cohorts. We might measure assimilation, on the one hand, by how the immigrant generation is adjusting. My core subjects—the current undocumented immigrant and the possible future guest worker—represent this cohort. On the other hand, a complete measure of assimilation requires understanding how the children of immigrants, who may have been born in the U.S. or who may have immigrated at a young age and therefore may not identify with the immigrant experience, are faring. Sociologists and demographers who measure assimilation are now profitably conducting longitudinal studies of the second generation,<sup>38</sup> as well as of immigrants who arrived in the United States as children. Not only do such measures give us a better sense of how immigration affects American society in the long term, they also make for more complete assessments of the absorption process.

This multi-generational perspective is particularly crucial, given our *jus soli*, or birthright citizenship, rule.<sup>39</sup> The *jus soli* rule reflects a commitment to treating anyone born in the United States as an equal. Understanding the processes of cultural adaptation experienced by the second generation is therefore essential to promoting equal citizenship. Relatedly, the *jus soli* rule means that the status of the second generations' parents is of similar concern, given that the parents' success will affect their children's prospects. Because both immigration policies and the public atti-

<sup>38</sup> See, for example, Alejandro Portes and Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, in Suárez-Orozco, Suárez-Orozco, and Qin, eds, *The New Immigration*, 85, 85–86 (cited in note 18) (noting the need, in evaluating the “new” immigration since 1965, to focus on the second generation, in addition to the immigrant generation).

<sup>39</sup> See US Const, Amend XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside.”).

tudes surrounding those policies ultimately affect the options and status of the second generation, we must consider whether immigration policies erect obstacles to the assimilation of this generation.

In addition to considering the generational components of assimilation, we must also consider that assimilation entails adjustments of different sorts; it has important cultural, economic, and socio-political dimensions. Each of these dimensions often reinforces the others, though it is also possible that one sort of assimilation can occur even if another is blocked. Moreover, each aspect of assimilation may unfold at different rates for different individual immigrants, as well as for different immigrant groups.<sup>40</sup> In fact, recent sociological research shows that assimilation has declined for some groups, whose second generations find themselves less well off economically and in terms of health outcomes and educational attainment than the immigrant generation, contrary to conventional expectations.<sup>41</sup> This phenomenon of downward assimilation suggests that both immigration and integration policy should be attentive to potential differences among immigrant groups as they negotiate the processes of assimilation—differences that often will manifest themselves in terms of race and class.

When considering the different types of assimilation, popular consciousness focuses most immediately on cultural adaptation. Linguistic diversity suggests the presence of the unassimilated, and popular discourse often focuses on the acquisition of English language skills as the most significant marker of adaptation. As a number of sociological studies have demonstrated, immigrant groups today follow this particular path of assimilation in the predicted manner: the immigrant generation acquires English-language speaking ability, the second generation acquires English pro-

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<sup>40</sup> See Brown and Bean, *Assimilation Models* (cited in note 32) (“[G]roups may vary in the apparent *incompleteness* of their assimilation for a number of reasons, including the level of human capital (education) they bring with them and the social and economic structure of the society they enter.”). It is the case that

[d]ifferent aspects of assimilation may also vary in completeness at any point in time. For example, an immigrant may master a host-country language faster than he or she matches the earnings of the native born. Finally, the incompleteness of assimilation may be similarly affected across groups if economic or other structural changes were to reduce most people’s chances of economic mobility.

Id.

<sup>41</sup> See, for example, Suárez-Orozco, *Everything You Ever Wanted to Know About Assimilation* at 75–77 (cited in note 18). See also Portes and Zhou, *The New Second Generation* at 89–90 (cited in note 38). Compare Nancy Foner and Richard Alba, *The Second Generation from the Last Great Wave of Immigration: Setting the Record Straight* (Migration Information Source Oct 1, 2006), available at <<http://www.migrationinformation.org>> (last visited Jan 20, 2007) (noting that despite popular mythology to the contrary, the southern and eastern European immigrants of the turn of the twentieth century, particularly Italians, also faced considerable obstacles to assimilation, experiencing only a “slow and gradual” climb into society’s mainstream that was punctuated by “painful setbacks and difficulties”).



iciency but is often bilingual, and the ability to speak the immigrant language tapers off by the third generation.<sup>42</sup>

Beyond this linguistic adaptation, cultural assimilation might also involve changes in attitudes about certain practices or social structures that are shaped by religion and culture, such as attitudes about family life, premarital sex, homosexuality, and abortion.<sup>43</sup> These two forms of adaptation appear to be mutually reinforcing, as the acquisition of English correlates with the development of attitudes more closely in line with the general population's views.<sup>44</sup> This correlation is, of course, complicated. It is not inexorably positive for immigrant views to approximate the median view in the country—both because diversity of perspective is generally valuable, but also because there may well be instances in which we would prefer the general population's values to more closely mirror immigrants' values, as might be the case with the heightened significance many immigrants place on family. And despite this connection between English-language ability and convergence with median public views, the ability to speak English is not necessarily an indication of comprehensive assimilation, as the downward assimilation data suggest,<sup>45</sup> nor is limited English-language ability necessarily a sign that immigrants have not or are not adapting to life in the United States in other ways by holding down jobs and forming social networks.

It is also important to emphasize that the process of cultural adaptation unfolds in a variety of settings. For immigrant children and the second generation, adaptation occurs in the public schools, but adult immigrants simply do not have access to such an assimilating institution. Instead, through formal adult literacy programs, the workplace, interaction with market and governmental institutions, and exposure to popular culture,

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<sup>42</sup> For studies demonstrating that post-1965 immigrants are assimilating linguistically, see Rubén Rumbaut, Douglas S. Massey, and Frank D. Bean, *Linguistic Life Expectancies: Immigrant Language Retention in Southern California*, 32 *Population & Dev Rev* 447, 454–55 (2006); Alba and Nee, *Making the American Mainstream* at 219–21 (cited in note 29); Pew Hispanic Center, *Assimilation and Language* at 1 (cited in note 30).

<sup>43</sup> Pew Hispanic Center, *Assimilation and Language* at 3–4 (cited in note 30).

<sup>44</sup> According to a recent study by the Pew Hispanic Center there is a relationship between linguistic assimilation and these changes in attitudes:

[L]anguage contributes to differences in attitudes substantially even after controlling for other factors, such as age, gender, level of education, income, place of residence . . . country of origin, political party, religion, citizenship, and generation in the United States. For example, . . . it is estimated that . . . 93% of Spanish-dominant Latinos agree that it is better for children to live in their parents' home until they get married . . . [whereas] 71% [of English-dominant Latinos] are estimated to feel the same way.

Id at 3. The study also estimates that 70 percent of English-dominant Latinos find divorce acceptable, but only 51 percent of Spanish-dominant Latinos agree. Id.

<sup>45</sup> Compare Portes and Zhou, *The New Second Generation* at 90 (cited in note 38) (describing the experience of Haitian immigrants in Miami and noting that, contrary to conventional expectations, “adopting the outlooks and cultural ways of the native-born does not represent, as in the past, the first step toward social and economic mobility but may lead to the exact opposite”).

adult immigrants negotiate cultural adaptation. The cultural aspect of assimilation is thus overarching and occurs as immigrants manage the other components of adjustment.

The extent to which an immigrant has adapted to his new surroundings can also be measured in economic and labor-based terms. Most immigrants move in hopes of making economic gains, and there are a number of ways of measuring economic incorporation. One way to consider this process of adjustment is to measure immigrants' economic fortunes—are their wages increasing; are they acquiring financial stability and security through home ownership and greater access to health care and other kinds of insurance; and what are the economic prospects for the second generation? Do the rising fortunes of immigrants themselves translate into better prospects and security for their children? We might also consider the extent to which immigrants themselves emerge from immigrant-dominated sectors of the economy and whether they and their children are working as equals of nonimmigrants in ethnically integrated workplaces. Economic advancement, like English-language acquisition, will inevitably enable other aspects of assimilation. Entering integrated workplaces will lead to cultural and social assimilation, and enhanced economic security may translate into political and other forms of power. The critical question, along this dimension, is to what extent immigrants' economic fortunes are improving or becoming more secure.

Finally, beyond the obvious cultural and economic indicia of immigrant adaptation, other forms of adjustment to life in a new society are also worth measuring and facilitating. Various forms of socio-political adjustment will be part of any immigrant's transition to a full and complete life in society. Forms of social integration, such as participation in churches, schools, and community groups such as sports leagues will be part of the formation of the social support networks essential to living a stable life. In many instances, these networks will be made up of co-ethnics. But it would be a mistake to consider the existence of such affiliations as a sign of failure to assimilate, for these affiliations are crucial to the accumulation of social capital necessary for survival and social development in a new society, and they complement or offset the challenges of entering into more integrated environments.<sup>46</sup>

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<sup>46</sup> Id at 90 (“[I]mmigrant youths who remain firmly ensconced in their respective ethnic communities may, by virtue of this fact, have a better chance for educational and economic mobility through use of the material and social capital that their communities make available.”). See also Suárez-Orozco, *Everything You Wanted to Know About Assimilation* at 80 (cited in note 18). Suárez-Orozco notes that:

[M]aintaining a sense of belonging and social cohesion with their immigrant roots is equally important [to developing skills and work habits required to thrive today]. When immigrant children lose their expressive culture, social cohesion is weakened, parental authority is undermined, and interpersonal relations suffer. The unthinking call for immigrant children to abandon their culture can only result in loss, anomie, and social disruption.

Id. See also Lily Wong Filmore, *When Learning a Second Language Means Losing the First*, in

Immigrant social networks might also facilitate pre-citizenship political activity or the organization of immigrants in defense of their interests. Examples of such organization include participation in labor unions, which connect immigrants not only with their own co-ethnics, but also with members of other immigrant groups and native-born Americans.<sup>47</sup> By participating in what scholars have called economic or labor citizenship,<sup>48</sup> immigrants develop the capacity and incentive to engage fellow workers and citizens to articulate and defend mutual interests—a process likely to promote social connectedness as well as broader forms of concerted or political action. The immigrants’ rights demonstrations held across the country in the spring of 2006 also reflect a form of pre-citizenship political activity, as do efforts to organize immigrants at the local level to agitate for government attention, including the right to vote in some contexts.<sup>49</sup>

By defining assimilation in cultural, economic, social, and political terms, I am not suggesting that these concepts are themselves singular or that other forms of adaptation are irrelevant in assessing how immigrants incorporate. Rather, this taxonomy emphasizes that assimilation is a multifaceted phenomenon whose dimensions sometimes reinforce one another, and sometimes outpace one another for different immigrant individuals and groups.

The common thread among each of these forms of adjustment, however, is that their unfolding requires agency and hence, mobility. Cultural assimilation will depend on access to communities outside the world of co-ethnics. Economic advancement similarly will depend on the ability to take advantage of the market. But the viability of this movement also depends on immigrants’ ability to withstand its inevitable challenges. Particularly for immigrants who have not yet learned English, achieving economic advancement will depend on the existence of some kind of social safety net. This support could come in the form of accessible (for example, translated and interpreted) government or employer assistance, but often it will come in the form of social and political support provided by families, immigrant social networks, and formally organized immigrant groups, as well as larger social groups with immigrant organizing agendas, such as labor unions.

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Suárez-Orozco, Suárez-Orozco, and Qin, eds, *The New Immigration*, 289, 302–06 (cited in note 18) (describing how children’s loss of their capacity to speak a home language has dramatic implications for family relations, as well as for children’s capacities to socialize).

<sup>47</sup> See generally Ruth Milkman, ed, *Organizing Immigrants: The Challenge for Unions in Contemporary California* (ILR 2000). I discuss how immigrant organizing is facilitated through the use of Spanish and other languages in Cristina M. Rodríguez, *Language Diversity in the Workplace*, 104 *Nw U L Rev* 1689 (2006). This phenomenon underscores how the process of assimilation depends on the mobilization of the “hybrid identities and bi-cultural capacities” discussed above. See Suárez-Orozco, *Everything You Wanted to Know About Assimilation* at 80 (cited in note 18).

<sup>48</sup> See Jennifer Gordon, *Transnational Labor Citizenship*, *S Cal L Rev* (forthcoming 2007) (articulating a concept of “labor citizenship” that refers to “participation by workers in collective efforts to achieve recognition of and compensation for their economic contributions to society”).

<sup>49</sup> See Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 63 (Routledge 2006).

Exercising mobility thus depends on having security anchors that compensate for the risks that movement entails. Mobility, therefore, should not be understood as a straight line out of immigrant communities, but rather as a form of action that enables movement in and out of immigrant sectors and that, in some cases, depends on those sectors to make movement possible.<sup>50</sup> In short, incorporation requires attention not just to immigrants' chances outside of their own communities, but also to the dynamics and hence vitality of those communities themselves.

### C. Receiving Society Adaptation

It is relatively easy to identify the types of adjustment immigrants undergo when they reach the United States, and the fortunes of immigrants can be compared to those of the native born, enabling us to estimate how well immigrants are adapting to life in the United States. But what assimilation means for the receiving society is somewhat more obscure and difficult to describe, particularly when we shift our focus from the short-term impacts created by the initial arrival of immigrants to the medium- and longer-term changes engendered by gradually assimilating immigrants and their descendants.

Immigration clearly changes the geography of the host society, and that change is easy to see in the short term. Each period in American immigration history is characterized by the emergence of unique immigrant neighborhoods and towns, where languages other than English thrive for some period of time, and where ethnically defined businesses and civic groups persist even longer.<sup>51</sup> But these communities change in character as time passes. Some immigrant neighborhoods eventually disappear as immigrants gradually integrate with the population at large over one or two generations, perhaps maintaining ethnic restaurants and festival-like traditions, in the spirit of New York's Little Italy. Some immigrant neighborhoods remain immigrant neighborhoods but become populated by new groups of immigrants—a trend exemplified by the transformation of New York's Lower East Side in the twentieth century.

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<sup>50</sup> Some of the latest research on immigrant assimilation describes the process as segmented:

Instead of a relatively uniform mainstream whose mores and prejudices dictate a common path of integration, we observe today several distinct forms of adaptation. One of them replicates the time-honored portrayal of growing acculturation and parallel integration into the white middle-class; a second leads straight in the opposite direction to permanent poverty and assimilation into the underclass; still a third associates rapid economic advancement with deliberate preservation of the immigrant community's values and tight solidarity.

Portes and Zhou, *The New Second Generation* at 90 (cited in note 38).

<sup>51</sup> Consider John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925* (Rutgers 2002); Heinz Kloss, *The American Bilingual Tradition* (Center for Applied Linguistics and Delta Systems 1998); Aristide Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Russell Sage 2006).

This narrative of transition suggests the gradual disappearance of the immigrant identity and contribution. But surely large-scale immigration leaves a mark on the receiving society, even as the immigrant generation gives way to the second or third generation and immigrant neighborhoods disappear. Perhaps the clearest long-term change that has resulted from immigration is the religious pluralism of our society.<sup>52</sup> Though Catholicism and Judaism as practiced today may look considerably different from the religions as practiced by the European immigrants of the early twentieth century, religious pluralism, unlike linguistic pluralism, has persisted across generations despite the virulent nativism directed toward the immigrant groups that brought those faiths to the United States.<sup>53</sup>

Apart from these obvious transformations, the long-term changes resulting from immigration elude straightforward measurement; as immigrant contributions become normalized into generally accepted ideas of regional or American culture, the immigrant origins of those contributions can be difficult to pinpoint. Take the case of the German immigration of the late nineteenth and early twentieth centuries. Before World War I, the Midwest was populated by thriving German communities. Some cities, such as Cincinnati, supported German-language schools, and some local governments functioned in German.<sup>54</sup> Through a process of assimilation accelerated by extreme public and legal coercion during World War I, however, German ethnic identity and cultural institutions became increasingly marginal, and the German language has almost no presence in the United States today.<sup>55</sup> It nonetheless seems implausible that German immigration had no impact on American culture. But how would we describe that impact? Can it be reduced to picturesque German architecture and the German-language surnames that are considered to be mainstream American, or did German immigration have some more fundamental impact?

A second narrative of transition adds further complexity to this picture. In some cases, despite the passage of time, neighborhoods, towns, and even regions retain an identifiable ethnic orientation, with varying levels of immigrant presence interspersed among a larger population of English-dominant residents who may still identify in some way with either the cul-

<sup>52</sup> See, for example, David Rieff, *Nuevo Catholics*, NY Times Mag 640 (Dec 24, 2006) (discussing the general decline of Catholicism in the U.S. along with its growth in Hispanic areas of the U.S.).

<sup>53</sup> For an account of this nativism, see Higham, *Strangers in the Land* at 60–63, 66–67, 160–61 (cited in note 51) (describing nativism directed towards Catholics, Italians, and Jews).

<sup>54</sup> See, for example, Zolberg, *A Nation by Design* (cited in note 51). [ED: I know Zolberg has extended discussions of German immigrants in his book. I unfortunately left this till the last minute before leaving the country and haven't been able to check for pincites, or for specific reference to Cincinnati—hopefully I can find such a source in the last round.]

<sup>55</sup> John Higham describes this anti-German hysteria that took hold after 1915. Local officials banned the sale of German newspapers, various states banned the teaching of the German language in the public schools on the theory that the study of language “served to inculcate un-American ideas,” German opera was boycotted, sauerkraut became known as “liberty cabbage,” and “many towns, firms, and individuals with German names changed them.” See Higham, *Strangers in the Land* at 208 (cited in note 51).

ture of origin, or some form of ethnic culture that has developed over time inside the United States. The Latino communities of the Southwest and major American cities exemplify this pattern. Though it may be occurring today in unprecedented numbers, immigration from Latin America is hardly a new phenomenon (and Latino presence is not all the result of immigration). Names, idioms, customs, and forms of aesthetic culture shaped through the interaction of new immigrants and established Latino communities are etched into the identities of communities around the country and may be accurately described as “mainstream.”

The complexity of identifying long-term immigrant contributions again underscores that our immigration policy should not attempt to achieve defined cultural outcomes. As with the process of immigrant adaptation, my primary purpose is not to identify or describe the long-term changes immigration brings to the receiving society. Though it would provide a nice bookend to the trans-generational work describing how immigrants have fared, identifying the new “mainstream” that emerges with each successive wave of immigration is largely beside the point. Struggling to identify the contributions of immigrant generations after they have first arrived distracts attention from the far more pressing task of facilitating the absorption of the immigrants currently seeking entry. It is sufficient to emphasize that the receiving society changes as a result of immigration and therefore participates in and negotiates the process of assimilation, just as immigrants do.

And just as the relevant focus of the inquiry into immigrant adaptation should be on the process of adaptation, our focus when considering the receiving society’s transformation should be on the mechanisms the receiving society uses to adjust—on the reciprocal willingness and ability of the receiving society to adapt to demographic change. The relevant descriptive questions include: what immediate changes does the host society experience as a result of immigration, and what forms of adaptation emerge in response?

Two central features of current immigration make this inquiry more concrete. First, as noted at the outset, a guest worker program would primarily address migration from Mexico and Latin America. Focusing our discussion of immigration in this way makes the issue of receiving-society assimilation easier to manage. The effects of migration run the gamut from the aesthetic and environmental to the structural and institutional. The environmental effects include the prevalence of the Spanish language in public spaces, from workplaces across the country<sup>56</sup> to the streets and storefronts of American cities and towns, through ever-expanding Spanish-language media,<sup>57</sup> and a services sector more focused on Latino communi-

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<sup>56</sup> I discuss in detail the impact immigration and language diversity have had on American workplaces in Rodríguez, 104 Nw U L Rev at 1689 (cited in note 47).

<sup>57</sup> See generally Arlene Davila, *Latinos, Inc.: The Marketing and Making of A People* (Cal 2001)

ties. Through the profusion of Spanish-speaking students and patients, many of whom are vulnerable because of their undocumented status, public institutions such as schools and hospitals feel the immediate effects of immigration generally, and unauthorized immigration in particular. Finally, by contributing to the growth of the Latino population, immigration is transforming the political stature of Latinos by capturing the attention of politicians looking to secure votes, though it remains too early to specify the full extent of this effect.<sup>58</sup>

The second distinctive feature of current immigration is its impact on the demography of states, suburbs, and rural areas with limited pre-1990 experience with immigration.<sup>59</sup> Though they remain concentrated in the so-called gateway states and cities,<sup>60</sup> many immigrants are bypassing these traditional destinations and settling in suburban and rural areas with minimal previous exposure to immigrant communities, as well as in states not traditionally associated with immigration.<sup>61</sup> North Carolina, for example—a state historically without a Latino population—has one of the fastest growing populations of Latino immigrants in the country<sup>62</sup>

Immigrants are transforming these new destinations demographically, and the response of the destinations' residents has been mixed. A recently released study of five of the new immigration states reveals a similar pattern of adjustment in each location: states and localities initially accommodate the immigrant influx, in some cases actively recruiting new immi-

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(assessing how the Spanish-language media in the United States are constructing conceptions of *latinidad*, or Hispanic identity).

<sup>58</sup> Early analyses of the 2006 mid-term elections noted the significance of the shift of Latino voters from Republicans to Democrats, a shift of greater magnitude than the reorientation of blacks and whites. Pew Hispanic Center, *Latinos and the 2006 Mid-term Election 2* (Pew Hispanic Center Nov 27, 2006), available at <<http://pewhispanic.org/files/factsheets/26.pdf>> (last visited Jan 20, 2007). An early study of exit poll data conducted by the Pew Hispanic Center revealed an 11-point swing between 2004 and 2006 in favor of Democrats, whereas the swing among white voters was 6 percent. *Id.* According to the study, “something distinctive occurred among Latino voters this year that rewarded the Democrats and punished the Republicans,” *id.* at 2, but it would be premature to connect that “something distinctive” to the immigration issue, considering the mixed results on the immigration question in Arizona. *Id.* at 3. See also Maria Echeveste, *Rising Tide: What the Midterm Election Results Tell Us About Hispanic Voters*, *Am Prospect* (Dec 22, 2006), available at <<http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=12350>> (last visited Jan 20, 2007) (assessing the 2006 election results and concluding that Latinos have nuanced views with respect to immigration and that the Latino population in the United States is diverse linguistically, culturally, and politically).

<sup>59</sup> See Waters and Jiménez, 31 *Ann Rev Sociol* at 107 (cited in note 20) (noting that though the regional concentration of immigration is inescapable, a statistically significant number of immigrants have been bypassing the traditional gateway cities and states and settling in suburban and rural communities, as well as in states that, historically, have not received much immigration).

<sup>60</sup> Traditional gateway states include California, Texas, New York, Florida, and Illinois. See Alba and Nee, *Remaking the American Mainstream* at 9 (cited in note 29).

<sup>61</sup> See Waters and Jiménez, 31 *Ann Rev Sociol* at 107 (cited in note 20).

<sup>62</sup> See Paula D. McClain, *North Carolina's Response to Latino Immigrants and Immigration*, in Greg Anrig, Jr. and Tova Andrea Wang, eds, *Immigration's New Frontiers: Experiences from the Emerging Gateway States 7* (Century Foundation 2006).

grants.<sup>63</sup> This openness eventually gives way to more restrictive measures, such as denying immigrants access to public benefits.<sup>64</sup> Today's status quo in most of these states is characterized by ambivalence, particularly when it comes to the growth of the undocumented population. Policymakers engage in regular efforts to reconcile the commitment to accommodation with the trepidation felt by existing residents because of their (often inaccurate) perception that their communities are becoming unrecognizable and even dangerous due to immigration.

The proliferation in the last year of local government ordinances that would prohibit landlords from renting to undocumented immigrants or deny city contracts to employers who hire undocumented workers represents another significant data point in the discussion of receiving-society adaptation.<sup>65</sup> These ordinances are overtly addressed to the specific problem of illegal immigration, but they arguably represent part of a larger struggle to adapt to and resist immigration more generally—a form of resistance to demographic change. Indeed, the fact that many of the ordinances passed include official English declarations, which in addition to proclaiming the need for commonality also claim that “in today's modern society, [the city] may also need to protect and preserve the rights of those who speak only the English language,”<sup>66</sup> suggests that the concern is not exclusively over immigration of the illegal variety. Whether the issue is day laborers congregating on street corners, the perception of overburdened public hospitals, or the dramatic rise of non-English-speaking students in the local schools, local communities are reaching for ways to handle what many people perceive to be threats to their ways of life. In the same way that immigrants often seek to insulate themselves from the challenges of life in a new society by relying on networks of co-ethnics, residents of places newly exposed to immigration strive to insulate themselves from changes they find overwhelming.

This cycle of acceptance, followed by restriction, and culminating in ambivalence, is of course not an innovation of the new immigration states. Traditional gateway states and the federal government cycle through these same stages, with measures like Proposition 187 in California and Con-

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<sup>63</sup> See Greg Anrig, Jr. and Tova Andrea Wang, *Introduction*, in Greg Anrig, Jr. and Tova Wang, eds, *Immigration's New Frontier: Experiences from the Emerging Gateway States 2* (Century Foundation 2006).

<sup>64</sup> Id. In another work, I explore the critical role that state and local governments play in the process of immigrant integration and argue that a coherent immigration system requires state and local participation in immigration matters. See Cristina M. Rodríguez, *Mich L Rev* (forthcoming 2008).

<sup>65</sup> The Fair Immigration Reform Movement has compiled a representative list of the local ordinances passed, as well as those defeated, since the movement began in San Bernardino, California, whose City Council ultimately blocked the ordinance. FIRM's documentation of the ordinances is available at <http://www.immigrationsolidarity.org/Documents/Nov06OverviewLocalOrdinances/> (last visited Jan 20, 2007).

<sup>66</sup> See City of Hazelton, *Official English Ordinance 2006-19*, available at [http://www.hazletoncity.org/home\\_frameset.htm](http://www.hazletoncity.org/home_frameset.htm) (last visited Jan 20, 2007).



gress's 1996 immigration overhaul representing the most recent peak of restriction.<sup>67</sup> The examples of local ambivalence and resistance in the new immigration states simply underscore that discussions about how best to ensure immigrant incorporation must include consideration of the mechanisms and attitudes the receiving society adopts to deal with immigration—of the coping mechanisms, so to speak.

Many of these coping mechanisms seriously complicate the lives of immigrants. Today's local ordinances, the 1996 welfare reforms that denied immigrants access to a range of public benefits,<sup>68</sup> and drives to ban bilingual education or declare English the official language<sup>69</sup> all reflect resistance to immigration and immigrant presence in some way. Whether or not these measures are preempted or constitutionally prohibited, and whether or not they express legitimate concerns, they stand in the way of incorporation—some more obviously than others.<sup>70</sup> Measures designed to limit immigrants' choices, to cut back on programs designed to assist immigrants, to exclude immigrants from participating in generally available programs and generally open institutions, or to define belonging in terms that exclude immigrants because of language or other cultural differences, conspire to make incorporation difficult. Again, some of these restrictions

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<sup>67</sup> Law of Nov 8, 1994, 1994 Calif Legis Serv Prop 187 (nullified by injunction); IIRIRA Pub L No 104-208, 110 Stat 3009-546 (1996), codified at 8 USC §§ 1101 note et seq and 5 USC § 552 note (1996).

<sup>68</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) significantly limited immigrant eligibility for various means tested benefits programs. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L No 104-193, 110 Stat 2105 (1996), codified in scattered sections of 8, 26, and 42 USC.

<sup>69</sup> For a discussion of these initiatives, see Rodríguez, 94 Cal L Rev at 751–54, 759–65 (cited in note 28).

<sup>70</sup> Denying immigrants access to public benefits arguably impedes economic advancement by removing temporary safety nets, as well as longer term forms of insurance, such as health care coverage for adults and children alike. Though no court has ever found a right to bilingual education, and as it has been implemented, bilingual education has produced mixed results, the social science evidence largely suggests that well designed bilingual education programs are more effective at promoting language and other achievement among students than English immersion programs. See H.D. Adamson, *Language Minority Students in American Schools: An Education In English* 231–32 (Lawrence Erlbaum 2005) (citing research showing that well-run bilingual programs are effective, but that not all bilingual programs are well-run); Robert E. Slavin and Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 Rev of Educ Rsrch 247, 273 (2005) (reviewing seventeen studies of various language programs, twelve of which found positive effects of bilingual education and none of which found results favoring English immersion); Wayne P. Thomas and Virginia P. Collier, *A National Study of Effectiveness for Language Minority Students' Long-Term Academic Achievement* Executive Summary 7 (Center for Research on Education, Diversity and Excellence 2003), available at <[http://crede.berkeley.edu/research/llaa/1.1.pdf/1.1\\_01es.pdf](http://crede.berkeley.edu/research/llaa/1.1.pdf/1.1_01es.pdf)> (last visited Apr 3, 2007) (finding that bilingually schooled students outperformed comparably monolingually schooled students after four to seven years of dual language instruction). Though these studies are not unassailable, and though there is an absence of good data on the subject, this research suggests that the measures passed by states such as Massachusetts, California, and Arizona that prohibit the use of native language in the instruction of English language learners sacrifices policy flexibility and rationality at the expense of immigrant children and in favor of an ideological agenda. For more detailed discussion of this issue, see Rodríguez, 94 Cal L Rev at 758–65 (cited in note 28).

may be justified by cost concerns and political calculations, and some may be supported by legitimate ideological positions, but they nonetheless add friction to the process of assimilation.

The emergence of these forms of adjustment to the perceived problems engendered by immigration ultimately force us from the descriptive to the normative—from assessing reaction to defining the degree of reciprocal adaptation required for immigrant incorporation to be successful. The subsequent and inescapable normative inquiry revolves around determining which forms of adaptation facilitate the process of immigrant incorporation and which forms of adaptation work at cross purposes with the goal of incorporation. What type of reciprocity is required on the part of the receiving society? What forms of adjustment on the part of the receiving society actually facilitate the incorporation process?

#### D. From Adaptation to Reciprocity

In defining the term “reciprocity,” I should be clear that I intend to use it in two different senses. I first consider reciprocity in a narrow sense, addressing the policy realm, by focusing on the forms of adaptation by the receiving society that are required to ensure a peaceful process of immigrant assimilation—reciprocity as a mechanism of integration. The question, under this definition of reciprocity, becomes what sorts of attitudes or practices adopted by the receiving society aid the process of assimilation.

But I also intend reciprocity to have a broader meaning, based on the conceptions of social obligation and mutual cooperation that ought to characterize a liberal society. The obligation to adopt immigration policies that promote the integration of immigrants represents the flipside of the obligation put on immigrants to adapt. This concept of reciprocity is, in a sense, a form of ideal theory. Though it is based on an appreciation of current demographic realities, its focus is on the ideal way of adapting to those realities.

In taking this approach, I acknowledge that the U.S. has a long tradition of reciprocity failures or nativist reactions to new immigrant groups. Often the forms of adaptation adopted by Americans in response to immigration have been coercive and exclusionary, as the preceding discussion makes clear. The classic work on American nativism remains John Higham’s *Strangers in the Land*,<sup>71</sup> which is filled with examples of anti-immigrant measures that have analogues today, though generally in less extreme form. Nativism as a form of host society adjustment thus may be inescapable, and it complicates the reciprocity question by introducing the dilemmas of politics into the equation. If there is an absence of political will to support an immigration policy that will promote integration, either because the public has temporarily rejected the goal of integration, or be-

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<sup>71</sup> Higham, *Strangers in the Land* (cited in note 51).

cause it cannot see the connection between immigrant-friendly policies and long-term assimilation,<sup>72</sup> then policymakers will be in a bind. On the one hand, the persistence of anti-immigrant anxiety should lead policymakers to attempt to counteract these tendencies as best they can, by trying to inject rationality into the policy process and use immigration policy to encourage and obligate Americans to act reciprocally. At the same time, to prevent anti-immigrant backlash or to achieve a second best solution when perfect policies are not achievable, policymakers must sometimes compromise.

Because I recognize the fickleness of Americans' attitudes toward immigrants and immigration, I take two tacks in the remainder of this Article. I first and foremost emphasize the sorts of reciprocity that will best facilitate integration, as well as the types of reciprocity we ought to exhibit—factors I argue in Part II should lead us to reject temporary worker programs. But in a concession to the difficult politics of the immigration issue, I also consider in Part II how a guest worker program, as a second best solution, could be devised to meet the requirements of reciprocity as closely as possible, given current political constraints.<sup>73</sup>

### 1. Reciprocity as a matter of policy.

As I have noted, we must take large-scale immigration as a given and focus on what happens to immigrants and the host society alike as immigrants build new lives in the United States. By accepting that a certain amount of low-skilled Latin American immigration is inevitable for push and pull reasons, I begin from the same premise as those who champion guest worker programs, because those champions seek to channel what are now illegal forms of immigration through legal channels. Channeling this inevitable immigration through expanded legal mechanisms is certainly

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<sup>72</sup> The political climates that produced Proposition 187 and the 1996 immigration and welfare reforms could be said to reflect both circumstances.

<sup>73</sup> For a similar approach, see Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 Chi Kent L Rev 291 (2003). Chang observes that guest worker policies are only second-best policies from the perspective of principles of liberal justice, but that they represent an improvement over the status quo and are an acceptable compromise in a world in which Americans appear unwilling to bear the burdens that more liberal policies would impose. Id at 294–95. Chang takes the position that liberal ideals of equality require us to treat all individuals with equal concern, which makes our immigration restrictions difficult to justify and tantamount to a form of employment discrimination, given that the restrictions prevent would-be immigrants from accessing jobs in the U.S. economy on the basis of immutable characteristics. Id at 295–303. He concedes, however, that “[t]he self-interest of natives . . . is bound to impose constraints of political feasibility on the availability of immigrant visas,” and that “[a]s long as natives are limited in their willingness to bear fiscal burdens, they are likely to restrict alien access to permanent residence.” Id at 322. The resulting restrictions “would likely exclude many unskilled aliens from the U.S. labor market unless they are willing to immigrate illegally or have access to guest worker visas.” Chang, 78 Chi Kent L Rev at 322. Given these political constraints, guest worker programs “may represent the only alternative to illegal immigration for aliens otherwise excluded from the U.S. labor market”, and therefore these programs would enhance the welfare of natives and immigrants alike, compared to the “politically feasible alternatives.” Id at 323.

preferable to the status quo. It is also preferable to a policy posture that places unrealistic faith in new technology's ability to seal the border and then attempts to manage subsequent crises of illegal immigration through post-hoc legalization efforts. But then critical questions arise: what legal mechanisms should we devise? Through what forms of adjustment should the receiving society facilitate the incorporation of these inevitable immigrants? The design of these legal mechanisms—an issue I consider in detail in Part II—is crucial.

As a general matter, reciprocity requires a willingness to assist as well as a willingness to adapt. Willingness to assist might take the form of a commitment to providing translation and interpretation services in the public and private sectors in order to make institutional bureaucracies and social institutions navigable to non-English-speaking immigrants. The willingness to devote resources to such services acknowledges that the process of learning English takes time, but it also reflects what might seem counterintuitive: translation and interpretation are mechanisms of integration. They build immigrants' trust in and understanding of the public sphere, and they help immigrants develop social and cultural capital in the form of knowledge of the system—capital that need not depend on an ability to speak English. Willingness to assist might take the shape of making public programs available to citizens also available to immigrants, reversing the spirit of the 1996 immigration reforms. Finally, willingness to assist might also include indicating openness to immigrants as political actors, by granting them voting rights, perhaps initially in local elections, or by responding to their political manifestations, such as the spring 2006 demonstrations, as we would respond to the political mobilizations of fellow citizens—not with incredulosity, but with recognition of the legitimacy of their concerns and a willingness to consider them in policy debates.

The meaning of willingness to adapt is more elusive. At bottom it requires openness to change, even when that change disrupts one's environment. Signs of adaptation might include liberal views toward future immigration, a public discourse that focuses less on sealing the border than on practical responses to demographic changes, or more widespread public recognition of the net benefits that immigration generates for the United States and the hemisphere as a whole.

In the context of the current debate, willingness to adapt should translate into willingness to substantially increase the number of unskilled immigrants permitted to enter legally—another assumption I share with those who support guest worker programs. This type of adaptation reflects the realization that we cannot enforce our way out of the illegal immigration problem—either because increased enforcement is unlikely to succeed in suppressing the market forces at work, or because the cost of optimal enforcement is too high, given that immigration produces economic benefits to the country.

In fact, as I already have suggested, to fail to adapt in this way would be to perpetuate the status quo of high levels of undocumented immigration—a circumstance that would substantially impede immigrant assimilation. Undocumented status, which really means the absence of legal status, impedes integration because of the obvious constraints it places on the individual immigrant and his family from operating as fully functional members of society. Moreover, the presence of a large undocumented population erodes public support for immigration and prompts the adoption of restrictions that often affect legal immigrants and their co-ethnic citizens.<sup>74</sup> The equation of immigration with lawlessness creates trepidation regarding immigration. While it is difficult to isolate the extent to which the current batch of restrictive proposals at the federal, state, and local levels are a response to the mushrooming of the undocumented population, as opposed to more general ambivalence about immigration itself, neutralizing the discourse of illegality would certainly help soften attitudes toward immigration.<sup>75</sup>

Finally, willingness to adapt includes openness to the possibility that American culture will come to resemble immigrant culture. This openness might include adopting some of the customs of immigrant groups (forms of celebration, holiday observances, or cuisine), or targeting media, entertainment, advertising, and consumer products to immigrant preferences. More significant signs of adaptation would entail open as opposed to closed attitudes toward language difference—rules that accept linguistic pluralism in certain settings, such as in the workplace or in public spaces, rather than rules that prohibit the speaking of non-English, or attempts to drive languages other than English out of the public sphere.<sup>76</sup> In its most developed form, this kind of adaptation would include willingness on the part of native English speakers to learn Spanish or other widely spoken languages. It also would involve acceptance by the white population of its status as one of many ethnic groups, as opposed to the dominant ethnic group. Whites would have to accept the status, in certain parts of the country, as a minority.<sup>77</sup>

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<sup>74</sup> See, for example, Yvonne Abraham, *Denied licenses, legal immigrants sue state Registry*, Boston Globe A1 (Dec 15, 2006) (reporting on the filing of a class-action lawsuit claiming that employees of the Massachusetts Registry of Motor Vehicles, in their efforts to ensure that undocumented immigrants are not issued drivers licenses, are denying lawful immigrants licenses); Press release by MALDEF, LULAC, NCLR, NALEO, *National Latino Organizations Express Concern about Recent Immigration Raids* (Dec 21, 2006), available at <<http://www.nclr.org/content/news/detail/43451/>> (last visited Jan 20, 2007) (condemning the December raids by ICE of the Swift meat packing plants for, among other things, racial profiling and targeting of lawful permanent residents).

<sup>75</sup> Support for a guest worker program might seem, at first glance, to be precisely the sort of adaptation I am suggesting. But though a temporary worker program would be preferable to the status quo, for reasons I explore at length in Part II, it is not the form of adaptation policymakers should adopt.

<sup>76</sup> I have discussed the English-only workplace rule as a sign of reluctance to adapt at length in Rodríguez, 104 Nw U L Rev at 1689 (cited in note 47).

<sup>77</sup> See Myers, *Immigrants and Boomers* at 38 (cited in note 23) (considering California, where

Our history is full of examples of these sorts of adaptations, just as it is full of instances of restrictions like the local ordinances currently being debated. The point of exploring the meaning of willingness to assist and adapt is not to suggest that these forms of adaptation would require a wholesale rethinking of our responses to immigration, nor that all immigrant admissions policies must bear these hallmarks. Rather, this discussion highlights the attitudes and tendencies we should foster when debating how to rework our immigration policy to respond to changing pressures on our borders.

## 2. Reciprocity as obligation.

As I have framed them thus far, questions of reciprocity are first and foremost matters of policy. But these complex policy questions are not wholly separable from the discrete and equally difficult questions of moral and political obligation. Adaptation by the host society, in addition to facilitating assimilation by reducing the friction that the arrival of new immigrants inevitably produces, is also arguably required as a matter of obligation—a point emphasized by the 1997 Commission on Immigration Reform, which employed the language of obligation to describe the responsibilities of both immigrants and the receiving society.<sup>78</sup> Even if a guest worker program serves the function of reducing illegal immigration, or is reasonably conducive to integration, it might not meet the demands of political fairness or justice.

But from where does the obligation to integrate immigrants come, and what is its scope? Political theorists have given sustained attention to the rights nation-states possess to exclude immigrants, as well as to the obligations nation-states have to admit certain types of migrants, namely refugees.<sup>79</sup> But little consideration has been given to the extent to which Americans might have obligations to integrate not only the immigrants Congress admits, but also those who have crossed and will continue to cross our borders illegally. Indeed, much of the discussion of immigration and justice accepts the assumption that we have the ability to control who enters the United States and to shape the body politic according to standards that conform to conceptions of justice, or to conceptions of who we want in our society.

A number of political philosophers, in addressing the phenomenon of globalization and the rise of international systems and institutions, have

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whites are no longer a majority of the population, as a “bellwether state” that should motivate Americans to consider immigrant integration as an investment in the country’s future).

<sup>78</sup> See United States Commission on Immigration Reform Report to Congress, *Becoming an American: Immigration and Immigrant Policy* 28 (1997).

<sup>79</sup> For a series of essays on this topic, see Warren F. Schwartz, ed, *Justice in Immigration* (Cambridge 1995). See also Michael Blake, *Discretionary Immigration*, 30 *Philosophical Topics* 273, 273 (2002) (defining discretionary immigration as “immigration . . . wherein the decision to admit the prospective immigrant is not itself demanded by liberal morality”).

made the claim that institutional relationships beyond those set up by the nation-state connect individuals of different citizenships to one another, imposing obligations of justice on their relationships. As Iris Marion Young has explained in her analysis of the anti-sweatshop movement, these theorists posit that

reciprocal obligations of justice obtain between most if not all [people,] not simply because they are human nor because they live under the same political constitution, but because they all depend to some degree on schemes of social cooperation which they presuppose in making their own plans or to which they contribute by their actions.<sup>80</sup>

It is, of course, difficult to pinpoint individual responsibility for these large-scale relationships, particularly when individuals do not represent the primary cause of these relationships,<sup>81</sup> but the fact of general social participation in these interdependent structures supports the notion that members of societies have obligations to one another by virtue of this participation.

How far these obligations extend, of course, is the difficult question. The answer must turn on the nature of the relationship under consideration. My claim here is that the case for interconnectedness giving rise to obligation is stronger and easier to define in the context of immigration than within a more general and amorphous framework of global justice. Because of conditions of interdependence, we can speak of our relationship to immigrants in the language of political obligation, whether those immigrants are here in compliance with the terms set out by Congress or in violation of them.

The circumstances of immigration only heighten the salience of this interdependency argument and make the scope of the obligation somewhat easier to discern. As Alejandro Portes and Rubén Rumbaut demonstrate, Mexican migration to the U.S. in particular is the result not of “individual calculations of gain,” but of “forces buried deep in the history of the relationships between both nations.”<sup>82</sup> Those forces are, of course, economic, and have been accelerated by the North American Free Trade Agreement, resulting in Mexico becoming “the real labor reservoir for the American

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<sup>80</sup> See Iris Marion Young, *Responsibility & Global Labor Justice*, 12 *J of Pol Phil* 365, 373 (2004).

<sup>81</sup> See Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* 39 (Oxford 2001) (“[W]hen an outcome is the joint result of the actions of a number of people, including ourselves, we tend to see our own agency as implicated to a much lesser extent than we do when we take an effect to have resulted solely from our own actions.”).

<sup>82</sup> See Portes and Rumbaut, *Immigrant America* at 352 (cited in note 21). See also Massey, Goldring, and Durand, 99 *Am J Sociol* at 1500 (cited in note 21) (describing the self-perpetuating character of migration networks).

economy.”<sup>83</sup> But they are also the result of a history of contact and colonization between the two societies.<sup>84</sup> The upshot of these observations is that migration, particularly from Mexico and Latin America, is the product not only of our own current economic needs and choices, but also of the economic and foreign policy choices that preceded us. In other words, immigration to the United States is the function of choices of which we as a society are the authors. These choices have given rise to an interdependence not only with immigrants who have already arrived, but also with future immigrants, which in turn requires us to recognize certain reciprocal obligations that arise from our associations with others, regardless of borders.

But what is the content of those reciprocal obligations? Why is the obligation not fulfilled in the form of foreign aid or through fair trade policies? This obligation must be reflected in our immigration policy, for the simple reason that our interdependence with Latin America does not just produce certain conditions abroad, it has given rise to and will continue to give rise to populations of actual people within our borders. In other words, the consequences of our interdependence are intimate and immediate and result in person-to-person relationships that are not simply abstract, as in the context of globalization, but physical and real. That this interdependence has produced in-person forms of association creates an obligation and need for social cooperation in the context of American society, which in turn should translate into an obligation to share spaces and institutions—both social and political.

The fact that much immigrant presence today is unauthorized by our law does not undermine these points. Indeed, the interdependence that exists as a matter of fact, despite the absence of legal sanction, simply underscores that interdependence is the product of decentralized choices by market participants and family and social networks, not just the product of decisions by a centralized sovereign. The significance of immigrants’ presence as the result of our interdependence is only heightened by the *jus soli* rule of citizenship; their presence means that children born while they are here, as a matter of constitutional right, belong to our political community, tightening the associative connections between U.S. citizens and the people from other societies with whom we associate through immigration.

This interdependence, resulting in physical and social interconnectedness on U.S. soil, provides the strongest basis to support an obligation to incorporate immigrants, but the obligation to integrate current and would-be immigrants might also come from the fact that Americans generally

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<sup>83</sup> Portes and Rumbaut, *Immigrant America* at 352 (cited in note 21) (“[B]y reason of size, geographic proximity, and history, Mexico has become the real labor reservoir of the American economy.”).

<sup>84</sup> *Id.* at 353.



benefit from immigration.<sup>85</sup> The obligation could stem from the fact that we choose neither where we are born, nor into what station we are born, and we therefore have no inherent entitlement to restrict movement between social strata and locales. Certainly the obligation lies somewhere between the obligations we owe to our compatriots and our cosmopolitan duties to others throughout the world.<sup>86</sup>

Ultimately, the obligation to integrate is based on a necessary expansion of the political community beyond the community of U.S. citizens and those admitted for lawful permanent residence to those with whom, through the ebb and flow of migration, we will predictably and consistently associate—not only in the sense of hemispheric economic interdependence, but through the quotidian person-to-person contacts that this interdependence produces—relationships that will arise with or without legal sanction. Those who fall into this category are not truly strangers, and the citizen/stranger dichotomy on which many existing theories of mutual obligation depend does not fully address the state of affairs implicated in today's immigration debate.

For a variety of reasons, it is vital that this question of obligation inform our immigration policy debates and that it do so with reference to specific forms of interdependency, as the nature of obligation will change depending on the nature of the relationship under examination. First, immigration policy, by exerting control over the migration of people into the United States, implicates the United States as a sovereign entity and therefore implicates not only the interests of U.S. citizens and residents and their domestic labor needs, but also the proper role of the United States in the world and the interests of other sovereigns and their people. As such, immigration policy should be informed by the obligations owed by the United States and its people to the world beyond its borders—particularly to the

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<sup>85</sup> There is an active debate among economists about whether and the extent to which the United States benefits from immigration. There appears to be a strong consensus that the economy as a whole benefits but that the costs are largely born by low-wage American workers with limited education. These redistributive consequences should not be dismissed, but they are limited and arguably better dealt with through more direct forms of intervention and training than immigration restrictions. For a discussion of this literature, see generally Chang, 78 *Chi Kent L Rev* at 305–16 (cited in note 73); Roger Lowenstein, *The Immigration Equation*, *NY Times Mag* (July 7, 2006). It is also worth pointing out that the interests of these low-wage workers are least well served by the existing system of undocumented immigration and would likely be best served by a system that admitted low-skilled workers for permanent residence, because those workers would have the strongest incentives and greatest freedom to advocate for higher labor standards.

<sup>86</sup> For a discussion of the concept of mutual aid owed to strangers, see Walzer, *Spheres of Justice* at 33 (cited in note 17). See also John Rawls, *A Theory of Justice* 114 (Belknap 1971). For a discussion of the duties we owe strangers from a cosmopolitan perspective, see generally Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap 2006) (articulating a theory of justice that assures that all people are able to realize what she calls “human capabilities”); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge 2000); Noah Feldman, *Cosmopolitan Law*, 116 *Yale L J* 1022 (2007) (discussing recent efforts by Martha Nussbaum and Kwame Anthony Appiah to make theories of cosmopolitanism useful to political theory discussions).

extent that the world crosses our borders. Second, it is critical to effective self-government that our basic treatment of participants in our political community be animated by an appropriate and considered appreciation of the obligations we owe to others, including those who are not citizens and those who have not yet secured the right to remain in the United States. Finally, theoretical debates concerning questions of global justice require an appreciation of how members of one nation-state might be bound to other actors that circulate within their sphere of influence but yet remain outside formal definitions of citizenship.

Deciding how far to extend this conception of political community will certainly be difficult; populations of migrants will shade into a global population to which the United States might owe obligations as matters of cosmopolitan concern or global justice—obligations necessarily different than those owed fellow citizens. This idea of obligation to integrate also intersects with myriad debates about open borders versus immigration control,<sup>87</sup> the nature of membership in a polity, and theories of global justice,<sup>88</sup> and therefore, my discussion here has only scratched the surface. In Part II, I explore why guest worker policies do not adequately respect the imperatives I have just outlined, but the full parameters of our obligation to integrate and adapt will necessarily be a subject for future work.

## II. GUEST WORKER PROGRAMS AND THE THREAT TO IMMIGRANT INCORPORATION

At first glance, guest worker programs appear to be designed in the pragmatic spirit I advocate in Part I. By channeling what would otherwise be illegal immigration through legal channels, a guest worker program would deal with the illegality factor currently poisoning public opinion on immigration, but in a way that promises little long-term change. Also, by promising to provide guest workers with labor protections, the policy makes a legal commitment to improving the status of otherwise vulnerable individuals, thereby undercutting the depressive effects of illegal labor on wages.

Guest worker programs are also consistent with contemporary trends in immigration policy toward the use of temporary visas. In 2004, only 38 percent of lawful permanent residents had arrived initially on permanent visas or as refugees or asylees—statuses that convert automatically to permanent residence—a figure down from the 60 percent level between 1998

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<sup>87</sup> Compare Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *Rev of Polit* 251, 251–52 (1987) (arguing that Rawlsian, Nozickian, and utilitarian theory all support a concept of open borders, which reflects the deep commitment of liberal societies to respect all people as free and equal) with Walzer, *Spheres of Justice* at 39–41, 60 (cited in note 17).

<sup>88</sup> See Thomas Nagel, *The Problem of Global Justice*, 33 *Philosophy & Pub Aff* 113, 129–30 (2005); Blake, 30 *Philosophical Topics* 273 (cited in note 79).

and 1999.<sup>89</sup> Indeed, the allure of the temporary worker has exerted a strong pull on labor-based admissions in particular. Today, more of our labor needs are filled by workers on temporary visas than by lawful permanent residents (“LPRs”). According to the Migration Policy Institute, in fiscal year 2004, the United States admitted nearly 1.5 million temporary workers, trainees, and their dependents, but only 155,330 new LPRs through the employment-based admissions categories.<sup>90</sup> In addition, a number of small-scale guest worker programs have long existed in the agricultural sector.<sup>91</sup>

The fact that our system is coming to look increasingly like the German model, under which no one is initially admitted for permanent residency, should give us pause, given the difficulties German society has had integrating its immigrant populations, at least relative to the United States.<sup>92</sup> And a few distinctive features of the phenomenon that has inspired guest worker proposals should make us particularly skeptical of accelerating the trend toward the temporary. First, the problem of illegal immigration to which a guest worker program is being proposed as a solution is enormous in scale and cross-cutting in scope. The undocumented population has reached at least 11.5 million people, and an average of 500,000 new undocumented immigrants have arrived each year since 2000.<sup>93</sup> Unlike existing programs in the agricultural sector, the new guest worker proposals would cut across sectors of the economy, making the programs more unwieldy and less susceptible to the cyclical rhythms that characterize harvesting cycles. What is more, the increasing flow of undocumented immigrants is not simply the result of labor market demands, but also the

<sup>89</sup> See Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 141 (Oxford 2006). (“[t]he number of noncitizens who came as lawful immigrants or in an asylum or refugee status that converts automatically to permanent residence . . . decreased . . . from 66 percent in the two-year period 1998–99 to 38 percent in 2004.”) Therefore the 38 percent figure includes people who arrived on permanent visas and also the asylum/refugee numbers.

<sup>90</sup> See Deborah Waller Meyers, *Temporary Worker Programs: A Patchwork Policy Response* 3 (Migration Policy Institute January 2006) available at <[http://www.migrationpolicy.org/ITFIAF/TFI\\_12\\_Meyers.pdf](http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf)> (last visited Jan 20, 2007). Note that only 5,000 LPR visas are available per year in the employment categories for unskilled workers and workers with the equivalent of a bachelor of arts degree. See 8 USC § 1153(b)(3)(B) (establishing that no more than 10,000 visas can be made available to unskilled workers per year); Nicaraguan Adjustment and Central American Relief Act, Pub L 105-100, 111 Stat 2160 (1997) (allocating 5,000 LPR visas from the 10,000 available to unskilled workers to beneficiaries of NACARA) see also Aleinikoff, Martin, and Motomura, *Immigration and Citizenship* at 281, n 3 (cited in note 37) (noting that the number of LPR visas for unskilled workers will likely be 5,000 for decades to come, in light of the Nicaraguan Adjustment and Central American Relief Act).

<sup>91</sup> For detailed discussion of these programs, see Philip Martin, Manolo Abella, and Christiane Kuptsch, *Managing Labor Migration in the Twenty-first Century* 94–98, 105–10 (Yale 2006).

<sup>92</sup> See Motomura, 59 *Stan L Rev* at 869–70 (cited in note 26).

<sup>93</sup> See Passel, *The Size and Characteristics of the Undocumented Population in the United States* at i (cited in note 1). See also Office of Immigration Statistics, US Dept of Homeland Security, *2005 Yearbook of Immigration Statistics* (2006), available at <[http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf)> (last visited Jan 20, 2007) (presenting various immigration statistics).

result of network effects discussed in Part I and the strong impulse to join family already in the United States.<sup>94</sup> The ambition behind the programs is thus substantial, and the impact of failure on public opinion and on the immigration system as a whole would be correspondingly significant.

Second, in contrast to the current flow of temporary visa holders who come from all over the world and from across the economic spectrum, the phenomenon that a guest worker program is meant to address comes predominantly from Mexico and Latin America<sup>95</sup> in the form of unskilled workers. This concentration compounds the danger that a temporary program would create a separable and identifiable caste<sup>96</sup> of workers with limited social capital stemming from their low-skilled status, limited participation rights, and tenuous purchase on public policy debates, all of which would be reinforced by their temporary presence, even assuming standard labor protections apply.<sup>97</sup> It is not insignificant that this class of workers would bear national origins, ethnicities, and cultural characteristics with which the United States and Americans already have a complex relationship of antagonism and discrimination.

In assessing the relationship between guest worker programs and immigrant mobility, it is important to note that guest worker programs could take one of two general forms. Most programs are designed to recruit foreign workers to meet temporary labor market demands and then rotate those workers out of the visa programs, and out of the country, once the labor market or political climate has changed. But a guest worker program also could include a path to permanent residence and then citizenship for those workers who meet certain qualifications. In this section, I assess the

<sup>94</sup> These family members inside the U.S. may be unable to petition for their relatives to enter because of their undocumented status or the considerable backlogs in the family preference categories, which are particularly severe for people seeking entry from Mexico and may be preventing legal family reunification, thus giving rise to illegal migration. See Portes and Rumbaut, *Immigrant America* at 18 (cited in note 21) (noting that “[o]nce migrant networks have consolidated, they can become sufficiently powerful to sustain the movement in the absence of the original economic incentives”).

<sup>95</sup> The Pew Hispanic Center has estimated that 78 percent of the current undocumented population has come from Mexico and the rest of Latin America—56 percent from the former and 22 percent from the latter. See Passel, *Size and Characteristics of the Undocumented Population in the United States* at i–ii (cited in note 1).

<sup>96</sup> Or, in the terms of *Carolene Products* footnote 4, a discrete and insular minority. *United States v. Carolene Products*, 304 US 144, 153 n 4 (1938).

<sup>97</sup> In his critique of guest worker programs, Michael Walzer relies on a similar distinction between the migrants likely to become guest workers, and those who migrate temporarily on other sorts of visas—the university professor or high tech engineer who might come as a provisional worker through a so-called nonimmigrant visa. Walzer, *Spheres of Justice* at 60 (cited in note 17). His argument, which I discuss in more detail in Part II B, is that all people who live and work in a society should have equal right to participate in it. *Id.* The obvious response to this claim is that surely the “technical advisor” or the “visiting university professor” would not qualify for such status. Walzer concludes that these temporary workers are “not very important,” because “it is in the nature of their privileged positions that they are able to call upon the protection of their home states if they ever need it.” *Id.* This response is not wholly satisfactory, but there is something significant to the idea that the constraints of a temporary visa do not inhibit the mobility of a high-tech or academically elite immigrant in the same way that they constrain the options of an unskilled laborer, both because of the nature of their respective employers, and because of the fact that they are likely to be received in different ways by the host society.

mobility and reciprocity questions assuming that a guest worker program would take the former shape. I then consider the viability of a guest worker program with a path to permanent residence as a second-best option.

Guest worker programs, under the strictly temporary model, are likely to include several basic design features. Visas would authorize migrants to work for limited periods of time; recent proposals set the limit at two to three years.<sup>98</sup> Most current proposals also would permit guest workers to renew their visas once, resulting in a maximum stay of four to six years. Some proposals would require workers to return home to renew their visas.<sup>99</sup>

Most existing proposals would tie the issuance of a visa to particular employers, some of whom might be pre-screened as participants in the program, others of whom will be required to go through a bureaucratic labor certification process once they have identified particular workers they would like to hire.<sup>100</sup>

The crucial question then becomes one of portability: can a worker who loses his job or who would prefer alternative employment, perhaps in a different industry or in a different city or state, carry his work authorization with him? In the event of job loss, most visa programs would grant the worker a certain number of days to find new employment, but under most program formulations, the new employer must also be officially certified to participate in the program.<sup>101</sup> In other words, unlike lawful permanent residents, a guest worker, even under a portability regime, would not have complete freedom to move in the economy. Finally, some guest worker programs would permit a visa holder to bring his or her spouse and dependents to the United States, but none of the programs currently proposed would permit the spouse to work.<sup>102</sup>

#### A. Guest Workers and Immigrant Mobility

As I argue in the sections that follow, strictly temporary guest worker programs are not conducive to immigrant mobility along any of the dimensions outlined in Part I. The constraints on immigrant mobility will vary, however, depending on the immigrant's intent. Two types of migrants are

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<sup>98</sup> See, for example, *Talking Nonsense*, Wash Post at A14 (cited in note 13) (discussing President Bush's latest proposal to limit guest worker visas to six years total and require visa holders to leave the country every two years for six months at a time). See also Migration Information Source, *Side-by-Side Chart for Major Immigration Legislation Pending in 109th Congress* (listing the visa terms for various bills), available at <[http://www.migrationpolicy.org/ITFIAF/legislation\\_jan06.pdf](http://www.migrationpolicy.org/ITFIAF/legislation_jan06.pdf)> (last visited June 23, 2007).

<sup>99</sup> See Migration Information Source, *Side-by-Side Chart* (cited in note 98).

<sup>100</sup> See *id.* The specifics of this process obviously depend on legislative design, but a guest worker program is likely to require that an employer engage in a period of recruitment of U.S. workers, make a commitment to pay the prevailing wage, and to abide by basic labor law protections.

<sup>101</sup> See, for example, *id.*

<sup>102</sup> See, for example, *id.*

at issue. Guest worker programs constrain the mobility of what I call temporary workers with temporary intent, or the mobility of workers who may intend to return to their countries of origin, but who may well spend extended periods of time in the United States. Temporary programs also thwart the mobility of those migrants whose ultimate desire is a more permanent form of residence in the United States—temporary workers with permanent intent. I consider each in turn.

#### 1. Temporary migrants with temporary intent.

Up to this point, I have defined immigrant mobility as mobility within the context of American life. This formulation of mobility amounts to the ability to take advantage of opportunities inside the United States and to acquire the social capital necessary for integration into American institutions. But another way of conceptualizing immigrant mobility is in terms of freedom to move across the border or to live a transnational life by participating in two different societies, with different allegiances to either side of the border. Guest worker programs are conceptually consistent with a growing appreciation among scholars of the cyclical nature of migration. They are also consistent with the desire of policymakers on both sides of the border to facilitate the temporary migration that serves the labor needs of the United States, the development needs of Mexico,<sup>103</sup> and the individual and familial needs of the migrants themselves.<sup>104</sup> Indeed, many migrants who travel to the United States, particularly those who enter through unlawful channels, initially intend to stay for only a brief period. Their migration is motivated by a number of factors, including the desire to support a family, to make major purchases or finance home construction, or to fund small business ventures in the home country—all projects difficult to commence in a low-wage society that lacks credit and insurance structures.<sup>105</sup> These migrants follow preexisting migration networks, so their

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<sup>103</sup> A guest worker program would, for example, serve the development needs of Mexico and other countries heavily dependent on remittances sent by their citizens from the United States. Remittances to Latin America from the United States were expected to reach \$45 billion in 2006. Multilateral Investment Fund, Inter-American Development Bank, *Sending Money Home* (cited in note 5). The continuation of this flow depends on migrants' retaining a strong attachment to their home countries, namely through the continued presence of their families there. This development strategy thus depends on temporary forms of migration that not only secure the flow of funds, but also ensure the return of a substantial portion of able-bodied citizens, rather than on permanent forms of migration that enable workers to move their families to the United States, thus weakening the connection to the home country. It is estimated that the total income for immigrants in the United States is about \$500 billion. *Id.* Approximately 10 percent of these earnings is sent home as remittances, but more than 90 percent is spent in the local economies where immigrants reside. *Id.*

<sup>104</sup> For an excellent example of scholarship exploring the possibility of facilitating transnational forms of citizenship and work, see Jennifer Gordon, *Transnational Labor Citizenship*, 80 S Cal L Rev 503 (2007) (proposing a new way of structuring labor migration that links permission to enter the United States to membership in an international network of worker organizations through which migrants would commit to refusing to work under conditions that violate labor laws).

<sup>105</sup> See Portes and Rumbaut, *Immigrant America* at 16–18 (cited in note 21).

actions might not match up perfectly with market dynamics. But their intent to engage in *va y ven* (come and go) is clear at the outset of their migration.

Perversely, as social scientists are increasingly uncovering, U.S. border enforcement policy is thwarting the cyclical nature of migration, making it more difficult for people to return to their home countries.<sup>106</sup> Observers and critics of increased border enforcement have emphasized that the amplification of enforcement at urban crossings, which began in the 1980s and continued vigorously through the Clinton years and in the aftermath of the attacks of September 11, has not only forced migrants to cross the border through treacherous desert terrain, but it also has essentially trapped migrants inside the United States. Because the cost of crossing the border has become so high, migrants who cross successfully are becoming less and less likely to return to their countries of origin after a brief stint in the U.S., opting instead for an extended presence, for fear that they will be unable to return in the future.<sup>107</sup> In other words, heavy border enforcement appears to be interrupting what would otherwise be a natural coming and going of migrants, transforming it instead into a seemingly permanent or semi-permanent resettlement in the United States.

There are at least two ways to think about how these findings should inform our immigration policy.<sup>108</sup> On the one hand, we could think of strong border enforcement as a constant. In the current political climate, it

<sup>106</sup> See Mireya Navarro, *Traditional Round Trip for Workers Is Becoming a One-Way Migration North*, NY Times A1 (Dec 21, 2006) (“Having run the gauntlet of enforcement resources at the border, migrants grew reluctant to repeat the experience and hunkered down to stay, causing rates of return migration to fall sharply.”) (quoting Princeton sociologist Douglas S. Massey). Navarro also notes that “[t]he 2005 census in Mexico counted 242,000 Mexicans who said they had lived in the United States and had returned to Mexico from 2000 to 2005,” and that, “[b]y comparison, a 1992 survey counted 955,000 people who said they had returned in the previous five years.” *Id.* Also, “[t]he average probability of return for illegal immigrants was 47 percent during 1979–84 but fell to 27 percent during 1997–2003.” See *id.*, citing Massey. Other factors that have contributed to the decline in cyclical migration include immigrants’ increasing settlement in states far from the border, which makes return migration more costly and harder to effectuate, and immigrants’ increasing employment in jobs outside the agricultural sector, meaning they have more stable employment that is less subject to seasonal variations. See *id.*

<sup>107</sup> See Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Free Trade* 128–33 (Russell Sage 2002). Massey, Durand, and Malone note that by increasing the psychic and economic costs of border crossing, U.S. border enforcement policy has had the unintended effect of reducing return migration to Mexico. *Id.* See also Fernando Riosmena, *Return Versus Settlement Among Undocumented Mexican Migrants, 1980 to 1996*, in Jorge Durand and Douglas S. Massey, eds., *Crossing the Border: Research from the Mexican Migration Project* 265, 278–79 (Russel Sage 2004) (noting the decline in return migration during the 1990s caused by changes in U.S. immigration policy).

<sup>108</sup> First, we might assume that tough border enforcement is one of the background conditions against which we should construct our policy. The current political climate—and the general political environment regarding matters of border enforcement—is unlikely to support a scaling down of border presence, and strong enforcement measures are arguably an inevitable trade-off that must be made to secure liberalization in other areas. If we take border enforcement as a given, facilitating cyclical migration becomes more difficult. To be sure, tough border measures could be passed alongside a guest worker program, but for reasons I discuss in more detail below, the interaction of guest worker programs with border enforcement may well produce a situation worse than the one we have now.

certainly seems unlikely that relaxation of border enforcement will emerge as a policy option. And support for stepped-up enforcement is likely to be the tradeoff for any policies that expand the number of legal immigrants in the United States, whether through earned legalization programs, guest worker programs, or a reevaluation of the caps on permanent admissions. With border enforcement held constant, a guest worker program may temporarily reduce the undocumented population by creating additional legal mechanisms for crossing the border. But once the terms of the guest worker visas expire or a guest worker runs afoul of bureaucratic requirements, there is no reason to believe that the migrants who obtained the guest worker visas initially won't behave in the same way as their counterparts who cross the border illegally, staying for long, albeit temporary, periods of time, whether with legal status or not. This phenomenon is more likely to occur if the guest worker visas made available are for short periods of time or do not include generous renewal provisions. In other words, a guest worker program will not necessarily foster cyclical migration if border enforcement makes re-crossings too costly. Guest worker programs will bring immigrants in with greater ease, but then border policies, along with other factors that make continued presence attractive, will trap those workers who have exhausted the temporary visa system but who have ongoing interest in remaining in the United States.

But what if borders were more open, or easier to cross? Perhaps if the hemispheric labor market were permitted to operate without the constraints of border enforcement, we would see the flowering of the transnational lifestyle. If, in a world without strong border enforcement, more migrants would follow the cyclical migration patterns that benefit North and South, why not try to facilitate the cyclical nature of migration by providing guest workers visas that would enable legal crossings?

Under this scenario, several types of migrants are likely to emerge. First, we might expect that some migrants' needs will be served by a short sojourn in the United States, and for these migrants, a guest worker program would ensure that those sojourns can be taken legally. Add to this possibility a world of relaxed border enforcement, and such migrants become even more likely to return home, with the expectation that later visa-less crossings might be feasible, should they become necessary.

Second, there will be some guest workers who will take full advantage of the temporary visa system, which will necessarily result in a long-term (though perhaps not lifelong) stay. The reason is that for a guest worker program to be minimally effective at reducing undocumented immigration, it must permit migrants to work for a number of years, it must include the possibility of visa renewal, and it should permit workers to bring their spouses and dependents, who are otherwise likely to attempt to cross the border as time passes to reunite with the breadwinner who made the initial crossing. Employers also will want some stability in their workforces. Many workers will apply for as many visa cycles as are made avail-



able, and many will bring spouses and dependents with them, which is also likely to extend the length of time guest workers remain in the United States, because the imperative of family reunification in the country of origin will no longer exist.

Assuming that migrants who take advantage of the full extent of the adopted guest worker program still opt to return home after two visa cycles—say six years—they will still have been in the U.S. for a long period. As brief sojourns turn into years, the importance of incorporating these migrants into the body politic rises. The longer the semi-permanent presence, the more likely it is that these migrants will form interests whose defense requires access to social support networks and political processes. Moreover, the more time passes, the more migrants' interests become intertwined with communities of lawful permanent residents and U.S. citizens. As Douglas Massey has shown, as migrants “make repeated trips and accumulate more time abroad,” as they are joined by spouses and children in the workforce, and as they forge stronger links with particular employers, “a growing number of migrants and families settle in the host society.”<sup>109</sup> The longer a guest worker's presence in the United States, the greater the possibility that U.S. citizen children will enter the picture, cementing permanent ties to the United States. Guest worker programs, even by their own temporary terms, are likely to create semi-permanent members.

Given this very real possibility, we want to provide immigrant workers with an incentive to invest in the society around them, even if their ultimate objective is to return home. All parties involved have an interest in ostensibly temporary workers behaving as good and effective social actors, even if their integration remains incomplete. No one has an interest in creating isolated cohorts with minimal connection to or investment in a world beyond their own personal interests. Preventing immigrant isolation requires psychological as well as resource-based investment by migrants in the institutions and customs of the receiving society—precisely the sort of investment that makes being an immigrant less of a challenge for migrants themselves.

To create the incentives for this level of regard, the society in which migrants are temporarily present must also be one in which they can meaningfully participate. Individuals will be better social actors if they are both given the option of a permanent stake in society and expected to show the level of concern or regard for the well being of the receiving society that we should expect of full members. As Adam Cox and Eric Posner note in their discussion of the concept of country-specific investment, the uncertainty caused by immigration policies, such as guest worker programs that treat immigrants as if they were on probation, delay an immigrant's investment in society.<sup>110</sup> Again, this may be precisely the motivation behind

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<sup>109</sup> See Massey, Goldring, and Durand, 99 *Am J Sociol* at 1502 (cited in note 21).

<sup>110</sup> See Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59

guest worker programs, but the result will be the presence for prolonged periods of time of isolated immigrant cohorts. Like Cox and Posner, my view is that “[a]ll else equal, it is generally better if the immigrant makes a country-specific investment than if she does not.”<sup>111</sup>

Even for the migrants whose relocation interests remain temporary, then, our policies should be focused on creating incentives for social investment. At this stage, it is worth underscoring the instability of the so-called transnational lifestyle. It may be that increasing numbers of migrants are forging a way of life that involves movement from society to society and maintenance of allegiances across borders.<sup>112</sup> But even those with transnational lives maintain presences in actual communities for extended periods of time, and the importance of having an anchor in those communities, whether it be in the form of citizenship or self-created social networks, should not be discounted. One way to facilitate the development of the ties that anchor even the highly mobile migrant would be to present migrants with the possibility of permanent membership, or with the security that the United States is a society to which they can belong. Designing visa policy in this way may lead more immigrants to form a permanent intent to remain. But a policy that accepts this possibility upfront and attempts to prevent the specter of a detached and isolated laboring class from arising is far preferable to a policy that encourages the creation and perpetuation of a laboring class with a minimal stake in the long-term prosperity of the society in which they labor.

## 2. Temporary migrants with permanent intent.

Whether migrants set out with the intent to relocate permanently, many migrants develop the intent to remain in the United States. Again, guest worker programs are arguably designed to prevent this sort of intent from forming, but in trying to prevent the inevitable and the predictable, a guest worker program would be destined for long-term policy failure. While it is difficult to determine what percentage of temporary migrants will inevitably form this permanent intent, ensuring that immigrant incor-

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Stan L Rev 809, 827–29 (2007).

<sup>111</sup> Id at 828. As Cox and Posner use it, the concept of country-specific investment has a very particular meaning; it involves investment in skills or relationships that are not transferable outside the U.S. Id at 828. Learning English, therefore, would not be a country-specific investment, given the prevalence of the language around the world. But as Hiroshi Motomura points out, this concept of country specific investment may be too narrow. “[I]mmigrants who face ex post screening will feel less attached to and accepted by the host country, and immigrants will feel more attached and accepted where ex ante screening is the norm. These effects have little to do with whether an investment is country specific.” Motomura, 59 Stan L Rev at 864 (cited in note 26). The key issue, ultimately, is whether a given immigration policy gives immigrants the incentive to become attached to and learn about American society. Programs that provide no right to remain, or no security with respect to long-term prospects, are less like to accomplish this objective.

<sup>112</sup> For various discussions of this development, consider Peggy Levitt and Mary C. Waters, eds, *The Changing Face of Home: The Transnational Lives of the Second Generation* (Russell Sage 2002).

poration is successful demands that we take into account the fact that despite the initial temporary intentions of most migrants, intentions can and do change.

As David Martin has pointed out, Mexico's assurances that Mexican migration is largely circular and the accompanying polling data of migrants demonstrating their temporary intent may well be misleading, particularly given the historical track record of guest worker programs.<sup>113</sup> Despite the fact that migration always has been cyclical or transnational in nature,<sup>114</sup> sizeable populations of immigrants made up of people who initially possessed temporary intent nonetheless have always maintained a semi-permanent or permanent residence in the United States. As a historical matter, guest worker programs have remained temporary only when accompanied with harsh enforcement measures. As Europe discovered in the 1970s, workers who migrate initially with temporary intent often end up "sink[ing] roots" into their host society, because workers "aren't just cogs in an economic machine," but human beings.<sup>115</sup> To think that guest worker programs will now succeed in channeling temporary migration and curbing illegal immigration, despite past failures, because of a new transnational or circular *Zeitgeist* is ultimately misguided. Indeed, millions of migrants build their lives inside the United States, despite the fact that they have no legal right to do so.

The reasons migrants develop permanent intent are various and can be summed up by the oft-quoted statement of Swiss writer Max Frisch: "We asked for workers and people came."<sup>116</sup> Return migration thus can be difficult to secure.<sup>117</sup> Some migrants find that the wage differential between what they earn in the United States and what they could earn at home is too great to give up, and this encourages them to transform brief stays into

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<sup>113</sup> See David A. Martin, *What Lures Them Here: Changes to Immigration Law Should Focus Less on the Border and More on the Job*, *Legal Times* 58 (May 29, 2006).

<sup>114</sup> Consider Foner and Alba, *The Second Generation from the Last Great Wave of Immigration* (cited in note 41). As Nancy Foner has emphasized, transnationalism is not a new phenomenon, though it is more viable among the second generation today than at the turn of the twentieth century.

<sup>115</sup> *Id.* See also Martin, Abella, and Kuptsch, *Managing Labor Migration* at 93 (cited in note 91) (noting that "rotation and return rules" in guest worker programs are difficult to implement while protecting the human rights of migrants).

<sup>116</sup> Martin, Abella, and Kuptsch, *Managing Labor Migration* at 93 (cited in note 91).

<sup>117</sup> See David Abraham, *American Jobs but Not the American Dream*, *NY Times* A19 (Jan 9, 2004) ("[E]xperience shows that guest workers are not good guests: they rarely want to leave. In Germany today there are more than two million people of Muslim Turkish origin, many of whose families came as guest workers four decades ago."). For a discussion of this phenomenon in the European context, see Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 *Labor Hist* 69, 88 (2003) ("Guestworker programs led to higher rates of unauthorized migration whether or not they cycled workers out of the country at the end of each season or year because the guest workers who stayed on—with or without state sanction—often sent for relatives and friends once they were established. Workers forced to leave at the end of their contracts often returned illegally to employers who were quite willing to rehire them and thus save the expense of complying with the terms of their government's temporary worker program.").

longer periods of presence.<sup>118</sup> Through the development of social networks and the formation of new family ties through LPR or citizen spouses and U.S.-born children, a temporary foray to the United States becomes a life in the United States.

Migration flows also tend to be self-perpetuating. What begins on the part of guest workers as a desire for economic advancement, or the desire to take advantage of opportunities to support a family or fund a project back home, gives way to a longer-term interest in reaping the advantages of life in the United States, which in turn creates the impulse toward reunification with extended family and friends who remained behind when the guest worker first crossed the border.<sup>119</sup> What is more, those workers who do return home are more likely to return to the United States illegally at a later date, perhaps because their experience has taught them how to navigate the American labor market and has given them an intimate awareness of the actual, practical advantages of the wage differential between the United States and Mexico, which would only have been an abstraction or rumor before their guest worker experience.

In a similar vein, guest worker programs also lead to the emergence of networks that encourage migration by others through information sharing and by creating the social support systems that make migration possible.<sup>120</sup> In this sense, guest worker programs facilitate illegal visa overstays as well as the unauthorized migration of foreign workers who cannot fulfill the criteria of the guest worker program, either because they cannot find a sponsoring employer, they have failed the screening requirements of the program, or because annual quotas have been met. Guest worker programs thus create a ready community into which illegal workers can integrate for their survival.

### 3. Temporary programs and the threat to mobility.

Guest worker programs conceived as truly temporary programs fail to appreciate the inevitability of changed intent and ultimately undermine integrationist goals in three ways. First, by creating an irreconcilable conflict between compliance with the law and long-term intent as described above, a guest worker program would give rise to new forms of illegality, which, as established above, would undermine the incorporation of immigrants as a general matter. This illegality arises not only because migrants unable to secure visas follow the networks that guest worker programs

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<sup>118</sup> See Ruhs, *Temporary Foreign Worker Programmes* at 15 (cited in note 11) (noting that many migrant workers “simply abandon their original plans of returning home and prefer to remain in the host country instead,” and that “failure to achieve savings targets, often due to lower than expected income, may force foreign workers to stay and work in the country much longer than initially intended”).

<sup>119</sup> Consider Massey, Goldring, and Durand, 99 *Am J Sociol* (cited in note 21).

<sup>120</sup> See *id.*

create, but also because many guest workers who run afoul of the requirements of their visas remain behind.<sup>121</sup> The more intricate the bureaucratic maze, the harder compliance is and the more likely it is that a new undocumented population will arise, despite attempts to create a new legal status. Tying a visa to a particular employer, limiting the amount of time a worker has to find a new sponsoring employer if he or she loses his or her job, permitting guest workers to find jobs only in certain sectors of the economy (namely where sufficient native workers cannot be found), limiting the number of times a worker can renew his visa, requiring that a guest worker return home for a year before applying for lawful permanent residence (if that option is available), and restricting the ability of spouses and children to work all create new incentives for illegal immigration or visa overstay. Though worker visas must come with requirements attached, the possibility of illegality should be taken into consideration when setting those requirements.<sup>122</sup>

Second, temporary worker programs prevent immigrants from taking advantage of opportunities in the economy and thus compound immigrant isolation<sup>123</sup> and delay integration. To the extent that guest worker visas tie migrants to particular employers at the initial stage of entry or prevent migrants who lose their jobs or wish to work elsewhere from seeking alternative employment, they present particular threats to mobility. Such restrictions not only make it difficult for migrants to respond to shifts in the labor market, but they also make the immigrant uniquely vulnerable to the interests of the sponsoring employer. But even a guest worker program that includes portability as a feature of the visa is still likely to lead to immigrant isolation in sectors of the economy, because even a portability regime would limit participation to industries that can demonstrate need for immigrant labor—industries such as meat packing, construction, domestic work,

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<sup>121</sup> See Ruhs, *Temporary Foreign Worker Programmes* at 20–21 (cited in note 11).

<sup>122</sup> This same caution should guide attempts to devise legalization programs for the undocumented population currently residing in the United States. The more obstacles or criteria Congress creates for the current undocumented population to overcome before attaining legal status, the less successful a legalization program will be in resolving the undocumented problem.

<sup>123</sup> See Ruhs, *Temporary Foreign Worker Programmes* at 10 (cited in note 11):

On the one hand, a segmented labour market and the existence of what is often perceived as “undesirable work” in “undesirable sectors”, which natives no longer wish to take up, have constituted major *reasons for* the inflow and concentrated employment of foreign workers in these sectors. On the other hand, restrictions of the employment of foreign workers to certain sectors and/or occupations of the host economy has led, or at least contributed, to the desertion of these sectors/occupations by native workers, thus giving rise to, or at least exacerbating, the (further) segmentation of the labour market and the emergence of immigrant sectors.

Id. See also Martin, Abella, and Kuptsch, *Managing Labor Migration* at 86 (cited in note 91) (noting that “immigrant sectors” in the host economy emerge in the face of temporary worker programs, which increases the economy’s need for migrants and which can lead to exploitation in recruitment and employment of workers).

and agriculture.<sup>124</sup> Whether these limitations are justified as forms of protecting the interests of U.S.-born and LPR workers, the result of such limitations is that employers in these industries become dependent on immigrant labor,<sup>125</sup> and immigrants remain concentrated in these industries.

In addition to the obvious restraints this concentration exerts on upward economic mobility, this isolation also makes the cultural and sociopolitical forms of assimilation more difficult to navigate. Economic isolation compounds cultural isolation. For migrants whose intents change, the strictures on their mobility outlined above become not just disincentives to invest in their temporary communities, but serious obstacles to their longer-term economic advancement. These limitations on guest workers' movement in the economy during their first years of presence thus are likely to delay their assimilation. And, as I discuss in more detail in the next section, the emergence of immigrant sectors also contributes to "social exclusion" by separating immigrant workers from native workers and into identifiable classes.<sup>126</sup> Because immigrant sectors of the economy are often characterized by low wages and poor working conditions,<sup>127</sup> their perpetuation helps fuel the sentiment that immigrant workers are willing to work in substandard conditions, whereas Americans are not. This contributes to the perception that immigrants as "cheap labor" are taking the jobs of American workers, thus fueling opposition to immigration generally.

Third, guest worker programs do not provide a stable basis for broader or more challenging forms of integration, because they do not guarantee the critical right to remain. Students of immigration and alienage law quickly come to realize that the most valuable right of citizenship may not be the right to vote or otherwise participate in the political process, but rather the right to continued and permanent presence in the society one calls home. The right to remain is the precursor to all other forms of participation. Mobility depends on the foundational security that permanent presence provides. There must, of course, be some sort of transition period before immigrants can become citizens, but the difference between an LPR and a temporary guest worker is that a legal commitment has been made to the former and not the latter; the former is presumptively entitled to per-

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<sup>124</sup> One potential antidote to this problem is suggested by an immigration reform about to be introduced in Singapore, a country that has long relied on guest workers to fulfill its demanding labor needs and that is also facing a population crisis. According to a recent report by the Migration Information Source, Singapore is implementing a "new category of flexible, 'personalized' employment passes tied to the person rather than the employer," which would allow the foreign worker to change jobs or stay in Singapore even after leaving his or her initial employer. See Brenda S.A. Yeoh, *Singapore: Hungry for Foreign Workers at All Skill Levels* (Migration Information Source Jan 2007), available at <<http://www.migrationinformation.org/Profiles/display.cfm?ID=570>> (last visited Jan 20, 2007).

<sup>125</sup> See Ruhs, *Temporary Foreign Worker Programmes* at 11–12 (cited in note 11) (noting how sectors targeted for temporary labor "are often afflicted by lowered wages and deteriorating working conditions," eventually developing a "structural demand" for foreign workers and thus suffering from permanent shortages of native workers).

<sup>126</sup> See *id.* at 12.

<sup>127</sup> See *id.* at 11–12.

manent presence, whereas the latter is not.<sup>128</sup> The absence of a commitment, or the uncertainty of one's status, diminishes incentives critical to successful assimilation—incentives to learn English and to integrate into larger social networks. A guest worker visa gives immigrants no clear signals with respect to their place in society, other than as workers. The risk of stepping outside communities of co-ethnics is great. But without taking these risks, the social capital needed to negotiate a new and diverse society becomes hard to develop. The right to remain provides a form of social insurance that makes these risks more manageable.

The policy failures common to many of the guest worker programs that have been adopted by societies in the recent past provide powerful evidence of these various threats to mobility. Studies of guest worker programs adopted in other societies underscore that the consequences of adoption are fairly predictable. As Philip Martin, Manola Abella, and Christiane Kuptsch have shown, guest worker programs grow far larger and last much longer than originally intended.<sup>129</sup> Employers become dependent on foreign workers and prove reluctant to see guest worker programs come to an end. What is promised as a limited solution to a temporary economic need often becomes an unwieldy program with an administrative and institutional life of its own. Guest worker programs create expectations and dependencies that cause them to be self-perpetuating and beyond the political control of policymakers.

The consequences of this expansion are evident in our own historical experience<sup>130</sup> with guest worker programs, which highlights how counter-

<sup>128</sup> Of course, the security of LPR status today is not what it once was. The dramatic expansion of the definition of aggravated felony alone, among the many highly restrictive changes of the 1996 immigration reforms, has made LPR status a precarious one. The central contention of this Article—that immigration policy should attempt to facilitate the integration of immigrants—would also demand a reform of many of the measures adopted in 1996. For a critique of our legal system's current conceptualization of lawful permanent residence, see generally Motomura, *Americans in Waiting* (cited in note 89). I discuss the important ideas Motomura advances in his book in more detail in Part II B.

<sup>129</sup> See Martin, Abella, and Kuptsch, *Managing Labor Migration* at 85 (cited in note 91) (noting that guest worker programs tend to become larger than originally planned and last longer than originally intended because of the phenomena of "distortion" and "dependence," distortion referring to the fact that once businesses make investments that assume that migrants will continue to come to the United States, they will resist changes to policies that curb the influx of foreign workers, and dependence referring to the fact that migrants, families, communities, and governments of sending societies become dependent on the earnings of guest workers and thus resist policy changes as well). See also Ruhs, *Temporary Foreign Worker Programmes* at 6 (cited in note 11) (analyzing the consequences of major temporary foreign worker programs adopted by six different societies in the recent past). Ruhs also documents the "bloating" that has occurred, or the "unforeseen prolongation . . . and the initially unanticipated increases in the legal admission of foreign workers." *Id.* at 15–17. See also Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* 141 (Routledge 1992) (noting that in the 1950s, the average number of braceros entering the United States each year was ten times higher than the number admitted during the wartime program of 1942–1947 when a labor emergency had been declared).

<sup>130</sup> In her important study of the Bracero program, Kitty Calavita demonstrates that, despite its initial conception in 1942 as a response to wartime labor shortages in the agricultural sector, the Bracero programs lasted until 1964, fueled both by Southwestern growers' evolving dependence on the imported labor, as well as by the INS's own institutional and bureaucratic interests in keeping the

productive they can be if their purpose is to prevent undocumented populations from arising, and if the assimilation of immigrants is our long-term goal. As Mae Ngai has demonstrated in powerful detail in her history of undocumented immigration, the infamous Bracero program, initially adopted to address labor shortages in the agricultural sector in the Southwest during World War II, resulted in what she terms an “imported colonialism”<sup>131</sup> unworthy of a liberal democracy.<sup>132</sup> During the Bracero era, which lasted until the mid-1960s, indicia of exploitation and immigrant isolation were rampant, such as violations of contract terms, including protections for the wages and jobs of native workers and poor working conditions.<sup>133</sup> Over time, Mexico lost its ability to control the terms of the program,<sup>134</sup> a control it had originally negotiated to protect its citizens, and a form of control it seeks today. What is more, because many more people wanted to enter the United States than were legally permitted, the program contributed to the emergence of a new, illegal population,<sup>135</sup> an explosion that the INS itself took advantage of and perpetuated.<sup>136</sup> Indeed, commen-

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program going. See Calavita, *Inside the State* at 2–4 (cited in note 129). As Calavita points out, the program was created in 1942 through administrative design by the INS and the Departments of State, Labor, and Agriculture and through a bilateral agreement with Mexico. Id. at 2. Congress initially authorized the program, but in 1947, with the original justification for the program gone because of the end of the war, Congress permitted the statutory authorization of the program to expire. Id. However for almost twenty years, administrative action led by the INS sustained the program. Id.

<sup>131</sup> Ngai, *Impossible Subjects* at 128–29 (cited in note 14). Ngai argues that this colonialism, a legacy of the U.S. conquest of northern Mexico in the nineteenth century, arose as the result of U.S. immigration policies. Id. These policies created a “racialized, transnational workforce comprising various legal status categories across the U.S.-Mexico boundary—Mexican Americans, legal immigrants, undocumented migrants, and imported contract workers (braceros)—but which, as a whole, remained external to conventional definitions of the American working class and national body.” Id.

<sup>132</sup> The key features of the Bracero program included a stipulation that Mexican workers would not be used to replace domestic workers or be permitted to depress wages in the agricultural sector; guarantees to the braceros of transportation, housing, food, and repatriation, as well as an exemption from U.S. military service; the setting of wages at the prevailing rate in the domestic market; and an agreement that braceros would not be subject to discrimination, such as exclusion from “white” areas of segregated public accommodations. Id. at 139–40. In addition to the Bracero program, other contract labor programs operated in the mid-twentieth century in the United States as well. Workers from the British West Indies migrated to the Southeast to perform farm labor, and Puerto Ricans, though citizens, performed seasonal agricultural work in the Northeast, under the auspices of the Puerto Rican government. See id. at 138.

<sup>133</sup> See Ngai, *Impossible Subjects* at 143–44 (cited in note 14).

<sup>134</sup> See id. at 146 (noting that by giving up its right to unilaterally blackball an employer or county, Mexico “lost the only practical leverage it had over the determination of wages and the treatment of braceros,” and that by agreeing to a policy of recontracting braceros at the border, Mexico effectively lost “whatever ability [it] had to control the process of emigration”).

<sup>135</sup> See id. at 147–48, 155–58 (noting that despite a massive enforcement effort known as “Operation Wetback,” illegal migration continued, partly as the result of border recruitment of workers and INS policies intended to rechannel illegal migration into legal migration).

<sup>136</sup> In her critical study, *Inside the State: The Bracero Program, Immigration, and the I.N.S.*, Kitty Calavita observes that:

To accommodate employers who complained that recruiting braceros from Mexico was expensive and time-consuming, the INS devised an even simpler arrangement: on-the-spot legalization of illegal Mexican farm workers. Indeed, the official policy during this period gave *priority* to illegal immigrants found in the United States. By 1950, the number of



tators describe the emergence of a large undocumented population as one of the primary legacies of the Bracero experiment.<sup>137</sup>

As a result of this experiment, the non-Hispanic population of the Southwest readily conflated illegal immigrants with legal immigrants and Mexican-American citizens of the United States.<sup>138</sup> The emergence of new forms of illegality not only compromised public support for immigration generally, but also poisoned already encumbered race relations among citizens of the United States. The racial dynamics introduced by the Bracero program created tensions within the Mexican-American community as well, which resented being associated with the braceros and illegal migrants, but which also was connected to those same people through common membership in a transnational community and was thus affected by the mistreatment and deportation of the migrant workers of the period.<sup>139</sup>

Given these events, the specter of the Bracero program may be sufficient reason to reject the guest worker idea out of hand because of its impact on the status of immigrants and Latinos in the United States. Indeed, many of the same exploitative conditions have been documented recently by the Southern Poverty Law Center as features of the limited guest worker programs that persist today. The Center reports that temporary workers who have entered the U.S. on the so-called H-2 visas<sup>140</sup> are routinely denied their wages, exploited by labor brokers or employers who seize their documents, forced to live in substandard conditions, and denied medical benefits for on-the-job injuries.<sup>141</sup> In other words, the passage of time and awareness of the pathologies of the Bracero era have not been sufficient to prevent similar conditions from arising in the lives of today's guest workers.

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Mexicans "legalized" and "paroled" to growers as braceros was five times higher than the number actually recruited from Mexico.

Calavita, *Inside the State* at 2 (cited in note 129). Calavita argues that such INS policies were not simply the result of the power of the "capitalist class," or the growers, but that they arose as result of the INS's own institutional and bureaucratic needs, which often put the INS at odds with the Department of Labor during the decades-long (mis)management of the Bracero program. See *id.* at 4.

<sup>137</sup> See, for example, Philip L. Martin and Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 *Foreign Aff* 117, 123 (2001).

<sup>138</sup> See Ngai, *Impossible Subjects* at 149 (cited in note 14).

<sup>139</sup> See *id.* at 158–60.

<sup>140</sup> The H-2 program was originally launched in 1943 and enabled Florida sugar cane growers to import workers from the Caribbean. The program was revived in 1986, when Congress passed the Immigration Reform and Control Act. In 2005, approximately 32,000 H-2A, or non-agricultural visas, were issued, and approximately 89,000 H-2B, or agricultural visas, were issued. The vast majority of these temporary workers come from Mexico, Jamaica, and Guatemala, with approximately three-quarters of workers coming from Mexico. See Southern Poverty Law Center, *Close to Slavery: Guest-worker Programs in the United States* 5 (2007). For an in-depth study of these programs, see David Griffith, *American Guestworkers: Jamaicans and Mexicans in the US Labor Market* (Penn State 2006).

<sup>141</sup> See *Close to Slavery* at 2 (cited in note 140).

#### 4. Integrating guest workers through institutional design.

Of course, though the problematic conditions of the Bracero experience still obtain, it might be possible to learn from past mistakes and avoid the common pitfalls of guest worker programs through innovations in institutional design. The policy panacea proposed at various stages of the debate to prevent some of the dysfunctions outlined above is a guest worker program that culminates in an earned path to permanent residence or citizenship. From the United States' perspective, such a solution might seem ideal. Workers come to the U.S. on a probationary basis, and only those with the wherewithal to comply with the strictures of the temporary program, who prove themselves able to meet certain selection criteria, are considered for permanent residence.<sup>142</sup>

A temporary visa that comes with the possibility of adjustment of status in the future would certainly be consistent with the trends in immigration law discussed above. A large share of the so-called nonimmigrant (in other words, temporary) visas allocated by Congress for workers at all levels of the employment ladder have become "de facto transitional visas,"<sup>143</sup> making temporary migration a standard path to permanent resettlement. And it should go without saying that no provisional worker program adopted should be without a path to permanent residence.

But the possibility of adjustment may not be sufficient to stave off the consequences of a guest worker program I have just outlined. Adjustment of status as it is permitted today occurs under highly restrictive circumstances involving heavy paper work, complex legal machinations, and high fees.<sup>144</sup> What is more, forming the intent to remain while on a nonimmigrant visa can be grounds for removal.<sup>145</sup> The adjustment process could, of course, be streamlined, but the need to adjust creates yet another significant bureaucratic hurdle for the immigrant to cross. The fact that our immigration laws have evolved in this way, probably as the result of inertia rather than consideration of the desirability of this trend, should not be a suffi-

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<sup>142</sup> See generally Cox and Posner, 59 *Stan L Rev* 809 (cited in note 110) (describing how an immigration system might be designed to gather information about potential permanent residents by admitting them with few screening mechanisms and considering their desirability after a period spent in the United States).

<sup>143</sup> See Marc R. Rosenblum, "Comprehensive" Legislation vs. Fundamental Reform: *The Limits of Current Immigration Proposals* 9 (Migration Policy Institute Jan 2006), available at <[http://www.migrationpolicy.org/pubs/PolicyBrief13\\_Jan06\\_13.pdf](http://www.migrationpolicy.org/pubs/PolicyBrief13_Jan06_13.pdf)> (last visited Jan 20, 2007). See also Deborah Waller Meyers, *Temporary Worker Programs: A Patchwork Policy Response* 11 (Migration Policy Institute January 2006), available at <[http://www.migrationpolicy.org/ITFIAF/TFI\\_12\\_Meyers.pdf](http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf)> (last visited Jan 20, 2007) (explaining that a significant portion of temporary workers just adjust to lawful permanent status, demonstrating that "[f]or many employers and workers [the temporary worker system] is acting as a transition to permanent employment").

<sup>144</sup> See Rosenblum, "Comprehensive" Legislation at 9 (cited in note 143).

<sup>145</sup> Id. Rosenblum concludes that "the nonimmigrant labor migration system lacks transparency, is highly inefficient, and in many cases undermines the rule of law." Id.

cient reason for replicating a pattern likely to exacerbate the current undocumented crisis, given that the guest worker program is meant to address an immigrant stream apparently quite willing to circumvent legal requirements.

The success of such promises of adjustment in accommodating those who form the intent to remain also depends in large part on the other features of the visa program. In debating this alternative, it is important to consider whether the other requirements of the program are too strict: Do the constraints of the temporary programs make it unlikely that many migrants with permanent intent will ultimately make it to the adjustment phase? Is the requirement that workers who lose or leave their jobs find employment with another certified employer—a requirement not imposed on lawful permanent residents, who have complete freedom of movement in the economy—an overly burdensome constraint, or a constraint that keeps immigrants locked in certain sectors of the economy?

Finally, even guest worker programs that promise a path to permanent status at some future date give rise to uncertainty with respect to the migrants' future presence in the United States, thus setting up the wrong incentives.<sup>146</sup> Again, freedom of movement and risk taking, such as leaving the security (or isolation) of one's community of co-ethnics, depends on the security of the right to remain. A visa that leaves the immigrant's long-term status undefined does not promote investment by the immigrant in the society around him. And even if the immigrant is willing to invest, the guest worker formulation nonetheless undermines social reciprocity, which ultimately stands as an independent obstacle to integration, which I consider in more detail in the final section of this Article.

One obvious alternative to a guest worker program with a path to earned citizenship would be to dramatically increase the number of LPR visas available to unskilled workers. After all, the current admission system permits the allocation of only 5,000 per year.<sup>147</sup> An LPR visa represents a much stronger form of pre-commitment than a guest worker visa with a hypothetical possibility of adjustment of status and immediately encourages its bearer to invest in becoming American. The problem, of course, is that the current system of LPR admissions, particularly with respect to the family preference categories, is beset by backlogs, and the processing of permanent visas is a cumbersome process, at least as currently designed.

Furthermore, the responsibility attached to holding an LPR visa may be more than some migrants initially want to take on. The puzzle thus becomes how to facilitate temporary migration for those whose cyclical intent remains, while simultaneously ensuring that the migrants who decide to

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<sup>146</sup> For reasons I explain in more detail in the next Part, for these types of migrants—call them semi-permanent migrants—guest worker programs present more of an obstacle to their integration because of the ways in which they undermine reciprocity.

<sup>147</sup> See note 81.

remain do not become unlawful once they have exceeded the time limits of the guest worker program. Can we devise a visa or set of visas that makes a commitment to permanent membership, but that also enables immigrants to return home, if that is what they prefer?

As a policy matter, perhaps the best strategy would be to open up two separate paths. As a complement to increasing the number of permanent visas for unskilled workers—a long term strategy that will require deep reforms in the admissions bureaucracy—we might create a provisional visa that enables the quick entry of enough workers to meet current labor market needs,<sup>148</sup> but that also carries a presumption of adjustment at the end of a relatively short period of time—perhaps at the end of a single visa period. The critical design issues will involve how easy it is to adjust status, whether self-petitioning is permissible, whether there will be quotas on the number of provisional workers who can adjust status, and what exactly it means for there to be a presumption in favor of adjustment. Though these details are beyond the scope of this Article, the crucial point to keep in mind is that any policy adopted with a view to curbing undocumented immigration and assuring future integration must focus on the inevitability of the temporary migrant with permanent intent.

## B. Guest Worker Programs and the Threat to Reciprocity

Even if we assume, despite all evidence to the contrary, that a guest worker program will be the solution to the crisis of unauthorized immigration, the initial reciprocity gains achieved through the neutralization of the illegality problem are likely to be offset by the longer-term impact of creating a new temporary immigration status. Moreover, even if some combination of temporary visas with the possibility of adjustment and a meaningful increase in the number of available LPR visas for unskilled workers were sufficient to secure optimal immigrant mobility, addressing the inevitable future demand for entry into the United States by promising Americans a temporary guest worker program will still threaten to undermine the reciprocity required for assimilation. Guest worker policies simply promise Americans too much and ask of them too little.

### 1. Policy failures and the threat of backlash.

In proposing a guest worker program as a prospective solution to the problem of unlawful migration, policymakers emphasize that the current undocumented population highlights the American economy's need for foreign workers in certain key sectors. As I noted at the outset of this Article, guest worker programs therefore promise Americans two things: a

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<sup>148</sup> For a proposal of this type, see Abraham, et al, *Immigration and America's Future* at 36 (cited in note 7) (proposing to dramatically simplify the current visa system by creating provisional visas, which would apply across all employment categories, including the unskilled).

means of securing essential labor in a way that will not dislocate the American worker, and a policy fix that will prevent the emergence of future undocumented immigration without opening the door to permanent immigrant resettlement.

But given the preceding discussion, it seems clear that these promises are unlikely to be met. When a program billed simultaneously as a solution to illegal immigration and a means of serving temporary economic demands results in the reemergence of either unauthorized immigration or the apparent resettlement of migrants and their families, the public is likely to conclude that the government has lost control of the policymaker's grand plans and thus demand that the plans be abandoned altogether—a major reason the Bracero program eventually came to an end.<sup>149</sup> As was the case during the Bracero era, the rise of illegality, along with general concern over working conditions and the saddling of the American worker with unfair competition, helps generate resentment of immigration that is often expressed as resentment of illegal migration specifically but also reflects eroded support for immigration more generally. This erosion ultimately threatens the reciprocity required for the absorption of immigrants into the fabric of American life.

The harm of a temporary guest worker policy will, however, include more than these previously experienced pitfalls. The guest worker solution, in and of itself and regardless of its consequences, fails to promote the necessary reciprocal social adaptation in at least three ways. First, either because Americans believe guest workers will not be or are not supposed to be repeat players, they are given little incentive to incorporate immigrants into their neighborhoods, friendship networks, civic and religious associations, and other forms of organization. Second, guest worker programs do not prepare Americans to consider immigrant laborers as actors with legitimate political status, who are entitled to demand action on their behalf by government, or demand recognition of their voice in public conversations about matters that affect the course of their lives in the United States. Finally, guest worker policies reinforce the perception that immigrants bring with them foreign cultures, as opposed to cultural identities that must in some way be integrated into conceptions of American culture. In other words, the guest worker formulation ensures that the forms of cultural distinctiveness—linguistic and otherwise—that immigration inevitably introduces into the receiving society will not be normalized, but instead will continue to be thought of as foreign.

Of course, the idea of the guest worker may on one level lead to greater acceptance of cultural distinctiveness. After all, if the worker's presence is temporary, there is no need for him to adapt to the surrounding

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<sup>149</sup> See Ngai, *Impossible Subjects* at 161–66 (cited in note 14) (discussing the variety of factors that led to the end of the Bracero program, including pressure from labor unions and civil rights activists, as well as heightened public awareness).

culture in the United States. This form of acceptance might even translate into greater tolerance of non-English-speaking children in the public schools and a corresponding willingness to support forms of instruction that emphasize the language, history, and culture of Mexico and the rest of Latin America—forms of instruction less likely to be tolerated for immigrants on the path to permanent residence.

Yet the obligations the United States might have as the host of temporary workers, particularly to the spouses and children of those workers, have scarcely been addressed in the public debate. And the cultural reciprocity required for immigrant assimilation to succeed is not acceptance of the presence of foreign cultures in the American midst, but rather a tolerance for the hybrid forms of cultural identity that assimilation produces, as well as acceptance of a public sphere that includes other languages, celebrations, forms of recreation, and forms of social organization.

In the end, guest worker programs offer an ad hoc solution to a persistent problem. As a policy solution, they leave for a later date a reality Americans must confront. Instead of devising technocratic quick fixes to the crisis that is pushing policymakers to address immigration in the first place, Congress and the American people should come to terms with the reality of the interdependence of the United States and Mexico and with the reality that Americans and Mexicans, and to a lesser extent other Latin Americans, are in an important sense part of the same society, which for the foreseeable future means the permanent presence of migrants within our borders.

## 2. Guest worker programs as a failure of reciprocal obligation.

For a variety of compelling reasons, political theorists have criticized the concept of the guest worker as inconsistent with liberal values. Michael Walzer's rejection of the guest worker formulation in his analysis of immigration in *Spheres of Justice* remains a touchstone for theoretical reflection on such proposals and is therefore worth considering in some detail. Walzer begins from the premise that membership is the primary good we distribute to one another, serving, as it does, as the individual's guarantee of security, welfare, and protection from the vicissitudes of the market.<sup>150</sup> Existing members of a political community have a right to distribute membership, thereby shaping their population.<sup>151</sup> This distribution is subject only to the limitations imposed by the meaning existing members give to the concept of membership and the duties of mutual aid we owe to strangers.<sup>152</sup>

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<sup>150</sup> See Walzer, *Spheres of Justice* at 31–32 (cited in note 17).

<sup>151</sup> *Id.* at 52.

<sup>152</sup> *Id.*

But, as Walzer emphasizes, though a state has a right to control whom it admits, every immigrant admitted should be a potential citizen. He writes, “members must be prepared to accept, as their own equals in a world of shared obligation, the men and women they admit.”<sup>153</sup> In return, “immigrants must be prepared to share the obligation.”<sup>154</sup> This relationship is, in a sense, one of perfect reciprocity.

On the face of things, guest worker programs might seem to promote reciprocity. The receiving society has engineered for itself and the guest worker an apparent bargain. Workers send money home they otherwise would not have had, and the receiving society saves as well. Though the receiving society loses something in the form of the remittances sent elsewhere and must, under some programs, spend to provide housing for their new guests, these costs are probably lower than the investment that would have been required had the migrants come in as future citizens. The lost remittances must be less than the cost of shaking up the domestic labor market and existing labor law consensus to channel citizen workers into the jobs that guest workers would otherwise fill.<sup>155</sup>

But the bargain is only short term, and its success is contingent. The employer ends up in the most favorable position, because his labor needs have been met. The guest worker is also better off than he would have been had he entered the country illegally. But because migrants’ intents change in ways they could not have foreseen when they entered into the guest worker contract,<sup>156</sup> guest worker programs that are truly temporary ultimately force migrants into an untenable choice: either to become unauthorized when their visas have expired or compromise the economic, social, and familial ties they have forged during their time as guest workers and return home. In addition to becoming a constraint on the guest worker whose intent changes, the initial Pareto superior bargain also imposes externalities on society. By creating a temporary laboring class without full participation rights, or even the prospect of full participation rights, such programs introduce opportunities for exploitation and inequalities into so-

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<sup>153</sup> Id.

<sup>154</sup> Walzer, *Spheres of Justice* at 52 (cited in note 17).

<sup>155</sup> See id at 56–58. See also Chang, 78 Chi Kent L Rev at 314 (cited in note 73) (“The empirical evidence indicates that immigrants are likely to make a positive contribution to the public treasury through the taxes they pay during their working years and impose a burden only if they remain in the United States for their retirement years and gain access to public benefits.”).

<sup>156</sup> See Massey, Goldring, and Durand, 99 Am J Sociol at 1497 (cited in note 21), which states:

At the individual level, participation in high-wage economy induces changes in tastes and motivations that turn people away from target earning and toward persistent migration. Satisfaction of the wants that originally led to migration creates new wants. Access to high wages and the goods they buy creates new standards of material well-being, and first-hand experience in an affluent society raises expectations and create new ambitions for upward mobility. As migrants earn high wages and alter their consumption patterns, they adopt new lifestyles and local economic pursuits become less attractive.

Id (citations omitted).

cial, political, and economic relations that are unacceptable in a democratic society that depends on the ongoing consent of its subjects and an absence of castes.<sup>157</sup> As a policy matter, given the predictable externalities, it is no answer to say that the guest worker willingly entered into the temporary contract, which underscores the absence of true reciprocity in the guest worker arrangement. As Walzer points out, guest workers are not truly guests, nor are they like tourists.<sup>158</sup> In Walzer's analogy, guest worker programs create live-in servants, hired to perform the tasks members of the family eschew.<sup>159</sup> They perform "socially necessary work" and are immersed in and subject to the legal system of the society in which they labor.<sup>160</sup> The treatment of guest workers should be governed by principles of justice, which demand that the guest worker have the choice about whether to remain or return home.<sup>161</sup> But the power of the state looms tyrannically over guest workers in the form of the constant threat of deportation,<sup>162</sup> and, I would add, the threat of having to become an undocumented immigrant if one cannot meet the terms of the guest worker visa. This power is interrelated with and augments the power of the employer, who holds the keys to the guest worker's right to remain and therefore acts with a form of authority over the worker to which citizens and LPRs are not subject.

In his recent work calling for a reconceptualization of our ideas of citizenship, Hiroshi Motomura articulates a vision of permanent commitment to immigrants that has certain affinities with Walzer's views on the importance of equal membership. Motomura calls for a revival of the concept of "Americans in waiting," or for treating immigrants not as strangers, as we largely do today,<sup>163</sup> but as future citizens, as was the practice before 1952, the year Congress passed the major statute that now governs all of

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<sup>157</sup> See Walzer, *Spheres of Justice* at 58–59 (cited in note 17). Note, the guest worker programs Walzer critiques are those that bar workers from future citizenship. Those admitted with the promise of future citizenship, according to Walzer, would temporarily occupy the lower rungs of the economy but would benefit from welfare and union protections and could, through their initiative, outdo and therefore move past local workers. See *id.* at 56. Whether Walzer would accept a guest worker program that promises a path to citizenship is unclear, though it would probably depend on how secure the law makes that path. Walzer explicitly notes that the only acceptable conditions on naturalization are time and "qualification," but he does not specify what legitimate qualifications would be. *Id.* at 60. What is more, despite the potential availability of adjustment, many of the same conditions Walzer decries are likely to result from a guest worker program whether it promises a path to citizenship or not, including the poor working conditions, and the failure of the existing population to regard guest workers as fellow citizens. It seems unlikely that the largely formal innovation of making adjustment of status available at the end of a certain number of visa cycles will cure the problems that have characterized most of the twentieth century's guest worker programs.

<sup>158</sup> *Id.* at 59.

<sup>159</sup> Walzer, *Spheres of Justice* at 58–59 (cited in note 17).

<sup>160</sup> *Id.* at 60.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 58–59. See also the discussion of the ways in which the various bureaucratic requirements of guest worker programs engender serious insecurities in the legal status of the guest worker in Part II A 2.

<sup>163</sup> See Motomura, *Americans in Waiting* at 9 (cited in note 89).



immigration law.<sup>164</sup> According to this form of membership, immigrants would be entitled to treatment as essentially full American citizens as they follow the path the law lays out to full membership.<sup>165</sup> Under his proposal, lawful immigrants would be permitted to sponsor their close relatives for admission in the same ways as citizens, immigrants would be permitted to vote, and immigrants would be eligible for the same public benefits as citizens.<sup>166</sup> The idea of Americans-in-waiting presumably stems from a belief, similar to Walzer's, that democracy is impoverished when those who are governed by the law have no voice in its conception.<sup>167</sup> Motomura's perspective also suggests that, by making an early commitment to the inclusion of immigrants into the polity, our law will not only make good on liberalism's promise of equal treatment, but also will promote affection for the body politic and the American community among new arrivals by promising them full membership from the outset, thus promoting immigrant integration.<sup>168</sup>

My conception of reciprocity has much in common with these positions, based as it is on the idea that the incorporation of immigrants depends on the willingness of citizens and residents to accept immigrants into their political and social institutions and to giving immigrants security that will encourage their investment in American society. As I have made clear throughout, like Motomura, I believe that the "we/they" lines we draw should be based on the fact that many of the "them" will inevitably become "us,"<sup>169</sup> if not in the immigrant generation itself, certainly in the second generation, by virtue of our birthright citizenship rule.

Motomura's conception of immigrants in transition goes a step further than my own, as I have articulated it thus far, because it reveals the limitations of our current system of lawful permanent residence, demonstrating that even the ostensibly permanent admission system is not supported by a conception of immigration that views immigrants as potentially permanent members of our society.<sup>170</sup> Given the increasing insecurity of LPR status,

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<sup>164</sup> See *id.* at 8. Motomura notes that, from 1795 to 1952, every applicant for naturalization was required to file a "declaration of intent" several years in advance, which in turn elevated the immigrant to a unique pre-citizenship status. *Id.*, citing Act of Jan 29, 1795, ch 20, § 1, 1 Stat 414, 414.

<sup>165</sup> For earlier work exploring these themes, see Gerald Rosenberg, *Aliens and Equal Protection: Why not the Right to Vote*, 75 Mich L Rev 1092 (1977) (arguing that lawful permanent residents embody qualities that should make them full members of society); and T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution* 7 Con Comm 9 (1990) (arguing that lawful permanent residents should be thought of as members).

<sup>166</sup> See *id.* at 13.

<sup>167</sup> See Motomura, *Americans in Waiting* at 151 (cited in note 89).

<sup>168</sup> Compare Cox and Posner, 59 Stan L Rev at 827–28 (cited in note 110) (noting that "risk-averse noncitizens who do not know whether they will be retained may be reluctant to come to the country and make country-specific investments," which are defined as "investments whose return can be obtained only through continued residence in the country").

<sup>169</sup> See Motomura, *Americans in Waiting* at 14 (cited in note 89).

<sup>170</sup> Motomura identifies two other conceptions of immigration at work in our system: "immigration as contract" and "immigration as affiliation." See *id.* at 9–11. According to immigration as contract,

expanding the numbers of LPR visas available to unskilled workers may not, therefore, enable mobility and secure reciprocity as broadly as I would advocate. The difference between LPR visas and guest worker visas may be of degree rather than kind. Regardless, the degrees of differences between the two are critical and worth emphasizing in the current debate, though I would not foreclose a complete reorientation of the system governing the rights of LPRs to remain in the U.S. for the same reasons that I am wary of guest worker programs.

Though I share Walzer's skepticism about the compatibility of guest worker programs and liberal democratic society, the core of my critique of the guest worker program does not depend on taking a communitarian point of view and emphasizing preservation of the tight-knit communities necessary to social bonding and self-government, as Walzer's does. The idea of reciprocity, or of mutual obligation as I present it, is built into liberal conceptions of society as a cooperative scheme that depends on a sense of obligation to regard those with whom we associate as members entitled to equal concern.

Not only does the idea of obligation stemming from association render guest worker programs problematic, it also calls into question strict admissions decisions. In his discussion, Walzer implies that the United States is justified in imposing restrictions on initial admissions as a way of avoiding the unseemly results of a guest worker experiment; rather than embroil itself in the creation of a mini-tyranny within a democratic society, the wall precluding entrance altogether should remain high. But under current conditions in the U.S., we must extend the concept of reciprocity to our admissions decisions. The pretense that we can avoid internal inequalities by restricting immigration is not only exposed as a pretense by the brute fact of undocumented immigration, it is also inconsistent with our behavior as a society.

In addition, as I have emphasized throughout this Article, the communitarian's faith that restrictions on admissions at the border will prevent the pathologies of a guest worker program from arising is misplaced. The inevitability of current migration means that if we do not adopt new forms of permanent membership, we will find ourselves either with a guest worker program as a second-best option, or a compounded crisis of illegal immigration, which would be even worse. Walzer's world is simply not achievable. To avoid these pitfalls, we must resist restrictionist tendencies in our

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immigrants agree to abide by the law and are subject to deportation, basically under whatever terms the government decides are warranted. See *id.* at 9–10. The elaborate maze of grounds of admissibility and deportability, the fact that courts have no difficulty finding changes in the immigration law to apply retroactively, and the fact that there are no external constitutional limits on Congress' power to establish grounds of inadmissibility and deportability support this view. According to immigration as affiliation, the treatment of immigrants should depend on the ties that they have inside the United States. See *id.* at 10–11. The fact that the family preference categories dominate the LPR admissions categories, as well as admissions more generally (through the unlimited admission of spouses and children of U.S. citizens) reflects this view.

admissions policies and be open to shifts in the permanent characteristics of our demography, creating rules of membership that facilitate the acceptance of these changes.

Put slightly differently, the fact is that United States as a sovereign entity is not in complete control of its membership rules. Walzer and other theorists who write about the legitimacy of restricting immigration as if such complete control existed seem to ignore this reality.<sup>171</sup> Walzer defines membership as “a social good constituted by our understanding,” meaning that the current members of a society decide, through “work and conversation,” to which strangers or aliens to give the good of membership.<sup>172</sup> But forces beyond the control of Congress—namely market and social realities in the U.S. and Mexico—are creating new *members* of American society in the form of undocumented migrants or members without legal status. In other words, the distribution of membership does not occur and is not occurring through a centralized entity; the centrally controlled naturalization process is hardly the only means through which new members of American society are being created. Congress is now behaving reactively and is under great pressure to create new channels of membership through legalization and guest worker programs, channels that might be very different from those we would establish in an unconstrained world.

As I emphasized in Part I, the illegal migrants of today and the guest workers of the future come to the United States as the result of bidirectional forms of association, or because of hemispheric interconnectedness. Though this interconnectedness may begin as a matter of economics, our economic choices result in the creation of social networks that facilitate migration, even once the economic incentives for migration fade<sup>173</sup>—networks of which U.S. residents are as much the authors as the immigrants themselves. The idea that obligations to others arise from our association with them requires that we expand our conceptions of political community. This observation does not mean that restrictions on admissions will not be appropriate in other contexts, but with respect to the phenomenon that is the focus of this paper, such restrictions must be limited.

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We thus are faced with the need to adapt or find ways to absorb large-scale immigration. We can conceptualize this need in two ways—as a mat-

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<sup>171</sup> The idea of membership distribution is supported by a distinction between members and strangers that Walzer defends. The existence of this distinction means that admissions decisions must be made by political communities, and it means that those decisions are rarely criticized as a failure of distributive justice. Admissions decisions may be criticized to the extent that they display a lack of charity—a criticism that reflects the idea that we owe strangers a duty of mutual aid—but the scope of our obligations to strangers, in Walzer’s view, is clearly limited, and does not appear to require certain types of admissions decisions over others. See Walzer, *Spheres of Justice* at 33–34 (cited in note 17).

<sup>172</sup> *Id.* at 32.

<sup>173</sup> See Portes and Rumbaut, *Immigrant America* at 17 (cited in note 21).

ter of pragmatics and as a matter of obligation. Either way, whether Americans like it or not, the social conditions that are generating the current wave of immigration are producing a population of semi-permanent and permanent settlers. Our commitment to certain political principles—to living in a liberal democracy without castes—as well as to a desire to live in social peace, require that we incorporate these immigrants into mainstream social and political institutions. But by characterizing immigrants as temporary sojourners, the very idea of a guest worker program frames immigration as a temporary solution to the needs of Americans, as opposed to a social condition to which Americans must adapt.

#### CONCLUSION

I began from the premise that guest worker programs represent a prospective solution to undocumented immigration. In that sense, these programs offer a productive approach to contemplating the current immigration phenomenon and an essential policy complement to proposals for stricter enforcement at the border and in the interior. It is difficult to specify how much of the current anxiety concerning immigration results from the high levels of unauthorized migration, and how much is simply a reaction to large-scale immigration in general, with “illegal” status serving as a convenient outlet for a more general frustration. But policies that reduce illegal immigration are likely to help shape American attitudes concerning immigration to correspond with our national mythology as a country that welcomes immigrants and thrives because of their presence. The cycle in which the United States finds itself—of permitting an undocumented population to accumulate as the result of under-enforcement and the failure to update the legal immigration system to changing demographic pressures, followed by immigration reform that includes legalization of undocumented migrants—is unhealthy, if only because it erodes support for the immigration that is both an inevitable and necessary part of the country’s future.

But as a means of breaking this unproductive cycle, a guest worker program promises short-term benefits and long-term friction. Because temporary worker programs are being proposed to channel migration flows with semi-permanent to permanent time horizons, they should be adopted only to the extent that they are consistent with the long-term objectives of assimilation. But by limiting immigrant mobility and failing to encourage reciprocity on the part of Americans, guest worker programs fall short of that objective. Our long-term interest in assimilation would be far better served by substantially expanding opportunities for permanent membership, perhaps by expanding the number of LPR visas available to unskilled immigrants and raising the country ceilings on immigration from key parts of the world, namely Mexico. Of course, given the current political climate, a guest worker program may be a second-best solution: we might not have sufficient political will or administrative capacity to support these

greater reforms, and a guest worker program is certainly preferable to the persistence of undocumented immigration. That said, though our nation's history of adapting to immigration has unfolded in a decidedly mixed way, in the end, a guest worker program is not worthy of the principles of opportunity, equality, and mutual respect among members that characterize the aspect of American immigration history we should strive to perpetuate.