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IMMIGRATION AND EQUALITY

Adam B. Cox & Adam Hosein[†]

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Philosophical writing about immigration is typically organized around two sets of questions. The first set is about state borders. The central questions are whether it is ever permissible for a state to prohibit some people from entering its territory; and, if so, what sort of limits a state may place on the numbers and types of people who may enter. The second set of questions is about how a state should treat noncitizens present within its borders. There the central question is whether a state is obligated to treat such persons identically to existing citizens—to give them the right to stay in the state indefinitely, the right to participate in politics, the right to public assistance, and so on. If such treatment is not always required, the inquiry turns to what determines whether a particular noncitizen must have access to these various rights.

As the scope of long-standing debates about open borders suggests, political philosophers have, over the years, focused principally on the borders questions. In this paper we want to set these issues aside. We will assume that states are permitted to put at least some limits on whom they admit, and we will ask how a state must treat those who are present within the state.

This second question raises central questions concerning equality. But there is widespread disagreement about what equality requires in the context of noncitizens present within a state's territory. Legal theorists have spent considerable thinking about this question, but there is little large-scale philosophical theorizing about it. And this question is important even if one thinks the border should be relatively open: in places like Europe, for example, there is relatively free movement across borders but states still must decide what rights to accord new entrants.

This paper makes two central claims. First, we argue that the two theories of equality that dominate the immigration literature—the theory of simple territorial equality and the affiliation theory—are both unpersuasive on their own terms. The former is implausibly strong, prohibiting many practices that are widely accepted. The latter is, in some ways, implausibly weak, accepting as just practices that are universally condemned. To replace these theories, we briefly sketch an alternative which fits better with familiar liberal theories of equality.

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Second, we argue that it is a mistake for immigration equality theorists to focus exclusively on the question of what *individuals* are owed by the state. Equality can often be understood only by reference to the relative treatment of *groups* of individuals. The existing literature's focus on equality-as-citizenship has obscured this fact, and helps explain why most work by both philosophers and legal theorists on the rights of immigrants is strangely divorced from modern thinking about equality in other legal contexts—such as with respect to the rights of women or the rights of racial minorities. We argue that these mainstream theories of equality should be central to thinking about the rights of noncitizens, and we tentatively explore what they would require of the state.

As a central illustration of our claim we will discuss the case of guest-worker policies. Temporary worker programs are in some ways very attractive: the workers get higher wages than they would in their home countries, the host country gains increased economic output without the fiscal burden of having more permanent migrants, and the home country gains remittances and workers who have higher skills when they return. Yet many philosophers and legal scholars think guest-worker programs are automatically unjust because those programs treat individual temporary workers unfairly—by denying them some of the rights and benefits granted to citizens, or in other ways. We show that, as a matter of individual treatment, at least some guest worker programs are compatible with a more plausible understanding of equality. Moreover, by moving beyond purely individualist approaches, we justify some intuitive limits on the structure of those programs, including limits designed to prevent group subordination.

1. Simple Territorial Equality

There are certain fundamental rights which we think every citizen must be granted equally. Nearly everyone would agree that these rights include the right to vote and to remain in the country indefinitely. Many philosophers would also add to the list rights to education, healthcare, social security and so on. These rights are owed to *individual citizens* regardless of their membership in any social group or other characteristics. Nearly all existing work by immigration theorists approaches the question of equality for immigrants from this perspective: by asking when the state incurs an obligation to treat an individual noncitizen as an equal member of society and thereby grant them all of the rights of full citizenship.

In discussions of immigration, equality is often construed as the requirement that a state treat equally all people who are present within the territory over which it governs. Deviations from equal treatment are therefore considered presumptively to violate the principle of equality and therefore demand special justification. There is, of course, a great deal of debate about what equal treatment requires in any particular case. But many immigration scholars assume, at least implicitly, that what we will call “simple territorial equality” (STE) is required. People within a territory are treated as equals, on this view, only if they all receive the same central benefits, privileges, rights, and so on. Any deviations from this norm of equal entitlements are

considered presumptively impermissible and therefore demand special justification. In particular, it is presumptively impermissible for someone present within a territory to be denied the same benefits and rights as another person just because she is an immigrant. So, for instance, it is presumptively impermissible for immigrants to be granted weaker welfare entitlements, be subject to possible deportation, or be given lesser protection for their speech and religious practice.

STE is, at least on its face, an attractive theory. It reflects a plausible and common understanding of equality as the requirement that a state favor equally all people who are within its jurisdiction. Since all of those people are required to respect its authority the state must treat them equally. And STE offers a simple and plausible interpretation of what equal treatment requires: ensuring that each person gets the same fundamental entitlements.¹

The requirement of simple territorial equality underlies much contemporary work on immigration. Much of this work self-consciously traces its authority to Michael Walzer, who laid out a theory of simple territorial equality in *Spheres of Justice*. Walzer's basic claim was that "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does." According that argument once someone is subject to the state's authority, which happens immediately on their entry into the territory, they have to put on the track to full citizenship. As Linda Bosniak states:

[The] territorial conception repudiates the notion of graduated or differential levels of inclusion because it views it as antithetical to liberal and democratic principles. It says: once someone is in the geographic territory of the state, the person must, for most basic purposes, be treated as fully in.

To be sure, there is some ambiguity about the attachment of these theorists to STE. Neither Walzer, Bosniak, nor anyone else appears to go so far as to demand that migrants be instantaneously accorded equal rights along every dimensions the moment they enter the state, perhaps because such a view would be seen as wildly implausible.² Thus, these scholars do sometimes allow deviations from STE, for instance when they allow that tourists can be given limited entitlements, or that it

¹ We will later show that this basic motivation for STE is mistaken and in fact supports a view which allows the state to give unequal entitlements to some people within its jurisdiction. See section 3 *infra*.

² See, e.g. Michael Walzer *Spheres of Justice* (New York: Basic Books, 1984); Linda Bosniak, *The Citizen and the Alien*; Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *Theoretical Inquiries in Law* (2007); Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, in *Debating Immigration* 63-81 (Carol M. Swain ed. 2007).

take a bit of time for a person to be granted full citizenship. This might give the impression that they don't really accept STE.³

But in fact STE plays a central role in their thinking. This is because they assume that all departures from STE are presumptively impermissible and thus demand special justification. Thus, the departures that they allow are assumed to have some special explanation.⁴ Consider Walzer's critique of Germany's guest worker system. Certainly some of Walzer's concerns seem especially pressing when we consider guest workers whose stay is very long-term, such the stigma faced by long-term residents who retain guest worker status. But it's clear that Walzer was also concerned about schemes in which workers came for only short period. For instance, he says, categorically, that "democratic citizen . . . have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done." That "choice" would seem to rule out having any situation intermediate between not bringing any workers and bringing workers who will be put on a track to becoming full citizens. In particular it seems rule out bringing short-term guest workers.

In fact Walzer seems to have thought the limited stay of such workers exacerbates the injustice they face. It is disturbing, he claims, that "they are brought in for a fixed time period, on contract to a particular employer; if they lose their jobs, they have to leave; they have to leave in any case when their visas expire." And his main arguments seem to support this rejection of short-term guest worker schemes. Thus, the guest worker who is present in the country but not on that track is being treated unjustly.

A the quotes from Walzer highlight, most theorists who support STE also hold another commitment: the commitment of self-governance according to which a political community has the right to determine its own membership and character. Control over membership and community character is thought to include the power to exclude outsiders from the territory. Bosniak has described these twin commitments as the "'hard outside/soft inside' conception of membership":

³ Some immigration theorists have suggested as much. Wellman (2011), for example, reads Walzer as complaining about the German guest-worker system only because the Turkish workers ended up being present for a very long time without becoming full residents. "If a worker and her family lived in Germany for twenty years, for instance, they would never be allowed to vote or help themselves to many other standard benefits of full political membership....Walzer found this policy objectionable. In his view, Germany could permissibly admit as many or as few Turkish workers as it saw fit, but was not at liberty to bring in a group of *permanent* workers and then treat them as political subordinates. (my emphases)."

⁴ These special justifications are often ad-hoc. Walzer, for instance, suggests a vague justification for the special status of tourists by saying that they are "guests" who don't have to be given the full rights of "members". Walzer *ibid.* p.59.

[W]ith ethical territoriality you have got commitments to both universality and boundedness going simultaneously. But notice that for Walzer and many others, these values are not in conflict; they are seen as entirely complementary. The idea is that norms are divided jurisdictionally, with each applying to a different domain: universalism within territory, and boundedness at edges.

Thus, theorists who support simple territorial equality generally take their task to be to develop institutions that jointly satisfy the demands of self-governance and simple territorial equality. Roughly, their aim is to allow a good deal of discretion to the state in its decisions about who and how many people to let in, while placing strict limits on how people may be treated once they are admitted. From their perspective, the state ideally should be free to let in as few or as many people as it wishes and to set criteria for selecting those who are to be allowed in. But once those people are present within the territory, the state must grant them all the same benefits and rights that it grants existing inhabitants.

The problem with attempts to reconcile control over admissions with simple territorial equality is that they cannot be squared. Our actual immigration practices, and our intuitions about them, confirm this and reveal that the principle of simple territorial equality is implausibly strong. There are certain rules and practices that are difficult to rule out of any plausible account of what it means to control admissions. And as we will show, those rules are fundamentally incompatible with the principle of simple territorial equality. In fact, the only understanding of control over admissions that is compatible with STE is what one might call the minimalist view of territorial control: that controlling admissions means having the *authority* to exclude any person at the border and no more. On this understanding, a state is authorized to stop a person who is attempting to enter. But if the state does not do so, then—regardless of the reason why the state did not do so—once the person crosses into the state’s territory no action taken by the state to remove the person will be considered to be in furtherance of control over admissions.

The minimalist understanding of control over admissions is compatible with simple territorial equality. But it is an implausible account—one that is inconsistent with widely shared views about what it means to have control over admissions. Revising the understanding make it more plausible renders it incompatible with STE.

One central problem with the minimalist account is that it cannot accommodate the problems of unlawful migration. It either assumes perfect enforcement capacities or assumes, implausibly, that deportation is always impermissible. Under the theory, if a person manages to enter the state’s physical territory, the state is prohibited from treating the person any differently than its existing citizens. This means that persons who sneak across the border or otherwise enter in violation of the state’s immigration laws must be treated identically to existing inhabitants. But no one who believes that states are permitted to restrict immigration would agree that states are utterly without power to remove anyone who evades the state’s immigration restrictions. To be sure, immigration theorists

disagree sharply about when, and to what extent, a state may treat those who enter without authorization differently than citizens. They all agree, however, that the state retains the authority to remove or otherwise subject to different treatment *at least some* unauthorized migrants—such as those who recently arrived. Simple territorial equality cannot justify this differential treatment.

Even setting aside problems that arise from the limited capacity states have to police their borders, there are a number of practices people think states are allowed to engage in which would violate simple territorial equality. Moreover, these practices are not tangential aspects of immigration policy that can be relegated to the status of minor exceptions to general rules. Rather, they are central part of immigration policy for many states.

There is disagreement about exactly which practices are acceptable, but most people think at least some of the following practices are acceptable

A. Probationary periods and ex post screening. Even when a state screens a prospective migrant at the border and agrees to her admission, states ubiquitously retain some authority to revoke the admission at a later date. These migration rules give states the ability to screen migrants a second time, after they have lived in the state for a time and the state has had a chance to learn more about the migrants. Historically this power has often been misused to deport those thought to be subversive, racially undesirable, and so forth. Yet some limited authority to remove admitted noncitizens is assumed by most immigration theorists and widely considered acceptable.

B. Hierarchical rights. Immigrants are seldom admitted to a state and granted citizenship on the same day. Instead, even immigrants that a state admits with the intention of creating future citizens typically are given limited rights for some interim period. For instance, many states require that immigrants live in the state for several years before they acquire full access to social insurance and the franchise. And even those who criticize the interim denial of some rights accept the denial to immigrants of others. For example, while many theorists hold that every person present in the state must have an equal right to police protection, nearly everyone also agrees that immigrants need not be given the right to vote in national elections the day they arrive in a new state. This is true even—or perhaps especially—for those who believe that states have an obligation to open their borders to all persons. For instance, many of those who think states must admit anyone who wishes to enter would agree that states do not have to give the right to someone who is planning to be in the country for only a short period.

Moreover, those who accept the permissibility of (at least some) border restrictions generally think that immigrants need not be given an equal right to reside in the state from the moment of entry. Because the acceptance of ex post screening is so pervasive, most agree that the state has authority to deport at least some noncitizens—such as violent criminals—during an initial probationary period. Thus, there is wide acceptance of giving immigrants a right to reside that is more limited

than that accorded to citizens, who most believe should never be banished or exiled. These widespread intuitions support practices that violate simple territorial equality by authorizing the differential treatment of a person on the basis of her status as a recent immigrant and a noncitizen.

C. Temporary migration. Many migrants, particularly labor migrants, are admitted by states on a formally temporary basis. Migrants who are allowed to enter and work in a country for only a limited time period often face restrictions on their labor market participation—such as rules prohibiting them from working for any employer other than the one for which their visa was granted. Moreover, temporary migrants are typically prohibited from seeking public assistance, from participating in politics, and so on. Temporary migration rules, often referred to as “guest worker programs,” are admittedly more controversial than probationary periods or hierarchical rights. There are some immigration theorists, such as Michael Walzer, who argue that there can exist no just system of temporary labor migration. Nonetheless, many forms of temporary migrations are widely accepted. No one thinks it is problematic to admit tourists for only a limited time with limited rights to work, to access public assistance, to political participation and so on. Similarly, there is widespread support for programs that admit some high-skilled workers on temporary visas, or that admit foreign students temporarily to attend our universities, again with limited rights to political participation and so on. Thus there is very widespread agreement that it is at least sometimes permissible to admit someone to the United States on a temporary basis and with limited rights along various dimensions.

In short, all of the above practices involve having some people present in a territory who have more limited rights than others. For this reason they all violate simple territorial equality. Yet nearly everyone thinks at least some of these practices are acceptable. Each of us may disagree with one or another, but it is hard to identify a single immigration theorist who rejects all of these practices.

This is true even for theorists who purport to adhere to simple territorial equality. These theorists struggle mightily with the radical implications of simple territorial equality. As we have shown, if taken seriously STE would prohibit a state from deporting *any immigrant* who is physically present in the state’s territory, regardless of how the immigrant came to be in the country or how long she had been there. It would also prohibit the state from denying the vote to immigrants the day after they arrived in the state. Theorists try to blunt these far-reaching implications in three ways. First, they sometimes place strict limits on the permissible structure of immigration law—limits at odd with extremely widespread practices. Michael Walzer, for example, argues that the state may admit immigrants only on a permanent basis; temporary admission is prohibited. Second, they sometimes try to modify subtly the idea of STE, though without explaining what principles underlie the modification. Walzer allows for an existence of a transitional period in which

new entrants can be denied some rights—such as political rights. But he does not explain what makes such a transitional period morally acceptable.⁵

The difficulty theorists have had squaring simply territorial equality with reasonable practices of control over admissions, limiting the rights of recent and short-term immigrants and so on is understandable. But rather than simply investing more effort trying to reconcile simple territorial equality with these practices, we should consider whether it is defensible on its own terms. We think that once we consider our actual immigration practices, and consult our intuitions about them, the principle of simple territorial equality seems very implausible.

2. Affiliation Theory

As we have shown, most people think that at least sometimes, and in some ways, it is permissible to treat immigrants and citizens differently. But they disagree about exactly when differential treatment is allowed and in what ways. For instance, people typically agree that tourists can be treated differently from citizens but they disagree about whether or when it is permissible to have temporary workers with various limited rights. People agree that everyone in a territory should be granted freedoms of expression and religion but they disagree about what political rights must be accorded to recent immigrants, and when those rights must be provided.⁶

The Affiliation Theory is perhaps the most commonly adopted alternative to STE in legal theory and political philosophy. Here are some representative statements of the theory. The Supreme Court concluded in *Diaz* that non-citizens are entitled to more rights as their “ties” to American society grow. Motomura writes that, on the Affiliation View, “[t]he more enmeshed they [aliens] become in the fabric of American life, the more we should treat them like citizens.”⁷ And philosopher Joseph Carens claims that “Living in a society on an ongoing basis makes one a member of that society. The longer one stays, the stronger one’s connections and social attachments. For the same reason, the longer one stays the stronger one’s claim to be treated as a full member. At some point a threshold is

⁵ About all Walzer says is this: “No democratic state can tolerate the establishment of a fixed status between citizen and foreigner (though there can be stages in the transition from one of these political identities to the other).” Walzer, *ibid.* p.61.

⁶ Patterns of legal regulation reflect this disagreement, as well as the variability of views over time. For evidence of this variation, see Alexander Keyssar, *The Right to Vote: the Contested History of Democracy in the United States* (New York: Basic books, 2000).

⁷ Hiroshi Motomura, ‘Immigration and “We the People” After September 11,’ *Albany Law Review* 66 (2003): 413-429.

reached, after which one simply is a member of society, tout court, and one should be granted all the legal rights that other full members enjoy.”⁸

In one important respect, the Affiliation Theory takes the same approach identical to that taken by the theory of Simple Territorial Equality: it asks when individual noncitizens must be treated by the state as equal members. The difference is the triggering condition identified by each theory. STE turns on territorial presence. In contrast, the Affiliation View makes *participation in civil society* the condition that triggers the state’s obligations to treat a noncitizen as equal to full members of society. The basic idea underlying the theory seems to be that the more someone participates in civil society the more they *interact* with existing citizens and the more they *identify* with existing citizens. It is that interaction and identification, Affiliation theorists posit, that gives rise to obligations of equal treatment by the state.⁹

Given this account, it should be unsurprising that much theorizing about the Affiliation View is given over to trying to figure out what constitutes participation in civil society. We want to bracket this ambiguity about the theory, however, and focus on the deeper question why participation in civil society should change what people are owed by the state. What is it about interaction and identification with existing citizens that generates these obligations?

⁸ Joseph Carens “The Integration of Immigrants,” *Journal of Moral Philosophy* 2 , no. 1 (2005): 29-46.

⁹ The Affiliation View, as we have described it, is often conflated with a closely related but distinct theory according to which noncitizens are entitled to concern by the state to the extent that they have *contributed* to a society, rather than the extent to which they participate in civil society and identify with existing citizens. Noncitizens make these contributions by engaging in productive activities that increase economic output and by paying taxes that improve state finances. For some rights the view seems plausible. For instance, it is plausible (though controversial) to think that someone should receive social security benefits to the extent that they have paid into the program. But the view seems rather implausible when we think about other rights that citizens enjoy. We do not ordinarily think a citizens’ right to stay in the country or their right to vote is conditional on their being economically productive. So there is no reason to think an alien’s access to these rights should be either. Furthermore, it is unsurprising that those rights are not tied to economic contribution. Unlike rights to claim social security, the right to vote is not a claim to an economic benefit or service that is only made available through individual contributions. So, there is no reason to think that enjoying that right should be conditional on making some sort of economic contribution.

Moreover, conditioning such rights on the extent on one’s contribution would suggest that those who contribute greatly become entitled to the rights of citizenship much more rapidly. For instance, the marginal contribution of a highly skilled worker working for a week is likely to be significantly higher than the marginal contribution of an unskilled worker. So the former should become entitled to the rights of citizenship much more quickly than the later because their total contribution increases much more quickly. But our intuitions don’t reflect this. We think that someone who has been in the country for only a few months has a very limited entitlement to concern from the state regardless of how productive during that period.

To motivate the view a little, think about non-political contexts. Suppose someone moves to a neighborhood. A lot of people will think that the more that person interacts with their neighbors and comes to identify with local practices the more they are a member of the neighborhood and that the more they are a member of the neighborhood the more they are entitled to concern from the other neighbors. Thus, the thought goes, we should think that people become members of society as a whole by interacting and identifying with society as a whole. And the more someone is a member of a whole society the more that society owes them. So, the state should show more concern for people in so far as they interact and identify with society as a whole, which they do by participating in civil society.

The Affiliation View thus has some intuitive attraction. However, as we will now see, it still must be rejected because it conflicts with some important intuitions about equality.

According to the Affiliation View, the state should show concern for non-citizens just to the extent that they participate in civil society. But the extent to which they are integrated into civil society itself depends on the extent to which other citizens and the state let them integrate. In other, non-alienage settings, settled moral and constitutional thinking about equality suggests that it is completely inappropriate for the state to take the fact that someone is separate from the main body of civil society as justification for giving them limited political rights.

Take, for instance, Jim Crow laws that tried to keep blacks separate from most of civil society or laws that attempted to keep women out of the public sphere. We would now object, as, say, the Brown court did, that these laws are bad for blacks or for women. But on the Affiliation View they should be self-justifying - it was probably bad for African Americans to be isolated in this way, but, on the affiliation view, the greater their isolation the less the state has to care about what's good for them. So keeping them isolated should itself create a justification for showing them less concern and having laws which are less good for them than other groups. But few now think those laws had even minimal justification.

In sum, it does not seem plausible to say that someone's lack of participation in civil society is a good justification for limiting the state's concern for them or for giving them fewer rights.

In fact, we, and the court, typically give *special* scrutiny to laws that disadvantage unpopular groups. When we see that a law is, say, especially burdensome for members of an unpopular religious group or ethnic group we tend to look especially hard to see if it has a good justification. This is precisely to make sure that their socially unpopular status is not being translated into a lesser political status where the state shows them lesser concern.

In the alienage context, the Affiliation View also seems to justify laws that attempt to keep aliens away from mainstream civil society. For instance, German guest-worker policies of the last century used various methods to keep guest-workers

separate from the rest of society. This makes them among the most criticized of previous guest-worker policies. But on the Affiliation View, those laws too were self-justifying – it was probably bad for the workers to be isolated in this way, but the greater their isolation the less the state has to care about what’s good for those workers.

Perhaps it will be said that African Americans, Turkish guest-workers and other groups who have been subject to social exclusion may not have been part of *mainstream* civil society but were all the same a part of *some* sort civil society, within their own communities, and thus were entitled to equal concern. So, for instance, African Americans were members of churches, had children and so on, they were just different churches, schools, etc. to the ones attended by the white majority. Thus, the objection goes, the Affiliation theorist can say that African Americans were entitled to equal concern by virtue of their affiliation with others, even though those others were not part of the majority.

The objector’s stated criterion for receiving equal concern from the state is affiliating with *some* other people, even if not with the main body of society. But this criterion is too weak. A Spanish citizen might interact and identify with a large number of other people, all of whom are in Spain. This surely doesn’t entitle him to concern from the US government, whereas the Affiliation Theorist must say that the African American who affiliates with others within the territorial boundaries of the US is entitled to equal concern from the state. The Affiliation View has no explanation for why doing these things within the territorial boundaries of the state brings with it rights that doing these things outside of those boundaries does not. We need a view that explains why presence within a territory is itself morally significant even if it doesn’t involve affiliating with the main body of civil society.

Can the Affiliation View be reformulated to avoid these problems? One might object that apartheid-like situations represent special cases. Perhaps they show that participation in civil society should not be a necessary condition for political equality. But maybe it still should be sufficient.

The difficulty with this view is that it implicitly privileges people who have close affective or ideological ties with others in the polity (or perhaps with the polity itself). In many contexts, we are deeply suspicious of laws that condition rights-holding on a person forming a certain type of connection to, or identification with, a community. First Amendment doctrine is built on this skepticism. So is much constitutional law concerning voting rights. Historically, states and local governments regularly tried to condition the right to vote on a person’s participation in (state or local) civil society—typically through requirements that a person reside in the state or local jurisdiction for some extended period of time before acquiring the right to vote.¹⁰ States defended these laws in part on the ground that a durational residency requirement would help ensure that the voter developed a connection to,

¹⁰ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972).

and identification with, the community—that is, that the voter “has a common interest in all matters pertaining to [the community’s] government.”¹¹ The Supreme Court consistently struck these laws down on the ground that it was inappropriate for these jurisdictions to demand that a person interact with local residents or identify with them before being permitted to vote in local elections.¹² These decisions are supported by the widely endorsed principle that a democratic state may not privilege some viewpoints or ways of life over others when assigning fundamental rights.

One way to try to avoid these problems is to propose very weak criteria for what counts as sufficient for membership in a society. And perhaps with an eye to something like our objections some Affiliation Theorists often do this – they say what matters is just, say, residence in the community.¹³ But if they adopt such a thin understanding of what is required for membership then they have abandoned the core of their view. The essence of the Affiliation View is that what makes someone a member of society, and thus entitled to equal concern, is their interaction and identification with its citizens. So to say that mere residence or whatever is sufficient for membership is to abandon the core of their view. On such a thin conception of affiliation, the Affiliation View collapses into Simple Territorial Equality.

Thus, we should reject the Affiliation View. But we said there was a plausible intuitive motivation for the view, so where did it go wrong? The motivation was that in general, in non-political contexts, people think that they owe others more to the extent that they interact and identify with them. Thus, the argument goes, we should think that to the extent someone interacts and identifies with society as a whole, society as a whole owes them more. Therefore the state should show more concern for people in so far as they interact and identify with society as a whole. Before dismissing the Affiliation View we should try to explain where this motivation went wrong. There are two promising options for doing so.

Firstly, one could deny that someone’s interacting and identifying with others *ever* changes what they are owed, even in the context of neighborhoods and so on. Making this case would require going into long standing debates in moral philosophy about justifications for partiality, so we won’t dwell on it.

¹¹ Gov’t brief in *Dunn v. Blumstein*.

¹² See *Blumstein*, 405 U.S. at 354-56; *Carrington*, 380 U.S. at 94.

¹³ This is, in fact, what courts did in the voting rights cases described above. They held that local jurisdictions could not impose durational residency requirements—because such requirements implicitly were justified by a desire to create affective or ideological ties between the new resident and the jurisdiction—but could require *bona fide* residence. Thus, local jurisdictions could exclude from the franchise those who did not in fact reside in the community, such as property owners who lived elsewhere.

But something weaker will do. Even if a person's interaction and identification with others does affect their status in non-political contexts it is plausible to think that it still shouldn't affect their status in political contexts—that is, it shouldn't change what the *state* owes them. The affiliation view has it that your interactions with individual members of society change what the state owes you. But it's more plausible to think that what the state owes you should depend on your interactions with the state itself.

3. The Autonomy View

We have seen that what is needed is a view that explains why mere presence in a territory can, over an extended period of time, even become enough to entitle a citizen to equal concern from the state, even in the absence of affiliation. Traditional social contract theory provides a more promising path for sketching out such a theory—one that focuses directly on the interactions between an immigrant and the state itself. While developing such a theory in full is not our goal here, this section sketches the outlines of such an approach, which we will call the Autonomy View. The Autonomy View rests on ideas about reciprocity. The state imposes certain burdens on people within its territory and has to give them something in return. What do people give up? People have the capacity for autonomy, the capacity to make decisions for themselves about how to live and carry out those decisions.¹⁴ The state requires people to give up some of this autonomy by accepting a degree of state control over their lives. This is because it issues directives which it demands that they follow. What do they receive in turn? The state promotes their interests—including their interest in leading an autonomous life—by providing them with protection, public goods, resources and so on.

Before developing these ideas more fully, we should say a few words about an rejoinder that the preceding paragraph invites. If the state's obligations arise from the autonomy that noncitizens give up to reside within the state, why shouldn't the state's obligations be comprehensively defined by the contract of admission between the immigrant and the state? Migration presents a situation that might be thought to overcome many of the problems of hypothetical consent in social contract theory, because unlike most citizens migrants generally do choose to come to a state. Thus, one might think that the migrant should be free to consent to whatever treatment the state says she can expect, assuming the conditions of her stay are made clear in advance. This view is sometimes called the "Contract View" because it imagines that immigrants make a contract with the host state, trading admission for whatever

¹⁴ Note that in saying this we mean to remain largely agnostic about the precise form autonomy takes. Moreover, we do not mean to imply that all state impositions are strictly autonomy-reducing. Obviously state action is often a precondition for many forms of autonomy.

conditions the state places on their stay. The only demand an immigrant might make is that the terms of the contract not change after the immigrant's admission.¹⁵

This view is implausible for a range of reasons. While consent can sometimes change what someone is owed, there are a wide variety of contexts in which justice is thought to require that an individual's private "choice" or "consent" be disregarded. Sometimes it is relatively easy to explain these intuitions. For example, where low-skilled immigrants have very weak bargaining power relative to the states with which they are dealing, or where refugees face torture or death if they remain in their home countries, many will feel that a state's obligations to these migrants cannot be grounded solely in the migrants' "consent" to the terms of admission offered by the state. In other situations, intuitions about consent are more mysterious: consider, for example, the universal invalidity of a contract selling oneself into slavery. Nonetheless, the widespread nature of these intuitions outside the immigration context makes it implausible that the choices made by noncitizens should be respected under all conditions, given that certain choices (or conditions on choice) by citizens are prohibited.

Putting aside the contract view, different versions of the Autonomy View are commonly invoked to explain why a state has special obligations to its own citizens. Here, for instance, is Dworkin's statement of the theory: "A political community that exercises dominion over its own citizens . . . must take up an impartial, objective attitude toward them all, and each of its citizens must vote, and its officials must enact laws and form governmental policies, with that responsibility in mind."¹⁶ But as Dworkin's reference to "citizens" illustrates, discussions of the Autonomy View have typically not considered what the theory implies with respect to noncitizens.¹⁷ They have implicitly assumed that everyone within a territory bears the same relation to the state and its authority and is thus entitled to the same concern from the state.

¹⁵ Hiroshi Motomura discusses something akin to the contract approach, though he does not appear to identify the constraint on ex post changes to the contract. Thus what he calls the "contract" view may in fact be closer to the view that the state has no obligations—that it can simply do whatever it wants, whenever it wants. See Motomura *op. cit.*

¹⁶ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), p. 6.

¹⁷ We cannot offer here a full defence of the Autonomy View. Our aim is just to show that a version of it can be extended to provide a plausible theory of what aliens are owed. For important presentations of the theory, in addition to Dworkin's, see Michael Blake "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs* 30 (2001): 257–96 and Nagel "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005): 113–47. For criticisms of the Autonomy View and social contract theory in general see, for instance, Martha Nussbaum, *Frontiers of Justice* (Cambridge: Belknap, 2007) and Richard Arneson, "Do Patriotic Ties Limit Global Justice Duties?", *Journal of Ethics* 9 (2005), pp. 127–150.

If the Autonomy View is right, must everyone in the territory be given the same rights? If so, then the Autonomy View collapses into Simple Territorial Equality. And at first pass it might seem so. Everyone in the territory must follow the law, so it might seem that they all bear the same burdens and must thus get the same benefits and rights. Some people, for instance Walzer, take the Autonomy View to imply basically this: “Men and women are either subject to the state’s authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does” But as we have seen, Simple Territorial Equality is, independently, highly implausible. If the Autonomy View reduces to STE, therefore, we should reject it.

Properly understood, however, the Autonomy View does not entail STE. The key point to notice is that restrictions on autonomy come in degrees. For instance, suppose that I am someone’s slave. In this case my autonomy is very heavily restricted, since that person controls nearly all aspects of my life. By contrast, suppose that I live in an apartment complex and must follow the rules made by the management, such as restrictions on when music can be played and where trash can be left. I have to give up some of my autonomy to the management company, but much less than the slave gives us to their master. The master has control over much more of the slave’s day and much more important aspects of their life.

Given that restrictions on autonomy come in degrees, the Autonomy View can provide a good explanation of, for instance, what distinguishes tourists from long-term residents. Tourists, unlike long-term residents, are in the country for a very short period of time and thus the state takes very little control over their lives. Because of this the state owes much less to the tourist.

To see how this works more clearly we need to explain the autonomy view in more detail. A first question is whether to adopt more “objective” or “subjective,” as we might call them, interpretations of what it is to restrict someone’s autonomy. On an objective interpretation, the extent to which someone’s autonomy is restricted depends just on what regulations apply to them. On a subjective interpretation, the extent to which someone’s autonomy is restricted depends on what regulations apply to them and also on the nature of their lifestyle and thus whether the restrictions that apply to them really affect their activities. Take, for instance, anti-sodomy laws. On the objective interpretation two people, one of whom is gay and one of whom is not, both have their autonomy restricted to the same degree by anti-sodomy laws. By contrast, on a subjective view we can say that the gay person’s autonomy is restricted to a much greater degree by the anti-sodomy laws. On the subjective interpretation we can say that since anti-sodomy laws have a much greater impact on the gay person’s lifestyle their autonomy is restricted to a more significant degree.

The example of anti-sodomy laws seems to indicate that the subjective interpretation is more plausible. Intuitively, the state has more control over the gay person’s life. Furthermore, this seems to fit with our fundamental ideas about what it is to give up autonomy. If giving up autonomy is giving some other person or institution control over my life then it seems that I have given up more of my

autonomy to the extent that I have to actually modify my lifestyle in accordance with their decisions.

If all this is right then when we are thinking about aliens we will need to consider not just whether someone is in the country and subject to its laws but also the nature of that person's activities in that country. The state has more control over the life of someone who is carrying out their central life plans in the territory than someone who is engaged in relatively trivial activities. This is part of the explanation for why, for instance, we treat tourists differently from temporary workers. The former are merely engaged in leisure activities that are not central to their lives, whereas the latter are working which is more significant activity. It also provides with a reason to distinguish temporary workers from very long-term residents. The former may be in the country for a sufficiently short period that they treat their stay as merely an attempt to earn some money which they can then bring to their home country, where they will be carrying out their major life plans. But latter are in the country for a sufficiently long-period of time that we can expect them to be pursuing all their major life plans there.

More generally, we can distinguish the following different factors that should be taken into account on the autonomy view. Firstly, we need to consider, *prospectively*, the likelihood that someone is going to remain in the country. If someone is going to be in a country for a longer period in the future then they must adjust more of the plans they are making in light of the state's regulations. If you are only going to be in a country for a short period of time, then you can defer your major plans until you return somewhere else. For instance, tourists have come from and will quickly return to their home country. If they don't like the laws in the receiving country, they can simply defer their major plans until they return to the home country whose laws they like more. The longer someone is in the country the less this deferment is possible.

This factor also explains our different reactions to a recent immigrant who has come as a refugee and a recent immigrant who is highly skilled and mobile. We feel rather more compulsion to extend rights quickly to refugee than we do to the highly-skilled immigrant. The Autonomy View can explain this by citing the fact that we are much more confident that the refugee will be in the country in the long-term, given her lesser mobility. We can be more confident that her future plans have to be carried out in the host country.

Secondly, it will also be worth considering, *retrospectively*, how much time someone has already spent in a territory. There are a couple of reasons for this. Firstly, the fact that someone has been in the country for a significant period of time is good evidence that they will continue to stay. So the retrospective inquiry is partly just a means of carrying out the prospective inquiry just mentioned. Although someone's past presence is often good evidence that they will continue to reside in the territory, it is defeasible. For instance, even though someone has been a long-term resident, the state might still deport them, thus ending their stay.

A second reason to look at previous residence is that it is good guide as to the nature of their current plans. If someone has been in the country for a significant period of time, then their current plans are likely to have been significantly shaped by the legal regime. Also, the longer someone has been in the country the more likely it is that the activities they are currently engaged in are central to their lives. Someone who is only in a place for a few weeks is likely to still have the main body of their plans focused on their previous home. By contrast, someone who has been in the country for a significant period of time is more likely to be pursuing their main life projects there.

This retrospective aspect also explains why tourists need only be offered relatively limited rights. Not are tourist going to leave soon, they have only been in the country for a short period.¹⁸

So what matters crucially on the autonomy view is the amount of time someone is a country for and, perhaps, their ability to pursue their life elsewhere. Affiliation and Economic Contribution theorists often also say that time is what matter because it is a good proxy for affiliation and contribution. But on their view time only matters retrospectively. How long someone has been in the country already is a rough proxy for how affiliated they are and how much they have contributed, but how long they are going to be in the country is not. The Affiliation View and the ECV also differ from the Autonomy View because they have a less good explanation for why things other than time shouldn't be considered too. Those other views suggest that the state's obligation of equal respect should perhaps turn on ideological or cultural tests, investigations into participation in civil society, measurements of tax contributions, and so on. These things are good guides, sometimes better guides, to a person's degree of affiliation and contribution. On the Autonomy View there is no reason to consider these other factors.

Consider the implications for temporary worker programs. On the autonomy view, the duration of the guestworker's admission to the state is critical to determining what legal rules are necessary to ensure that the program does not undermine political equality. Two strategies that are consistent with the Autonomy View are open to states. First, they can strictly limit the stay of temporary workers and prohibit program structures that formally limit a migrant's stay but in practice permit repeated admission by the same migrant. Second, states can permit "temporary" workers to stay for longer periods—or to renew their temporary status repeatedly—but afford those putatively "temporary" workers greater rights over time, perhaps including an eventual right of residence and access to citizenship for those workers who have participated in the program for a sufficiently long duration.

¹⁸ More needs to be said here about exactly which rights are important enough to be granted to even short-term residents and which rights can be restricted to longer-term residents. We are developing a framework to answer this question in future work.

Before moving on, we should note an important limitation of the Autonomy View as we have sketched it. While traditional social contract theory has a number of well-known shortcomings, it provides a useful framework for thinking about what equality requires for recent arrivals in a state. We have assumed that these recent arrivals are people who have full membership in some other state but are now present in the state whose obligations are in question. Therefore, we do not confront the special problems that may arise for stateless persons, newborns, or others who might be seen as having no existing relationship with any state. More generally, we do not directly address an important and oft-overlooked question: should what a state owes to a person sometimes turn on what some other state owes to that person? Our intuition is that the answer to this question is yes, but it is well beyond the scope of this paper.

4. Equality Among Groups

The Autonomy View provides a more plausible account of when a state is obligated to treat an *individual noncitizen* as an equal member. But there is another kind of familiar concern of equality. Many forms of equality can be understood only by reference to the relative treatment of recognizable *groups of individuals*. For example, a prominent understanding of American antidiscrimination law is that it prohibits group subordination. This latter understanding of equality has been almost entirely overlooked in the literature on the treatment of immigrants. Our aim in what follows is to sketch out a theory of equality for immigrants based on these conventional understandings of equality that have been developed outside the immigration arena.

4.1. Group Subordination

To see the intuitive concern with group-based notions of equality, consider a caste society. One sort of criticism about a caste society is that it is wrong for individual members of lower castes to be treated with less concern by the state. But we find a caste society unacceptable not just because some individuals are not getting their due from the state but also because it seems morally abhorrent for there to be a group of people in society who are understood by all to be inferior or less important members. It strikes us as seriously wrong that there be, as it is sometimes put, “second class” citizens or members of society who everyone believes are inferiors.

At their core, therefore, all group-based notions of equality require reference to recognizable social groups. For that reason, we will refer to these forms of equality as “social equality.” Note, however, that many forms of equality that are commonly understood as “political,” such as various forms of electoral equality, are

widely understood as demanding equality among groups rather than simply individuals.¹⁹

A “social group,” in the sense we use the term, is more than just an arbitrary collection of individuals. Members of a social group share certain characteristics, such as race or sex, though these characteristics may themselves be socially constructed. Also, crucially, members of a social group identify themselves with others who share these characteristics and are identified with others who share these characteristics.²⁰ Thus, for instance, women constitute a social group. Women share a set of sex traits and identify with each other on the basis of these traits. They are also identified together in light of these traits.

The groups that people are typically concerned with when they worry about social equality are social groups as we have defined them. For instance, African Americans share a common identity on the basis of their shared race. Gay people share a common identity on the basis of their shared sexual orientation.

Subordination of a social group exists when the members of that group are understood to have a lower status in society by virtue of their group membership. There is a common understanding in society that one group is less important or inferior in some way. These understandings of inferiority might come in quite different forms. They might be beliefs that members of the subordinate group possess some characteristic that makes their lives less valuable or they might be feelings of disgust about members of the subordinate group. Subordinate status is also often accompanied by material disadvantage, but it need not be.

The most obvious case of policies that create or perpetuate subordinate status are those where the state itself marks a group as inferior. For instance, the policy of requiring Jews to wear yellow stars was intended, and had the effect, of marking Jewish members of societies as having an inferior status. The badges were supposed to be markers of a shameful and degraded position in society. Racial segregation in post-Bellum America had the same intent and effect. As Justice Harlan noted in his famous dissent in *Plessy v. Ferguson*, Jim Crow laws that formally did no more than require separation in fact powerfully reflected and reinforced the inferior status of African Americans in society.

Not having policies that themselves stigmatize certain groups is part of what is needed to prevent subordination in society but often more than just this will be

¹⁹ For some discussion of this in American constitutional law, see Heather Gerken, *Understanding the Right to an Undiluted Vote*; Samuel Issacharoff, *Groups and Political Equality*; Adam B. Cox, *The Temporal Dimensions of Voting Rights*.

²⁰ These are standard ways of defining a social group. See, e.g., Owen Fiss “Groups and the Equal Protection Clause,” *Philosophy and Public Affairs* 5, no. 2 (1976) and Iris Marion Young, “Status Inequality and Social Groups” *Issues in Legal Scholarship*, *The Origins and Fate of Antisubordination Theory* (2002): Article 9.

needed. It may be that even though the state is not itself attempting to mark a certain group as inferior there is still a common social understanding of that group's inferiority and policies may be needed to combat those social understandings. For instance, suppose that in a caste society the state ceases to engage in activities designed to reinforce the lower status of members of the lower castes. It starts assigning rights to vote, to hold property, and so on without regard to caste. In this case, the state is not itself taking any steps to mark low caste people as inferior. But they still might be viewed in that way and policies might be needed that attempt to reduce the stigma associated with membership of a low caste. So, in aiming to eliminate subordination we may need to think about whether our policies are indirectly supporting subordination or not doing enough to reduce it.

Notice how the concern about group subordination goes beyond, and is sometimes in tension with, the attempt to ensure that individuals are treated fairly. For instance, it is troubling to us when an individual is dismissed without cause but it is much more troubling, and troubling in a different way, when they are dismissed because of their race. Race and gender based discrimination and inequality raises special concerns because they suggest that not only are individuals being treated unfairly but that certain groups are being subordinated. Moreover, sometimes preventing or remedying group subordination will require individuals to be treated in ways that seem unfair. This is a central critique of affirmative action programs in the United States. For example, the lawsuit challenging the use of affirmative action at the University of Michigan argued that the program unfairly reduced Barbara Grutter's likelihood of being admitted to the law school. Even those who are sympathetic to programs like Michigan's have acknowledged this tension.²¹

4.2. Conflating Individual Fairness with the Demands of Social Equality

How must immigrants be treated to meet the demands of social equality? Most immigration theorists do not consider this question because they focus on forms of equality tied to individual fairness. This is true even of recent work by immigration theorists who attempt to move beyond the purely membership-based accounts of equality for immigrants. For example, Anna Stilz and others have recently argued that the differential treatment of a migrant violates egalitarian ideals to the extent it exploits the noncitizen, leaves her in a vulnerable position, or places her in a dominating social relationship.²² But these arguments still focus on the treatment or position of an individual immigrant relative to others in the receiving state. The anti-subordination principle of equality, however, cannot be understood by reference only to the treatment of individuals.

²¹ See, e.g., Justice Brennan.

²² See Anna Stilz, *Guestworkers and Second-class Citizenship*, 29 *Policy and Society* 295 (2010); Valeria Ottonelli & Tiziana Torresi, *Inclusivist Egalitarian Liberalism and Temporary Migration: a Dilemma*, *Journal of Political Philosophy* (2010).

A few theorists, most prominently Michael Walzer, have at least implicitly considered the demands of group-based forms of equality. But he suggests that social equality requires simple territorial equality.²³ Consider, for example, his discussion of Athenian society. He notes that members the “metic” class were denied many of the rights of citizens: to vote, to receive welfare and so on. He criticizes this not just because individual members of the metic class were not receiving their due from the state but also because these “these exclusions both expressed and enforced the low standing of the metics in Athenian society.”²⁴ He argues similarly the European guest-worker policies of the twentieth century made the alien guest-workers into “outcasts.” Walzer concludes that unless aliens are granted all the same rights as citizens—that is, unless we have simple territorial equality—there cannot be social equality. For this reason, he infers that “every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship.”²⁵

But we cannot infer from the mere fact that some individual has more limited rights than others that there is social inequality. This is because for there to be social inequality there has to be *subordination* attached to membership in a particular *group*, not just different treatment of individuals. Thus, there is no necessary connection between social equality and simple territorial equality, as Walzer suggests. This point is well-understood in most domestic contexts. For those who are acknowledged members of a society, no one thinks that every form of differential treatment violates anti-caste principles or threatens to subordinate a group within society.

This said, Walzer’s view is understandable, given the context in which he was writing. His work focuses on the problems with European guest-worker policies that developed in the 1960s and 1970s. For instance, he points out that Germany’s unequal treatment of Turkish guest-workers stigmatized the workers and branded them as inferior. They were often “housed in barracks, segregated by sex, on the outskirts of the cities where they work[ed],” which had the effect of making them social outcasts, unable to interact with the rest of society and marked as the sort of people that should not be interacting with the rest of society.²⁶ The “*gastarbeiter*” became a recognizable social group and one with an inferior status in society.

Other guest-worker programs have been plagued by similar problems. During the 1940s and 50s, the Bracero program run by the United States marginalized and stigmatized the (primarily Mexican) immigrant participants. Braceros were often housed in segregated facilities, paid substandard wages, and forced to submit to

²³ Linda Bosniak, whose views track Walzer’s, suggests this as well. See Bosniak, *Ethical Territoriality* at 3.

²⁴ Walzer, *op. cit.* p.53.

²⁵ *Ibid.* p.62.

²⁶ Walzer, *op. cit.* p.57.

demeaning “sanitation” measures at the border. These conditions contributed to their identification as an insular group and reinforced the group’s inferior status—stigma that spilled over to other Latinos living in the United States.²⁷ Today, many believe that large-scale guest worker programs in Gulf States, such as Qatar, are generating similarly stigmatic social structures. The programs admit huge numbers of migrants from the Philippines, India, Sri Lanka, and elsewhere. The ethnically distinct “temporary” workers often remain for long periods—sometimes for more than a decade—but during their stay they are segregated from mainstream society and are prohibited from ever acquiring the right to remain indefinitely, let alone the right to obtain citizenship.

Older examples like the Bracero program and German guest-worker policies, as well as contemporary policies in the Middle East (and perhaps in the American H-2A program) suggest that at least some ways of treating aliens differently creates stigmatized groups in society and thus social inequality. But this doesn’t show that any departure from simple territorial equality inevitably produces social inequality. Our question is whether having any kind of different treatment for aliens always produces subordination or whether it is possible to treat aliens differently in some ways without producing subordination.

In fact there are clear examples of policies that violate simple territorial equality but are not objectionable on social equality grounds. Consider, for instance, H1-B visas issued by the United States government to highly skilled workers to work in scientific research, medicine, engineering and so on. Workers who enter the country on these visas have more limited rights than US citizens. Their stay is limited, they have limited job mobility, they cannot vote, and they are denied access to most forms of public assistance. But no one thinks issuing these visas creates problems of social inequality. These people have, if anything, high status in society and certainly are not members of a stigmatized group.

This example could be multiplied. No one thinks that foreign students given visas to study at American universities should be compared in any way to African Americans in the post-bellum South. Nor are tourists thought to be a subordinated, identifiable group who have been denied social equality. Thus, it is possible to violate simple territorial equality without producing social inequality.

²⁷ See, e.g., Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), pp.158-63; Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, *U. Chi. L. Forum* 219 (2007): 219-288: “The racial dynamics introduced by the Bracero program created tension within the Mexican-American community as well, which resented being associated with the braceros . . . but which also was connected to the 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,” pp.274-275.

4.3. Guest Workers and Social Equality

However, again as with political equality, there is a harder question of exactly which departures from STE are compatible with social equality and which are not. We have seen some that clearly are compatible with social equality, such as admitting highly skilled workers on H1-Bs, and others that are clearly incompatible with social equality, such as German guest-worker policies of the last century. We need to know what policies we can adopt without creating problems of social inequality. In particular we need to know whether controversial policies, such as admitting low-skilled temporary workers, can be adopted without creating problems of social inequality. Answering this question fully would require much more social science research than we can engage in here. And one of our conclusions is that much more research needs to be done on this question. But in what follows we make a tentative argument that it is possible to design policies that admit low-skilled temporary workers but are compatible with social equality.

We saw earlier that many previous programs for admitting low-skilled workers have resulted in social inequality. Let us pause to consider what it is about those programs that created this problem. Four features, we suggest, stand out:

1. *Homogeneity* of the immigrant group. For instance, the *gastarbeiter* workers in Germany were drawn almost exclusively from Turkey.
2. *Distinctiveness* of the immigrant group relative to the rest of society. For instance, not only were the *gasterbeiter* ethnically homogenous they also were recognizably distinct from the main body of German society.
3. *Concentration* of immigrants in certain economic and geographic areas. For instance, *Braceros* were confined mainly to farm work in Texas and New Mexico.
4. *Undesirable work* done by immigrants. Immigrants are not only concentrated in certain sectors but, more specifically, in sectors where the work is viewed as undesirable and not worthy of most citizens. Farm work, for instance, has often been viewed as menial labor.

We explained at the beginning of this section that for there to be social inequality two conditions have to be in place. Firstly, there have to be defined social groups and, secondly, there has to be hierarchy between those groups. The four features just presented plausibly contribute to creating these conditions.

The homogeneity and distinctiveness of immigrants encourages the formation of a distinctive immigrant identity. By selecting immigrants who share racial, ethnic and so on characteristics the state encourages them to identify together. Their visible differences from the rest of the population encourage them to identify, and be identified as, a group separate from the rest of society. In other words, homogeneity and distinctiveness encourage the creation of a distinct immigrant social group.

The concentration of immigrants in particular economic and geographical sectors also reinforces this sense of immigrants as constituting a group separate from the rest of society. Sometimes the concentration of immigrants in economic and geographic areas separate from the rest of the polity is a deliberate attempt by the government to prevent mingling between immigrants and the rest of society. In these cases, the separation of immigrants from the rest of society also clearly conveys the message that immigrants are not fit to be affiliated with the rest of society. But even when it is not deliberately intended to keep immigrants separate, policies that put immigrants into isolated economic and geographic areas can encourage the perception of immigrants as being outsiders, and thus to be viewed with suspicion.²⁸ This is reinforced by the nature of the jobs that the immigrants are primarily working at. These jobs are already associated with somewhat lower status because they are the jobs many citizens view as degrading. When those jobs are associated primarily with an immigrant social group the stigma of that work tends to transfer to the group as a whole.²⁹

Now, none of the four elements of previous migrant workers schemes that we have identified (homogeneity, distinctiveness, concentration, undesirable work) is a necessary feature of a temporary migrant program. It should thus be possible to create a temporary worker program that does not have those features. Our suggestion, then, is that it should be possible to design a temporary migrant program, even one that admits low-skilled workers, that does not lead to problems of social inequality. What needs to happen is that the program be designed in a way that avoids enough of the four problem creating features that we identified.

Here are some brief suggestions, then, about how a temporary program that includes low-skilled workers might be designed to avoid problems of social inequality:

1. The program should not admit worker solely from a particular racial, ethnic or national group; the admitees should be diverse. Also it would

²⁸ See, for instance, Martin Ruhs, "Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work," in *Perspectives on Labour Migration 6* (Geneva: International Migration Branch, International Labour Office (ILO)), "immigrant sectors may lead, or at least contribute to, social exclusions and marginalisation of the foreign workers employed in these sectors. The presence of a separate social class of migrant workers may generate and fuel intolerance and xenophobic sentiments within the native population," p.12.

²⁹ See, for instance, Kitty Calavita, "Law, Immigration and Exclusion in Italy and Spain," *Papers: Revista de Sociología* 85 (2006): 95-108, discussing immigration in Europe: "Spanish and Italian laws make it difficult for Third World immigrants to gain admission as legal residents outside of the quota system that is largely confined to those willing to work in agriculture, domestic help, and construction, i.e. those sectors where wages and working conditions are inadequate to attract sufficient local workers. These laws thus guarantee that most immigrant workers labor under conditions that are largely shunned by the indigenous working class, an arrangement that reproduces their economic otherness and related racialization," p.106.

be desirable to have at least some migrant workers who are relatively similar to the mainstream population in a society, or, if the existing population is already diverse, similar to members of the society who are held in high regard.³⁰ These policies hopefully prevent the immigrants from identifying and being identified as a group separate from the rest of society.

2. The program should try to place migrant workers in a relatively diverse set of jobs and geographic areas. These policies hopefully create more integration between the migrant community and the rest of society, thereby reducing the extent to which the migrants are viewed as outsiders.
3. The program should place at least some migrant workers in high status jobs. This is perhaps especially important if the immigrant group remains relatively homogenous and distinct from the dominant groups in society. This policy aims to reduce any perceived connection between the immigrants (and their race, language, or other characteristics) and low status in society. It is attempt to ensure that even if immigrants form part of a distinctive social group that group is not stigmatized.

These policies attempt to avoid the creation of a social group composed of a set of immigrants identified by shared characteristics (racial, language-based, or otherwise), and to avoid that attachment of stigma to membership in that group. Note that, on this account, the duration of a guestworker's stay is not independently significant. As we explained above, it is crucial to understanding what political equality requires in the treatment of individual migrants. But because social equality is concerned with the status of social groups, the question is simply whether the circumstances of the program contribute to the subordination of a social group. There are circumstances in which the length of stay under a program (or perhaps the temporary nature of admission itself) could contribute to subordination. For instance, if members of a particular ethnic group are only ever in a society for a very short period then existing residents might not develop ties with any members of that group, which in turn could lead to a lack of empathy and ultimately stigma. But time is not the critical variable here—it is that the program violates condition 1 above by being composed entirely of a monolithic ethnic group which has no members living

³⁰ This condition is tricky, of course, because it might improve the prospects of social equality for the noncitizens but threaten to exacerbate social inequality among existing groups in the receiving state. Imagine, for example, a situation where citizens of Chinese descent are held in low regard. When designing immigration policy, a well-intentioned government might conclude that it should restrict the entrance of Chinese migrants because their entry might lead them to be stigmatized. But prohibiting their entry might further stigmatize existing residents of Chinese descent. This points to a deeper problem about the construction of immigration policy in a society where social inequality already exists. Immigration policy necessarily effects the composition of the migrant pool. Yet there may be situations where *any* chosen policy is causally connected to some form of social inequality.

in society outside of the guestworker program. In other contexts, therefore, the duration of admission will not contribute to social inequality. No one bothers to get to know tourists, but that doesn't create social inequality. In fact, in some circumstances the short nature of a migrant's stay can alleviate concerns about social inequality: restrictions on labor market mobility that might be seen as badges of inferiority if imposed on long-term residents may be less objectionable when imposed on short-term admitees.

Suppose these attempts are successful: no social group of immigrants as a whole forms or is stigmatized. Still there may be preexisting social groups in society which are stigmatized and which some immigrants will end up joining. For instance, suppose that no stigma attaches to being, say, a Mexican immigrant *per se* because the government has taken aggressive steps to ensure that Mexican immigrants as a whole are relatively integrated with rest of society and occupy a range of jobs with different statuses. Still it might be that the lowest skilled Mexican immigrants find themselves part of a preexisting social group, such as farm workers, which is already stigmatized by the society.

If this is the case it is certainly a problem of social inequality. However, it is not a problem that has any distinctive bearing on immigration or alienage policy. If certain jobs are stigmatized this is an equally bad problem whether the occupants of those jobs are aliens or citizens. So, the existence of that kind of stigma is good reason to take aggressive steps to change the perceived status of those jobs. But is not a reason to avoid admitting immigrants who might occupy those jobs or to make us concerned about the rights given to immigrants in general. The problem is orthogonal to the problems of social equality produced specifically by giving immigrants limited rights.

In short, it is possible to have immigrants in a territory that are not granted the same rights as citizens (thus violating STE) without creating problems of social inequality. Sometimes this is relatively easy, as with certain high-skilled workers, college students, or tourists. Sometimes it may require carefully designed conditions that avoid the failures of past policies. Nonetheless, despite these historic failures, it should be possible to design temporary-worker policies that admit some low-skilled workers without creating problems of social inequality.

In the previous section we saw that such temporary-worker policies can be compatible with political equality; we have now seen that they can also be compatible with social equality. This does not mean, of course, that there are no other reasons why temporary worker programs might be a mistake. It is often contended that such programs lead to intractable enforcement problems—either because they cause higher levels of unauthorized migration, or because migrants admitted on a temporary basis overstay their visas in large numbers. If true, this might be a different reason to reject temporary worker programs. Our only claim here is that the requirement of social equality does not categorically rule out such programs.

5. Conclusion

Immigration theorists have overlooked a deep tension between two principles that have been central to their views: a principle of self-governance, which permits states to control admission into their territory, and a strong principle of equality, STE, which requires states to grant the same rights to everyone within their territory. The best response to this tension, we have argued, is to abandon STE. We should put in its place a more flexible view that draws on our best understandings of political and social equality from outside of the immigration context. Once we do so we can see that policies which give somewhat limited rights to certain immigrants, such as guestworker policies, should not be categorically rejected. We should focus instead on the hard question of exactly what constraints these policies would have to meet to be acceptable. There remains much to be said on that issue but we have suggested some important considerations.