

# Immigration Outside the Law



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## *Finding Answers*

THIS BOOK OPENED with the idea that the three themes central to the 1982 US Supreme Court decision in *Plyler v. Doe* have remained at the heart of debates about immigration outside the law and continue to illuminate their substance. For anyone who hopes that a sound national policy will emerge to engage with unauthorized migration, it is essential to understand these themes—the meaning of unlawful presence, the role of state and local governments, and the integration of unauthorized migrants. They are instructive, not just alone, but also because they combine to raise issues that are even more fundamental.

In combination, the meaning of unlawful presence and the state and local role shed light on the authority to enforce immigration law. Connecting the state and local role with the integration of unauthorized migrants guides the building of communities that include noncitizens and citizens. And looking at the meaning of unlawful presence and the integration of unauthorized migrants illuminates the topic of legalization. Any durable efforts to address immigration outside the law must take seriously the lessons that emerge from the *Plyler* framework.

This chapter picks up where my analysis of legalization in Chapter 6 left off. I did not fully address questions about how to rework immigration law to avoid repeating the same debates over legalization a generation from now. The answers fall into two general categories: those within immigration law, and those that go beyond immigration law. One helpful way to get at both categories is to consider a topic that is indispensable in any thoughtful discussion of immigration policy. The topic is temporary workers.<sup>1</sup>

Temporary worker programs are an essential part of any discussion of immigration outside the law, because an alternative to deporting or legalizing unauthorized migrants is admitting them lawfully. In turn, one approach to lawful admissions is to admit temporary workers. More fundamentally, temporary worker programs illuminate the choices available in responding to unauthorized migration. This broader inquiry goes beyond temporary

workers and unauthorized migrants, and even beyond immigration law itself, to address not only the US system for admitting immigrants, but also the US educational system and international economic development.

### *But People Came*

United States law currently admits groups of temporary workers in several nonimmigrant categories. Some categories have annual numerical limits, and one is limited to agricultural workers. Two categories are especially relevant to unauthorized migration because they do not have university-level educational requirements. As a result, these categories include many temporary workers who resemble unauthorized migrants in education, training, and occupation. The H-2A category allows the admission of an unlimited number of agricultural workers, assuming that they and their employers meet various requirements. H-2B temporary workers are unrestricted by line of work, but only 66,000 are admitted annually, and employers must show that these workers will not displace or earn less than prospective employees who are US citizens or lawful permanent residents.<sup>2</sup>

US immigration law admits other temporary workers in categories that require more formal education or higher-level job responsibilities. These workers tend not to fit a prevalent unauthorized stereotype, but they, too, might be unauthorized migrants if these temporary admission categories did not exist. One such category admits H-1B nonimmigrants, who generally must have a four-year college degree or its equivalent. This category is capped at 65,000 new visas each year, with exceptions. Other nonimmigrant categories seem intended for international business, but they include temporary employees and offer advantages over the H-1B category for those who qualify. For example, L-1 intracompany transferees must have worked for the same employer for one year out of the past three, but they can stay in valid nonimmigrant status for a longer period and become permanent residents more easily than H-1B workers. The E-1 and E-2 nonimmigrant categories for traders, investors, and some of their employees may also include some non-citizens who otherwise might arrive or stay unlawfully.<sup>3</sup>

Most of the legislative proposals since the year 2000 for legalization as part of a package of changes in US immigration law would have expanded temporary worker admissions. A bill to establish a broad temporary worker program passed the US Senate in 2006, but it failed in the House of Representatives. The next year, a more limited temporary worker program was part of the comprehensive Kennedy-McCain bill, which narrowly failed to pass in the Senate.

The bill that the US Senate approved in June 2013 included two temporary worker programs. One would have admitted temporary agricultural workers in a scheme that resembled various versions of prior legislation known as the Agricultural Job Opportunities, Benefits, and Security Act (AgJOBS). The 2013 Senate bill would also have established a new program to admit temporary workers in other industries, and would also have modified the existing H-1B and H-2B programs.<sup>4</sup>

Supporters of temporary worker programs typically argue that the lawful admission scheme should supply the US economy with needed workers. Failure to do so impairs national economic competitiveness and has contributed to the growth of the unauthorized population. Compared to permanent immigration, the argument continues, temporary or circular migration is more responsive to employers' workforce needs—especially for jobs requiring little training or formal education. Temporary workers benefit the economy without the social, fiscal, or political impact of the same number of long-term immigrants. Supporters also maintain that many migrants want only temporary work sojourns, preferring regular return visits home in circular migration patterns, and that it would be unjustifiably paternalistic for the government to deny this option.<sup>5</sup>

Skeptics often emphasize the exploitation of temporary workers, observing that they are vulnerable to harsh and dangerous working conditions, wage theft, and other workplace injustices. A deeper concern stems from the inherent tension between the borders that are inherent in immigration law and the national commitment to equality that is central to political and civic culture in the United States. The harm to that equality is too great, the argument goes, if immigration law admits noncitizens only temporarily as workers without the path to citizenship that is essential to preventing their permanent marginalization.<sup>6</sup>

Further skepticism of temporary worker programs reflects perceived harms to US citizens or permanent residents. Some will benefit from temporary workers who complement what they do, but other citizens or permanent residents will suffer a decline in job prospects, wages, or working conditions. Again, the link between temporary worker programs and unauthorized migration is crucial. Unauthorized migration may have similar effects, but some skeptics argue that these harms can become especially entrenched through temporary worker programs. From this point of view, temporary worker programs are not an acceptable alternative to unauthorized migration; the United States should admit noncitizens for permanent residence with a path to citizenship, or not admit them at all.<sup>7</sup>

THE OUTCOME OF debates between supporters and skeptics of temporary worker programs is evident in the design of temporary worker programs. Some choices involve what a worker must show to qualify—education, training, or work experience. Other questions involve the terms of admission—the initial stay, possible renewal, mandatory departure before renewal, and allowed total stay. Other issues include workplace rights and protections, ability to change jobs or employers while maintaining immigration status, and admission and work authorization for family members. It is also necessary to decide how the admission of temporary workers fits with other aspects of immigration law. For example, will prior immigration violations by a noncitizen block his admission as a temporary worker? Can a temporary worker become a permanent resident or citizen later? Can a temporary worker renew his status if he has applied and is waiting to become a lawful permanent resident?

Beyond these specific rules and conditions of admission lie other design choices. One is whether programs should be restricted to certain occupations or industries, and how to check compliance with such limits. Another is whether to make temporary admissions sensitive to regional needs, and how to make sure that the admitted workers meet those needs. And if only some employers may participate, how will they be chosen? Related questions are how to divide decision-making authority among Congress and federal administrative agencies, and whether state and local governments will have a role. Another issue is whether and how to respond to short-term conditions, perhaps with flexibility to set admission levels and respond to workforce needs in occupations, industries, or regions. And who will identify and respond to employer violations such as noncompliance with admission requirements or unlawful working conditions and wages? If workers overstay or otherwise violate their terms of admission, will the enforcers be US government agencies, employers, or even persons or institutions in their countries of origin?

Other issues are more fundamental. Should US law's treatment of temporary workers differ from its treatment of other noncitizens admitted temporarily, such as students? Another question is whether to handle temporary worker admissions from different countries differently, perhaps in bilateral or multilateral agreements with specific countries, rather than as part of a unitary body of immigration law.

The answers to these many questions can reflect a variety of possible perspectives on temporary worker programs. One perspective considers temporary workers as substitutes for unauthorized workers. A second evaluates the effects of temporary worker programs and unauthorized migration as similar forces in the US economy—benefiting many citizens and permanent

residents, but perhaps disadvantaging others. A third perspective compares the roles that temporary worker admissions and unauthorized migration play in international economic development. A fourth assesses temporary admissions and unauthorized migration in the context of citizenship and of the integration of immigrants. Each of these four perspectives says something different about temporary workers, and in combination they yield a variety of lessons for responding to unauthorized migration.

### *Temporary Admissions and Immigration Outside the Law*

It is only natural to compare temporary admissions with a closely related aspect of US immigration law—the admission of noncitizens as lawful permanent residents. But it is at least as accurate to see temporary workers as offering an alternative to unauthorized migration in the context of the US labor market. This relationship is especially apt for low-wage workers with little formal education or training, who fill the ranks of unauthorized migrants and of lawful temporary workers admitted as H-2A and H-2B nonimmigrants. These are also the workers who would be admitted temporarily under the bill that passed the US Senate in June 2013, part of which would have established a “blue card” program for temporary agricultural workers and a new “W” visa for temporary workers in general.<sup>8</sup>

It seems logical that admitting more temporary workers would likely curtail the number or flow of unauthorized migrants. This perspective also draws support from the long history of US government acquiescence in a sizable unauthorized population. From the early 1900s until the 1960s, a period when the line between legal and illegal had not yet acquired today’s political valence, unauthorized migration and temporary farmworker admissions under the Bracero program coexisted as alternatives for supplying US employers with cheap labor that was temporary and flexible. By the time the Bracero program ended in 1964, it had brought in between 4 and 5 million Mexican workers, more than 400,000 in some years.<sup>9</sup>

Also in the 1960s, a new admission scheme limited the number of new lawful permanent residents from Latin America, but by then northward migration patterns had established work in the United States as both economically and socially customary. After the Immigration Reform and Control Act (IRCA) of 1986 bolstered enforcement, temporary worker programs grew but have stayed relatively small. Restrictions built into the current temporary worker categories preclude their use to admit many of the workers who are

now unauthorized migrants. The annual cap for H-2B admissions falls far short of employer demand for willing workers. Many jobs do not qualify for H-2B treatment because the work is not temporary, even if the worker comes only for a limited period of time. Over 50,000 H-2A agricultural workers have been admitted annually since 2007, but this is a small group compared to the total agricultural labor force, which numbered about 750,000 workers in 2011. With both permanent and temporary admissions curtailed since the mid-1960s, unauthorized migration has increased dramatically.<sup>10</sup>

IF TEMPORARY WORKER programs are to be part of an acceptable response to unauthorized migration, they cannot replicate the vulnerability to workplace exploitation and abuse that unauthorized workers face. Analysis of workplace protections for temporary workers should start by comparing them to the protections available for unauthorized migrants and to the fuller protections for lawful permanent residents. Even if protections are weaker for temporary workers than for citizens or permanent residents, temporary workers would seem better protected than unauthorized workers, but the actual picture is mixed and complex.

The 2002 US Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* limited the eligibility of unauthorized workers for back pay, which is a key remedy for employer violations of federal labor law governing union organizing and collective bargaining. In theory, unauthorized workers have many other workplace protections and remedies, especially for other aspects of organizing and collective bargaining, and for many wage-related claims. But the gap between theory and practice can be especially wide. If unauthorized workers assert their rights—or even complain informally—they can put themselves and their families in serious jeopardy of job loss and immigration enforcement. The inherently precarious position of unauthorized workers suggests that expanding temporary worker programs to include workers who are currently unauthorized would reduce overall workplace exploitation.<sup>11</sup>

And yet, a crucial form of protection for unauthorized migrants is quitting to seek other work. Finding a new job can be hard, especially because they will need to prove work authorization, and even more difficult in occupations and industries where the worksite and living quarters are isolated, making it hard to communicate with prospective employers. Ineligibility for unemployment insurance and for other safety net benefits also limits the mobility of unauthorized workers within the labor market. Nevertheless, their ability to find another job can limit what employers get away with. To be sure, lawful

temporary workers also can quit, but under current law they give up their lawful status the moment they are no longer in the job that they were admitted to do. By quitting, they give up something very significant—their lawful status—whereas unauthorized migrants do not have that status to lose.<sup>12</sup>

Viewed in this light, lawful temporary workers are more tied to their jobs and employers than unauthorized workers are. Abuses rampant within the H-2A and H-2B programs include onerous debts owed to recruiters, failure to pay wages for work performed, denial of access to medical care for on-the-job injuries, squalid housing conditions, and blacklisting of workers who complain about wages and working conditions. It is not uncommon for employers of lawful temporary workers to hold the workers' identification documents and to threaten them with deportation if they complain about their wages and working conditions. The lack of mobility under current law may leave H-2A and H-2B workers at least as vulnerable as unauthorized workers to employer abuse and exploitation.<sup>13</sup>

Of course, labor mobility for temporary workers is only a partial response to employer abuse. Also important is a much more effective level of government enforcement against offending employers. If temporary worker programs are to be part of an acceptable and effective response to unauthorized migration, both labor mobility for temporary workers and strengthened government enforcement of workplace protections will be essential.<sup>14</sup>

IN EVALUATING WHETHER temporary worker programs can respond effectively to unauthorized migration, a different but equally important issue is whether either type of immigration is truly temporary. The suspicion of permanence may generate skepticism of temporary worker programs as a response to unauthorized migration. As compared to unauthorized migrants, however, temporary workers may come and go in migration patterns that are more circular. Temporary workers may stay for a long time, but on average they may not stay as long as unauthorized migrants, for whom a perilous and costly trip to his country of origin and back may be too daunting to undertake. Especially if enforcement is more intense on the border than in the interior, he may decide to stay longer in the United States. For those who are concerned about the permanence of unauthorized migration, temporary workers may be a preferred alternative, even if some stay long-term.<sup>15</sup>

A related way to compare temporary workers with unauthorized migrants examines the possibility that noncitizens in either group will become lawful permanent residents. When the federal government chooses noncitizens who



are outside the United States for admission as lawful permanent residents, it selects them in advance, based on credentials but not on any track record in the United States. If and when temporary workers become permanent residents, the selection process may be better informed if it is delayed until some point in time after admission, when their employment record and other aspects of the integration into American society will be known.<sup>16</sup>

Because US immigration law provides some unauthorized migrants with various ways to become lawful permanent residents, it also defers the selection process. Eligibility to become a permanent resident through cancellation of removal generally requires ten years of continuous physical presence in the United States. The bill that passed the US Senate in 2013 would have made unauthorized migrants wait 10 years in Registered Provisional Immigrant (RPI) status before allowing adjustment of status to lawful permanent resident. If the only goal were to have the most informed process for finding workers, it may be best to tolerate significant unauthorized migration and periodically offer lawful status to workers based on their employment history or other contributions to US society. Temporary worker programs might provide a similarly informed selection process, but the probationary period for cancellation of removal or legalization may be even longer and perhaps better informed as a result.<sup>17</sup>

### *Domestic Economic Impact*

To shift to a second perspective, any analysis of temporary worker programs as a response to unauthorized migration must also consider how both temporary and unauthorized workers affect the distribution of wealth and opportunity inside the United States. From this domestic economic perspective, would it be better to have more temporary workers and fewer unauthorized migrants? They have this in common: many citizens and permanent residents benefit when having more workers or lower wages dampens the cost of goods and services. Moreover, both temporary workers and unauthorized migrants may help create jobs and other opportunities for citizens and permanent residents.

The role of temporary workers in the US economy resembles the role of unauthorized migrants. Without temporary workers, the cost of doing business in the United States may rise and may force companies or industries to restructure, cutting jobs done by US citizens and permanent residents, or to forgo expansion plans. Or, high costs can force companies to move some or all of their operations outside the United States or to die out altogether. The potential benefits of temporary worker programs pose the challenge of

making sure that they respond in a timely and rational way to economic conditions. The 2013 Senate bill would have established a new federal agency, the Bureau of Immigration and Labor Market Research, to make basic decisions about temporary worker admissions. Whether or not such institutional arrangements emerge, admitting temporary workers and tolerating unauthorized migrants are both ways to make the US economy more robust overall than it otherwise would be.<sup>18</sup>

But all immigration redistributes wealth and poverty by enhancing the economic well-being of some, while diminishing the well-being of others. On the negative side, temporary workers, like unauthorized migrants, can harm citizens and permanent residents who are vulnerable to economic displacement, including wage stagnation, declining work conditions, or outright job loss. These effects can be uneven in different regions of the United States. Moreover, a revenue imbalance generally arises because the federal government collects more in taxes from unauthorized migrants than it pays out, while states and localities pay out more than they collect.<sup>19</sup>

CAN TEMPORARY WORKER programs manage these distributional effects more effectively and more fairly than a system that tolerates significant unauthorized migration? The goal is to make sure that neither temporary workers nor unauthorized migrants exacerbate inequalities in US society. Unless temporary worker programs respond well to this challenge, it may be hard to include them in a sound response to unauthorized migration.

Unauthorized migration operates outside direct government regulation, so direct management seems inherently more difficult. In contrast, the current system of temporary admissions is designed to minimize adverse effects on US workers. For example, the number of H-1B workers admitted to the United States is capped. Employers must attest that they are offering the job at the prevailing wage or actual wage paid to similar individuals (whichever is higher), and that working conditions for the noncitizen will not undercut the working conditions of similarly employed workers. Employers who want H-2A and H-2B workers must go farther and secure a formal finding by the US Department of Labor that workers will receive the prevailing wage and that no citizens or permanent residents are able and willing to do the work. The proposal that passed the Senate in 2013 would have imposed more demanding requirements on employers, such as more recruiting of US workers before hiring temporary workers. It would also have limited H-1B or L-1 workers to half of an employer's workforce.<sup>20</sup>

If, however, current temporary worker programs are superior to unauthorized migration in minimizing harms to US citizens and permanent residents, it is likely not because of efforts to regulate the initial placement of workers in jobs. These controls are so imperfect that some adverse effects seem to be unavoidable and even inherent in letting employers hire temporary workers. Impact varies by employer and employee, by locality and region, and by government entity—local, state, federal. But the core incentive to hire temporary workers remains that employers often prefer them to US workers, who in turn suffer lost wages or lost jobs. The more fundamental solution is not to prevent the hiring of temporary workers who collectively benefit much of society even if they may adversely affect part of it. Instead, the daunting but ultimately more promising challenge is redistributing the benefits to individuals, economic sectors, geographic areas, or levels of government that are vulnerable to harm.<sup>21</sup>

A first step in any redistribution is measuring and capturing benefits. Current law collects an extra \$1,500 from employers when they file initial petitions or extensions for H-1B temporary workers or hire one from another US employer. Fees paid by employers could generate much higher revenues. The 2013 Senate bill would have required employers to pay significantly higher fees on a sliding scale if 30 percent or more of the workforce consists of H-1B workers. A related option is screening employers more selectively for participation, perhaps through an auction or other market vehicles for the government to sell permits that employers could use to hire temporary workers. This approach would give employers an incentive to hire US workers whenever possible, and it would create a fund to offset both specific effects on US workers as well as general public costs associated with temporary workers. Similar vehicles for capturing and redistributing the benefits from temporary workers could be effective across a wide array of nonimmigrant categories and groups of US workers. Assistance to offset the negative impact of international trade offers instructive analogies. International trade has similar effects, especially when cheaper goods arrive from foreign sources. Lower prices for imports will benefit many consumers and businesses, but may also dry up the market for domestic production.<sup>22</sup>

The essential second step is redistributing these benefits. Under current law, the fees from H-1B visas go to the National Science Foundation and the Department of Labor, primarily for job training for citizens and permanent residents, for college scholarships for low-income students in engineering, math, and computer science, and for K-12 science enrichment programs. This basic idea of using fees for training makes sense, though many of the

US citizens and permanent residents who are adversely affected by temporary workers are unlikely to be attending college at all. If properly designed, redistribution mechanisms could operate more effectively as part of temporary worker programs than they could in the unregulated context of unauthorized migration. But if the idea is that this advantage over unauthorized migration makes temporary worker programs a superior alternative, much more must be done than current law undertakes to mitigate adverse effects on US citizens and permanent residents.<sup>23</sup>

To be meaningful, measures to mitigate these harms must go well beyond fees generated by federal immigration statutes. Effective responses must also go far beyond simply rejecting temporary workers and cracking down on the unauthorized. Essential are remedies for those who suffer a reduction in wages or outright job loss. This means that an essential aspect of both temporary worker programs and responses to unauthorized migration is investment in education and training, especially for lower income citizens, both to prevent job loss and to soften the blow if it occurs.<sup>24</sup> A proposal in the mid-2000s by Representative Sheila Jackson Lee would have required recruitment, including in minority communities, of US citizens and permanent residents before any job could be filled by a temporary worker. It also would have imposed a 10 percent surcharge on all petitions for temporary worker status to fund job creation and training programs for unemployed US citizens. Without careful thought about distributing the overall economic benefits from temporary workers and unauthorized migrants to those who suffer harm, the likely result is substantial political resistance to both temporary workers and unauthorized migrants from individuals, communities, industries, and regions that feel economically threatened.<sup>25</sup>

### *International Economic Development*

A third perspective on temporary worker programs and unauthorized migration considers both as responses to economic development outside the United States. Temporary worker programs may be superior to unauthorized migration in this context, but once again the structure of the programs matters a great deal. Any comparison must start by acknowledging that the relationship between immigration law and international economic development goes both ways. Temporary worker programs and unauthorized migration both influence—and are influenced by—international economic development.

Of course, not all migration, and not all immigration outside the law, occurs from so-called developing countries to developed ones. Many

unauthorized migrants move between developing countries. That said, most unauthorized migration to the United States comes from countries that are less economically prosperous. In this context, many temporary workers and unauthorized migrants—like migrants in general—send money back to their countries of origin, where the funds are essential. These remittances buoy the national economy as a whole. They also offset the absence of available credit for individuals and families, helping to build houses, educate children, start and grow small businesses, and more. Beyond sending remittances, temporary workers and unauthorized migrants may be well-positioned to address problems in their countries of origin through nonmonetary contributions based on their time in the United States. If they return to those countries with enhanced experience, ranging from language to occupational skills to entrepreneurial know-how, they vitally augment the education, training, and experience that are available there. In addition, temporary workers and unauthorized migrants—like all emigrants—provide a safety valve for economic or political discontent and unrest.<sup>26</sup>

International economic development concerns explain the dominant approach of some countries that actively promote the emigration of temporary workers. As a prominent example, the Philippine government has a long-standing practice of training workers who emigrate for temporary employment, helping them find work in other countries while maintaining home country ties with the Philippines, and facilitating remittances and their eventual return and integration into the domestic economy. This general model explains the emigration management policies of many governments, as well as the limits on their capacity or their readiness to protect their nationals in other countries for fear of jeopardizing their work prospects and remittances.<sup>27</sup>

A blend of permanent resident immigration to the United States, temporary worker programs, and tolerance of unauthorized migration can foster interrelated aspects of international economic development—especially remittances, return of human capital, and safety valves. This latitude may allow the US government to reduce direct aid or investment, to stabilize friendly regimes, or in extreme cases, to avoid more drastic measures like US military intervention—such as in Haiti in 1994—to resolve a crisis driving emigration to the United States.

Lawful temporary workers may find it easier than unauthorized migrants to travel back and forth and thus to stay active in their countries of origin. Frequent lawful travel may keep a worker from putting down deep roots in the United States. The result may be stronger remittance flows and other forms of home-country engagement. On the other hand, unauthorized migrants suffer

from the acute impermanence that comes from living in jeopardy of arrest and deportation. In comparing temporary workers and unauthorized workers from an international economic development perspective, certainty is elusive and would require more empirical research than is available now.

COMPARING TEMPORARY WORKER programs and unauthorized migration as a matter of international economic development raises yet another important question about both temporary workers and unauthorized migrants: Should temporary workers from different countries be treated differently? For instance, should it be easier for temporary workers to come to the United States lawfully from Mexico than from other countries? If temporary worker programs are meant to respond to unauthorized migration from specific countries, it may be most effective to design such programs for those countries. A concrete example would be a program for Mexican temporary workers as part of an initiative to strengthen the Mexican economy and limit unauthorized migration from Mexico, which is the source of almost 60 percent of the unauthorized population of the United States.<sup>28</sup>

The issue of country-specificity is complex. Delving deeper starts with an idea inherent in an international economic development perspective—that immigration policy is a form of foreign policy, and foreign policy is a way of making immigration policy. In turn, this relationship requires another look at the inherent tension between national borders and a national commitment to equality. The very idea of national borders is in tension with a national culture that values equality, because borders and immigration law distinguish citizens from noncitizens. One way to ease this tension is to treat noncitizens equally, regardless of race or ethnicity, and to tolerate discrimination on no basis other than citizenship itself. A closely related principle is that immigration law must treat all citizens equally. These two ideas are intertwined; racial or ethnic discrimination against noncitizens is virtually certain to discriminate against citizens who are closely related to them. But the definition of equality is complex. Would US policy violate these equality principles by making it easier for temporary workers to come lawfully from some countries than from others? Perhaps yes, if temporary admissions are simply a variation on permanent admissions. If, however, the purpose of temporary admissions is to respond to unauthorized migration, then programs that favor certain countries may be more justified.<sup>29</sup>

Probing this issue calls for a look at the evolution of equality principles in immigration law during the twentieth century. One of the conceits of the past

generation has been the belief that justice in immigration is the product of equality produced by the even-handed application of a set of universal principles. But the relationship between equality and universal principles in the immigration context is more nuanced. The belief in universal principles is a legacy of the struggle to end the national origins system. When operated from 1921 to 1965, its aim was to maintain the ethnic mix of the US population as it was at the turn of the twentieth century by strongly preferring European immigrants, especially from northern and western Europe. During the same era, a bilateral agreement between the United States and Mexico established the Bracero program starting in 1942, reflecting and reinforcing perceptions of Mexico as a source of workers, but not of Americans in waiting.<sup>30</sup>

The 1965 amendments to the Immigration and Nationality Act replaced the national origins system with a scheme that seemed to admit immigrants regardless of their country of origin. These amendments reflected a faith in uniform criteria and the related assumption that immigration law is a unitary body of law governed by principles that are neutral and applied universally. Today, it seems only natural to look back at the abolition of the national origins system as a hard-won triumph for the idea that a system for choosing immigrants should be based on law, not politics or prejudice. Closely related was the successful push in 1964 by the farmworker movement to end the Bracero program and its perceived abuse and exploitation of workers. The Civil Rights Act in 1964, the Voting Rights Act in 1965, and the 1965 immigration law reforms all seemed part of a long overdue embrace of equality.<sup>31</sup>

But with the end of the Bracero program, the major avenue for temporary worker admissions from Mexico disappeared, and it became much harder for immigrants from Latin America in general and Mexico in particular to come to the United States. Before 1965, immigrants from the Western Hemisphere had to meet financial self-sufficiency and other qualitative requirements, but their overall number was not capped. The 1965 amendments replaced the national origins system with a system that treated all countries equally, but this logic led to a series of laws that imposed an overall worldwide numerical limit on immigration in the family- and employment-based preference categories. In 1976, Congress capped the number of immigrants from any single country to 20,000 per year. The 20,000 cap had an important exception for “immediate relatives”—defined as spouses and unmarried minor children of citizens, and parents of citizens who are 21 years old—but these changes had two dramatic consequences.<sup>32</sup>

One was a steady rise in unauthorized migration. The other was waiting periods that are long for immigrants in many categories and even longer for

immigrants from certain countries. Especially when the affected immigrants are from countries with a long history of sending workers to the United States, the question arises: What does it mean to apply universal principles and to treat countries equally? Is it faithful to equality to have uniform numerical ceilings that apply to all countries, regardless of a country's population or its geographic, historical, or economic ties to the United States?<sup>33</sup>

An international economic development perspective may make country-specific temporary worker policies seem less problematic and perhaps even natural. The reason is that international economic development initiatives are traditionally ad hoc arrangements with particular countries that are not limited by any expectation of uniform arrangements with all. Similarly, the conditions that affect emigration from a particular country may be unusually sensitive to US economic activity or policies, especially when such ties are geographic, historical, or economic.

Some country-specific arrangements are already part of current immigration law, though typically as exceptions. For example, the E nonimmigrant category admits traders, investors, and some employees on generous terms, if the United States has a trade or investment treaty with their country of nationality. Trade agreements with Chile and Singapore offer their citizens temporary admission on terms that vary from the general body of US immigration law. The North American Free Trade Agreement is a potential vehicle for temporary admissions from Canada and Mexico, though at present it does not facilitate low-wage worker admissions, and its categories requiring more education or training do not vary from immigration law generally.<sup>34</sup>

If well-designed with regard to international economic development, temporary worker programs may be essential to any sound response to unauthorized migration. To realize this potential, however, the programs must facilitate the return of funds and know-how, and they must maintain the safety valve aspect of emigration. This may require administering temporary worker programs more like economic development initiatives and less like part of a universal system of immigration admissions. Legislation may matter less, and executive agency decisions may matter more. Governments and private persons outside the United States may have more influence and possibly some enforcement power. The roles of courts and other institutions that traditionally apply legal rules of general application may diminish.<sup>35</sup>

Ad hoc, country-specific decisions—likely driven by executive branch initiative—raise questions about how to achieve transparency and establish checks on improper or unwise decisions. Standards and expectations may depend on the frame of reference. If temporary worker programs are



compared to the admission of lawful permanent residents, then ad hoc, country-specific, executive branch decisions may seem unpredictable. But such decision-making may seem transparent, regulated, predictable, and consistent if temporary workers are compared to the highly discretionary regulation of unauthorized migration within the current immigration law system.

CONSIDERING TEMPORARY WORKERS as part of an international economic development response to unauthorized migration yields general lessons for dealing with unauthorized migration. One is that economic development initiatives are an essential part of any effective response. The selective, discretionary immigration law system that has led to a large unauthorized population is ultimately the reflection of international economic forces. In the global economy, immigration mediates between great wealth and great poverty. Remittances represent just one example. Flows of capital and goods—such as those fostered by the North American Free Trade Agreement (NAFTA)—create social networks and economic pressures that inevitably prompt people to move as well.<sup>36</sup>

Reducing unauthorized migration requires robust economies in sending countries, so that people have reasons to stay and prosper at home. The opportunity to buy houses and build businesses can keep people in their home countries even if wages are lower than those they could earn by emigrating. Migration patterns within the European Union are instructive. As sociologist Douglas Massey has explained, full economic integration in the European Union has retarded migration to wealthy countries. Especially important have been funds to support structural adjustments in credit markets in poorer countries that were joining the Union. For the United States, if economic conditions elsewhere make millions of people feel that they have no choice but to leave home to pursue what seem to be better lives—or basic survival—in this country, then emigration pressures can lead to substantial unauthorized migration.<sup>37</sup>

### *Citizenship and Integration*

There is a fourth perspective on temporary worker programs as a lens to understand the best responses to unauthorized migration. This one is rooted in one of the most frequent criticisms of temporary worker programs: that they are the source of a troubling and corrosive inequality in the receiving society. The problem is that temporary workers, and unauthorized migrants,

too, are relegated to second-class status: needed and tolerated as workers, but not fully accepted. The frequency and intensity of concerns about workplace conditions are only part of this dissonance. Even if wages, hours, and workplace conditions—and enforcement mechanisms—were the same for temporary workers as for citizens and lawful permanent residents, inequality is inherent in any system that assumes that workers are temporary. The same is true for unauthorized migrants. Limiting the future participation of both groups of noncitizens effectively bars them from society's mainstream.

Temporary worker programs can be an attractive alternative to unauthorized migration, but only if they offer more satisfactory responses to this problem of inequality. How might temporary worker programs do this? The answer requires understanding how the initial admission of noncitizens into the United States is related to their integration into US society and their acquisition of US citizenship. Again, this inquiry not only shows how temporary worker programs can be part of a response to unauthorized migration; it also says a great deal about unauthorized migration in general.

In an earlier book, *Americans in Waiting*, I explained the compelling reasons to treat newcomers to the United States as Americans in waiting by admitting them as permanent residents, adopting policies that foster immigrant integration, and providing a clear, presumed path to citizenship. Making the line between immigrants and citizens permeable in this way is closely related to avoiding discrimination against noncitizens on any basis other than citizenship itself. Both are essential aspects of reconciling the tension between borders and equality. It is troubling that legalization proposals that Congress has seriously considered in recent years would force unauthorized migrants to wait many years before becoming eligible for citizenship, but proposals that would absolutely bar the path to citizenship are even more troubling.<sup>38</sup>

As a corollary, *Americans in Waiting* also criticized the steady trend over the twentieth century to widen the gap between permanent residents and citizens, and to abandon the expectation that lawful immigrants will integrate fully into American society. In past periods of US history, it was customary to view immigration as a transition to citizenship and immigrants as Americans in waiting, but the beneficiaries of this attitude were white, European immigrants. As immigrants came from a wider array of countries, this attitude faded. Though racial barriers to immigration eroded, being an immigrant carried diminished expectations of belonging and US citizenship.<sup>39</sup>

These views about immigration as a transition to citizenship admittedly stand in some tension with the view of temporary worker programs that I express here—that temporary worker programs, if properly designed, have potential as part of a sound response to unauthorized migration. Admittedly,

temporary worker programs suggest that noncitizens are unlike citizens and that the line between them may be hard to cross. In fact, however, US law can admit temporary workers as a partial response to unauthorized migration while also striving to give immigrants meaningful access to equality by treating them as Americans in waiting.

IF TEMPORARY WORKER programs are to be consistent with immigration as a transition to citizenship, then coming to America as a temporary worker must include some kind of path to citizenship. One way to think about that path is to view each temporary worker not just as an individual, but also as potentially part of a family. Doing so makes relevant the rules that confer citizenship on all children born on US soil, regardless of their parents' citizenship. Birthright citizenship under the Fourteenth Amendment is a backstop against the marginalization of temporary workers' families.<sup>40</sup>

More generally, the acquisition of citizenship by a temporary worker's family through the birth of children eases any tension between temporary workers and the idea of equality. Policymakers tend to overemphasize the adult generation, reflecting both the myopia of electoral politics and the difficulties of predicting how the children of immigrants will fit into American society. But moving away from a snapshot view of justice—and toward a sense of time measured in generations—makes temporary worker programs more compatible with the idea of Americans in waiting. Even if integration in one generation is too much to expect, two or three may be enough. Time makes the line between immigrants and citizens permeable.

Viewing temporary worker programs in light of their implications for citizenship and integration is consistent with seeing temporary workers as a matter of international economic development. Both perspectives allow time to soften injustices that might otherwise make temporary workers unacceptable as an alternative to unauthorized migrants. Just as birthright citizenship for children makes corrosive inequality less inherent in temporary worker programs, time also allows temporary worker programs to foster more benign migration patterns as part of international economic development. If opportunities in their home countries give temporary workers some meaningful choices—to stay in the United States, to return to their home countries, or to go back and forth—then temporary workers become more viable as a response to unauthorized migration.

A citizenship and integration approach also reprises the question of whether temporary worker programs are exploitative. The ability to change jobs and having legal protections in the workplace combined with government

enforcement of employment law can limit employer abuse, but a more fundamental type of exploitation is inherent in being seen and treated as a worker, not as a person. Such fundamental exploitation may seem more irreducible, but it need not be entirely so. Curbing it can do much to make temporary workers an acceptable alternative to unauthorized migration. Citizenship law matters a great deal in this setting. The United States has a significant number of temporary workers, but again it matters a great deal that their children born on US soil are automatically citizens. In many other countries around the world, the children of temporary workers are not citizens at birth, and naturalization is difficult. Even if temporary workers are treated exactly the same in every other way, the US scheme is less exploitative because the admission of the workers, though temporary in their generation, can lead to future integration.<sup>41</sup>

Integration over time also raises this question: What does it mean for temporary worker programs to be temporary? Though part of this question is whether the programs themselves are temporary, it is much more important to ask what future possibilities these programs open up for individual workers and their families. If temporary admission of individual workers can be transitional for their families, then temporary worker programs can be consistent with viewing immigration as a transition to citizenship. Fostering the integration of families goes a long way toward reducing the concern that temporary worker programs are an unacceptable response to unauthorized migration because they are offensive to equality.

Besides citizenship for children born on US soil, what else might foster transition for temporary workers and their families? First, it is crucial that the spouses and children of temporary workers be allowed to come with them and to work. Current US law hampers the economic viability of the families of H-2A and H-2B temporary workers by allowing their spouses and unmarried minor children to come to the United States, but not to work. Second, it is important to allow temporary workers to become lawful permanent residents routinely after several renewals of temporary worker status, at least if they have formed close ties in the United States. Significantly, the modified and new temporary worker programs in the bill that passed the US Senate in 2013 would generally have let the spouses and unmarried minor children of temporary workers accompany them and let spouses work. It also would have made the transition to permanent resident status much easier than under current law.<sup>42</sup>

### *The Question of Permanence*

So far in this chapter, I have assessed both temporary workers and unauthorized migration from four different perspectives, in order to explore how to

design temporary worker programs so that they do not replicate the problems of unauthorized migration. Those problems include relegating temporary workers to a troubling second-class status, and allowing reliance on temporary workers to relegate some citizens and permanent residents to the same sort of second-class status. If, and only if, temporary worker programs can be severed from these fundamental defects, then they can serve as part of an effective and acceptable response to unauthorized migration.

Now I need to acknowledge a major objection to this inquiry into temporary worker programs as an alternative to unauthorized migration. The changes that would make them a constructive response to unauthorized migration address their shortcomings in ways that seem to make temporary migration more permanent. This means that such solutions undercut one of the main attractions of temporary worker programs as an alternative to unauthorized migration—the ability to meet the economy’s labor needs without simply raising the number of lawful permanent immigrants to the United States. This concern with overall numbers will lead to political resistance to immigration in general if newcomers are seen as burdens in the short term, even if they contribute substantially in the long term.

One possible rebuttal to this objection is that even if almost all temporary workers and their families stay in the United States indefinitely, programs to admit temporary workers still have virtues. They reflect a different approach to selecting new permanent residents by imposing a probationary period of temporary status. But even if this response is accurate, any system that treats temporary workers as potential permanent residents—and then as potential citizens—is open to the charge that it is really a system of permanent admissions. Skeptics might argue that it is more honest and transparent to evaluate whether and how to increase the number of lawful permanent residents admitted to the United States.

THE BEST WAY to address this question of permanence is by designing a temporary worker program with incentives and choices. The distinction between incentives and coercion can be elusive, since any form of coercion can be cast as an incentive, and vice versa. But the distinction can be drawn coherently, if roughly, in ways that can allow temporary worker programs to be part of an effective response to unauthorized migration.

Consider possible measures to make it likely that many, if not most, temporary workers remain temporarily. At one extreme is an exclusive emphasis on enforcement that means arresting, detaining, and then deporting any

worker who overstays. Closely related are measures to make the lives of overstaying workers hard enough that they will leave. A less coercive system might achieve similar results by requiring workers to post a financial bond or by withholding some earned wages until they return to their countries of origin. An approach with the same effects, but which may seem more like an incentive, is a financial bonus for leaving.<sup>43</sup>

A better approach would focus less on getting workers to leave and more on creating opportunities that draw them back to the countries and communities from which they came. This difference is imprecise but important. An exclusive focus on enforcing the terms of temporary worker admission, even if measures might fairly be cast as incentives, may be too costly or difficult to implement effectively. Moreover, a policy that is focused on enforcement, no matter if enforcement is hard or soft, is a reminder that these workers are brought in and tolerated just to work. Such a policy also resurrects the problem of creating a second-class status in a society that purports to embrace a commitment to equality.

This better approach works simultaneously toward two goals, even if they first appear to be in some tension with each other. One goal is to respond to the economy's needs with temporary workers rather than increased permanent admissions. The second goal is to keep temporary workers from becoming a servant underclass. The tension between these goals—and the way to resolve that tension—is captured in the idea that temporary workers should have a path to citizenship. This idea may seem counterintuitive, but any sound immigration policy must pursue these two goals simultaneously.

Doing so requires giving temporary workers some reasons to leave the United States that are not incentives or penalties tied directly to the individual worker or his work. The emphasis should instead be on international economic development initiatives that help to create general conditions in locales of origin that will give temporary workers, as a group, strong reasons to return, thus keeping migration temporary or circular for many of them. Some sending countries, notably but not only the Philippines, already try actively to entice emigrants to return. Programs by the US government could have the same aim. Some initiatives could concentrate on specific communities that have historically sent significant numbers of migrants to the United States and have built up strong migration networks over generations.<sup>44</sup>

The same policies that foster integration into American society can also enhance a migrant's position in her country of origin if she decides to go back. This happens when she acquires assets or skills in the United States. Ties to the country of origin can play a similar dual role. Such ties can provide the foundation for integration in the United States, but they can also make return

migration easier and more likely. Crucial is enticing temporary workers to return to their countries of origin, but so is allowing them to integrate and succeed in the United States if they decide to stay.<sup>45</sup>

Working without self-contradiction toward both temporary migration and integration, and toward creating a realistic path to citizenship for temporary workers, means turning both temporary work and permanent immigration into normal, government-fostered choices for individual migrants. The common element is treating temporary workers with dignity by offering them real choices. Doing so may be difficult and may even seem utopian, but the undertaking can start by respecting something obvious yet often overlooked—that many who come to the United States have no initial intent to stay permanently. Many do stay, but the first decision is typically to leave home temporarily, often under dire circumstances that push migrants to leave.<sup>46</sup>

This approach—temporary workers with a path to citizenship—has its limits. It would be troubling to turn the acquisition of permanent residence by temporary workers into the dominant approach to selecting immigrants and thus future citizens. It would better enhance US society's capacity to integrate newcomers and to maximize their contributions if most immigrants arrive as permanent residents. As I explained more fully in *Americans in Waiting*, the welcome that is inherent in treating newcomers as future citizens makes them much more likely to integrate in ways that satisfy them and those who came to the United States before them. But it is not objectionable if some temporary workers become lawful permanent residents by exercising a choice. Overall, this approach to temporary worker programs from a citizenship and integration perspective would make them far more viable as part of a sound response to unauthorized migration.

### *Immigration Law and Beyond*

So far in this chapter, I have explained how temporary worker programs can be a key part of any effective response to unauthorized migration. The challenge, however, is designing them well to serve this purpose and to avoid the problems that have consistently plagued such programs in the past. They would need to provide adequate workplace protections and play a constructive role in international economic development. They should include a path to citizenship, but alongside international economic development initiatives that give temporary workers a real choice to return to their countries of origin.

Looking closely at temporary worker programs reveals many core truths about unauthorized migration itself. Effective responses to unauthorized migration require a sharp awareness that it is a powerful force within the US

economy. It is also crucial to appreciate that unauthorized migration plays a key role in international economic development. It is equally imperative to consider how unauthorized migrants fit into the patterns by which immigrants integrate and become US citizens.

Two further, more general lessons about unauthorized migration emerge from looking at temporary worker programs as both a lens and an alternative. One, grounded in pragmatism, is that moving to constructive responses to unauthorized migration is largely a search for second-best solutions that are better than the status quo. Temporary worker programs may be far from ideal from many perspectives, even if improved in the ways that I have suggested. And yet, they may help find the most realistic way out of the current dilemma.<sup>47</sup>

A second general lesson is that the challenges and opportunities associated with unauthorized migration—and with immigration in general—do not necessarily spring from immigration origins, nor do they have immigration solutions. What determines the success or failure of immigration policy is both more global and more local than it first appears. Effective approaches require a keen sensitivity to the multinational context that prompts migration across national borders, to the domestic interests of US citizens whom immigration most directly affects, and to the foundation laid by national history. Unauthorized migration is both a consequence and a cause of these fundamental forces.

THE NEXT STEPS are to apply these two general lessons—finding pragmatic solutions and thinking beyond immigration law—and to consider unauthorized migration from the same perspectives that I have applied to evaluate temporary worker programs: as a domestic economic force, as an aspect of international economic development, and as influencing integration and citizenship. But before considering these issues, I should revisit the topic of immigration enforcement, for it is an essential element in any search for answers.

Back in 1986, IRCA was a finely balanced legislative compromise that included stronger enforcement. On top of stricter border controls came the first federal employer sanctions scheme, which in turn allowed the same legislation to adopt broader changes, including legalization and revised temporary worker programs. In the generation since IRCA, it has remained difficult—perhaps impossible—to win votes for legalization and other reforms without agreeing to devote more resources to enforcement. In



2013, the Senate voted to condition the ability of unauthorized migrants to acquire lawful permanent resident status on the federal government meeting various enforcement goals, including a massive infusion of resources into the US-Mexico border.<sup>48</sup>

The impulse to accompany changes to the immigration system with an enhanced commitment to enforcement is entirely natural. The idea is that if the system changes in far-reaching ways, then the rules of the new system should be enforced. But the multiple perspectives that I have examined in this chapter show that enforcement—even though it will always matter—never should be the entire discussion. Much more fundamental is deciding what rules are being enforced and what system is being administered.

The seductive misconception is thinking that drastically increasing the resources devoted to enforcement is the one pivotal change that will ensure a new beginning. But this one-dimensional approach reflects blind faith in the line between legal and illegal, and a belief that laws must be enforced no matter how ultimately unenforceable. Simplistic solutions may win some votes in short-term election cycles, but the essential foundation for the rule of law is having laws that are actually enforceable in the broader context of the US economy and US society as a whole. Enforcement must take place with the predictability and consistency that have been impossible within a system that has come to tolerate a large unauthorized population.<sup>49</sup>

Ultimately, focusing on enforcement while ignoring larger forces that lie at the root of migration patterns is just as ineffective as responding to drugs only with more prisons, or to conflict only with more troops. Durable solutions lie in changes to the system for admitting immigrants and temporary workers, international economic development initiatives, and changes to domestic education and domestic economic policy. Without these broader changes, enforcement may intensify for some period of time, but it will remain inconsistent and unpredictable within some version of the current system.

DISCUSSING THE ROLE of temporary workers and unauthorized migrants in the domestic economy suggests a strong need to rethink the overall scheme for lawful admission of noncitizens to the United States to better meet the labor needs of the US economy. The US labor market has a strong demand for workers who lack a college degree—but who often have or easily can acquire valuable skills. Significantly, this is precisely the group of potential migrants for whom lawful admission to the United States is very limited under current law. In a system that would be more responsive to the US economy, they

could be admitted as permanent residents, who by definition have a path to citizenship under current law, or as temporary workers with an opportunity to become permanent residents later.<sup>50</sup>

As with temporary workers, expanded work-related admissions may lead to reasonable perceptions that the overall gains to the US economy will be distributed unevenly, and that some citizens and permanent residents will suffer the most adverse effects. And as with temporary workers, the best solutions are not in limiting admissions, but rather in redistributing some of the overall benefits and in addressing the more fundamental flaws in the US system for education and training that leave these US workers vulnerable in the first place.

Another important change is relaxing or repealing numerical limits that currently cap immigrant admissions in many categories on a country-by-country basis. These limits make the waiting lists for intending immigrants from certain countries—notably Mexico—longer than for those from other countries. The bill approved by the Senate in 2013 would have maintained per-country limits but raised them from 7 percent to 15 percent of the total number of immigrant visas available in any given year. The same legislation would also have exempted employment-based admission categories. Immigrants from Mexico and the Philippines, who are waiting in long lines in the family-based preferences, would benefit most from these changes to the per-country cap. Amendments of this sort would reflect a commitment to equality in immigration law more effectively than simply capping admissions from every country in the world at the same number.<sup>51</sup>

Besides understanding immigration as a domestic economic force, any restructuring of admissions as part of a response to unauthorized migration must take integration and citizenship seriously. Especially important is recognizing that immigrant workers have families and aspirations outside the workplace. Laws and policies that view immigrants only as workers or other economic contributors run two overlapping risks. One is to strive only for short-term benefits that are easily measured. The other is to underestimate contributions that may be evident only as newcomers integrate into US society over several generations. It is a misleading assumption to believe that immigrants in employment-based categories that require advanced educational degrees will necessarily contribute more to US society in the long run. Immigrants who are admitted in the family-based categories—many of whom happen to have advanced degrees—may contribute at least as much economically in the long run, especially if their children and grandchildren achieve success. One noteworthy reason is that families may provide an especially strong platform for integration into US society.<sup>52</sup>

Other crucial responses to unauthorized migration involve international economic development. The core aim should be to support the economies of countries of origin, so that all intending migrants have a more realistic choice to stay home instead of coming to the United States. If a sending country's economy becomes robust enough to provide opportunities for the country's population, then the push to emigrate will diminish. Moreover, the migration that continues will become more likely to stay within the lawful admission scheme for immigrants or temporary workers. Return migration from the United States may also increase, moderating the size of the unauthorized population and making higher admission ceilings more acceptable politically. Return migration back to South Korea, Poland, and Ireland was significant in the 1990s and 2000s, when those economies began offering attractive prospects to their expatriates. In Ireland, later declines in the economy dampened this return trend, but the basic point remains that the economies in sending countries strongly influence who comes to America both lawfully and unlawfully, and how long they stay.<sup>53</sup>

One other possibility requires attention. If immigration to the United States diminishes or return migration away from the United States increases, then many of the jobs now performed by unauthorized migrants may go unfilled. If this happens, then economic development in sending countries will do more than reduce unauthorized migration. An additional consequence will be a need to align the US economy with the labor force that it can expect to have. That realignment may require restructuring, mechanization, outsourcing, or some combination of these and other approaches. The fundamental challenge would then be how to educate and train workers for an evolving US economy that can no longer rely on a flexible pool of cheap labor, including many unauthorized migrants. Here, too, the focus must be on the US educational system.

NOW IT IS time to circle back to a question that I deferred at the end of Chapter 6: How should broad-scale legalization be designed to fit best into an overall response to unauthorized migration? I explained how legalization should start with noncitizens who already qualify for lawful permanent resident status under existing law, and with unauthorized migrants who have close citizen or permanent resident relatives and have lived in the United States for the seven years that pre-1996 law required for cancellation of removal. This would amount to a limited legalization program for those with the closest or most long-standing ties in the United States.

The next issue is whether legalization should include a much larger group of unauthorized migrants in the United States. Legalization itself does little to solve fundamental problems with the US immigration system. Without other changes that address the origins of the current situation, a large unauthorized population is likely to reemerge. Many of these potential changes emerge from focusing on temporary worker programs, permanent admissions changes, domestic education, economic policy, and international economic development. What role does legalization play in this new beginning?

Suppose a response to unauthorized migration reworks the admissions system moving forward and changes the composition of the future immigrant population. But what if these changes had been part of US immigration law all along? What if the immigration system had not relied so heavily on selective admissions, selective enforcement, and vast discretion? If so, then many of today's unauthorized migrants might have been admitted to the United States lawfully. So viewed, these unauthorized migrants are logical candidates for legalization. Conceptually, legalization should amount to the retroactive application of changes that Congress adopts to temporary worker and permanent admissions. In a legalization program that takes this approach, the cutoff date becomes much less significant than it would be in a program that does nothing about future immigration.

This approach is generally evident in the legislation that the US Senate approved in 2013. Its legalization provisions would have provided lawful status under different terms to three groups of unauthorized migrants. Most favored would be DREAM Act beneficiaries, who would be eligible for permanent resident status after five years and eligible for naturalization as soon as they become permanent residents. Many in this group may qualify in an existing admission category, or would have the strongest case for cancellation of removal under pre-1996 requirements. Others may qualify under the revised admission categories in the 2013 Senate bill. Another favored group would be agricultural workers, who would be eligible immediately for interim lawful status and then for permanent resident status five years later. After five years as permanent residents, they would be eligible to apply for naturalization. This group would resemble the agricultural workers who would be admitted in the future under a new program for temporary agricultural workers. In this way, the bill would approach legalization as the retroactive admission of unauthorized migrants who arrived before the changes.<sup>54</sup>

Under this proposed legislation, a third tier of unauthorized migrants would need to wait the longest for permanent residence and citizenship, pay the largest monetary penalties and fees, and meet the most demanding

requirements. But here, too, the rationale is that the practical effect reflects retroactive application of changes to the admission system. Many of the unauthorized migrants who would benefit from this part of the Senate proposal would, if they were outside the United States today, qualify for lawful permanent resident status in new employment-based immigration categories or for admission to expanded temporary worker programs.<sup>55</sup>

By combining a broad-scale legalization program with revised admissions, this part of the Senate proposal tried to find responses to immigration patterns that are in the national interest, are consistent with the realities of the US and global economies, and reflect fundamental notions of justice for both US citizens and newcomers. The answers reach the current unauthorized population through legalization, but they also recognize that one-time legalization is not part of the long-term solution. The system for admitting immigrants and temporary workers, international economic development initiatives, developments in the US educational system, and broader economic and demographic factors will be far more influential.

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IMMIGRATION IS ONE of the most important areas of American public policy, for it literally determines who “we” are. Some of the most urgent questions about immigration involve immigration outside the law. The dramatic increase over the past several decades in the number of noncitizens who live and work in the United States without lawful status has led to broad chasms between opposing views on immigration and has made the task of a national conversation especially daunting. But without hard work on all sides to make that conversation productive, this new American dilemma will persist, in even more divisive forms, to burden our children and grandchildren.

Working toward a productive national conversation will require the sort of broader and deeper understanding of unauthorized migration that starts with *Plyler*. The three themes that were essential to the US Supreme Court’s decision in *Plyler* show, individually and in combination, that workable, durable, and politically viable responses will require forthright engagement with the larger forces that generate and shape migration patterns. It is far from clear if the ethos of *Plyler v. Doe* remains vibrant in today’s America. But *Plyler* represents the noblest aspects of the US Constitution and more generally of the United States as a nation of immigrants—a nation with borders, but also a nation committed to a sense of equality and human dignity.

