

Designing Temporary Worker Programs

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INTRODUCTION

Some of the most vexing and persistent questions in US immigration policy involve whether and how to design programs to admit temporary workers to the United States. In addressing this topic, I start with a brief overview of temporary worker admissions in US immigration law today and then summarize the main points typically made by supporters and skeptics of temporary worker programs. I then explain how many specific points that others have made reflect four broader perspectives, and how identifying and analyzing these perspectives can help elucidate current disagreements. Overall, the broad assessment provided by a balanced combination of these perspectives generally suggests cautious support for temporary worker programs, but only if they are carefully designed and coordinated with initiatives outside of immigration law.

I. OVERVIEW OF TEMPORARY WORKER PROGRAMS

US law currently admits groups of temporary workers in various nonimmigrant categories in the federal Immigration and Nationality Act¹ (INA).² Each category has requirements that workers and employers must meet, and most have annual numerical limits. The H-1B category generally requires a college education or its equivalent and is limited to 65,000 new visas each year, with exceptions.³ Other categories require less education or skill, but employers must show that these workers will

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¹ Immigration and Nationality Act of 1952 (INA), Pub L No 414, ch 477, 66 Stat 163, codified as amended at 8 USC § 1101 et seq.

² INA § 101(a)(15), 8 USC § 1101(a)(15).

³ INA § 101(a)(15)(H)(i)(b), 8 USC § 1101(a)(15)(H)(i)(b); INA § 184(g)(1), 8 USC § 1184(g)(1); INA § 214(i), 8 USC § 1184(i).

not displace or earn less than prospective employees who are US citizens or lawful permanent residents. Several categories are tied to a certain occupation or industry. For example, the H-2A category is for agricultural workers.⁴ Their overall number is not capped. H-2B temporary workers are unrestricted by line of work,⁵ but only 66,000 are admitted annually.⁶ Other categories seem to be more for international business than temporary work, but they can function similarly and offer advantageous alternatives. For example, L-1 intracompany transferees must have worked for an employer for one year out of the past three; they can then transfer to a US office.⁷ The E-1 and E-2 categories—for traders, investors, and some of their employees—can offer similar alternatives.⁸

II. SUPPORTERS AND SKEPTICS

Most of the proposals for sweeping changes in US immigration law since 2000 have included temporary worker programs.⁹ Supporters typically argue that the lawful admission scheme should supply the US economy with needed workers.¹⁰ Failure to do so, the argument continues, impairs the US economy's competitiveness¹¹ and has contributed to the recent dramatic growth of the unauthorized population.¹² Compared to permanent immigration, temporary or circular migration is more responsive to employers' workforce needs—especially for jobs requiring little

⁴ INA § 101(a)(15)(H)(ii)(a), 8 USC § 1101(a)(15)(H)(ii)(a).

⁵ INA § 101(a)(15)(H)(ii)(b), 8 USC § 1101(a)(15)(H)(ii)(b).

⁶ INA § 214(g)(1)(B), 8 USC § 1184(g)(1)(B).

⁷ INA § 101(a)(15)(L), 8 USC § 1101(a)(15)(L).

⁸ INA § 101(a)(15)(E), 8 USC § 1101(a)(15)(E); *Types of Visas for Temporary Visitors* (Department of State), online at http://travel.state.gov/visa/temp/types/types_1286.html (visited Mar 3, 2013).

⁹ See Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 436 (West 7th ed 2012); Andorra Bruno, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues* 6 (Congressional Research Service Dec 13, 2012), online at <http://www.fas.org/sgp/crs/homesec/R42434.pdf> (visited Mar 3, 2013).

¹⁰ See, for example, Daniel T. Griswold, *Willing Workers: Fixing the Problem of Illegal Mexican Migration to the United States* 19–21 (Cato Institute Oct 15, 2002), online at <http://www.cato.org/pubs/tpa/tpa-019.pdf> (visited Mar 3, 2013).

¹¹ See, for example, Bill Gates, *How to Keep America Competitive*, Wash Post B07 (Feb 25, 2007) (arguing that the United States must increase the H-1B visa cap to retain its economic competitiveness); Edward Alden, *America's "National Suicide,"* Newsweek (Apr 18, 2011), online at <http://www.thedailybeast.com/newsweek/2011/04/10/america-s-national-suicide.html> (visited Mar 3, 2013).

¹² See, for example, Griswold, *Willing Workers* at 11 (cited in note 10).

training or formal education. Temporary workers benefit the economy without the social, fiscal, or political impact of the same number of long-term immigrants.¹³ Noting prior migration patterns, supporters assert that many migrants want only a temporary work sojourn, preferring regular return visits home in circular migration patterns;¹⁴ the government should not deny this option paternalistically.

Skeptics of temporary worker programs often emphasize exploitation,¹⁵ observing that these workers are vulnerable to harsh and dangerous working conditions and other workplace injustices.¹⁶ A deeper concern stems from the tension between the borders inherent in immigration law and the national commitment to equality that is central to political and civic culture in the United States.¹⁷ The harm to 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.¹⁸ Further skepticism reflects perceived harms to US citizens or permanent residents.¹⁹ Though some will benefit from temporary workers who complement what they do, the job prospects, wages, or working conditions of other citizens or permanent residents will decline. According to this point of view, though unauthorized

¹³ See Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 *Mich L Rev* 1111, 1122–23 (2008) (“If we commit to treating immigrants as citizens, we may well erode what support exists for large-scale immigration.”). For a similar analysis in a global context, see Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 *Labor Hist* 69, 72–73 (2003).

¹⁴ See, for example, Jorge Durand and Douglas S. Massey, *Borderline Sanity*, *American Prospect* 28, 30 (Sept 24–Oct 1, 2001).

¹⁵ See, for example, Christopher Fulmer, Comment, *A Critical Look at the H-1B Visa Program and Its Effects on U.S. and Foreign Workers—A Controversial Program Unhinged from Its Original Intent*, 13 *Lewis & Clark L Rev* 823, 855–56 (2009).

¹⁶ See, for example, Mary Bauer, *Close to Slavery: Guestworker Programs in the United States* 25–26 (Southern Poverty Law Center 2007), online at http://cdna.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf (visited Mar 3, 2013).

¹⁷ See Hiroshi Motomura, *Who Belongs?: Immigration outside the Law and the Idea of Americans in Waiting*, 2 *UC Irvine L Rev* 359, 363–67 (2012).

¹⁸ See, for example, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 52 (Basic Books 1983) (“[A] family with live-in servants is—invariably, I think—a little tyranny.”). See also Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 *U Chi Legal F* 219, 222 (criticizing guestworker programs for failing to incorporate immigrants into social and civic life).

¹⁹ See, for example, Ron Hira, *The H-1B and L-1 Visa Programs: Out of Control* 7–14 (Economic Policy Institute Oct 14, 2010), online at <http://www.epi.org/page/-/pdf/bp280.pdf> (visited Mar 3, 2013).

migration can have similar effects, these harms become especially entrenched through temporary worker programs.

III. QUESTIONS AND PERSPECTIVES

To assess the contrast between supporters and skeptics, I start by identifying key questions in designing temporary worker programs. Some questions concern what a worker must show to qualify—education, training, or work experience. Other issues involve terms of admission—the initial stay, renewal possibilities, mandatory departure before renewal, and limited total stay. Further issues address workplace rights and protections, ability to change jobs or employers while maintaining immigration status, and the admission of family members. Additional questions probe how temporary workers fit with other aspects of immigration law. Will prior immigration violations complicate admission as a temporary worker? Other issues are how admission as a temporary worker affects later becoming a permanent resident or citizen and whether temporary workers who apply and are waiting for permanent residence can renew their status in the meantime.

Other questions probe the purposes of any temporary worker scheme. One is whether programs should be tailored to particular occupations or industries, and how to check compliance with such limits. A similar design choice is whether to make temporary admissions sensitive to regional needs and how to see that workers meet those needs. And if not all employers may participate, a crucially important feature is how to select the employers who may. A related issue is how to divide authority among federal decision makers, including Congress and administrative agencies, and perhaps state or local governments. Another issue is whether and how to respond to short-term conditions, perhaps with flexibility to set admission levels and respond to labor needs in occupations, industries, or regions. Other questions involve enforcement. Who will identify and respond to employer violations such as noncompliance with admission requirements and unlawful working conditions and wages? And if workers overstay or otherwise violate admission terms, will the enforcers be government agencies, employers, or persons or institutions in their countries of origin?

The most fundamental issues go beyond temporary worker programs to other areas of immigration law and then to broader topics. 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.

Though these questions set a daunting but essential design agenda for conscientious policy makers, the answers have generally not been addressed systematically. One reason is that some policy makers and commentators have failed to appreciate that other policy makers and commentators may approach these questions from entirely different perspectives. To promote constructive dialogue, it helps to explore four broad perspectives on temporary worker programs. Though these perspectives may seem obvious when identified, they are seldom compared with each other to see how they affect design choices. In fact, they combine to suggest new ways to think about temporary worker programs, and for this reason they suggest ways to replace political impasses with sound compromises.

One perspective evaluates temporary worker programs as a force in the US economy that benefits many citizens and permanent residents but disadvantages others. A second perspective views admission of temporary workers not only in comparison to its traditional foil—admission of permanent residents—but also to immigration outside the law. A third perspective analyzes temporary worker admissions not only as a vital facet of immigration law but also as essential to international economic development. A fourth perspective assesses temporary admissions in the context not just of immigration law but also of citizenship, especially by looking at the integration of future generations. These four perspectives shed light on current debates by broadening and deepening analysis of the challenge of designing temporary worker programs.

A. Temporary Admissions as an Economic Force in the United States

Temporary workers affect the distribution of wealth and opportunity within the United States. Many citizens and permanent residents benefit when the downward pressure exerted by more workers or lower wages dampens the cost of goods and services. Moreover, temporary workers may help create jobs and other opportunities for citizens and permanent residents. Without temporary workers, the cost of doing business in the United

States may rise to force companies or industries to restructure and cut jobs done by US citizens and permanent residents. Or, high costs can force companies to move some or all of their operations outside the United States or to die out altogether. Many consumers, including businesses, will benefit, even if the lower prices for imports may dry up the market for some domestic production. From this perspective, admitting temporary workers keeps the US economy robust.

At the same time, temporary workers can seriously threaten citizens and permanent residents who are vulnerable to economic displacement, including wage stagnation, declining workplace conditions, or outright job loss. These concerns explain various aspects of current law, such as the numerical caps in several categories. Similarly, H-2A and H-2B temporary workers are admitted only with an approved labor certification—a formal finding that workers will receive the prevailing wage and that no citizens or permanent residents are able and willing to do the work.²⁰

From this domestic economic perspective, a central challenge in designing temporary worker programs is to address their distributional impact fairly. The task includes keeping temporary worker programs from exacerbating inequalities in US society. Labor certifications try to prevent some of the worst of such problems, but some uneven impact is unavoidable and even inherent in letting employers hire workers on terms more favorable than would otherwise be available. Impact varies by employer and employee, by locality and region, and by government entity—local, state, and federal.²¹

The next questions are whether and how to redistribute the benefits from admitting temporary workers to some citizens and permanent residents, or as between economic sectors, geographic areas, or levels of government that are vulnerable to harm. The first step in any redistribution is measuring and capturing benefits. An option is screening employers for participation, perhaps imposing fees or establishing an auction or other market

²⁰ INA § 218(a), 8 USC § 1188(a) (H-2A); INA § 101(a)(15)(H)(ii)(b), 8 USC § 1101(a)(15)(H)(ii)(b) (H-2B); 77 Fed Reg 10038, 10169 (2012), amending 20 CFR §§ 503, 655. As a weaker form of protection, employers hiring H-1B workers must attest to offering the job at the prevailing wage or actual wage paid to similar individuals (whichever is greater) and with working conditions that will not adversely affect the working conditions of similarly employed US workers. See INA § 212(n)(1)(A), 8 USC § 1182(n)(1)(A).

²¹ See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 Comp Labor L & Pol J 125, 135–36 (2009).

for permits to employ temporary workers.²² The second step is adopting vehicles for redistribution. Current law does so only modestly, by collecting 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.²³ The funds go to the National Science Foundation and the Department of Labor, primarily for job training for citizens and permanent residents, college scholarships for low-income students in engineering, math, computer science, and other science-enrichment courses.²⁴ Fees paid by employers in a screening process could generate much higher revenues.

Unless policy makers successfully take on both aspects of redistribution, the likely result is significant political resistance to temporary worker programs from individuals, communities, industries, and regions that see temporary workers as an economic threat. Some of this resistance will be directed at temporary worker programs in general. At least as significantly, this resistance will also impede or prevent the adoption of other, specific measures that would make temporary worker programs more acceptable from the other three perspectives that I will discuss.

B. Temporary Admissions as a Response or an Alternative to Immigration outside the Law

It is only natural to compare temporary admissions in general, and temporary worker programs in particular, with the most closely related feature of US immigration law—the admission of noncitizens as lawful permanent residents. But the preceding discussion of the first perspective on temporary workers—as a domestic economic force—shows how it is just as accurate to see

²² See Giovanni Peri, *Rationalizing U.S. Immigration Policy: Reforms for Simplicity, Fairness, and Economic Growth* 15–17 (Brookings 2012), online at http://www.brookings.edu/~media/research/files/papers/2012/5/15%20immigration%20peri/05_immigration_peri_paper (visited Mar 3, 2013). See also Peter H. Schuck and John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 *Fordham Urban L J* 327, 354–55 (2010) (discussing auctions to admit highly skilled immigrants); Griswold, *Willing Workers* at 20 (cited in note 10) (suggesting a fee “high enough to offset costs and regulate demand, but low enough to undercut smugglers, perhaps in the range of \$1,000”).

²³ INA § 214(c)(9)(B), 8 USC § 1184(c)(9)(B) (stating the fee for employers with more than twenty-five employees and setting \$750 as the fee for employers with twenty-five or fewer workers in the United States). Colleges, universities, and nonprofit research institutions are exempt. INA § 214(c)(9)(A), 8 USC § 1184(c)(9)(A).

²⁴ INA § 214(c)(9)(C), 8 USC § 1184(c)(9)(C); 8 USC § 1356(s).

temporary workers as an alternative to unauthorized migration in the context of the US labor market. This comparison is especially apt for low-wage workers with little formal education or training. They make up most unauthorized migrants,²⁵ most H-2A and H-2B temporary workers,²⁶ and they are most of the temporary workers under recent proposals considered by Congress.²⁷

This second perspective is well-founded if, as seems true, admitting more temporary workers would likely curtail the number or flow of unauthorized migrants. This perspective is further grounded in the long history of US government tolerance or acquiescence in a sizeable unauthorized population.²⁸ For the first half of the twentieth century, the unauthorized and the foreign-born populations of the United States were both much smaller than they are today, and the line between legal and illegal had not yet acquired today's political valence. In this era, 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.²⁹ Between 4 and 5 million Mexican workers were employed as Braceros by the time the program ended in 1964, with over 400 thousand coming to work each year.³⁰

In the mid-1960s, the Bracero program ended, and a new admission scheme limited the number of new lawful permanent residents from Latin America.³¹ But by then, migration patterns had established work in the United States as both economically

²⁵ See Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* 10–11, 16 (Pew Hispanic Center Apr 14, 2009), online at <http://www.pewhispanic.org/files/reports/107.pdf> (visited Mar 3, 2013).

²⁶ See Daniel Carroll, et al, *Findings from the National Agricultural Workers Survey (NAWS) 2001–2002: A Demographic and Employment Profile of United States Farm Workers* 18 (Department of Labor Mar 2005), online at http://www.doleta.gov/agworker/report9/naws_rpt9.pdf (visited Mar 3, 2013).

²⁷ See, for example, Agricultural Job Opportunities, Benefits, and Securities Act of 2009, HR 2414, 111th Cong, 1st Sess, in 155 Cong Rec H 12620 (May 14, 2009).

²⁸ See Hiroshi Motomura, *Immigration outside the Law*, 108 Colum L Rev 2037, 2047–55 (2008).

²⁹ See Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 134 (Oxford 2006); Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* 31 (Routledge 1992); Motomura, 108 Colum L Rev at 2050 (cited in note 28).

³⁰ Alison K. Guernsey, *Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A*, 93 Iowa L Rev 277, 282 (2007); Stephen H. Sosnick, *Hired Hands: Seasonal Farm Workers in the United States* 9 (McNally & Loftin, West 1978).

³¹ Motomura, *Americans in Waiting* at 134 (cited in note 29).

and socially customary.³² Temporary worker programs grew after the Immigration Reform and Control Act of 1986 bolstered enforcement, but they remain relatively small.³³ For example, though over 50 thousand H-2A agricultural workers have been admitted each year since 2007, this is a small number compared to unauthorized farm employment, and to total farm employment of about 750 thousand in 2011.³⁴ With temporary and permanent admissions severely curtailed since the mid-1960s, immigration outside the law increased dramatically.

In assessing temporary worker programs, shifting the comparison from permanent residents to unauthorized migration influences the answers to several design questions, starting with workplace protections. Analysis should start by deciding if the right comparison is workplace protections for unauthorized migrants, or the fuller set of protections associated with admission to the United States as a lawful permanent resident. Protections may be much weaker for temporary workers than for citizens or permanent residents, but much stronger for temporary workers than for unauthorized workers. In theory, unauthorized workers have many workplace protections and remedies,³⁵ even though the 2002 Supreme Court decision in *Hoffman Plastic Compounds, Inc v NLRB*³⁶ limited their eligibility for the key remedy of back pay.³⁷ But the gap between theory and practice can be especially wide for unauthorized workers in an inherently precarious position. If they assert their rights—or even complain informally—they can put themselves and their families at serious risk of job loss and immigration enforcement.³⁸

That said, an essential form of protection for unauthorized migrants is quitting to seek other work. Though finding a new job can be hard, especially given the need to prove work authorization,³⁹ a worker's ability to do so may constrain employer

³² See id at 135.

³³ Bruno, *Immigration of Temporary Lower-Skilled Workers* at 30 (cited in note 9).

³⁴ See id at 5–6 & n 11; Carroll, et al, *Findings from the National Agricultural Workers Survey* at 6 (cited in note 26).

³⁵ See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration outside the Law*, 59 Duke L J 1723, 1746–62 (2010).

³⁶ 535 US 137 (2002).

³⁷ Id at 151–52.

³⁸ See id at 153–55 (Breyer dissenting) (explaining that the majority's holding incentivizes employers to hire unauthorized workers because it enables employers to violate labor laws with impunity).

³⁹ See Aleinikoff, Martin, Motomura, and Fullerton, *Immigration and Citizenship* at 952–54 (cited in note 9).

behavior. Of course, lawfully admitted temporary workers also can quit, but they would give up more—their lawful immigration status—than unauthorized migrants would. So viewed, lawful temporary workers are more tied to their jobs and employers. This comparison suggests that lawful temporary workers—who have no labor mobility under current law—may be as vulnerable to employer abuse and exploitation as unauthorized workers are.⁴⁰ If true, this underscores the inadequacy of labor standards enforcement in current temporary worker programs. It must be recognized, of course, that labor mobility can only do so much without more effective government enforcement against employers who violate labor standards. But it also shows labor mobility would make the protections that lawful temporary workers have under current law much more effective.⁴¹

Contrasting temporary workers with unauthorized migrants has a more general design implication: US immigration law can rely more heavily on the potential of the labor marketplace to regulate employers who mistreat workers. Such informal enforcement is an inherent feature of unauthorized migration, which exists outside direct regulation to begin with. Relying on the market to limit employer overreaching may reduce the role of government agencies that currently monitor employers and penalize violations.⁴²

Using immigration outside the law as a frame for assessing temporary workers also influences the inquiry into whether they or the programs that admit them are actually temporary. A frequent objection to temporary workers and these programs is that nothing is more permanent.⁴³ But as compared to unauthorized migration, temporary worker programs may produce more circular

⁴⁰ See Bauer, *Close to Slavery* at 25–26 (cited in note 16); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 Hofstra Labor & Emp L J 575, 596 (2001).

⁴¹ For arguments for labor mobility, see Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 U Dayton L Rev 3, 7 (2008); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 Georgetown Immig L J 521, 561–64 (2007).

⁴² For a related idea concerning nongovernmental solutions, see Jennifer Gordon, *Transnational Labor Citizenship*, 80 S Cal L Rev 503, 568 (2007) (suggesting protection through membership in transnational labor organizations).

⁴³ See, for example, Philip L. Martin and Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 Foreign Aff 117, 119 (Nov/Dec 2001) (noting that “virtually no low-wage ‘temporary worker’ program in a high-wage liberal democracy has ever turned out to be genuinely temporary”).

migration patterns, especially if enforcement is more intense on the border than in the interior. If so, it becomes rational for an unauthorized migrant to run the risk of detection and apprehension inside the United States rather than take an even more perilous and costly trip to his country of origin and back.

The time dimension of admission decisions is another way to compare temporary workers, permanent residents, and unauthorized migrants. When the federal government issues immigrant visas outside the United States, choosing noncitizens for admission as lawful permanent residents, it selects them *ex ante* based on credentials but not on any track record in the United States.⁴⁴ If and when temporary workers become permanent residents, their selection is delayed until after some time in the United States and it is thus less *ex ante*.⁴⁵ The selection of unauthorized migrants as permanent residents through various avenues for acquiring lawful immigration status is deferred to an even later time and thus may be the most informed of these three selection processes.

This means that as compared to lawful permanent residents, temporary worker programs will seem *ex post* and offer a more informed choice of permanent residents. But compared to choosing permanent residents from among unauthorized migrants, temporary worker programs may seem too *ex ante*. It might be more informed to tolerate significant unauthorized migration and periodically offer lawful immigration status to the unauthorized migrants who prove themselves most worthy through a strong employment history or other contributions to US society.⁴⁶

Assessing temporary worker programs against a benchmark of unauthorized migration rather than permanent lawful immigration has a deeper implication. This perspective is an invitation to view workplace protections, temporariness, and other aspects of temporary worker programs as second best rather than ideal options.⁴⁷ Adopting immigration outside the law as a point of comparison may seem inherently suboptimal, but with over

⁴⁴ See Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* 809, 812 (2007).

⁴⁵ See *id.* at 850.

⁴⁶ See Gordon H. Hanson, *The Governance of Migration Policy*, 11 *J Human Dev & Capabilities* 185, 188 (2010); Cox and Posner, 59 *Stan L Rev* at 847 (cited in note 44).

⁴⁷ See Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 *NC J Intl L & Comm Reg* 465, 468–69 (2002).

eleven million unauthorized migrants in the United States,⁴⁸ this frame of reference is both reasonable and inescapable.

An unauthorized migration benchmark also broadens inquiry into whether temporary workers from different countries should be treated differently. Should it be easier for temporary workers to come to the United States lawfully from Mexico than from other countries? If unauthorized migration supplies the perception frame, then it may matter that Mexico is the source of almost 60 percent of the current unauthorized population of the United States.⁴⁹ This country-specific view of the context may support country-specific design choices for temporary worker programs, including the number of workers, length of stay, and required qualifications.

And yet, treating countries differently brings up another facet of the challenge of defining equality in immigration. I observed earlier in this Article how the very idea of national borders—by distinguishing citizens from noncitizens—is in tension with a political culture that values equality.⁵⁰ One partial resolution is incorporating equality into immigration law by treating noncitizens equally regardless of race or ethnicity, thus discriminating on no basis other than citizenship itself.⁵¹ Whether it violates this principle to treat Mexican temporary workers differently because they are from Mexico is a question that I address more fully after exploring a third perspective on temporary worker programs—international economic development.

C. Temporary Admissions and International Economic Development

From a third perspective, temporary worker programs respond to economic development pressures outside the United States. This relationship goes both ways; temporary workers can influence international economic development, and vice versa. For example, temporary workers (and other emigrants) typically send remittances back to their countries of origin, where the

⁴⁸ Michael Hoefler, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* 3 (Department of Homeland Security 2012), online at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (visited Mar 3, 2013).

⁴⁹ *Id.* at 4–5 & table 3; Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* 11 (Pew Hispanic Center Feb 1, 2011), online at <http://www.pewhispanic.org/files/reports/133.pdf> (visited Mar 3, 2013).

⁵⁰ See note 17 and accompanying text.

⁵¹ See Motomura, 2 UC Irvine L Rev at 366 (cited in note 17).

funds are essential to the economy. Remittances not only buoy the national economy in general but also offset the absence of available credit, helping to build houses, educate children, start and grow small businesses, and more.⁵²

Emigration, including emigration of temporary workers, is also a safety valve for what might otherwise emerge in the sending country as economic or political discontent and unrest.⁵³ As with remittances, a key part of analyzing this safety valve is comparing temporary workers with unauthorized migrants, though confident conclusions are elusive. Unauthorized migrants may represent more of a political safety valve than lawful temporary workers, who may find it easier to travel back and forth and thus to stay active in their countries of origin. Frequent travel may reinforce a worker's sense of impermanence in the United States, perhaps strengthening remittance flows and other forms of home-country engagement.

If temporary workers maintain ties, they may be well-positioned to address problems in their countries of origin beyond sending remittances. From an international economic development perspective, an important question is whether temporary worker programs allow workers to make nonmonetary contributions based on their US experiences. Temporary workers may return to their countries of origin with enhanced experience, ranging from language to occupational skills to entrepreneurial know-how. By sending back human capital, temporary worker programs can offset shortcomings of education, training, and experience levels in the population of sending countries.⁵⁴

An international economic development perspective is the dominant approach of some countries that actively promote temporary work elsewhere as an option for their citizens. As a prominent example, the Philippine government has a long-standing policy of training workers to leave the country for temporary work, helping them find work in other countries and

⁵² See generally *Migrants' Remittances and Related Economic Flows* (Congressional Budget Office Feb 2011), online at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12053/02-24-remittances_chartbook.pdf (visited Mar 3, 2013); Ezra Rosser, *Immigrant Remittances*, 41 Conn L Rev 1 (2008).

⁵³ See Thomas Kleven, *Why International Law Favors Emigration over Immigration*, 33 U Miami Int-Am L Rev 69, 90–91 (2002).

⁵⁴ See Jesús Alquézar Sabadie, et al, *Migration and Skills: the Experience of Migrant Workers from Albania, Egypt, Moldova, and Tunisia* 44 (World Bank 2010); Xinying Chi, *Challenging Managed Temporary Labor Migration as a Model for Rights and Development for Labor-Sending Countries*, 40 NYU Intl L & Polit 497, 500 (2008).

maintain home country ties with the Philippines, and facilitating remittances and eventual return.⁵⁵ The same general model explains policies in many countries to manage emigration.⁵⁶ One consequence of such policies is that the government's interest in protecting its nationals may be limited for fear of jeopardizing the remittance flow.⁵⁷

Remittance streams, political safety valves, return of human capital, and other consequences—whether they are fostered through permanent resident immigration, temporary worker programs, or tolerance of unauthorized migration—provide valuable options for the US government to address economic and political imperatives in other countries. This decision-making latitude may allow the US government to reduce direct aid or investment, or to avoid more drastic measures like military intervention.

Assessing temporary workers as an aspect of international economic development also helps in assessing the differential treatment of temporary workers from different countries. An international economic development perspective—like the perspective that compares temporary workers to unauthorized migrants—may make country-specific temporary worker policies seem less problematic, perhaps even natural. The reason is an intuition that international economic development initiatives are inherently country-specific or at least region-specific, and thus not limited by any expectation of uniform arrangements with all countries.

But the country-specificity issue is complex and deserves a fuller answer than intuition alone can supply. Delving deeper, an international economic development perspective on temporary worker programs underscores some basic truths—immigration policy is a form of foreign policy, and foreign policy is a way of making immigration policy. This link revisits the tension between national borders and a national commitment to equality. As I mentioned earlier in this Article, an idea that partially resolves this tension comes from treating noncitizens

⁵⁵ See Jason DeParle, *Downturn Does Little to Slow Migration*, NY Times A4 (May 28, 2010); Jason DeParle, *A Good Provider Is One Who Leaves*, NY Times Magazine 50 (Apr 22, 2007); Philip Martin, Manolo Abella, and Elizabeth Midgley, *Best Practices to Manage Migration: The Philippines*, 38 Intl Mig Rev 1544, 1551–54 (2004).

⁵⁶ See generally *Taxonomy of the Diaspora-Engaging Institutions in 30 Developing Countries* (Migration Policy Institute 2010), online at http://www.migrationinformation.org/datahub/migration_development/taxonomy.pdf (visited Mar 3, 2013); Chi, 40 NYU Intl L & Polit at 502–11 (cited in note 54).

⁵⁷ See Hahamovitch, 44 Labor Hist at 83 (cited in note 13).

equally regardless of race or ethnicity and discriminating on no basis other than citizenship itself.⁵⁸ A closely related idea that helps reconcile borders with equality is the principle that immigration and citizenship law must treat all citizens equally.⁵⁹ The connection between these ideas is that discrimination against noncitizens is virtually certain to discriminate against citizens who would suffer harm if noncitizens do, perhaps because they are closely related as family members. Would the United States abandon these ideas by making it easier for temporary workers to come from Mexico than from other countries?

The answer starts with 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 evenhanded application of a set of universal principles.⁶⁰ But the relationship between equality and universal principles in the immigration concept deserves closer analysis.

The belief in universal principles is a legacy of the struggle to end the national origins system,⁶¹ which operated in some form between 1921 and 1965.⁶² Its purpose was to maintain the ethnic mix of the US population that prevailed at the turn of the twentieth century.⁶³ To accomplish this, the system strongly preferred European immigrants, especially from Northern and Western Europe.⁶⁴ During the same period, other country-specific arrangements established the Bracero program, reflecting and reinforcing perceptions of Mexico as a source of workers and not of Americans in waiting.⁶⁵

The 1965 amendments to the Immigration and Nationality Act⁶⁶ replaced the national origins system with a scheme that

⁵⁸ See Part III.B.

⁵⁹ See Motomura, 2 UC Irvine L Rev at 366 (cited in note 17).

⁶⁰ See Motomura, *Americans in Waiting* at 132 (cited in note 29) (arguing that the proponents of the 1965 amendments believed that the amendments would allow immigration law to adhere to principles of equality).

⁶¹ See *id* at 130–32.

⁶² See *id* at 126–32.

⁶³ See *id* at 126–27 (explaining that the national origins system originally capped immigrant admissions based on 2 percent of 1890 foreign-born population levels, thereby favoring immigrants from Northern and Western Europe).

⁶⁴ See Motomura, *Americans in Waiting* at 126–27 (cited in note 29).

⁶⁵ See *id* at 129–30.

⁶⁶ The Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub L No 89-236, 79 Stat 911, amending INA § 201 et seq, codified at 8 USC § 1151 et seq.

largely admitted immigrants regardless of country of origin.⁶⁷ These amendments reflected a faith in formally uniform admission criteria that in turn reflected a deeper assumption that immigration law is a unitary body of law governed by neutral principles that apply universally within it.⁶⁸ Today, it seems only natural to look back at the 1965 abolition of the national origins system as a hard-won triumph for universal admission principles and the related idea that a system of choosing immigrants should be based on law, not politics. The passage of the Civil Rights Act of 1964⁶⁹ and the Voting Rights Act of 1965⁷⁰—and the successful push by the farmworker movement to end the Bracero program in 1964—are part of the association of the 1965 immigration amendments with an overdue embrace of equality.⁷¹

As I mentioned a few pages ago,⁷² the end of the Bracero program, combined with the adoption of universal admission criteria in the 1965 amendments and related later laws, led to a dramatic rise in unauthorized migration from Latin America.⁷³ The chain of events had several links. First, during debates over the 1965 amendments, many legislators expressed concerns that Latin American immigration would rise dramatically.⁷⁴ At that time, immigrants from the western hemisphere had to meet financial self-sufficiency and other qualitative requirements, but their overall number was not capped.⁷⁵ In contrast, the national origins system included a numerical limit on overall eastern hemisphere immigration.⁷⁶

The 1965 reformers were intent on abolishing the national origins system and treating all countries equally. But absent any serious suggestion to repeal the eastern hemisphere cap, they were unable to refute the logic that all numerical limits should apply to all immigration. Congress adopted an overall

⁶⁷ See Motomura, *Americans in Waiting* at 132 (cited in note 29).

⁶⁸ See *id.*

⁶⁹ Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 1981 et seq.

⁷⁰ Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1973 et seq. See also Motomura, *Americans in Waiting* at 130-32 (cited in note 29).

⁷¹ See Motomura, *Americans in Waiting* at 132 (cited in note 29); Hahamovitch, 44 *Labor Hist* at 87 (cited in note 13).

⁷² See notes 31-34 and accompanying text.

⁷³ See Motomura, *Americans in Waiting* at 134 (cited in note 29).

⁷⁴ See *id.* ("Many in Congress feared a dramatic increase in Latin American immigration and were able to insist on limiting Western Hemisphere immigration in exchange for the end of national origins.").

⁷⁵ See *id.*

⁷⁶ See *id.*

western hemisphere cap, effective July 1, 1968.⁷⁷ And in 1976, Congress limited the number of immigrants from any single country, excepting citizens' immediate relatives—defined as spouses, unmarried minor children, and parents of citizens if the citizens are at least twenty-one years of age.⁷⁸

Today, the long waiting periods⁷⁹ for immigrants from some countries with a long history of sending workers to the United States raise the question of what it means to apply universal principles and to treat countries equally. Definitions of “equal” and “universal” in immigration law are elusive. Do equality and universality find expression in numerical ceilings on most categories of immigrants that are uniform around the world, regardless of a country's population or its geographic, historical, or economic ties to the United States? The intuition to look beyond superficial symmetry and treat countries differently gains power from viewing temporary worker programs as a matter of international economic development. Any such global economic perspective on temporary worker programs makes it seem natural to accept ad hoc arrangements that try to tailor relationships with particular sending countries.⁸⁰

Some country-specific arrangements are already part of current immigration law, though they tend to be exceptions, not expressions of a general rule. 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.⁸¹ Trade agreements with Chile and Singapore offer their citizens temporary admission on terms that vary from the general body of US immigration law.⁸²

⁷⁷ Hart-Celler Act §§ 8, 21(e), 79 Stat at 916, 921.

⁷⁸ Immigration and Nationality Act Amendments of 1976 § 3, Pub L No 94-571, 90 Stat 2703, 2703–05, amending INA § 202, codified as amended at 8 USC § 1152.

⁷⁹ See generally *Visa Bulletin: Immigrant Numbers for October 2012* (Department of State Oct 2012), online at http://www.travel.state.gov/pdf/visabulletin/visabulletin_october2012.pdf (visited Mar 3, 2013).

⁸⁰ See Adam B. Cox and Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 NYU L Rev 1403, 1454 (2009) (“[A] pressing question is why capital flows and trade are pervasively the subject of bilateral and multilateral agreements, while migration flows are much less frequently the subject of international agreement.”).

⁸¹ INA § 101(a)(15)(E), 8 USC § 1101(a)(15)(E) (distinguishing treaty investors and traders who come to the United States from other nonimmigrants and from immigrants to the United States).

⁸² See United States-Chile Free Trade Agreement, ch 14 (June 6, 2003), online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file479_4008.pdf (visited Mar 3, 2013); United States-Singapore Free Trade Agreement, ch 11,

In contrast, the North American Free Trade Agreement is a potential vehicle for temporary admissions from Canada and Mexico, but it currently does not facilitate low-wage worker admissions, and its categories for Canadians and Mexicans that require more education or training do not vary from the categories that exist in immigration law generally.⁸³

If an international economic development perspective supports country-specific approaches to temporary worker programs, then it also has implications for institutional design. Country-specific arrangements shift decision making to the actors that produce and administer such arrangements. Congressional decisions may matter less, and executive branch decisions more. Governments and private persons outside the United States may have more influence, including enforcement authority.⁸⁴ Courts and other institutions associated with applying apparently equal or universal principles could have their roles reduced, though one can reasonably question whether courts have ever effectively enforced antidiscrimination norms in immigration admissions.⁸⁵

Ad hoc, country-specific decision making—likely driven by executive branch initiative—raises design questions about how to achieve transparency and establish checks on improper or unwise decisions. Some answers may emerge from connecting this international economic development perspective on temporary worker programs with the perspective that views temporary workers as a response or an alternative to unauthorized migration. If temporary worker programs are compared to the admission of lawful permanent residents, then ad hoc, country-specific, executive branch decision making may seem unpredictable and unchecked. But if temporary worker programs are compared to government policies that have produced an unauthorized

May 6, 2003, online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf (visited Mar 3, 2013).

⁸³ North American Free Trade Agreement, annex § 1603 (Dec 17, 1992), 32 ILM 605, 664–65 (1993).

⁸⁴ See Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 *Fordham L Rev* 2475, 2482 (2009) (suggesting enforcement by temporary workers' home communities).

⁸⁵ The problem is partly defining equality and partly institutional design for the enforcement of antidiscrimination norms given the plenary power doctrine. See Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L J* 545, 546–49 (1990).

population of over eleven million persons,⁸⁶ then ad hoc, country-specific, executive branch processes may seem relatively transparent and regulated.

D. Temporary Admissions, US Citizenship, and Integration over Time

A fourth perspective is rooted in one of the most frequent criticisms of temporary worker programs—that they are the source of a troubling and corrosive inequality.⁸⁷ The problem is that temporary workers are relegated to second-class status—needed and tolerated as workers, but not accepted in society. This dissonance between the receiving country's expectations and the workers' aspirations recalls the comment by the Swiss writer Max Frisch on the European experience: "We asked for workers, but people came."⁸⁸

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. Limiting their future separates them fundamentally from society's mainstream.

I have written in an earlier work about 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 path to citizenship.⁸⁹ Making the line between immigrants and citizens permeable in this way—like avoiding discrimination against citizens and noncitizens on any basis other than citizenship itself—is essential to reconciling the tension between borders and equality.

As a corollary, I 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

⁸⁶ See Hofer, Rytina, and Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States* at 3 (cited in note 48).

⁸⁷ See notes 15–19 and accompanying text.

⁸⁸ Max Frisch, *Überfremdung I*, in *Schweiz als Heimat? Versuche über 50 Jahre* 219, 219 (Suhrkamp Verlag 1991) ("[M]an hat Arbeitskräfte gerufen, und es kommen Menschen.").

⁸⁹ Motomura, *Americans in Waiting* at 173 (cited in note 29).

will integrate fully into American society.⁹⁰ 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.⁹¹ As immigrants came from a wider array of countries, the idea that they were Americans in waiting was largely lost. Though racial barriers to immigration eroded, being an immigrant came to mean less.⁹²

These views about immigration as a transition to citizenship admittedly stand in some tension with my view that temporary worker programs are both necessary and desirable because of the virtues that this Article's sketch of perspectives has explained. This tension calls for explanation. Temporary worker programs reinforce the idea that noncitizens are unlike citizens. They thus may seem to suggest that the line between noncitizens and citizens is more important than the line that separates citizens and permanent residents from all other noncitizens.

In fact, US law can—without self-contradiction—have temporary worker programs while also striving to give immigrants meaningful access to equality by treating them as Americans in waiting. But how can temporary worker programs be consistent with this view of immigrants? The answer starts by observing that if temporary worker programs are to be consistent with immigration as a transition to citizenship, then coming as a temporary worker must include some kind of path to belonging. Of course, defining that path is a complex task.

One way of thinking about a path to citizenship is to view the temporary worker not just as an individual, but also as part of a family. Doing so makes relevant the rules that confer US citizenship on all children born on US soil, regardless of their parents' citizenship. In this way, birthright citizenship under the Fourteenth Amendment is a backstop against the marginalization caused by barriers between temporary workers and citizenship. The value of this backstop is another reason to admit temporary workers' close relatives, with work authorization to help make the family financially viable.

More generally, the acquisition of citizenship by a temporary worker's family through the birth of children adds the dimension

⁹⁰ *Id.* at 171–73 (expressing skepticism that current law adequately treats immigration as a transition to citizenship).

⁹¹ *Id.*

⁹² *Id.*

of time to the connection between temporary worker programs and the idea of equality. In turn, the time dimension sheds light on immigrant integration, which is essential to making the line between immigrants and citizens truly permeable. Policy makers tend to focus on the adult generation, reflecting both the myopia of electoral politics and the difficulties of pondering an uncertain future. But moving away from a static 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. Of course, integration requires that the adult generation have some economic opportunity through work so that the children may have social mobility, but also crucial is that the children have citizenship.

Viewing temporary worker programs from a perspective that evaluates citizenship and integration over time is consistent with an international economic development perspective. Both perspectives allow time to soften injustices associated with temporary workers. Automatic citizenship for children born on US soil makes corrosive inequality less inherent in temporary worker programs. Likewise, time allows temporary worker programs to foster more benign migration patterns as part of international economic development—with temporary workers having some degree of choice about whether to stay in the United States, return to their home countries, or go back and forth in some pattern in between.

A citizenship and integration perspective also reprises the issue of whether temporary worker programs are exploitative. I have explained how workplace protections can mitigate one type of exploitation,⁹³ but a more fundamental type is inherent in being viewed and treated as a worker, but not as a person. This second type of exploitation may seem more irreducible, but it is not necessarily so. Consider two countries, Ruritania and Meridian, both with large numbers of temporary workers. In Ruritania, the temporary workers' children are automatically citizens if born there. In Meridian, temporary workers' children are not citizens at birth, and naturalization is difficult. Even if both countries otherwise treat temporary workers exactly the same, the Ruritanian scheme is less exploitative because the admission of the workers, even if temporary in their generation, enables

⁹³ See notes 15–19 and accompanying text.

permanence for future generations. This future greatly reduces the exploitation inherent in impermanence.

Integration over time also prompts inquiry into what it means for temporary worker programs to be *temporary*. One question is whether the programs themselves are temporary. A more important question is whether the programs, even if permanent, will be temporary as applied to the admission of each individual worker. The answer to this question determines if temporary worker programs are offensive to equality. Temporary worker programs can be consistent with viewing immigration as a transition to citizenship. The reason is that the temporary admission of individual workers can be transitional for their families—it allows at least the workers' children a path to citizenship. Besides citizenship for children born on US soil, what else might foster transition for temporary workers and their families? One possibility is the ability to become a lawful permanent resident routinely after several renewals of temporary worker status. The birth of citizen children might be relevant at this stage. Normalizing such a process as the dominant approach to selecting immigrants and thus future citizens may be quite troubling because it may limit US society's capacity to integrate newcomers in ways that enhance their contributions. But it is not objectionable to allow *some* temporary workers to become lawful permanent residents in this way.

IV. THE QUESTION OF PERMANENCE

The most fundamental question about temporary worker programs goes back yet again to trying to reconcile the tension between national borders and equality. The essential question is how to design temporary worker programs so that they do not create a troubling second-class status for temporary workers, nor use temporary workers to create a troubling second-class status for some citizens and permanent residents. The best answers come from combining the four perspectives that I have discussed: temporary workers as a domestic economic force, as an alternative to unauthorized migration, as international economic development, and as tied to citizenship and integration.

As I have explained, one approach to designing temporary worker programs is to soften the second-class nature of temporary status. This might be done by enhancing workplace protections, by allowing workers to keep their immigration status while moving to a new employer, and by allowing family members to

accompany the worker routinely. These are logical extensions of viewing temporary worker programs as a response and an alternative to government tolerance or acquiescence in immigration outside the law to meet a significant part of the US economy's labor needs.

I have explored another approach to designing temporary worker programs that emphasizes a different perspective—the relevance of temporary workers for citizenship and integration over time.⁹⁴ This perspective leads to a different way of mitigating the second-class nature of temporary worker status. From the citizenship perspective, what counts is allowing temporary admission to operate as a point of entry for the worker's family so that the next generation can integrate and maximize its opportunities. A key instrument is birthright citizenship, but also crucial are other ways that temporary workers might be able to stay permanently.

Both of these perspectives on temporary worker programs collide with a major objection. They tend to solve problems with temporary worker programs by making temporary migration permanent. Such solutions to problems associated with temporary worker programs gradually undercut one of their key advantages—the ability of temporary worker programs to meet the economy's labor needs without necessarily adding to the overall population. This concern with overall numbers will intensify if numerous newcomers overburden the public treasury in the short term in spite of their direct and indirect tax contributions, increasing political resistance to immigration.

To be sure, even if almost all temporary workers and their families stay in the United States indefinitely, temporary worker programs still have some virtues. They reflect a different approach to selecting new Americans by imposing a probationary period before they can become permanent residents.⁹⁵ But a system that treats temporary workers as potential permanent residents and then citizens is open to the charge that it is really a system of permanent admissions and should be evaluated as such.

The way to address the question of permanence is by designing a system consisting of incentives and choices, as well as requirements with enforcement mechanisms. The distinction between

⁹⁴ See Part III.D.

⁹⁵ See Part III.B.

incentives and coercion can be elusive since any form of coercion can be cast as an incentive, and vice versa. But if the distinction can be drawn coherently, if roughly, it can be valuable in designing temporary worker programs.

Various measures are available to make it likely that many, if not most, temporary workers remain temporarily.⁹⁶ At one extreme is an exclusive emphasis on enforcement focused on arresting and deporting any temporary worker who overstays. Closely related are measures to make the lives of overstaying workers hard enough that they will leave. A system might achieve similar results less coercively by requiring a worker to post a financial bond or withhold some wages until he goes back to his country of origin.⁹⁷ A financial bonus for leaving may have the same effect, but it may seem less coercive and more like an incentive.

A better approach would give temporary workers some reasons to leave the United States that are not specific to the individual worker or his work. Programmatically, this approach would emphasize economic development initiatives that work toward creating general conditions in countries of origin to entice some significant number of migrants to keep their migration temporary or circular.⁹⁸ Conceptually, this approach values the difference between forcing workers to leave and providing opportunities that draw workers back home. Some sending countries, notably the Philippines but also many others, actively try to entice emigrants to return.⁹⁹ Part of the difference is that an exclusive focus on enforcement may simply be too costly or difficult to implement effectively. Moreover, outright coercion through enforcement is a reminder that these workers are brought in and tolerated just to work, and resurrects the problem of creating a second-class status in a society that purports to embrace a commitment to equality.

The alternative to pure enforcement is working toward two goals, though they are in some tension with each other. One goal is responding to the economy's needs with temporary workers

⁹⁶ See Rodríguez, 2007 U Chi Legal F at 229 n 24 (cited in note 18).

⁹⁷ See Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 Vand L Rev 1047, 1051–52 (2011).

⁹⁸ See, for example, Durand and Massey, *Borderline Sanity* at 31 (cited in note 14) (discussing Spain and Portugal's integration into the European Union as migration management through international economic development).

⁹⁹ See Xiang Biao, *Emigration from China: A Sending Country Perspective*, 41 Intl Migration 21, 29 (2003).

rather than increased permanent admissions. This goal reflects the perspective that views temporary worker programs as a domestic economic force or an alternative to unauthorized migration. The second goal is keeping temporary workers from becoming a servant underclass. This reflects the perspective that views temporary worker programs in a citizenship and integration frame. The tension between these goals is captured in the perhaps counterintuitive idea that temporary workers should have a path to citizenship.

Working toward both goals and making meaningful a path to citizenship for temporary workers depends on turning both temporary work and permanent immigration into normal, government-fostered choices for an individual migrant. The common element is treating temporary workers with dignity by offering them a real choice. Doing so may be difficult and may even seem utopian, but the undertaking can start by recognizing something obvious yet often overlooked—that not all who come to the United States want to stay permanently. While many end up staying, the initial decision is typically to leave home temporarily, often under dire circumstances that compel departure.

The next step is relying on an international economic development perspective that makes it sensible to give temporary workers a path to citizenship. This requires economic and other incentives on both sides of the border, so that workers who come for an officially limited period also have their own strong reasons to return. The key is creating opportunities that entice temporary workers to return to their countries of origin but also allow workers to integrate and succeed in the United States if they decide to stay. The same policies that foster integration here may also be the policies that give immigrants a real choice to go back by enhancing their position in their countries of origin if they decide to return.¹⁰⁰ This can happen through the acquisition of assets or skills in the United States. Ties to the country of origin can play a similar role by providing the foundation for integration in the United States, especially of US-born children, while also maintaining the home-country connections that make return migration more likely.

¹⁰⁰ See Roger Waldinger, *Between "Here" and "There": Immigrant Cross-Border Activities and Loyalties*, 42 *Intl Migration Rev* 3, 8 (2008) (explaining how receiving state politics and policies "exercise the crucial influence on the 'here'-'there' activities of international migrants").

CONCLUSION

Much of the controversy surrounding temporary worker programs comes from a clash of perspectives. What seems sensible from an international economic development perspective may be troubling or perplexing if the frame of reference is viewing temporary workers as a domestic economic force. It makes a big difference whether temporary workers are viewed as the alternative to lawful permanent residents or unauthorized migrants. Further, a perspective that considers temporary worker programs in the context of citizenship and integration yields different approaches to designing temporary worker programs.

Ultimately, any hope for consensus—or even constructive dialogue—starts by understanding how these different perspectives lead to different conclusions. The zone of compromise between them seems to lie in adopting temporary worker programs that are carefully designed and implemented along with other initiatives outside the traditional sphere of immigration law in order to enhance the benefits of temporary worker programs and minimize their troublesome potential. More generally, looking carefully at temporary worker programs can shed considerable light on possible policy initiatives in the areas that correspond to the four perspectives I have explored: domestic economy, immigration outside the law, international economic development, and citizenship and integration.