

THE NEW MIGRATION LAW: MIGRANTS, REFUGEES, AND CITIZENS IN AN ANXIOUS AGE

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INTRODUCTION

Once every generation or so, entire fields of law require a full reset. We need to step back from the fray and rethink basic premises, ask new questions, and even recast the role of law itself. This moment has come for the law governing migration. Seasoned observers of immigration and refugee law have developed answers to core questions that emerged a generation ago. But now these observers often talk past each other, and their answers often fail to engage coherently with the daunting challenges posed by migration in this anxious age.

To try to do better, I undertake four inquiries. In isolation they may seem familiar, but I combine them here in new ways to find a path forward. The first and second inquiries rethink approaches to immigration law that emerged in the twentieth century, but can be too narrow to answer today's and tomorrow's pressing questions. The third and fourth inquiries show how the new migration law should push past its traditional boundaries. By rethinking what migration law is, I offer a roadmap for understanding migrants, refugees, and citizens now and into the future.

Part I starts by analyzing how U.S. immigration law and immigrants' rights have come to be argued in civil rights terms. This trend reflects a nation-centered perspective on migration and justice that has tried—though often failed—to expand legal protections for noncitizens, including noncitizens without lawful status. But viewing immigration law through a civil rights lens has limits and costs, not only for migrants and noncitizen residents, but also for longtime U.S. citizens. By adopting a civil rights framework, advocates for immigrants' rights can neglect economic justice. And though a civil rights framework is elastic enough to include many noncitizens with connections to the United States, it responds incompletely to the many

migrants whose claims to fair treatment are based on something other than civil rights or other ways of articulating their connections to this country.

Part II examines “forced migrants”—people fleeing dire situations under duress. A civil rights framework misses much of what makes their claims so compelling. Refugee law emerged in the mid-twentieth century to address their plight, but only as a narrow exception that did not challenge the basic ideas of national sovereignty and borders. Refugee law is too narrow legally and too fragile politically to deal coherently with the many forced migrants who do not fit the formal definition of “refugee.” The governments of destination countries have largely succeeded in making refugee law much less central to the big picture of international migration. Looking beyond refugee law to find sustainable responses to forced migration is another essential task for the new migration law.

Part III responds to these gaps in immigration law and refugee law by sketching a broader role for migration law. It starts with two intertwined questions: what is the relationship between temporary and permanent admissions, and what is the relationship between migration and citizenship? The answers to these questions depend on both why people migrate and what makes them want to stay in a destination country or instead to return. In turn, what matters are conditions in countries of origin, especially security, governance, human rights, and economic development. And yet, many initiatives that address migration in these terms are deeply problematic in practice. Traditional migration law has too often left these topics to ad hoc arrangements, negotiated by governments and sometimes by the private sector, that can do as much harm as good. Even if ad hoc approaches are sometimes the best available options in an imperfect world, the new migration law can play a role that is crucial and constructive, yet untapped.

Just as Part III asks what causes migration, Part IV considers what migration causes. In destination countries, politics often reflect anxieties about immigration—much of it expressed in economic terms, but often fundamentally cultural, racial, or religious in origin. Addressing economic anxieties is essential for exposing cultural, racial, or religious anxiety for what it is. This effort requires correcting a serious shortcoming of a civil rights approach to migration: its tendency to neglect economic justice inside destination countries. Only by paying attention to fair distribution of economic gains and fair sharing of burdens from immigration can policymakers block manipulative

campaigns that deceptively pit justice for immigrants against justice for disadvantaged citizens.

These four inquiries combine to draw a roadmap for the new migration law. Though I recognize political realities and the need to think pragmatically, I strive to identify aspirational goals and suggest how to reach them, even if the journey will be long. I write principally about the United States, but with the hope that readers elsewhere find this Article illuminating. My focus is the law and legal culture, for they are at the core of responses to migration, but I write not just for lawyers, and my message and audience are far broader. Sustainable responses to migration require looking well beyond migration law's traditional domains.

I

IMMIGRATION, IMMIGRANTS, AND CIVIL RIGHTS

Part I explains how debates over immigration law and immigrants' rights in the United States take place in civil rights terms.¹ I use "civil rights" as a historian might, to mean concepts and institutions associated with advancing equality in the twentieth century—most vividly in the struggle of African Americans to claim their rightful place in American life.² I also refer to values based on the rule of law, such as due process, that serve to contest discrimination and subordination. In broader terms, Part I discusses the promise and limits of a civil rights framework—as a nation-centered approach to justice in migration—in addressing migration across national borders.

A. The Era of Explicit Discrimination

History does much to explain the influence of civil rights in immigration law and immigrants' rights. For about 150 years, U.S. citizenship depended explicitly on race. Consider some milestones, starting with citizenship by birth. The U.S. Supreme Court's 1857 decision in *Dred Scott v. Sandford* read the U.S. Constitution to deny citizenship to anyone of African ancestry.³ After the Civil War, the Fourteenth Amendment tried to erase this stain by conferring citizenship on all persons born

¹ By "immigration law," I mean government decisions to admit, bar, or expel noncitizens. By "immigrants' rights," I mean the consequences of immigration status.

² Cf. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 8–17 (1950) (distinguishing among social, civil, and political rights in political theory).

³ See *Dred Scott v. Sandford*, 60 U.S. 393, 454 (1857).

on U.S. soil and subject to U.S. jurisdiction.⁴ The Supreme Court held that this citizenship clause excluded American Indians, who only later acquired birthright citizenship under a series of statutes.⁵ But in 1898 the U.S. Supreme Court confirmed that birthright citizenship under the Constitution included persons of Asian ancestry.⁶

Citizenship by naturalization also depended on race. Starting in 1790, a federal statute limited naturalization to “free white person[s].”⁷ In 1870, Congress opened eligibility to “aliens of African nativity and to persons of African descent”—but not Asian immigrants.⁸ Two U.S. Supreme Court decisions in the 1920s held that two immigrants, from Japan and India, could not become citizens because they were not “white.”⁹ A statute in 1943 made Chinese immigrants eligible, but only in 1952 did Congress repeal the last racial bars to naturalization.¹⁰

Immigration was, like citizenship, a domain permeated by racial exclusion. Chinese migrants, first recruited to work in the western United States in the mid-1800s, later became scapegoats for economic downturns.¹¹ In 1882, one of the earliest federal immigration statutes banned Chinese laborers—an exclusion that lasted until 1943.¹² The U.S. Supreme Court rejected constitutional challenges to Chinese exclusion laws

⁴ See U.S. CONST. amend. XIV, § 1.

⁵ *Elk v. Wilkins*, 112 U.S. 94, 109 (1884). On the expansion of naturalization eligibility to include American Indians, see T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 67 (8th ed. 2016).

⁶ *United States v. Wong Kim Ark*, 169 U.S. 649, 694–96 (1898).

⁷ See Act of Mar. 26, 1790, ch. 3, § 1, Stat. 103, 103 (1790). Many laws treated white immigrants who *could become* citizens better than nonwhites who could not. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 115–19 (2006).

⁸ See Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870).

⁹ See *United States v. Thind*, 261 U.S. 204, 215 (1923); *Ozawa v. United States*, 260 U.S. 178, 198 (1922).

¹⁰ The Nationality Act of 1940 opened eligibility to “races indigenous to the Western Hemisphere,” referring to American Indians. Eligibility expanded to immigrants from China in 1943, and from India and the Philippines in 1946. See Nationality Act of 1940, ch. 3, § 303, 54 Stat. 1137, 1140; Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601; Act of July 2, 1946, ch. 534, § 303(a)(1), 60 Stat. 416, 416 (1946).

¹¹ See MOTOMURA, *supra* note 7, at 16–17.

¹² See Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (1882); Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 392, 428 (1904); *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600, 600 (1943).

with reasoning premised largely on Anglo-Saxon racial superiority.¹³

With Chinese labor migration cut off, employers had to look elsewhere for migrant labor, first from Japan, but other racial and ethnic immigration bars followed. A federal statute in 1917 blocked immigration from most of Asia.¹⁴ From the 1920s, Congress sought to preserve the racial mix of the United States by adopting the national origins system, with its elaborate caps on immigration based on ethnicity.¹⁵ Until 1965, this system kept immigration to the United States from outside the Western Hemisphere almost entirely white and largely from western and northern Europe.¹⁶

No numerical cap applied to Latin American migrants before the 1960s, but federal law allowed the exclusion of anyone “likely to become a public charge.”¹⁷ With racial perceptions casting Mexicans as a subordinate labor force—to work when needed and then go home¹⁸—the federal government applied this law only selectively, to serve the interests of growers, ranchers, mining companies, railroads, and other employers.

With minimal resources to patrol vast borderlands and employers needing workers, the U.S. government tolerated substantial migration outside the law.¹⁹ Mexican workers traveled back and forth across the border based on seasonal employer demand. Enforcement was highly discretionary, reflecting economic trends. Workers toiled for low wages in harsh conditions. Some came outside the law. Others were temporary

¹³ See MOTOMURA, *supra* note 7, at 29; cf. Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels With Legislative Debates Over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681, 687–95 (2017) (distinguishing cultural from racist arguments for restrictionist immigration laws and policies).

¹⁴ See Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876. Exceptions were the Philippines, other U.S. possessions, and Japan, which agreed in 1907 to limit emigration to the U.S. mainland. See MOTOMURA, *supra* note 7, at 32.

¹⁵ The benchmark was the late 1800s, before large-scale immigration from southern and eastern Europe. See MOTOMURA, *supra* note 7, at 126–32. After a temporary screening measure in 1921, the National Origins Act of 1924 made these ethnic caps a core feature of federal immigration law. See Act of May 19, 1921, ch. 8, §§ 2(a)(6), 3, 42 Stat. 5, 5–7; Act of May 26, 1924, ch. 190, § 5, 43 Stat. 153, 155.

¹⁶ See MOTOMURA, *supra* note 7, at 132–33.

¹⁷ See Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876. For its precursor, see Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214.

¹⁸ See U.S. IMMIGRATION COMM’N, *Abstract of the Report on Japanese and Other Immigrant Races in the Pacific Coast and Rocky Mountain States*, in REPORTS OF THE IMMIGRATION COMMISSION: ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION WITH CONCLUSIONS AND RECOMMENDATIONS AND VIEWS OF THE MINORITY, S. DOC. NO. 61-747, at 690–91 (3d Sess. 1911).

¹⁹ See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 31–55 (2014).

workers, most prominently in the Bracero program from 1942 until the mid-1960s, bringing in nearly a half-million Mexicans in each of its peak years. Here, too, race and immigration were closely intertwined.

B. America Changes

After repealing Chinese exclusion in 1943 and the last racial bars to naturalization in 1952,²⁰ Congress repealed the national origins system in 1965.²¹ This was a transformational move, driven by the same civil rights coalition that won the 1964 Civil Rights Act and the 1965 Voting Rights Act.²² The 1965 immigration amendments profoundly changed America's racial and ethnic makeup. The foreign-born share of the total U.S. population rose from under 5 percent in 1970 to over 13 percent in 2016.²³ Many fewer immigrants came from Europe, and many more from Asia and Latin America, prompting new questions about what it means to be an American. As debates erupted over affirmative action, diversity, and other aspects of racial and ethnic justice inside the United States, it was natural to ask how these ideas—so central to civil rights—might apply to immigrants.

Who can invoke civil rights? Do noncitizens belong enough to the national community to invoke what is essentially a nation-centered system of justice based on the U.S. Constitution? A landmark for including noncitizens was the 1971 U.S. Supreme Court decision in *Graham v. Richardson*,²⁴ which struck down two state statutes that barred lawful permanent residents from welfare benefits. Permanent residents, the Court

²⁰ See Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600, 600 (repealing Chinese exclusion); Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 311, 66 Stat. 163, 239 (codified at Immigration and Nationality Act (INA) § 311, 8 U.S.C. § 1422 (2012)) (ending race, sex, and marital status restrictions).

²¹ See Act of Oct. 3, 1965, Pub. L. No. 89-236 § 2(a), 79 Stat. 911, 911-12 (1965) (amending the INA).

²² See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973-1973bb-1); see also Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 300-06 (1996) (discussing the 1965 Act as principled antiracist legislation). On civil rights and immigration in this period, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 152-248 (2000).

²³ See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 7-9 (2018); U.S. IMMIGRANT POPULATION AND SHARE OVER TIME, 1850-PRESENT, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time> [<https://perma.cc/GC9T-F9B8>] (last visited Sept. 29, 2019).

²⁴ 403 U.S. 365 (1971).

explained, were a “discrete and insular minority” protected by the Constitution from government discrimination.²⁵ By the mid-1970s, lawyers were deploying these and other civil rights concepts to challenge government treatment of noncitizens. This approach to litigation and lobbying in immigration law and immigrants’ rights continues.²⁶

These claims have prompted much debate. For example, was *Graham* right to view permanent residents as constitutionally protected minorities? With such basic uncertainties, the framing of immigration law and immigrants’ rights in civil rights terms has been halting and very incomplete. When Congress or the federal executive branch bars noncitizens from the United States, courts remain reluctant—applying the “plenary power doctrine”—to hear constitutional challenges.²⁷ A statute to restrict noncitizen eligibility for public benefits need only have a “rational basis” to be consistent with the U.S. Constitution.²⁸ My focus, however, is not the state of the law but rather the terms of debate, where a civil rights framework has been dominant. In courts and in public arenas, the outcome of debates over immigration law and immigrants’ rights turn on whether to accept or reject arguments made in civil rights terms.

In this respect, a civil rights framework has been crucial in debates involving a broader circle of noncitizens, especially those without lawful status. The increase in the undocumented population can be traced back to the 1960s, when Congress for the first time capped most categories of Latin American immigration.²⁹ New work-based admissions were

²⁵ See *id.* at 372 (internal quotation marks omitted).

²⁶ See LEILA KAWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE* 47–64 (2015); cf. *Lau v. Nichols*, 414 U.S. 563, 564–69 (holding that failure to provide English language instruction denies students who do not speak English a meaningful opportunity to participate in public education).

²⁷ See generally David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (discussing why the plenary power doctrine endures despite widespread criticism); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (exploring the partial erosion of the plenary power doctrine through statutory interpretation).

²⁸ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) (holding that statutory eligibility requirements for noncitizens enrolling in Medicare Part B were not “wholly irrational”); *City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000) (applying rational basis scrutiny to review provisions of the Welfare Reform Act of 1996 that disqualified some lawfully present noncitizens from federally funded public benefits programs).

²⁹ See INA § 202(a)(2), 8 U.S.C. § 1152(a)(2) (2012); IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976, H.R. REP. NO. 94-1553, 94th Cong., 2d Sess. 1976,

very limited, especially for the less educated.³⁰ At the same time, the end of the Bracero program—though also viewed as a civil rights victory—cut off a major path for Mexican workers.³¹ But by then, migration patterns from Mexico had become deeply engrained for migrants, their communities, and many employers.³² The federal government continued to tolerate an unauthorized workforce. The combination of selective admissions and selective enforcement meant that vast discretion came to govern arrest, detention, and removal of this vulnerable population—many of them immigrants of color, invited to work but open to exploitation and discrimination. This was fertile ground for including the undocumented in the civil rights framework initiated in *Graham*.

The next landmark for viewing immigration and immigrants in civil rights terms involved a Texas statute that effectively barred undocumented children from public schools.³³ Several lawsuits alleged that this exclusion from public education amounted to unconstitutional discrimination against Mexican Americans.³⁴ This approach was modeled after the struggle against school segregation that produced *Brown v. Board of Education*.³⁵ Ultimately, the U.S. Supreme Court's 5-4 decision in *Plyler v. Doe* struck down the statute.³⁶ Though its equal protection reasoning was confined to the context of K-12 public education, *Plyler* was broadly pivotal.³⁷ Even after

at 1-4 (1976); S. REP. NO. 89-748, 89th Cong., 1st Sess. 1965, at 17-18; Daniel Tichenor, *The Political Dynamics of Unauthorized Immigration: Conflict, Change, and Agency in Time*, 47 *POLITY* 283, 293-96 (2015); see also Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 8, 21(e), 79 Stat. 911, 916, 921; Act of Oct. 20, 1976, Pub. L. 94-571, § 3, 90 Stat. 2703 (amending the INA); Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978); Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

³⁰ See MOTOMURA, *supra* note 19, at 41-46.

³¹ The program ended on December 31, 1964, when authority expired under the Act of Dec. 13, 1963, Pub. L. No. 88-203, § 1, 77 Stat. 363, 363. See DAVID FITZGERALD, *A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION* 48-55 (2009); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 334 (2006).

³² See FITZGERALD, *supra* note 31, at 55-56; MOTOMURA, *supra* note 19, at 45-46; Douglas S. Massey, Luin Goldring & Jorge Durand, *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 *AM. J. SOC.* 1492, 1496-1503 (1994).

³³ See TEX. EDUC. CODE ANN. § 21.031 (1981).

³⁴ See *Plyler v. Doe*, 457 U.S. 202, 205-06 (1982).

³⁵ See *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 483 (1954).

³⁶ See *Plyler*, 457 U.S. at 230.

³⁷ On *Plyler's* significance and the plaintiffs' strategic thinking, see KAWAR, *supra* note 26, at 51-55; MOTOMURA, *supra* note 19, at 1-12; MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: Plyler v. Doe and the Education of Undocumented Schoolchildren* 7-33 (2012).

Graham let permanent residents demand that states not treat them worse than citizens, the Court could have cast the noncitizens outside the Constitution if they were unlawfully present. Instead, *Plyler* established civil rights advocacy as a core strategy for all noncitizens, even if they were undocumented, and even if they would not always prevail.³⁸

The unauthorized population is now about eleven million,³⁹ the majority from a combination of countries in Latin America, Asia, and Africa, who live and work in society's shadows. The Trump Administration has pursued draconian enforcement, seemingly unconcerned with discrimination in enforcement, and often affirmatively enabling it.⁴⁰ Now more than ever, vast discretion in immigration enforcement creates a substantial risk of unlawful discrimination based on race—or religion. All of this—starting with explicit racial exclusion and continuing with constant efforts since the 1960s to end discrimination in immigration and citizenship—has kept civil rights ideas and institutions at center stage.

C. The Rule of Law

Beyond the direct concerns with discrimination and subordination that drove *Graham* and *Plyler*, various ideas tied to the rule of law have become central to efforts—again, not always successful—to implement and reinforce a civil rights framework for immigration law and immigrants' rights.⁴¹ These ideas include the right to notice and a hearing, and other aspects of procedural due process.

³⁸ See MOTOMURA, *supra* note 19, at 156–62 (on protections for the undocumented in criminal procedure and employment law).

³⁹ See *id.* at 46–52; JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009, at 3 (2016), <https://www.pewresearch.org/hispanic/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/> [<https://perma.cc/2BU4-E3D7>].

⁴⁰ See Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 463–64 (2018); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 201 (2019); David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html?rref=collection%2Fbyline%2Fian-prasad-philbrick&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=10&pgtype=collection [<https://perma.cc/6DZX-JJ2H>].

⁴¹ On equality as the core value in the rule of law, see PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 6 (2016).

A key milestone was the 1982 U.S. Supreme Court decision in *Landon v. Plasencia*.⁴² The Court held that procedural due process applies to noncitizens who are lawful permanent residents, even when returning from outside the country.⁴³ More generally, government immigration decisions involving permanent residents must respect core principles of U.S. public law.⁴⁴ Decisions must be fact-based, transparent, and consistent—that is, respect the rule of law, not just for fairness generally but also to guard against discrimination.⁴⁵ These ideas have had persuasive power for several decades, but four relatively recent examples show the persistence of this civil rights approach.

The Deferred Action for Childhood Arrivals (DACA) program,⁴⁶ adopted in 2012, offers renewable two-year reprieves from removal to many undocumented noncitizens who were under the age of sixteen upon arrival in the United States. In the debate over DACA, it is significant—though underappreciated—that DACA served to centralize discretionary enforcement decisions within the Department of Homeland Security (DHS). DHS had pursued this goal earlier by issuing guidelines for exercising enforcement discretion,⁴⁷ but field offices and agents resisted these guidelines. DACA was part of

⁴² 459 U.S. 21 (1982); see also MOTOMURA, *supra* note 7, at 104–05.

⁴³ *Plasencia*, 459 U.S. at 32.

⁴⁴ See Motomura, *supra* note 27, at 579–80; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5 (1984) (discussing the movement of constitutional immigration law “closer to the mainstream of public law”).

⁴⁵ See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1647 (1992).

⁴⁶ See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enf’t, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012).

⁴⁷ See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to all Field Office Directors, all Special Agents in Charge, & all Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to all Field Office Directors, all Special Agents in Charge, & all Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011); Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to all U.S. Immigration & Customs Enf’t Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t, to Peter S. Vincent, Principal Legal Advisor, & James Chaparro, Exec. Assoc. Dir., Enf’t & Removal Operations, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010).

the DHS response. Government employees in a central office in suburban Washington, D.C.—not far-flung U.S. Immigration and Customs Enforcement (ICE) offices and agents—would decide when to refrain from immigration enforcement. In this way, DACA limited enforcement discretion in the field, enhanced transparency, and minimized the risk of discrimination, all to advance the rule of law within a civil rights framework.⁴⁸

Second, civil rights-based concerns about the rule of law explain the Obama Administration's opposition to state and local efforts to intensify federal immigration enforcement. States and localities tried to do this by having state and local police arrest and detain suspected immigration violators, or by pressuring the undocumented to leave or "self-deport" by denying access to education, jobs, housing, or public benefits.⁴⁹ Courts have struck down such state and local measures, often because federal law preempts them. Preemption's focus is *who* decides, but it also has a civil rights aspect, by keeping states or localities from enabling undetected or unremedied discrimination.⁵⁰ This view explains the Obama Administration's largely successful court challenge to Arizona's SB 1070. This law would have required state and local police to demand iden-

⁴⁸ See Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 27–29 (2015); cf. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 694–98 (2015) (noting that, "[d]espite its seemingly categorical nature, DACA incorporates key features that are reflective of prosecutorial discretion"); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 135–42 (2015) (discussing DACA as centralizing immigration enforcement); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 685–89 (2016) (discussing how DACA and DAPA essentially "represent a management strategy by which the Obama Administration effectively overcame frontline resistance from immigration enforcement agents"); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 85–90 (2015) (explaining that managing prosecutorial discretion was a central concern underlying the creation of both DACA and DAPA).

⁴⁹ See generally MOTOMURA, *supra* note 19, at 71, 74–75 (explaining self-deportation and giving examples of state and local laws adopted for this purpose); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1880–82 (2019) (analyzing self-deportation as an aspect of immigration law enforcement with an underlying logic to make "individuals into agents of the state's goal of their removal by making their lives unbearable").

⁵⁰ On this prophylactic use of preemption, see MOTOMURA, *supra* note 19, at 135–38. Challengers would not need to meet the burden under prevailing law to prove discriminatory intent. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). For a critique, see David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1008–12 (2016).

tification papers from suspected immigration violators and detain them.⁵¹ Preemption limited the risk of discrimination in such demands and detention.⁵² The Obama Administration's efforts in its later years to curtail delegation of immigration enforcement to states and localities likewise reflected civil rights considerations.⁵³

A third recent example is the civil rights foundation for state and local "sanctuary" measures that insulate noncitizens from federal immigration enforcement.⁵⁴ Just as concerns about unbridled discretion and possible discrimination led to DACA and to federal litigation against SB 1070, sanctuary measures often reflect similar state and local concerns about federal enforcement.⁵⁵ A key source of these concerns is a Trump Administration Executive Order, issued in 2017. It

⁵¹ See S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 2(B), 3, 5(A), 5(C), 6 (Ariz. 2010); see also ARIZ. REV. STAT. ANN. §§ 11-1051(B), 13-1509(A), 13-2928(C), 13-2929(A), 13-3883(A)(5) (2010) (creating state offenses specific to unauthorized noncitizens and further enabling and requiring officers to check a person's immigration status in some situations); *Arizona v. United States*, 567 U.S. 387, 416 (2012) (finding federal preemption of sections 3, 5(C), and 6 of S.B. 1070). Although the Supreme Court dissolved a preliminary injunction against § 2(B), the required demand for papers and related detention, the case later settled with severe limits on Arizona's implementation of that provision as well. See *id.*; Fernanda Santos, *Arizona Limits Police Actions in Enforcing Immigration Law*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/arizona-limits-police-enforce-immigration.html> [<https://perma.cc/NW9M-29ZS>].

⁵² A fear was that state and local police would discriminate against not just noncitizens but also U.S. citizens in the same family or community. See TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, *THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM* 8 (2009); Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111, 112 (2016); Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. ON MIGRATION & HUM. SEC. 645, 651 (2017); Ashley Powers, *The Renegade Sheriffs: A Law-Enforcement Movement that Claims to Answer Only to the Constitution*, NEW YORKER (Apr. 23, 2018), <https://www.newyorker.com/magazine/2018/04/30/the-renegade-sheriffs> [<https://perma.cc/382Q-HWXE>].

⁵³ See Memorandum from Jeh Charles Johnson, Sec'y., U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec'y for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

⁵⁴ See Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 128 (2019).

⁵⁵ See generally Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1736-52 (2018) (discussing sanctuary jurisdictions' reasons to "limit the involvement of local government institutions in furthering the Trump Administration's immigration agenda"); Motomura, *supra* note 40, at 437-40 (discussing possible reasons for state and local laws that insulate noncitizens from federal immigration enforcement).

characterized as an enforcement priority almost all potentially removable noncitizens, including any who “[i]n the judgment of an immigration officer . . . pose a risk to public safety or national security.”⁵⁶ This order seemed to end enforcement discretion, but it actually delegated vast discretion to field officers.⁵⁷ Combined with the president’s unvarnished rhetoric against immigrants of color,⁵⁸ the Executive Order amplified fear that enforcement targets individuals and families in opaque ways that enable discrimination.⁵⁹ This foundation for sanctuary measures arises in the broader context of civil rights-based vigilance against discriminatory policing in general.⁶⁰

A fourth example of arguing immigration law or immigrants’ rights in civil rights terms is the debate over the 2017 “travel ban” or “Muslim ban.” It banned the entry of noncitizens from seven (later six) majority-Muslim countries.⁶¹ In

⁵⁶ Exec. Order No. 13,768, § 5, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); see Memorandum from Matthew T. Albence, U.S. Immigration & Customs Enf’t Exec. Assoc. Dir., *Implementing the President’s Border Security and Interior Enforcement Policies* (Feb. 21, 2017); Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigration & Customs Enf’t, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigration Servs., Joseph B. Maher, Acting Gen. Counsel, Dimple Shah, Acting Assistant Sec’y for Int’l Affairs, & Chip Fulghum, Acting Undersecretary for Mgmt., *Implementing the President’s Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017); see also *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 635 (E.D. Pa. 2017) (calling the clause “an apparent delegation of wildly discretionary power to ICE officers to determine their own enforcement protocol”).

⁵⁷ See Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html> [<https://perma.cc/2U85-EAK7>].

⁵⁸ See, e.g., Julie Hirschfeld Davis, Sheryl Gay Stolberg & Thomas Kaplan, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [<https://perma.cc/R4AQ-CQU5>] (describing comments on proposed legislation to allow noncitizens from Haiti and some African countries to obtain lawful immigration status). This pattern started well before the 2016 election. See Leonhardt & Philbrick, *supra* note 40.

⁵⁹ A related worry is that if local police assist immigration enforcement, crime reporting and witness cooperation will decline, undermining police protection in immigrant communities. See Motomura, *supra* note 40, at 447.

⁶⁰ See Leonhardt & Philbrick, *supra* note 40; Alexis Okeowo, *Hate on the Rise After Trump’s Election*, NEW YORKER (Nov. 17, 2016), <https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [<https://perma.cc/4MKJ-PSGZ>]; Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html> [<https://perma.cc/QL6G-LS8J>].

⁶¹ See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82

2018, the U.S. Supreme Court decided *Trump v. Hawaii*.⁶² A 5-4 majority let the third version of the ban take effect.⁶³ This version added a late veneer of national security respectability to statements by the president—both as a candidate and in office—and his surrogates promising some kind of ban on Muslims.⁶⁴ In multiple lawsuits, both the federal government and challengers framed the issues in civil rights terms. The opposing sides contested whether the ban violates the Equal Protection Clause or the Establishment Clause of the U.S. Constitution, or federal statutes forbidding discrimination in some immigration settings.⁶⁵ The Court allowed the ban to take effect, rejecting arguments that the plaintiffs were likely to show that the ban is unlawful. But litigation continues over its constitutionality⁶⁶ and whether the process of allowing individual waivers operates lawfully.⁶⁷

These four examples do not suggest that civil rights arguments have usually won. They often have not, as the Muslim/travel ban litigation has made clear so far. More generally, the persistence of the plenary power doctrine explains why civil rights arguments often lose traction. But these examples show that what matters is whether civil rights arguments are apt. Why are civil rights concepts so dominant as terms of debate? One reason is the long association of immigration law and immigrants' rights with antidiscrimination and the rule of law. But another reason—subtle but basic—is closely tied to justifications for national borders.

D. Borders With Justice, Without Racism

A basic tension is inherent in the national borders of liberal democracies, including the United States. On the one hand, U.S. constitutional and public culture embraces a belief in the

Fed. Reg. 8977 (Jan. 27, 2017). The first and second versions also severely restricted refugee admissions, but the third version considered by the Supreme Court did not address refugees.

⁶² 138 S. Ct. 2392 (2018).

⁶³ *Id.* at 2423.

⁶⁴ See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

⁶⁵ See *Trump*, 138 S. Ct. at 2417 (Establishment Clause dispute); Third Amended Complaint for Declaratory and Injunctive Relief, *Hawaii v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017) (No. 1:17-cv-00050), 2017 WL 6547116 (statutory, equal protection, and free exercise).

⁶⁶ See *Int'l Refugee Assistance Program v. Trump*, 373 F. Supp. 3d 650, 675–76 (D. Md. 2019); *Arab Am. Civil Rights League v. Trump*, 2019 WL 3003455, at *1–2 (E.D. Mich. July 10, 2019).

⁶⁷ See *Mosleh v. Pompeo*, 2019 WL 2524407, at *1–2 (E.D. Cal. June 19, 2019); *Emami v. Nielson*, 365 F. Supp. 3d 1009, 1018–19 (N.D. Cal. 2019).

equality and dignity of people. But this belief clashes with the fundamental and intended effect of national borders—to divide “us” from “them.” One persuasive response to this tension is that borders, even if they create outsiders, can promote equality and dignity on the inside. Without national borders, even stronger religious, racial, or class boundaries would emerge—“a thousand petty fortresses,” as political philosopher Michael Walzer put it.⁶⁸

From this perspective, national borders must foster equality and dignity on the inside. This includes fostering health, safety, and welfare. I believe that borders have the potential to do justice in this way. But if borders are to do so, they must meet a demanding standard. Only to that extent can they be justified as “ethical” borders. They must minimize the inherent tension between borders and values of equality and dignity. Borders must not be petty fortresses, and they must not magnify any inequalities inside the border. They must be borders with justice, and without racism.

This means that immigration and citizenship laws—as the practical embodiment of borders—must treat all citizens equally and must not use race or ethnicity to confer advantages on some citizens over others. Citizens of Nigerian or Norwegian ancestry must find it equally easy or hard to sponsor their parents to immigrate. And even if immigration laws inherently discriminate on the basis of citizenship, they must not discriminate in any added way that would be disallowed domestically—thus not by race or religion.⁶⁹

My view of national borders without racism may seem romanticized or naïve. After all, U.S. immigration law—past and present—has failed these tests for ethical borders. A thousand

⁶⁸ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 39 (1983); *see also* DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 201–13 (2007) (critiquing arguments for a “right to immigrate”); MOTOMURA, *supra* note 19, at 89–96 (explaining justifications for national borders); SARAH SONG, IMMIGRATION AND DEMOCRACY 77–110 (2018) (discussing whether justice requires open borders); *cf.* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 269 (1951) (associating twentieth-century totalitarianism to denationalization and European nation-states’ inability to guarantee human rights to those who had lost nationally-guaranteed rights); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 138–39 (2004) (commenting on the moral basis for exclusion). Prominent theorists have questioned the coherence or persuasiveness of this view. *See, e.g.*, LINDA S. BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 134–40 (2006); JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 225–54 (2014).

⁶⁹ Categories may rely on nationality as intentional proxies for racial or religious discrimination, but here my purpose is to set out basic principles, understanding that application will be complex and with close cases.

petty fortresses persist.⁷⁰ The national origins system that was central to U.S. immigration law from 1921 to 1965 violated both principles.⁷¹ It barred some immigrants, by both discriminating by race *and* treating their U.S. citizen sponsors unequally. The current system of tolerating immigration outside the law to supply an exploited workforce of noncitizens of color similarly fails.

But this is precisely why a civil rights-based quest for borders with justice on the inside has long driven efforts to reform U.S. immigration law and immigrants' rights. Many (though certainly not all) advocates for immigrants who might at first seem to favor open borders are actually arguing for borders that are more ethical—that is, borders that are nondiscriminatory in both theory and practice. This aspiration drives the work that civil rights can do—to mobilize arguments for equality and dignity inside the United States.

Why is this work for civil rights, not human rights? The answer should first recognize that this question may assume too stark a contrast between civil rights and human rights. They overlap in substance, and rhetorical differences mask common ground. The human rights recognized in migration-related conventions closely track the reasons why people migrate. These include the right to life, the right to security of the person, the right to resources for subsistence, and the right against persecution, among others.⁷² Whether or not human rights enjoy explicit recognition, these foundations—especially the idea that equality and dignity matter in these domains—infuse a civil rights approach to immigration law and immigrants' rights.⁷³

As compared to civil rights, however, human rights law has little traction in the practical world of U.S. immigration law and immigrants' rights. Legal doctrine in the United States resists the application of human rights, unless they first become part of U.S. domestic law.⁷⁴ This reality reflects a basic difference between human rights, which cast doubt on the centrality of

⁷⁰ See BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 73–76 (2001); MOTOMURA, *supra* note 19, at 96–102.

⁷¹ See subpart I.A.

⁷² See SONG, *supra* note 68, at 94.

⁷³ On efforts to expand the role of human rights in the United States, see BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., abr. ed. 2007).

⁷⁴ On U.S. law's links to international law and human rights, see Maryellen Fullerton, *Stealth Emulation: The United States and European Protection Norms*, in *THE GLOBAL REACH OF EUROPEAN REFUGEE LAW* 201, 201 (Hélène Lambert, Jane McAdam & Maryellen Fullerton eds., 2013); Gerald L. Neuman, *Human Rights*

state sovereignty, and civil rights, which invoke state power to give effect to rights that may otherwise be similar in content to human rights. This reliance on domestic law is the legacy of hostility to the emergence of human rights in the United States in the mid-twentieth century, when the civil rights movement worked to end explicit racial segregation.⁷⁵ For those who resisted this civil rights effort in this early period, any acceptance of human rights posed an additional undefined threat associated with both racial integration and communism.⁷⁶

But what is true in the United States is not universal. All parties to the European Conventions on Human Rights must recognize and apply decisions of the European Court of Human Rights, sometimes in ways that block deportation under the national laws of EU member states.⁷⁷ In contrast, no supranational body issues human rights decisions that are binding in the United States. Instead, debates about immigration law and immigrants' rights invoke the rhetoric of civil rights. Working within a culture that tends to assume national borders and then strives to make those borders ethical—by putting them in the service of equality and dignity on the inside—many advocates have little to lose and much to gain by invoking civil rights grounded in national belonging, so that is what these advocates do to seek borders with justice.

E. The Limits of Civil Rights

In political moments rife with hostility toward immigration and immigrants,⁷⁸ a civil rights framework can do vital work to

and Constitutional Rights: Harmony and Dissonance, 55 STAN. L. REV. 1863, 1880–82 (2003).

⁷⁵ See Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 322 (2010).

⁷⁶ Compare *id.* (noting that the concerns of many Americans about the spread of communism led to skepticism of “the developing human rights project”), with Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995) (discussing the United States' resistance to human rights conventions). See also DUDZIAK, *supra* note 22, at 43–45, 63–65 (discussing human rights and the United Nations as aspects of the U.S. civil rights movement). These early associations did not keep the United States from later using human rights as an ideological and foreign policy weapon.

⁷⁷ See, e.g., *Boultif v. Switzerland*, App. 54273/00, 22 Eur H.R. Rep. 50 (2001) (holding that a deportation violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms); *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802 (1991) (same).

⁷⁸ This sort of hostility and racism can be directed against U.S. citizens who are targeted along with immigrants. See, e.g., Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to 'Go Back' to the Countries They Came From*, N.Y. TIMES (July 14, 2019) <https://www.nytimes.com/2019/07/14/us/politics/>

expose and sometimes remedy the unjust treatment of noncitizens. But the same climate can also reveal the limits of civil rights as a way of thinking about migration. To be sure, civil rights have been essential—through litigation, and lobbying and other political and organizing work—in resisting and reducing racial, ethnic, and religious discrimination in immigration law and immigrants' rights. Immigrants and their advocates ally with social movements for racial or religious equality outside of immigration law and immigrants' rights.

But consistent with the basic distinction in U.S. public law between civil rights and economic rights, a civil rights framework has a notable limit: it can be—and often is—deployed in ways that neglect immigration's effects on class or economic justice inside the United States.⁷⁹ Though a counterstory of social movements places higher priority on economic justice in immigration law and immigrants' rights,⁸⁰ the civil rights framework remains central, especially in influential settings where law and lawyers set the terms of debate. This civil rights dominance has ceded the rhetoric of economic justice to immigration skeptics, who can invoke economic harms to U.S. citizens to cloak racial and religious exclusion, as Part IV explains more fully.

A second, related limit of a civil rights framework is its inability to supply a satisfactory set of principles for assessing the justice of government responses to migration. Suppose the United States and Mexico agree to address unauthorized migration. The agreement admits more Mexicans to the United States as temporary workers, and it establishes an economic development program for Mexican localities with a history of emigration to the United States. As Part III discusses, this sort of arrangement may be essential to respond wisely to migration. But how can we assess the justice of arrangements that confer advantages on Mexico that other countries do not enjoy?

trump-twitter-squad-congress.html [https://perma.cc/DD6L-NQQS] (discussing President Trump's comments about four minority congresswomen who are U.S. citizens).

⁷⁹ On the larger role of economic justice earlier in the civil rights movement, see MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 17–37 (2003); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 217–37 (2007); THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* 155–87 (2007).

⁸⁰ See, e.g., Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1916–25 (2007) (analyzing a campaign for immigrant workers grounded in opposition to the economic, political, and social conditions of globalization and neoliberalism).

This question is hard to answer from a civil rights perspective, which relies heavily on equality as a concept that has substantive content inside a national community, for example to expose improper discrimination inside the United States. But this idea of civil rights equality struggles for any normative core—and thus struggles for traction—across national borders. Relatedly, a civil rights framework offers few persuasive answers to today’s most pressing and challenging questions—such as whether and how historical and economic relationships between source and destination countries are relevant in assessing the justice of migration policy.⁸¹

A third limit of a civil rights framework is its narrow scope. It relies on national belonging as the foundation for rights that can enhance justice on the inside. But who belongs enough to assert civil rights? The lawyers who sued Texas in *Plyler* knew that this question was pivotal. The Supreme Court’s decision sustained their argument that the undocumented children were—and would remain—part of U.S. society.⁸²

More recently, however, court challenges to the “travel ban” illustrate greater complexities. The ban seemed most vulnerable to constitutional challenges when it had direct effects inside the United States. In 2017, the U.S. Supreme Court upheld a partial preliminary injunction that blocked the application of the ban to noncitizens with a “credible claim of a bona fide relationship with a person or entity in the United States.”⁸³ But the Court later let the ban take effect.⁸⁴ The 5-4 majority was unwilling to let the interests of U.S. citizens—even in a setting marked by the president’s many anti-Muslim state-

⁸¹ On the history of Mexican labor in U.S. immigration law and policy, see MOTOMURA, *supra* note 19, at 31–55. On the relevance of colonization or other forms of economic domination, and more generally of past injustices perpetrated in the name of borders, see SONG, *supra* note 68, at 82; E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1533–39 (2019); E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, COLUM. HUM. RTS. L. REV. ONLINE, Spring 2017, at 1, 7–10.

⁸² See *Plyler v. Doe*, 457 U.S. 202, 230 (1982); MOTOMURA, *supra* note 19, at 1–12; cf. Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 132–45 (2010) (“[T]he fit between the civil rights paradigm and the case of the unauthorized immigrant remains an uneasy one.”).

⁸³ See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (upholding district court’s preliminary injunction in part). The Court seemed to include citizens, employers, governments, and educational institutions as a “person or entity in the United States.” *Id.* at 2087. For a relationship to count, it seemed enough that an employer hired a noncitizen employee, or that a university admitted a noncitizen student. How close a family relationship with a banned noncitizen would count—what about grandchild/grandparent?—became an issue in interpreting the Court’s preliminary injunction.

⁸⁴ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

ments—override traditional deference in immigration cases to the executive branch when it invokes national security. Brushing aside the ties of marriage and other close family relationships with noncitizens in the six targeted countries, the Court allowed the Executive Order to take effect and block family reunification.

Perhaps this choice reflected a worry that assessing citizens' claims—even to live in the United States with their spouses—through a civil rights lens would overscrutinize immigration decisions when the executive invoked national security in terms that were strong, if extemporized. Even conceding the importance of “family,” the Court may have thought it too hard to cabin the idea that the adverse effects of immigration decisions on U.S. citizens must respect the Constitution.⁸⁵ This concern is unfounded; close cases do not undermine the urgency of applying important principles. But in many cases the direct effects of immigration decisions on persons and entities inside the United States are less substantial. At that point, a civil rights framework, or any nation-centered approach to justice in migration, reaches its analytical and persuasive limits. This raises but does not answer the next question: whether and how to broaden assessment by adopting a more transnational perspective.

These, then, are three limits of a civil rights framework—neglect of economic justice inside the United States, inability to assess the larger context for international migration, and the incomplete fit of any system of nation-based justice for assessing migration across national borders. To be clear, the work done in the name of civil rights calls for celebration and persistence in many settings. This work is vital to protect U.S. citizens who suffer when noncitizens are barred or deported, but also to treat members of U.S. society fairly regardless of their formal legal status.⁸⁶ Without a civil rights framework, immigration decisions can allow government policy and private hate

⁸⁵ On the family in immigration law, see SONG, *supra* note 68, at 135, 143–48; Matthew Lister, *Immigration, Association, and the Family*, 29 L. & PHIL. 717 (2010); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511 (1995). Treating immigration cases differently would help explain the Court's apparent view that enjoyment of marriage does not include freedom to live in the place of the married couple's choice, in contrast to the Court's reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

⁸⁶ See Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1572 (1997); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1946–50 (1996); cf. KAWAR, *supra* note 26, at 55–59 (discussing the civil

to target both citizens and noncitizens based on race, ethnicity, language, religion, and gender. Allowing this targeting moves down the path to borders that lack any moral foundation. In turn, such borders will ultimately lose the broad support across society that is essential for immigration and citizenship law to be enforceable.

To move beyond overreliance on a civil rights framework for immigration law and immigrants' rights, it is essential first to understand why and how this framework's emergence reflected the main concerns of the second half of the twentieth century. The United States struggled mightily to define belonging for its citizens. Related were difficult immigration-related questions concerning the integration of large groups of lawfully admitted immigrants—thus *Graham*⁸⁷—and the growing presence of a large undocumented population—thus *Plyler*.⁸⁸

These two issues remain at the core of U.S. politics, but the United States and other destination countries face challenges that are new and more daunting. The political focus has shifted to large numbers of new migrants who are fleeing civil war and unrest, famine, environmental calamity, collapsing economies, and other dire conditions.⁸⁹ In the United States, the most prominent “forced migrants” are Central Americans on the southern border, but similar scenes are familiar throughout the world.⁹⁰

In these settings, the connections between migrants and the countries that they try to reach are of a different and more generalized sort. The ties are more historical and economic than more immediate forms of national belonging, so civil rights-based responses risk sounding off-key. The continued reliance on civil rights in defense of noncitizens with few direct personal ties to the United States leaves openings for hostile narratives that cast migrants as invaders bringing crime,

rights basis of court challenges to the U.S. government's treatment of Haitian asylum seekers from the 1970s to the 1990s).

⁸⁷ 403 U.S. 365 (1971).

⁸⁸ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

⁸⁹ See Kirk Semple & Miriam Jordan, *Migrant Caravan of Asylum Seekers Reaches U.S. Border*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/29/world/americas/mexico-caravan-trump.html> [https://perma.cc/J8E3-8T5M].

⁹⁰ See, e.g., Rebecca Ratcliffe, *More Than 70 Million People Now Fleeing Conflict and Oppression Worldwide*, GUARDIAN (June 19, 2019), <https://www.theguardian.com/global-development/2019/jun/19/more-than-70-million-people-fleeing-conflict-oppression-worldwide> [https://perma.cc/R6LA-DJRU]; Megan Specia, *The Five Conflicts Driving the Bulk of the World's Refugee Crisis*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/world/five-conflicts-driving-refugees.html> [https://perma.cc/S6P2-QSRJ].

drugs, and disease, and for the unfounded accusation that justice in immigration will lead to open borders. Migrants become easy targets for opportunistic demagogues who attack with hate that would be less acceptable if directed against noncitizens living inside the United States or against U.S. citizens with immigrant backgrounds.⁹¹

A key alternative to a civil rights framework is refugee law, the other main pillar of migration law in the late twentieth century. But how is refugee law related to immigration law and immigrants' rights? What happens when the natural reflex is to apply a civil rights framework to noncitizens with direct ties to a national community, and a refugee protection scheme to everyone else? This is a fair if overgeneralized summation of the law's current approach to migration. Part II explores these questions, to see if refugee law offsets the limits of viewing migration in civil rights terms.

II

MIGRANTS AND REFUGEES

If migrants win recognition as refugees in the United States or other destination countries, they gain favorable treatment under international and domestic law. This typically means a grant of asylum, followed by durable residence and some path to citizenship, depending on national law. This refugee exceptionalism is widely accepted,⁹² but it is the fragile core of a system that offers little or no protection to many of today's migrants. They leave their homes because of dire conditions, but they may not fit the legal definition of "refugee."⁹³

Part II explains how this definition is difficult to apply, yet it carries momentous stakes for both migrants and destination

⁹¹ See Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. C.R. & C.L. 95, 111 (2017); Nicholas Confessore, *For Whites Sensing Decline, Donald Trump Unleashes Words of Resistance*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/us/politics/donald-trump-white-identity.html> [<https://perma.cc/FX8U-X5YA>]. It would be too sanguine to say that such hate is uniformly viewed as unacceptable. See, e.g., Rogers & Fandos, *supra* note 78 (discussing President Trump's comments about four minority congresswomen who are U.S. citizens).

⁹² See, e.g., CARENS, *supra* note 68, at 194–99 (discussing acceptance and exclusion of refugees); DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 78 (2016) (calling "not in dispute" the idea that states have "more stringent obligations" toward refugees than toward immigrants in general); WALZER, *supra* note 68, at 48–51 (discussing criteria for the acceptance of refugees as a special group of "needy outsiders").

⁹³ See Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 138–47 (2017) (highlighting the limitations of the current Convention-based protection regime).

countries. The threshold focus on defining refugees has led to neglect—or at best, haphazard and incomplete beneficence—toward forced migrants who do *not* qualify as refugees, yet have compelling claims to protection. To be sure, haphazard and incomplete beneficence may be the best that is possible in many situations, especially in the short term. But it is sometimes, perhaps often, possible to do better, and desirable to have the law guide the effort. The best searches for sustainable responses to migration challenges require thinking outside the traditional boxes of immigration law and refugee law.

A. Refugee Protection

As World War II ended, many countries, including the United States, realized to their shame that they had turned away refugees who later perished in the Holocaust. Their national responses became part of international law, establishing the dominant refugee protection paradigm. Its most prominent foundation became the 1951 Geneva Convention Relating to the Status of Refugees. This title reflects the Convention's original, narrower purpose—to address the status of persons who could not be expected to return to their countries of origin. But its basic, practical guarantee is *nonrefoulement*—the duty to not return people to persecution on account of nationality, race, religion, political opinion, or membership in a particular social group.⁹⁴

This protection scheme reflected its origins in a particular historical moment: the chaos and suffering of postwar Europe, at the end of a cataclysmic conflict but also the continuation of geopolitical chasms that would persist for at least another half-century.⁹⁵ The 1951 Convention was originally limited to migrants displaced by “events occurring in Europe before 1 January 1951.”⁹⁶ Signatory countries obligated themselves to protect migrants who fit the refugee definition, but they re-

⁹⁴ See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

⁹⁵ See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 28–31 (2005); KATY LONG, *MIGRATION POL'Y INST., FROM REFUGEE TO MIGRANT? LABOR MOBILITY'S PROTECTION POTENTIAL* 4–5 (2015), <https://www.migrationpolicy.org/research/refugee-migrant-labor-mobilitys-protection-potential> [<https://perma.cc/UW24-QWHS>].

⁹⁶ See Office of the United Nations High Commissioner for Refugees, *Introductory Note to the Convention and Protocol relating to the Status of Refugees* (2010), <https://www.unhcr.org/3b66c39c1.pdf> [<https://perma.cc/AG7N-FXVR>]. The 1967 Protocol eliminated the “events occurring in Europe” limitation. See *Protocol Relating to the Status of Refugees*, Oct. 4, 1967, 606 U.N.T.S. 267.

mained free to refuse “economic” migrants who did not.⁹⁷ Predating much of modern human rights law, refugee protection emerged as an exception, not a challenge, to sovereign control of national borders.⁹⁸ Firmly rooted in Cold War politics, the system also gave the United States and countries in Western Europe the latitude to recognize anyone who managed to flee the Soviet Union or its satellites as refugees from Communism.

This basic legal structure is commonplace in the Global North, where countries brought refugee protection into domestic law by adopting two types of related schemes. Both are distinct from other forms of migration regulation. An example of the first type is the U.S. Refugee Admissions Program, which admits a few refugees from outside the country.⁹⁹ Under federal law, the president consults with Congress before setting an annual limit, subdivided among regions of the world. This number is much lower than the millions of people worldwide who might qualify, so selection criteria—including region, degree of threat, and U.S. ties—are very strict.¹⁰⁰ Once admitted, these refugees routinely become permanent residents of the United States, who are eligible to become citizens by naturalization.¹⁰¹

The second type of protection scheme adopted into domestic law consists of asylum and related forms of protection that are available only at or inside the national border. For example, if an applicant makes the required showing of persecution on account of enumerated grounds, immigration judges or other U.S. government officials may exercise their discretion to grant asylum.¹⁰² Unlike refugee admissions, asylum grants are not limited in number. But like refugee admissions, asylum routinely leads individuals and their spouses and children

⁹⁷ Refugee protection before World War II focused more on economic inclusion. See Rieko Karatani, *How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins*, 17 INT’L J. REFUGEE L. 517, 541 (2005); Katy Long, *When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection*, 1 MIGRATION STUD. 4, 10, 13–21 (2013).

⁹⁸ See Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, in HUMAN RIGHTS AND IMMIGRATION 19, 23–24, 39–40 (Ruth Rubio-Marin ed., 2014).

⁹⁹ See INA § 207, 8 U.S.C. § 1157 (2012). A key legislative predecessor was the Displaced Persons Act of 1948, Pub. L. 80-744, 62 Stat. 1009 (1948).

¹⁰⁰ See ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 6–7 (2018).

¹⁰¹ See INA § 209(a), 8 U.S.C. § 1159(a) (2012).

¹⁰² Applicants at the border or port of entry typically face “expedited removal” procedures that are truncated compared to procedures applied to applicants inside the United States. See INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2012).

to both permanent residence and citizenship eligibility.¹⁰³ Some persons not granted asylum may still be protected—by withholding of removal and protection under the Convention Against Torture (CAT)¹⁰⁴—from being returned to a country where they face risks. The requirements for these protections differ from the requirements for asylum, and the protections are less durable or robust, not including family reunification or eligibility for permanent residence and citizenship.

Applicants for both the Refugee Admissions Program and asylum in the United States must meet the same statutory definition of refugee:

[A]ny person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁵

But refugee admissions differ from asylum grants in both practice and politics. Refugee admissions are extremely selective. Until recently, the annual limit fluctuated between 70,000 and 100,000.¹⁰⁶ The current administration slashed it to 45,000 for 2018, then 30,000 for 2019, then 18,000 for 2020.¹⁰⁷ Actual refugee admissions can run lower.¹⁰⁸

¹⁰³ See INA §§ 208, 209(b), 316; 8 U.S.C. §§ 1158, 1159(b), 1427 (2012).

¹⁰⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁰⁵ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012).

¹⁰⁶ UNITED NATIONS HIGH COMM'R FOR REFUGEES, RESETTLEMENT IN THE UNITED STATES (2019), <https://www.unhcr.org/resettlement-in-the-united-states.html> [<https://perma.cc/T28W-6BSK>].

¹⁰⁷ See Presidential Memorandum for the Secretary of State, Presidential Determination on Refugee Admissions for Fiscal Year 2018, Pres. Determination No. 2017-13, 82 Fed. Reg. 49,083 (Sept. 29, 2017); Michael D. Shear & Zolan Kanno-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html> [<https://perma.cc/HU4Q-GBKD>]; Lesley Wroughton, *U.S. to Sharply Limit Refugee Flows to 30,000 in 2019*, REUTERS (Sept. 17, 2018, 5:38 PM), <https://www.reuters.com/article/us-usa-immigration-pompeo/u-s-to-sharply-limit-refugee-flows-to-30000-in-2019-idUSKCN1LX2HS> [<https://perma.cc/W6JQ-F43E>].

¹⁰⁸ In FY 2018, there were 22,491 actual admissions, as compared to a ceiling of 45,000. See *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980–Present*, MIGRATION POLY INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united>, [<https://perma.cc/4BW6-CBW4>] (last visited Dec. 27, 2019) (Click “Get Data”); see also Liz Robbins & Miriam Jordan, *Apartments Are Stocked, Toys Donated. Only the Refugees Are Missing.*, N.Y. TIMES (May 16,

Refugee admissions include only a tiny fraction of people who could qualify, but over the years the number accepted as refugees worldwide from outside the United States and other destination countries has been highly significant. At the same time, a key political difference is that with overseas refugee programs, the disappointed are far away and have no recourse, so the government retains substantial control. For asylum, however, a government has to work much harder to control who reaches its borders and applies.

B. Exceptionalism Under Pressure

The political sustainability of refugee exceptionalism is delicate. Enough people with influence in the destination country must see the number of asylum applicants as low enough to coexist with selective admissions for other migrants. This is not primarily a matter of absolute numbers. Politics, including racial and religious perceptions, can fuel intense hostility toward asylum seekers from unfamiliar lands, even if few such migrants actually arrive. Domestic political viability can require that protection be viewed as an exceptional act of sovereign grace for extraordinary reasons, not as a matter of right that could undermine control over national borders.¹⁰⁹ As long as asylum is seen as exceptional, few will associate it with legalization or amnesty, even though asylum likewise gives lawful status to migrants who might be barred or expelled because they lack permission to stay.¹¹⁰

The second precondition for refugee exceptionalism to be politically sustainable is confidence that “refugee” can be defined consistently and fairly. Under prevailing law, protection is not for voluntary migrants—thus not for “economic migrants.” Instead, it is just for forced migrants, and only for *some* forced migrants.¹¹¹ This line-drawing generally limits ref-

2018), <https://www.nytimes.com/2018/05/16/us/refugee-admissions.html> [<https://perma.cc/6H47-NTSG>].

¹⁰⁹ See T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, *THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME* 16 (2019); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1266–70 (1990).

¹¹⁰ On asylum as a form of legalization, see MOTOMURA, *supra* note 19, at 195–96; cf. WILLIAM MALEY, *WHAT IS A REFUGEE?* 90 (2016) (on the film *Casablanca*: “The audience forgives [Rick] such infractions [of document fraud and people smuggling] because the cause in which he acts is so plainly just.”).

¹¹¹ Using the term “forced migrants” risks a threshold definition, like “refugee,” that excludes many migrants, especially as “forced migrants” becomes a defined term of art with legal consequences. To minimize this risk, I use “forced migrants” in a broader sense than any legal label. Cf. JANE MCADAM, *CLIMATE*

ugee protection to migrants forced to move by specific events, not by the cumulative effects of deteriorating conditions—such as climate change—that magnify the consequences of political dysfunction.¹¹²

Events have put pressure on these preconditions. Most forced migrants must make harrowing journeys to reach places of refuge beyond countries in immediately neighboring regions. This fact has tempted the Global North to assume that “first host” countries—closer to migrants’ homes—would have them indefinitely. But geographic insulation is unreliable. On the U.S. border with Mexico, for example, the number of migrants arriving from El Salvador, Guatemala, and Honduras has increased dramatically in the past several years.¹¹³

To be sure, the overall number of Central American migrants remains a small fraction of new arrivals. Surreptitious border crossings are much less frequent, and the unauthorized population of the United States has declined.¹¹⁴ In Europe, migrants from the Middle East are far less numerous than the highs in 2015.¹¹⁵ But perceptions of threats to border security have been persistent in news cycles, and asylum seekers remain central to politics in destination countries of the Global

CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 98 (2012) (distinguishing forced from voluntary migration).

¹¹² See generally Matthew Lister, *Climate Change Refugees*, 17 CRITICAL REV. INT’L SOC. & POL. PHIL. 618 (2014) (analyzing the concept of “climate change refugee” and how it can fit within the logic but not necessarily the current legal definition of refugee). On a “climate refugee” case tied to multiple factors, see Andrew Jacobs, *China’s Appetite Pushes Fisheries to the Brink*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html> [https://perma.cc/TS4U-AL4T]. Cf. Andrew E. Shacknové, *Who Is a Refugee?*, 95 ETHICS 274, 277–81 (1985) (arguing that “refugee” should include migrants who flee severe economic deprivation or natural disasters).

¹¹³ See Manny Fernandez & Mitchell Ferman, *Border Patrol Facilities in Texas Are Overflowing, Prompting Mass Releases in Border Cities*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/us/border-migrants.html> [https://perma.cc/9BRY-UC88]; Dara Lind, *The Migrant Caravan, Explained*, VOX (Oct. 25, 2018), <https://www.vox.com/2018/10/24/18010340/caravan-trump-border-honduras-mexico> [https://perma.cc/L2TJ-MP72]; Jose A. Del Real & In-young Kang, *Members of the Migrant Caravan Await Their Fate Near San Diego*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/us/california-today-migrant-caravan.html> [https://perma.cc/RWN9-ALPC].

¹¹⁴ See Jessica Bolter & Doris Meissner, *Crisis at the Border? Not by the Numbers*, MIGRATION POLY INST. (June 2018), <https://www.migrationpolicy.org/news/crisis-border-not-numbers> [https://perma.cc/E6YF-TEJM].

¹¹⁵ See, e.g., Joseph Nasr, *Asylum Applications in Germany Fall for Second Year in a Row*, REUTERS (Jan. 23, 2019), <https://www.reuters.com/article/us-europe-migrants-germany/asylum-applications-in-germany-fall-for-second-year-in-a-row-idUSKCN1PH16E> [https://perma.cc/84KA-SV9L].

North.¹¹⁶ As more migrants reach distant lands, politicians and media can make refugee “crises” loom large, even if what seems like unprecedented migration is not all that new in many destination countries and long familiar in the Global South.¹¹⁷ One commentator put it this way: “the populist narrative on migration is number-proof.”¹¹⁸ Long before numbers reach levels that matter in substance, invented notions of crisis can amplify narratives of asylum claims as fabricated and as crime-infested threats—to national security,¹¹⁹ public health,¹²⁰ and control over borders—that demand zero-tolerance responses.¹²¹

C. Managing Refugee Protection

One response by governments to perceptions of unprecedented large-scale migration has been to limit the number of asylum applicants, by taking advantage of the Refugee Convention’s near-silence on how protection is actually implemented.¹²² One strategy shifts practical borders outward. The

¹¹⁶ See Patrick Kingsley, *Migration to Europe Is Down Sharply. So Is It Still a “Crisis”?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/world/europe/europe-migrant-crisis-change.html> [https://perma.cc/L6VG-W7CR].

¹¹⁷ On the history of human migration, see JACQUELINE BHABHA, *CAN WE SOLVE THE MIGRATION CRISIS?* 1–30 (2018).

¹¹⁸ John Dalhuisen, *How to Win the Fight Over Europe’s ‘Refugee Crisis,’* N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/opinion/eu-election-immigration-refugees.html> [https://perma.cc/N8E9-YN2D]; see also SONG, *supra* note 68, at 126 (“The ‘crisis’ of refugees is less a crisis in terms of numbers and protection capacity and more a failure among states to meet their moral responsibilities.”).

¹¹⁹ See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Syrian Refugees Receive Green Light from U.S. Courts, Mixed Reception from States and Congress*, MIGRATION POL’Y INST. (Mar. 31, 2016), <https://www.migrationpolicy.org/article/syrian-refugees-receive-green-light-us-courts-mixed-reception-states-and-congress> [https://perma.cc/V24R-5RKW].

¹²⁰ See, e.g., Sudeepa Abeyasinghe, *Ebola at the Borders: Newspaper Representations and the Politics of Border Control*, 37 THIRD WORLD Q. 452, 453 (2016) (discussing how the 2014–15 Ebola outbreak “triggered border control and surveillance practices”). On similar trends elsewhere, see Jan-Werner Müller, *Behind the New German Right*, N.Y. REV. DAILY (Apr. 14, 2016), <https://www.nybooks.com/daily/2016/04/14/behind-new-german-right-afd/> [https://perma.cc/SWJ5-RVHN].

¹²¹ On the evolution of “zero tolerance” within the Trump administration, see Jason Zengerle, *How America Got to ‘Zero Tolerance’ on Immigration: The Inside Story*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html> [https://perma.cc/6T2T-5EDW].

¹²² See DAVID SCOTT FITZGERALD, *REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS* 41–251 (2019); Chetail, *supra* note 98, at 23–24, 51–52.

U.S. Coast Guard has long kept Haitians and many Cubans away from U.S. shores.¹²³ In the Mediterranean, various strategies prevent boats carrying migrants from reaching Europe.¹²⁴ Australia combines this interdiction with long-term detention of asylum seekers in camps in Papua New Guinea and Nauru.¹²⁵ In July 2019, officials from the United States and Guatemala signed an agreement that may similarly allow the U.S. government to shunt asylum seekers to Guatemala.¹²⁶

Governments adopt other strategies of migration control outside the physical border.¹²⁷ The U.S. government has enlisted Mexico's help to impede the passage of Central American migrants to the United States. A 2016 agreement between the European Union and Turkey largely blocks Middle Eastern migrants from reaching Greece and other EU countries.¹²⁸ Sev-

¹²³ See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 158–65 (1993).

¹²⁴ See Gaia Pianigiani, Jason Horowitz & Raphael Minder, *Italy's New Populist Government Turns Away Ship with 600 Migrants Aboard*, N.Y. TIMES (June 11, 2018) <https://www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html> [<https://perma.cc/W69R-6MUV>]; Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POLY INST. (Oct. 16, 2014), <https://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing> [<https://perma.cc/AR7E-LWRR>]. Interdiction imposes practical limits, even if interdiction by any vessel under an EU member state flag theoretically gives migrants a right of access to EU territory and a full asylum procedure.

¹²⁵ See Sasha Polakow-Suransky, *How Europe's Far Right Fell in Love with Australia's Immigration Policy*, GUARDIAN (Oct. 12, 2017), <https://www.theguardian.com/world/2017/oct/12/how-europes-far-right-fell-in-love-with-australias-immigration-policy> [<https://perma.cc/9N3N-8SP2>].

¹²⁶ See Michael D. Shear, Zolan Kanno-Youngs & Elisabeth Malkin, *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html> [<https://perma.cc/WFA4-7PTN>]. The terms or effect of this agreement remain unclear, see Adolfo Flores & Hamed Aleaziz, *Trump Says the US and Guatemala Have Signed a "Safe Third Country" Agreement to Restrict Asylum-Seekers*, BUZZFEED NEWS (July 26, 2019), <https://www.buzzfeednews.com/article/adolfoflores/trump-guatemala-safe-third-country-asylum-agreement> [<https://perma.cc/6TWZ-SUBF>]; Susan Gzesh, *Questions Surround Secretive US-Guatemala Agreement*, JUST SECURITY (July 30, 2019), <https://www.justsecurity.org/65203/us-guatemala-plan-is-not-a-safe-third-country-agreement/> [<https://perma.cc/RB4H-APK5>].

¹²⁷ On this practice in U.S. history, see generally ZOLBERG, *supra* note 31, at 110–13, 264–67.

¹²⁸ European Council Press Release, EU-Turkey Statement (Nov. 29, 2015), <https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/> [<https://perma.cc/TEC5-L9KM>]; European Council Press Release, EU-Turkey Statement, (Mar. 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> [<https://perma.cc/9XXP-4BDE>]; Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLY INST. (Mar. 2016), <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> [<https://perma.cc/94FN-GYP7>].

eral EU countries have arrangements with Libya, Niger, and other African countries to limit northward migration.¹²⁹ Similar in effect are requirements that asylum seekers apply in the first “safe country” that they reach. The United States has an agreement with Canada that effectively imposes this requirement.¹³⁰ Governments reinforce these safe-country requirements by using visa restrictions and penalties on carriers to block direct travel, so that migrants must travel through other countries and seek protection there. Most recently, the U.S. government issued regulations in July 2019 that would bar asylum applications from any migrants who traveled through another country (such as Mexico) where they could have applied for asylum but did not.¹³¹

Other responses truncate the process for hearing asylum claims or limit where and how asylum seekers may apply. In the United States, an asylum seeker at the border or ports of entry is typically subject to “expedited removal.” Often without the help of a lawyer, migrants must navigate a preliminary stage—an interview to establish a “credible fear of persecution”—before their asylum claims receive a full hearing.¹³² In

¹²⁹ See *Fact Sheet: EU-Libya Relations*, EUR. UNION EXTERNAL ACTION (Nov. 9, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations [<https://perma.cc/8XT6-EPMG>]; *Joint Statement on the Migrant Situation in Libya*, AFRICAN UNION-EUR. SUMMIT (2017), <https://www.consilium.europa.eu/media/31871/33437-pr-libya20statement20283020nov2010.pdf> [<https://perma.cc/Y5DK-VRGX>]; Kate Hooper, *European Leaders Pursue Migration Deals with North African Countries, Sparking Concerns about Human Costs*, MIGRATION POL'Y INST. (Dec. 18, 2017), <https://www.migrationpolicy.org/article/top-10-2017-issue-3-european-leaders-pursue-migration-deals-north-african-countries> [<https://perma.cc/48PZ-VPGG>]; Joe Penney, *Europe Benefits by Bankrolling an Anti-Migrant Effort. Niger Pays a Price.*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/world/africa/niger-migration-crisis.html> [<https://perma.cc/P3YQ-C2XG>].

¹³⁰ See Safe Third Country Agreement Canada-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229. For a similar agreement in the Europe Union, see Dublin II Regulation: Council Reg. (EC) No 343/2003 of 18 Feb. 2003; Dublin III Regulation, Reg. (EU) No 604/2013 of the European Parliament and Council of the 26 June 2013.

¹³¹ The federal district for the Northern District of California issued a preliminary injunction blocking the implementation of the regulations. See *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. 2019). The U.S. Supreme Court later stayed that injunction pending further proceedings. See *Barr v. East Bay Sanctuary Covenant*, No. 19A230, 2019 WL 4292781 (Sept. 11, 2019); Peter Margulies, *Supreme Court Stays Asylum Injunction: Signal on the Merits or Procedural Snag*, LAWFARE (Sept. 12, 2019), <https://www.lawfareblog.com/supreme-court-stays-asylum-injunction-signal-merits-or-procedural-snag> [<https://perma.cc/N6LD-2H7N>].

¹³² See INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2012); ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 5, at 503–10. On July 23, 2019, a DHS Notice announced the immediate expansion of expedited removal to apply to all noncitizens located anywhere in the United States who have not been admitted

late 2018, the government tried to go further and require that asylum applications be filed only at ports of entry.¹³³ A court order has blocked this rule for the time being,¹³⁴ but the government has also limited the number of applications it accepts at ports of entry.¹³⁵ Since December 2018, the U.S. policy often called “Remain in Mexico” allows immigration officers to return certain asylum seekers to Mexico to wait for very long periods until their cases can be heard in the United States.¹³⁶ In addition, the U.S. government has adopted measures to deter asylum seekers,¹³⁷ including detaining them and separating children from parents.¹³⁸

or paroled into the United States, unless they can show that they have been continuously present in the United States for the prior two-year period. See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

¹³³ See generally Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (codified at 8 C.F.R. §§ 208, 1003, 1208 (2018) (making ineligible for asylum any applicant who enters the United States contrary to a presidential order suspending or limiting entry on the southern border); *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (suspending entry on the southern border to channel asylum applicants to ports of entry).

¹³⁴ See *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779–80 (9th Cir. 2018), *stay denied*, 139 S. Ct. 782 (Dec. 21, 2018).

¹³⁵ See Azam Ahmed, *Migrants’ Despair Is Growing at U.S. Border. So Are Smugglers’ Profits.*, N.Y. TIMES (Jan. 6, 2019), <https://www.nytimes.com/2019/01/06/world/americas/mexico-migrants-smugglers.html> [<https://perma.cc/FLX5-XA54>].

¹³⁶ See Memorandum from Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Servs., Kevin K. McAleenan, Comm’r, U.S. Customs & Border Prot., Ronald D. Vitiello, Deputy Dir. & Senior Official Performing the Duties of Dir., U.S. Immigration & Customs Enf’t, on Policy Guidance for Implementation of the Migrant Prot. Protocols (Jan. 25, 2019); Azam Ahmed, Miriam Jordan & Elizabeth Malkin, *Mexico Protests U.S. Decision to Return Asylum Seekers*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/world/americas/mexico-asylum-seekers.html> [<https://perma.cc/3825-V24E>]; Molly O’Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn*, L.A. TIMES (Aug. 28, 2019), <https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases> [<https://perma.cc/9XAS-VZ46>]; Glenn Thrush, *U.S. to Begin Blocking Asylum Seekers From Entering Over Mexican Border*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html> [<https://perma.cc/462V-57P8>].

¹³⁷ See Margaret H. Taylor, *Symbolic Detention*, 20 IN DEFENSE OF THE ALIEN 153, 155–58 (1997) (criticizing the use of detention as deterrence or as a signal of heightened enforcement efforts).

¹³⁸ See generally U.S. Att’y. Gen., Attorney General Sessions Delivers Remarks Regarding the Immigration Enforcement Actions of the Trump Administration (May 7, 2018) (explaining that the U.S. government will prosecute any parent “smuggling a child,” prosecute the parent, and separate children from parents “as required by law”); *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1136–37 (S.D. Cal. 2018) (describing family separation). See also Colleen

Other efforts to limit asylum focus on the legal rules, by narrowing the refugee definition as applied. Debates at the core of asylum law address what counts as persecution, how much risk of persecution is required for asylum, and when persecution is “on account of” one of the protected grounds: nationality, race, religion, political opinion, and membership in a particular social group.¹³⁹ In the United States, the range of recognized claims has expanded in recent decades to include more claims based on persecution on account of sexual orientation, domestic abuse, and gang violence. But many U.S. government decision makers are wary of such claims, or even hostile toward them.¹⁴⁰ In 2018, then-Attorney General Sessions issued a decision that made it much harder to seek asylum based on domestic violence or gang violence.¹⁴¹ This was an executive branch decision that interpreted a legal standard more narrowly than prior law.¹⁴² Just as importantly, it was also a practical tool that low-level officers could use to discourage migrants from ever applying. Though a federal court held that this standard conflicts with federal statute and temporarily blocked its application to the preliminary “credible fear”

Long & Ricardo Alonso-Zaldivar, *Separations at the Border Didn't Worry Some Trump Officials*, ASSOCIATED PRESS (July 2, 2018), <https://www.apnews.com/40ce7070a0de43f1ba21f079c10bb9cb> [<https://perma.cc/ES5P-BYFD>] (other long-standing restrictions in U.S. law include a one-year deadline to apply for asylum, and a rule that applicants generally must wait at least 180 days for work authorization). On the one-year deadline and the 180-day waiting period, see INA §§ 208(a)(2)(B), § 208(d)(2), 8 U.S.C. §§ 1158(a)(2)(B), 1158(d)(2) (2012); ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 5, at 872–73.

¹³⁹ Other aspects of the refugee definition preclude eligibility, for example due to criminal convictions, see the Convention Relating to the Status of Refugees art. 33(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); INA §§ 208(b)(2)(A)(ii), (iii), 241(b)(3)(B)(ii), (iii), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (iii), 1231(b)(3)(B)(ii), (iii) (2012). Eligibility is also precluded by past participation in persecution, see INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) (2012); *Negusie v. Holder*, 555 U.S. 511, 524–25 (2009); *Matter of Negusie*, 27 I. & N. Dec. 347, 355 (B.I.A. 2018); or national security concerns, see INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv), 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231(b)(3)(B)(iv) (2012). See also Mica Rosenberg & Yeganeh Torbati, *Trump Administration May Change Rules that Allow Terror Victims to Immigrate to U.S.*, REUTERS (Apr. 21, 2017) <https://www.reuters.com/article/us-usa-immigration-returns-exclusive/exclusive-asylum-seekers-returned-to-mexico-rarely-win-bids-to-wait-in-u-s-idUSKCN1TD13Z> [<https://perma.cc/GYU2-DGBH>] (explaining that ineligibility for asylum does not bar more limited forms of relief through withholding of removal or the Convention Against Torture).

¹⁴⁰ See ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 5, at 809–72.

¹⁴¹ See *Matter of A-B-*, 27 I & N Dec. 316, 320–23 (A.G. 2018).

¹⁴² See *id.* at 317 (overruling *Matter of A-R-C-G-*, 26 I & N Dec. 388 (B.I.A. 2014)).

stage of an asylum application,¹⁴³ such government efforts to interpret the law to restrict asylum will persist.

Interdiction, remote borders, and safe-country provisions offer to destination country governments the legal advantage of casting migrants' claims as beyond legal protections tied to physical presence on national territory.¹⁴⁴ This makes it hard—though not impossible—to mount civil rights-based challenges, which ultimately rely on some connection to the United States. The same vulnerability—based on a paucity of direct U.S. ties—blunts challenges to standards and procedures that the government applies at the border to restrict the legal definition of refugee or the process of applying for protection.

All of these techniques for managing refugee protection are closely tied to a political strategy—to link migrants with a soft altruism that can be overridden in the name of nation first, whenever the government can cite a foreign threat, real or imagined. The results are deeply troubling as governments avoid their obligations. They act beyond the meaningful constraints that the international refugee protection scheme is intended to place on unilateral government decision making, and all too often they treat desperate migrants with indifference and even cruelty.

D. Refugee Law as Immigration Law

Some observers criticize government limits on asylum as blunt instruments to shirk legal and humanitarian obligations.¹⁴⁵ Others defend some of these measures as preserving the scarce political resource of asylum for the migrants in greatest need.¹⁴⁶ But more fundamentally, the core problem is a protection regime that is ill-suited to migration realities that are shaped by unsettled political conditions, civil wars, envi-

¹⁴³ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2018).

¹⁴⁴ *Cf. KAWAR*, *supra* note 26, at 55–59, 61 (discussing civil rights-based lawsuits against U.S. government treatment of Haitian asylum seekers from the 1970s to 1990s).

¹⁴⁵ *See, e.g.,* B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 351 (1998) (explaining the emergence of a refugee protection system starting in the 1980s in which restrictions on access to protection are central). This view may be especially persuasive if governments pursue collective exclusions and do not even consider individual cases.

¹⁴⁶ On the general political fragility of refugee protection, but writing a generation before today's much more draconian laws and policies, see David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30 (Howard Adelman ed., 1991); Martin, *supra* note 109, at 1267–70.

ronment degradation, and other causes of large-scale forced migration. International and domestic law establish a binary scheme that distinguishes refugees from all other migrants, with momentous consequences.¹⁴⁷ But that line is exceedingly difficult to draw, even if line-drawing is insulated from political pressure—which it never is. Forced migrants who do not qualify as refugees are still in dire straits, and government responses to their plight are typically ad hoc, conceptually underinformed, and politically precarious.

Under political pressure, refugee law falls back into the orbit of national immigration law's policies and politics. An example is Temporary Protected Status (TPS), which complements asylum in the United States by protecting many migrants who do not qualify for asylum because they fall outside the definition of "refugee."¹⁴⁸ TPS allows some noncitizens to stay if their countries are beset by war, disaster, or similar conditions.¹⁴⁹ Debate over TPS reflects core aspects of U.S. immigration politics. Skeptics object that it is a de facto expansion of asylum.¹⁵⁰ Supporters emphasize the community ties and contributions of TPS recipients, echoing many of the arguments made by supporters of proposals to legalize the undocumented.¹⁵¹

Because TPS fills a gap between refugee law and immigration law, it is not surprising that the announced end of TPS for Sudan, Haiti, Nicaragua, El Salvador, Nepal, and Honduras prompted applications for asylum and other paths to lawful status.¹⁵² In this way, TPS is like other aspects of U.S. immi-

¹⁴⁷ See, e.g., INA § 208, 8 U.S.C. § 1158 (2012) (setting out the basic legal framework for asylum in the United States).

¹⁴⁸ See INA § 244, 8 U.S.C. § 1254a (2012).

¹⁴⁹ See *id.*; see also Keyes, *supra* note 93, at 102–06 (analyzing Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966)); *id.* at 106–07 (discussing Lautenberg Amendment, Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, § 599D, 103 Stat. 1195, 1261–63 (1989) (codified as amended at 8 U.S.C. § 1157 (2012))); Alexander Betts, *Survival Migration: A New Protection Framework*, 16 GLOBAL GOVERNANCE 361, 361–82 (2010).

¹⁵⁰ See Miriam Jordan, *Trump Administration Says That Nearly 200,000 Salvadorans Must Leave*, N.Y. TIMES (Jan. 8, 2018), <https://www.nytimes.com/2018/01/08/us/salvadorans-tps-end.html> [<https://perma.cc/8E2Q-PA6N>].

¹⁵¹ See *id.* at 3; cf. Keyes, *supra* note 93, at 107–12 (critiquing TPS from a pro-protection standpoint). For discussion of arguments for and against legalization, see MOTOMURA, *supra* note 19, at 181–200.

¹⁵² See, e.g., Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018) (announcing the end of TPS for El Salvador); Jordan, *supra* note 150, at 3. A federal district court blocked termination of TPS for Haiti, Sudan, Nicaragua, and El Salvador. See Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1108–09 (N.D. Cal. 2018), *appeal docketed*, No.

gration law that often help near-refugees—such as T visas for survivors of trafficking, U visas for victims of crimes, and Special Immigrant Juvenile Status (SIJS).¹⁵³ These three legal vehicles allow noncitizens to acquire lawful immigration status, and eventually lawful permanent resident status, on humanitarian grounds. Put more generally, refugee law and immigration law are never very far from each other. Numerous legal rules combine to fill some of the gap between them, and debates over laws and policies addressing forced migration follow patterns familiar from immigration law.

The influence of national immigration law and policy is also evident in debates over the substance of asylum law and its application. Arguments for broadening the refugee definition for deciding asylum claims draw much of their persuasive power from U.S. immigration law's perceived failures. For example, some forced migrants who seek asylum have close relatives who already live in the United States without lawful status. If any of the past decade's legalization proposals in Congress had become law,¹⁵⁴ they would have allowed many of these migrants to join their relatives without having to seek asylum. These proposals failed, yet the hope that they may become law continues to fuel political pressure, grounded in overall immigration politics, to expand the refugee definition in the meantime.

Similarly, the perception that forced migrants fall into the gap between refugee law and immigration law can influence the outcome in close asylum cases. Applicants who meet basic eligibility requirements must also convince an immigration judge or other government official to grant asylum in the exercise of discretion.¹⁵⁵ Decisions may ultimately turn on measures of worthiness or desirability, even if this influence is

18-16981 (9th Cir. Oct. 12, 2018). The government later agreed not to terminate TPS for Nepal and Honduras while the *Ramos* litigation is pending. See *Bhattarai v. Nielsen*, No. 3:19-cv-00731-EMC (N.D. Cal. Mar. 12, 2019) (stipulation to stay proceedings); see also *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designation for Nepal and Honduras*, 84 Fed. Reg. 20,647 (May 10, 2019).

¹⁵³ See INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012); INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012).

¹⁵⁴ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess. (2013).

¹⁵⁵ See 8 C.F.R. § 208.14(a), (b) (2012) (providing that an immigration judge or an asylum officer may grant asylum in the exercise of discretion).

subtle or often unacknowledged.¹⁵⁶ Immigration judges may grant asylum to sympathetic applicants who might better fit other avenues to lawful status—except that the admission system is severely restricted. Skeptics will criticize such grants of asylum or other ad hoc protections as stretching the law.¹⁵⁷ Skeptics will likewise push to limit refugee admissions from outside the country. The logical rebuttal invokes a robust self-image of the United States as a nation of immigrants that welcomes the tired, the poor, the huddled masses. Again, debates over national immigration law and policy shape refugee protection.¹⁵⁸

The next question is how best to respond to this gap between refugee law and immigration law. Though the influence of national immigration law and policy is strong, the specifics will not add up to a coherent approach to forced migration without some effort that is rarely exerted. TPS generally does not apply to migrants who arrive in the United States *after* dire conditions in their home countries emerge.¹⁵⁹ If TPS is rescinded, many of the paths to lawful status that might be available to former TPS recipients do not directly assess the degree of danger that they will face if returned to their countries of origin.¹⁶⁰ Similarly, unsuccessful asylum applicants are shunted to other paths to lawful status that disregard the degree of harm at the core of their asylum claims.

A natural response might be that a civil rights framework should guide protection for forced migrants who do not qualify as refugees. But as I explained in Part I, that framework is awkwardly suited to assess forced migration from outside the

¹⁵⁶ Decisions can parallel government decision making on discretionary relief from removal. Similarly, selection criteria for overseas refugees favor those with relatives in the United States, paralleling family immigration categories.

¹⁵⁷ See Maya Rhodan, *The Number of Asylum Seekers Has Risen by 2,000% in 10 Years. Who Should Get to Stay?*, TIME (Nov. 14, 2018), <https://time.com/longform/asylum-seekers-border/> [<https://perma.cc/QSW5-AVBY>].

¹⁵⁸ These blurred lines are consistent with the transformation of refugees into immigrants in the public imagination, for example the Vietnamese “refugee” community that evolved over time into the Vietnamese “immigrant” community. See Elijah Alperin & Jeanne Batalova, *Vietnamese Immigrants in the United States*, MIGRATION POLY INST. (Sept. 13, 2018), <https://www.migrationpolicy.org/article/vietnamese-immigrants-united-states-5> [<https://perma.cc/6RTF-HTK8>]. On the problems of heavy reliance on asylum without a “transparent and normal” immigration process, see David Abraham, *The Refugee Crisis and Germany: From Migration Crisis to Immigration and Integration Regime* (Univ. of Miami Legal Studies, Research Paper No. 16-17), <https://ssrn.com/abstract=2746659> [<https://perma.cc/WY28-ZSV4>].

¹⁵⁹ See INA § 244(c)(1)(A)(i), 8 U.S.C. § 1254a(c)(1)(A)(i) (2012).

¹⁶⁰ See Keyes, *supra* note 93, at 107–12 (noting how the longevity of TPS for some countries leaves recipients in an undesirable limbo status).

United States.¹⁶¹ For skeptics of immigration, this poor fit may seem to give the government broad latitude to respond to forced migrants without being constrained by notions of justice that might operate inside national borders. On this reasoning, protection for these migrants is mere altruism that should yield, in the national interest, to strict limits on protection.

It would be a grave mistake, however, to think that the United States or any country can completely disregard people reaching its borders, even if migrants fall outside the zone of benefits of immigration law or protections of refugee law. Fleeing violence, famine, civil war, environmental disaster, or other traumas, migrants will arrive in numbers. Migration puts great political and cultural pressure on any country to find responses that are consistent with its foundational values.

These values do not compel open borders or taking in all newcomers, for the reasons set out in Part I.D's discussion of ethical borders. But it is essential to take the needs of forced migrants seriously. Some values will be grounded in impulses that are humanitarian in origin. These impulses drive outrage at the consequences of hardline responses—whether that means children separated from parents, or toddlers drowned and washed up on Mediterranean shores, or on the banks of the Rio Grande. This reaction gains traction from basic ideas: that even in a system of nation-states, nationalism has its limits; that nation-states share some responsibility for human beings who are displaced and suffering, and that the total disregard for people based solely on their place of birth is unacceptable.¹⁶²

Taking the needs of forced migrants seriously is all the more urgent if migration is attributable to prior U.S. involvement in the economics or politics of source countries. Whether such history creates an obligation to accept some forced migrants is a tough question that will likely generate vehement disagreement.¹⁶³ But more fundamentally, there will be substantial domestic and international pressure to respond thoughtfully and coherently to forced migration. A shrug of the shoulders will not do, nor will the simple retort that immigra-

¹⁶¹ Some of the plaintiffs who challenged the refugee admissions cutbacks in 2017 were resettlement agencies that had started to help government-approved refugees, but this covers only a diminishing number of refugees. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

¹⁶² See SONG, *supra* note 68, at 115–17 (explaining three grounds for duties toward refugees: causal responsibility, humanitarian concern, and the legitimacy conditions of the modern state system).

¹⁶³ See, e.g., Achiume, *Migration as Decolonization*, *supra* note 81, at 1517.

tion law and refugee law have no application because migrants neither belong to the national community nor qualify as refugees. This sort of indifference may win some adherents, but several factors will likely limit that support.

One factor is the burden of history—the unsettling dread that if we reject cases of compelling hardship today, we are burdening future generations with a sense of shame.¹⁶⁴ It does not require a belief in open borders to fear repeating history. Recall also that national borders cannot be ethical if they discriminate on any basis that would be illegitimate among U.S. citizens.¹⁶⁵ By this reasoning, the overall treatment of migrants should reflect an intelligible rationale and serious efforts to apply legal rules fairly. Though ad hoc and discretionary approaches may sometimes be the best available options, sound decision making cannot start by assuming this is true. The risk is too great that decision making that is ad hoc or driven by political exigencies or opportunism can lead to cavalier and cruel treatment and mask illegitimate discrimination.

E. Toward the New Migration Law

What would a conceptually sound approach to forced migration look like? Answering this question may require provisional faith that moving toward this goal is possible. Some may conclude that any such faith is unfounded and utopian. But we live in a policy world that constantly poses hard choices. If we are to respond in any given moment with a full understanding of the options, it is essential to envision a path to just and sustainable responses. In this spirit, I start by offering this first principle: responses to migration are badly hobbled if they start by relying on a sanguine belief that the line between refugees and other migrants is objective and immune to political sway, and then make that line hugely consequential.¹⁶⁶ In-

¹⁶⁴ See CARENS, *supra* note 68, at 192–94 (applying the rejection of Jewish refugees before World War II as a benchmark for judging responses to forced migrants today).

¹⁶⁵ See *supra* subpart I.D.

¹⁶⁶ See, e.g., G.A. Res. 73/195, Preamble, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018) (“[M]igrants and refugees are distinct groups governed by separate legal frameworks.”); BENHABIB, *supra* note 68, at 137 (“States have more discretion to stipulate conditions of entry in the case of immigration than they do when facing refugees and asylees.”); *Interview with Filippo Grandi*, 99 INT’L REV. RED CROSS 17, 21 (2017) (“It is important to maintain the distinction between refugees and migrants.”). For critique of the distinction between refugees and other migrants, see Rebecca Hamlin, *The Migrant/Refugee Binary and State Responses to Asylum Seekers*, paper presented at the Annual

stead, it is essential to see a broad spectrum of migrants with many gray areas and hybrid categories that change over time.

Second, forced migrants are not just survivors in flight, but multidimensional people who will shape the societies where they and their children and grandchildren settle. Though these migrants have strong needs for protection, they also have pressing economic needs and can make significant economic contributions.¹⁶⁷ These facts suggest why it is crucial not only to put less weight on a sharp initial line between refugees and other migrants, but also to examine each migrant's situation comprehensively.

Germany, for example, offers forced migrants from Syria more than language instruction and other traditional integration programs. It also tries to draw them into apprenticeships that badly need new recruits, much as employment-based immigrant admission categories would, including an active role for the private sector.¹⁶⁸ Germany has also given unsuccessful asylum seekers from the Balkans special consideration for employment-based immigration.¹⁶⁹ Similarly, conditions in Central America should influence U.S. government decisions on cancellation of removal, Special Immigrant Juvenile Status, relief for domestic violence victims, other crimes, or trafficking, as well as the design of future legalization programs.¹⁷⁰ Put more generally, decisions on protection should consider not just the vulnerability of forced migrants but also harmonize their treatment with other paths to lawful status.¹⁷¹ Allowing the causes of forced migration to influence a full range of gov-

Meetings of the Law and Society Association, Toronto CA (2018) (on file with author).

¹⁶⁷ Viewing refugees as migrants, not as distinct from migrants, was more common before World War II. See Long, *supra* note 97, at 13–15.

¹⁶⁸ See Paul Hockenos, *Germany's Secret Labor Experiment*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/opinion/germans-secret-labor-experiment.html> [<https://perma.cc/XB2X-TCT5>]; Dorothea Siems, *Wirtschaft sieht Flüchtlinge als Fachkräftereservoir* [Economy Sees Refugees as a Skilled Workforce Reservoir], DIE WELT (April 9, 2015), <https://www.welt.de/wirtschaft/article139325361/Wirtschaft-sieht-Fluechtlinge-als-Fachkraeftereservoir.html> [<https://perma.cc/SJ3J-QA9Z>].

¹⁶⁹ See JESSICA BITHER & ASTRID ZIEBARTH, CREATING LEGAL PATHWAYS TO REDUCE IRREGULAR MIGRATION? WHAT WE CAN LEARN FROM GERMANY'S "WESTERN BALKAN REGULATION" 10 (2018); GERMAN NAT'L CONTACT POINT FOR THE EUROPEAN MIGRANT NETWORK, MIGRATION, INTEGRATION, ASYLUM: POLITICAL DEVELOPMENTS IN GERMANY 2016, at 24 (2017).

¹⁷⁰ See Keyes, *supra* note 93, at 147–53 (discussing sources of protection in U.S. law for forced migrants).

¹⁷¹ See G.A. Res. 73/195, *supra* note 166, at ¶ 21 ("Enhance availability and flexibility of pathways for regular migration.").

ernment immigration law decisions would relieve much of the pressure that currently distorts refugee law subtly but surely.

Third, human rights can inform protection for forced migrants who do not qualify as refugees. Human rights law, only nascent when the Refugee Convention was adopted, has matured into a broad net of protections. Though human rights are still not directly enforceable in many countries, especially in the Global North, they can play a pivotal role as general principles that can help ascertain when forced migrants who do not qualify as refugees should still receive protection.¹⁷²

This third principle calls for assembling ad hoc vehicles like TPS, T and U visas, and Special Immigrant Juvenile Status into a more integrated framework. It may make sense to allow their ad hoc emergence, but over time it becomes important to incorporate them into a coherent overall response to migration. Extending beyond separate schemes, this framework would reflect some recognition of migration-related human rights, such as the right to life, the right to security of the person, the right to resources for subsistence, and the right against persecution.¹⁷³ A useful model may be the growing acceptance in the European Union of “subsidiary” or “complementary” protection for forced migrants who fall outside the “refugee” definition.¹⁷⁴

Fourth, it is essential to ask about the balance between decisions in individual cases and group-based decision making, and to rethink when and how that decision making occurs. As a baseline, it is important to commit enough resources to case-by-case decision making so that adjudication is careful and benefits from competent legal counsel who can make sure that each case is decided accurately in light of the facts and the governing law. A more fundamental question is whether a sep-

¹⁷² See Directive, 2011/95, 2011 O.J. (L337) 9 (EU); Aufenthaltsgesetz [AufenthG][Residence Act], Feb. 25, 2008, BCBL I at 162, last amended by Gesetz[G], Aug. 15, 2019, BGBl I at 1307, § 25(2) (Ger.) (providing a renewable residence permit (*Aufenthaltsurlaubnis*), which leads after five years to permanent resident status); JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 197 (2007); Matthew Lister, *Philosophical Foundations for Complementary Protection*, in *THE PHILOSOPHY OF REFUGEE* 211 (David Miller & Christine Straehle eds., 2020).

¹⁷³ See SONG, *supra* note 68, at 94; cf. Chetail, *supra* note 98, at 22 (“[H]uman rights law is the primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role.”).

¹⁷⁴ The New York Declaration for Refugees and Migrants, G.A. Res. 71/1, ¶ 21 (Sept. 19, 2016), proposed and prompted the Global Compact for Safe, Orderly and Regular Migration, G.A. Res. 73/195, *supra* note 166171, and the Global Compact for Refugees, Report of the U.N. High Comm’r for Refugees, U.N. Doc. A/73/12 (2018). These Compacts provide special protection for forced migrants only if they fit the Convention refugee definition.

arate inquiry for each migrant should give way to overall assessments of groups from troubled regions.¹⁷⁵ A group-based approach could also reduce administrative costs and delays. Less may turn on luck and access to skilled professional advocates.¹⁷⁶ Relatedly, refugee admissions from outside the borders of destination countries may be able to offer more protection for more people, with more multilateral cooperation and with less political vulnerability to populist skepticism and opposition. But group determinations—whether to grant or deny lawful status—may be politically sustainable only if the number of forced migrants is perceived to be manageable. These are complex issues, and the best approach will vary by situation, but there is much room for improvement in assessing the available options.

Fifth, the new migration law should carefully consider the nature of protection for forced migrants. Is it ever acceptable for protection to mean only temporary shelter? Is asylum sometimes not the best form of protection for migrants fleeing extreme poverty or environmental degradation?¹⁷⁷ By offering limited protection that does not lead routinely to permanent residence and citizenship, would more people be protected? When might it be better to adopt this tradeoff and offer more people less? When does it do more for more people to offer help closer to their countries of origin? When is that sort of response to migration just an excuse for tragic and inexcusable failure to help people in need?

In identifying these five areas of inquiry, I do not mean to be naïvely optimistic or to overvalorize initiatives with mixed or limited success, but they offer general lessons. I also recognize that it matters how national traditions and politics understand the relationship between migration and citizenship. But even more fundamental—and too little explored—is how that relationship depends on what can be done to address the reasons why people migrate, and why they return—or do not return—to their countries of origin. In turn, especially pivotal is how migration interacts with international trade and economic devel-

¹⁷⁵ See ALEINIKOFF & ZAMORE, *supra* note 109, at 1-7 to 1-8; Keyes, *supra* note 93, at 137-47.

¹⁷⁶ On the difference a lawyer makes, see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 47-59 (2015). See also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007) (discussing the effect of legal representation on outcomes in asylum cases).

¹⁷⁷ See SONG, *supra* note 68, at 120.

opment, and how modest gains in security and economic development affect emigration and return migration. These considerations should influence any search for sustainable responses to forced migration. Part III tackles these questions. In doing so, it rethinks migration law not just for forced migration, but for all migrants.

III

MIGRATION AND CITIZENSHIP IN TRANSNATIONAL CONTEXT

Parts I and II combined to explain the interwoven shortcomings of two pillars of twentieth-century migration law. I now go beyond immigration law and refugee law as traditionally understood, and instead analyze migration in more transnational terms. This broader perspective reflects two basic concerns. One, as Part II explained, that any threshold attempt to classify migrants as refugees or other migrants likely undermines any quest for sustainable responses. By addressing migration in general, Part III presses beyond this conceptual and political impediment.

My other concern is that legal principles and institutions have engaged the causes of migration very inadequately. Doing better starts with traditional legal questions about migration and citizenship, but then asks about the factors that lead migrants to emigrate, and why some choose to stay in their new lands or return to their countries of origin. My focus includes conditions in sending countries, but also the global contexts for those conditions. Law can play a vital role in these domains, especially by offsetting the tendency to rely more than necessary on ad hoc politics without transparency or coherent justice principles.

A. Migration and Citizenship

I start with traditional inquiries into the balance between temporary and permanent admissions, and into the link between migration and citizenship. Decisions to admit migrants temporarily usually reflect a judgment that they offer benefits without the concerns associated with permanent arrivals. For example, temporary workers can meet labor needs that would otherwise go unmet or met by undocumented workers. Some temporary migrants may be acceptable, even if a similar number of new immigrants would generate political resistance. Proponents of temporary admissions argue that many migrants do not want to stay permanently, and that the choice to move temporarily should be theirs to make. Moreover, their home

countries benefit from remittances and from emigration as a demographic and political safety valve.¹⁷⁸

Such reasoning typically prompts two main objections. First, a sharp line between temporary and permanent residents can create an exploited underclass. Though temporary migrants gain some protection from their lawful status, that status is typically tied to their employer and job. This dependence exposes them to harsh working conditions, wage theft, and other injustices, sometimes made worse by arbitrary or discriminatory enforcement patterns. Employers can use temporary workers to leverage downward the wages and working conditions of citizens. This is corrosive for society, even if migrants, sending countries, and employers all consent.¹⁷⁹

This inequality between temporary and permanent residents is troubling because it undermines justifications for national borders as fostering equality and dignity on the inside. As subpart I.D explained, national borders must not discriminate among citizens, nor discriminate on any basis beyond citizenship itself.¹⁸⁰ There must be borders with justice and without racism. Only then can national borders create and maintain a system of rights, responsibilities, and institutions to foster equality and dignity.¹⁸¹

Borders can work effectively toward justice on the inside only if they reinforce civic solidarity, or put more generally, some sense of national community. This requires a sense of common purpose and of concern for the common good—reflecting a sense of national belonging based on perceptions of shared experience.¹⁸² Without national community, the risk is too great that national borders will not foster equality and dignity, but instead will allow old petty fortresses to persist and new ones to emerge. The consequence will be a society rife with

¹⁷⁸ See MARTIN RUHS, *THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION* 136–38 (2013); SONG, *supra* note 68, at 154–55; Valeria Ottonelli & Tiziana Torresi, *Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma*, 20 J. POL. PHIL. 202, 208 (2012).

¹⁷⁹ See BOSNIAK, *supra* note 68, at 37–76, 122–40; Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1069–87 (1994).

¹⁸⁰ See *supra* notes 69–71 & accompanying text.

¹⁸¹ See MOTOMURA, *supra* note 19, at 92–93.

¹⁸² See LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* 203–08 (2015); SONG, *supra* note 68, at 53–56, 67–69; David Abraham, *Immigrant Integration and Social Solidarity in a Time of Crisis: Europe and the United States in a Postwelfare State*, 1 CRITICAL HIST. STUDS. 215, 236 (2014); Jochen Bittner, *Why the World Should Learn to Say 'Heimat'*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/america-heimat-germany-politics.html> [https://perma.cc/H8CH-SQJN].

exclusion, discrimination, and injustice, which national borders will do little to help remedy.

Essential for this civic solidarity is the integration of newcomers into this national community. Integration is reciprocal; it entails mutual respect and an openness—among both newcomers and long-time residents—to what is at first new and unfamiliar.¹⁸³ Pressure on migrants to cut ties with their cultures or languages can turn national borders into an exclusionary proxy for permanent inequality and the sort of discrimination beyond citizenship that is inconsistent with ethical borders. Integration takes time, which allows transnational lives to evolve as ties to countries of origin become less exclusive.¹⁸⁴

Formal citizenship also matters, by opening doors and enhancing a sense of belonging, especially for migrants who do not fit racial or religious stereotypes associated with the dominant culture.¹⁸⁵ Crucially, the Fourteenth Amendment to the U.S. Constitution confers citizenship on children based simply on birth on U.S. soil,¹⁸⁶ enhancing integration regardless of a parent's status.¹⁸⁷ Also central is the assumption that migrants will belong fully.¹⁸⁸ With time, integration allows the line between noncitizen immigrants and citizens to be permeable. Initial inequality between citizens and noncitizens can yield to equality. But temporary admissions—without integration and a path to citizenship—create an underclass that undermines civic solidarity. It then becomes impossible to justify borders as fostering equality and dignity on the inside.¹⁸⁹

A second objection to temporary admissions is that they are really permanent and should be assessed as such. The Swiss writer Max Frisch wryly observed, "We asked for workers, but people came."¹⁹⁰ Analyzing this objection starts by seeing that no bright line separates temporary from permanent. Some

¹⁸³ See BENHABIB, *supra* note 68, at 141–46; WALZER, *supra* note 68, at 60–63.

¹⁸⁴ See ROGER WALDINGER, *THE CROSS-BORDER CONNECTION: IMMIGRANTS, EMIGRANTS, AND THEIR HOMELANDS* 37–44 (2015).

¹⁸⁵ Especially for these migrants, denizen status falls short of formal full citizenship.

¹⁸⁶ U.S. CONST. amend. XIV, § 1. The only exceptions are the children of diplomats and of enemy military forces.

¹⁸⁷ On this aspect of birthright citizenship, see MOTOMURA, *supra* note 19, at 178–80. Allowing dual citizenship can incentivize migrants to naturalize and integrate, precisely because they can keep this formal tie to countries of origin. See MOTOMURA, *supra* note 7, at 148–49.

¹⁸⁸ See MOTOMURA, *supra* note 7, at 162–65.

¹⁸⁹ See WALZER, *supra* note 68, at 56–61.

¹⁹⁰ MAX FRISCH, *Überfremdung I*, in *SCHWEIZ ALS HEIMAT?* 219, 219 (Walter Obschlager ed., 1990) (translation by author).

migrants may return to countries of origin; others may stay. Even if some stay permanently, those settlers may be exceptions. Which label is more accurate—temporary or permanent—depends not just on initial admission, but also on migrants' choices *after* admission. Too few decision makers recognize that shaping such choices is a core function of migration law and policy. The next question is how to do this.

B. Choices for Migrants

Frisch underscored the folly of sanguine confidence that migrants come only for a limited time and purpose. Taking him seriously, the best response to both objections to temporary workers is to allow some migration that is provisionally temporary, but also recognizing that some migrants will stay, and at the same time to make return a viable option. Temporary admissions with a path to citizenship may seem self-contradictory, but it can be coherent policy if migrants have choices. This approach—normalizing both staying and returning—responds to concerns that temporary migrants form a underclass, and to concerns that temporary means permanent.¹⁹¹ And by giving migrants viable options, it also respects their dignity.

For staying to be a real choice for both migrants and the destination country, government enforcement of labor standards is a vital minimum shield against exploitation. Workers also must be able to protect themselves by changing employers and jobs without jeopardizing immigration status.¹⁹² Even if these protections cost something, temporary migrants can help meet the destination country's labor needs on terms that offer most employers an alternative to the undocumented.

After some period of time in the destination country, however, the law should recognize temporary migrants' contributions and ties with durable immigration status and a path to citizenship that over time becomes routine even if not automatic. This approach was evident in comprehensive immigration legislation adopted by the U.S. Senate in 2013, but never

¹⁹¹ This approach recognizes as alternatives to temporary admissions both permanent admissions and undocumented migration. See MOTOMURA, *supra* note 19, at 212–15; Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263, 284–87 (2013); cf. SONG, *supra* note 68, at 156 (arguing that temporary worker programs are permissible if workplace protections are robust).

¹⁹² See SONG, *supra* note 68, at 155–56 (discussing the United Kingdom's mobile work visa, and increases in worker abuse after the visa became unavailable in 2011); cf. G.A. Res. 73/195, *supra* note 166, at ¶ 16 (“Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work.”).

actively debated in the House of Representatives.¹⁹³ Allowing what starts as temporary to sometimes become permanent is also consistent with having children grow up in the United States with fading ties to their parents' countries of origin.

For a viable option to return to countries of origin, one key fact is that many migrants leave home reluctantly, initially hoping to return.¹⁹⁴ Home has a powerful gravity, and for those who leave, the most effective incentives to return are better conditions in communities of origin. In the 1990s and 2000s, for example, many migrants returned from the United States to South Korea, Poland, and Ireland, drawn by improving economic conditions and political stability.¹⁹⁵

A broad lesson is that economics and politics are essential elements of viable return options, which can then lead to less restrictive regulation of migration. The European Union allows citizens of member states to move freely across national borders as part of regional integration of trade and development. Migration is distinct from citizenship. Freedom of movement does not come with a routine path to citizenship in other EU member states, nor does the EU generally restrict member states' authority to set their own citizenship requirements.¹⁹⁶

¹⁹³ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess. (2013). *But cf.* Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 258–64 (2017) (on the problems of long surveillance periods).

¹⁹⁴ See DAVID BACON, *THE RIGHT TO STAY HOME: HOW US POLICY DRIVES MEXICAN MIGRATION* 273–87 (2013).

¹⁹⁵ For Ireland, later declines reversed the trend. See Kirk Semple, *As Ireland's Boom Ends, Job Seekers Revive a Well-Worn Path to New York*, N.Y. TIMES (July 10, 2009), <https://www.nytimes.com/2009/07/10/nyregion/10irish.html> [<https://perma.cc/7JHM-6US7>]. On opportunities in Mexico reducing emigration, see Francisco Alba, *MIGRATION POLY INST., Mexico: The New Migration Narrative* (Apr. 24, 2013), <https://www.migrationpolicy.org/article/mexico-new-migration-narrative> [<https://perma.cc/AX3N-YJGZ>]; Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES (July 6, 2011), <https://archive.nytimes.com/www.nytimes.com/interactive/2011/07/06/world/americas/immigration.html> [<https://perma.cc/NM8N-28V3>]; Damien Cave, *In Mexican Villages, Few Are Left to Dream of U.S.*, N.Y. TIMES (Apr. 2, 2013), <https://www.nytimes.com/2013/04/03/world/americas/new-wave-of-mexican-immigrants-seems-unlikely.html> [<https://perma.cc/TF5Z-U97E>]; see also Joshua Chaffin, *Young Poles Leave UK to Return Home as Economy Booms*, FINANCIAL TIMES (Oct. 27, 2017), <https://www.ft.com/content/2329a046-ba6f-11e7-8c12-5661783e5589> [<https://perma.cc/ULS7-2D69>] (on return from United Kingdom); *cf.* FITZGERALD, *supra* note 31, at 103–24 (observing that regular contact between sending country governments and emigrants makes return more likely).

¹⁹⁶ Freedom of movement also eliminates what would otherwise be a strong incentive to acquire citizenship in another EU member state. On the complex links between freedom of movement and immigration law in the EU, see Jo Shaw, *Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 247,

But assured of future mobility, people move in temporary or circular patterns. This freedom gives migrants the same options as international lawyers, financiers, artists, and athletes, who provoke no sense of “crisis” and typically are untroubled that their ability to travel does not include a path to citizenship. If migrants have choices, governments and migrants are under less pressure to decide at the outset how long they will stay.¹⁹⁷

Arrangements elsewhere have similar potential, though they do not go as far in practice. The Southern Common Market Free Movement and Residence Agreement (MERCOSUR) lets workers move among member countries—Argentina, Brazil, Paraguay, and Uruguay, with Bolivia and Chile as associate members.¹⁹⁸ The Trans-Tasman Travel Agreement allows mobility between Australia and New Zealand. The Economic Community of West African States (ECOWAS) allows mobility among member states, subject to some practical limits under national laws.¹⁹⁹ Some republics of the former Soviet Union have labor migration agreements.²⁰⁰ All of these regional arrangements pose important questions, including whether their effects on migration patterns reflect the degrees of similarity or difference among the countries involved. More fundamentally, several questions arise. What can be done to address migration in transnational context, so that government responses do more than react after the fact? And what is the role of law and legal institutions in addressing the reasons for migration?

247–53 (2015). Further variations may emerge if and when the United Kingdom leaves the EU.

¹⁹⁷ This approach is in some tension with treating newcomers as future citizens to foster their integration. See MOTOMURA, *supra* note 7, at 162–67. But it can be sound policy to admit *some* migrants temporarily, knowing that some temporary migrants may acquire persuasive claims to stay indefinitely. See MOTOMURA, *supra* note 19, at 224–25, 229.

¹⁹⁸ See generally DIEGO ACOSTA, THE NATIONAL VERSUS THE FOREIGNER IN SOUTH AMERICA 173–98 (2018) (analyzing regional arrangements in South America that allow freedom of movement).

¹⁹⁹ See Marie-Laurence Flahaux & Hein De Haas, *African Migration: Trends, Patterns, Drivers*, 4 COMP. MIGRATION STUD. 1, 12 (2016) (observing that ECOWAS and several other free movement agreements among African countries “have generally been poorly implemented or contradicted by the restrictive policies and practices of member states”).

²⁰⁰ See generally Olga Chudinovskikh, *Migration and Bilateral Agreements in the Commonwealth of Independent States*, in FREE MOVEMENT OF WORKERS AND LABOR MARKET ADJUSTMENT: RECENT EXPERIENCES FROM OECD COUNTRIES AND THE EUROPEAN UNION 251–76 (2012) (discussing migration, especially labor migration, among countries that were formerly part of the Soviet Union); Rainer Bauböck, INST. HUM. SCI., *In Defence of Free Movement* (Jan. 12, 2016), <https://www.iwm.at/transit-online/in-defence-of-free-movement/> [<https://perma.cc/W76B-DPPN>] (commenting on “the global trend toward citizenship-based free movement,” with examples from Europe).

C. Trade and Economic Development

To examine migration in transnational context, I start with international trade. Trade allows the private sector to import goods to satisfy domestic demand at lower prices, using cheaper labor elsewhere. This practice is routine, especially as the cost of transporting goods has dropped, and even with tariffs and other trade barriers. For similar reasons, domestic companies move operations where labor or material costs are lower.

Trade affects domestic politics by redirecting investments, and by affecting employment patterns and the price of goods and services. Migration can have the same effects if domestic employers can reduce labor costs by hiring workers from other countries. Because trade and migration can be substitutes for each other, an increase in trade can reduce support for migration, and vice versa.²⁰¹ But trade can reduce prices without directly affecting domestic demographics. Importing goods can be less politically or culturally complicated than admitting migrants.

Not all work can be outsourced by importing goods or moving operations to other countries. Especially for many service jobs, employers rely on migrants to work for wages that allow employers to stay competitive.²⁰² To satisfy demand with workers with little formal education, destination country governments allow labor migration, both lawful and outside the law—almost always acting unilaterally to get them without explicitly cooperating with other countries.²⁰³

The reason that action by destination country governments generally remains unilateral is that willing workers for these jobs are abundant, and recruiting them does not require the mutual incentives or guarantees that a bilateral or regional migration agreement might formalize. Unsurprisingly, then, most migration agreements are limited to educated or skilled workers.²⁰⁴ For example, the United States appears to have

²⁰¹ See MARGARET E. PETERS, *TRADING BARRIERS: IMMIGRATION AND THE REMAKING OF GLOBALIZATION* 30 (2017) (arguing that cross-border free trade reduces private sector support for admitting workers that have less education or skill).

²⁰² See Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 *Nw. U. L. Rev.* 1109, 1119–21 (2010).

²⁰³ See James F. Hollifield, *Governing Migration: Public Goods and Private Partnerships*, in *FREE MOVEMENT OF WORKERS AND LABOR MARKET ADJUSTMENT*, *supra* note 200, at 277, 282.

²⁰⁴ See DEMETRIOS G. PAPADEMETRIOU, GUNTER SUGIYARTO, DOVELYN RANNEIG MENDOZA & BRIAN SALANT, *MIGRATION POL'Y INST., ACHIEVING SKILL MOBILITY IN THE ASEAN ECONOMY COMMUNITY* 20–21 (2015), <https://www.adb.org/sites/default/>

few incentives for its trade agreement with Mexico—the North American Free Trade Agreement (NAFTA) and its apparent successor, the United States-Mexico-Canada Trade Agreement—to allow freedom of movement. In fact, much of NAFTA’s political support in the United States has rested on assurances that free trade will *not* mean more Mexican migration.²⁰⁵ So NAFTA’s admission scheme mirrors the main body of U.S. immigration law—allowing the cross-border flow of educated workers, but severely restricting the admission of other workers.²⁰⁶

Comparing trade with migration prompts this question: what would it take for countries to cooperate—with or without formal agreements—on migration in ways that resemble cooperation on trade? As an example, the European Union is a model, but also a cautionary tale. What became the EU emerged from a period of haltingly cooperative postwar reconstruction after the devastation of World War II. The exigencies of the period allowed freedom of movement to become a bed-rock premise, despite worries about large-scale migration among its member states.

If these conditions may be impossible to replicate, the EU may yield few practical lessons for today’s needs. Moreover, the EU’s responses to migration have met with mixed success at best, and outright failure at worst. The breakup of the Soviet Union in the early 1990s generated pressure to include former Soviet bloc countries. Many came with economic ambitions that the EU was positioned to foster, but also with a strong sense of ethnic nationalism—unleashed after being buried by Soviet oppression for decades—that has led many governments in new EU countries to view migration with skepticism or hostility. These new countries widened economic and political differences and increased tensions within the Union. The results included a fragile Euro, an uncoordinated response to migra-

files/publication/178816/skill-mobility-asean.pdf [https://perma.cc/V492-SYG5].

²⁰⁵ See Dolores Acevedo & Thomas J. Espenshade, *Implications of a North American Free Trade Agreement for Mexican Migration into the United States*, 18 *POPULATION & DEV. REV.* 729, 731 (1992); Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 *ANNALS AM. ACAD. POL. & SOC. SCI.* 98, 105 (2007); Gordon, *supra* note 202, at 1114; Jeff Faux, *How NAFTA Failed Mexico: Immigration Is Not a Development Policy*, *AM. PROSPECT*, July–Aug. 2003, at 35.

²⁰⁶ See Peter Baker, *Trump Signs New Trade Deal with Canada and Mexico After Bitter Negotiations*, *N.Y. TIMES* (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/world/americas/trump-trudeau-canada-mexico.html> [https://perma.cc/XRD7-DQAK].

tion from outside the EU,²⁰⁷ and the United Kingdom's looming exit.²⁰⁸

This recent EU history complicates the lessons from the EU expansion in 1986 to include Spain and Portugal. Expansion did not lead to substantial migration to existing EU members, contrary to some fears expressed at the time. The infusion of development funds in Spain and Portugal gave migrants reasons to stay home or to return home if they migrated, especially because they were assured of future mobility.²⁰⁹ One lesson may be that economic development is essential for trade and migration to be integrated as the EU has done. Economic differences need not be equalized, but enough must be done to keep some migrants at home and to incentivize circular or return migration by others.

How much economic development is enough to give people a viable option to not emigrate? It is hard to say. Time may eventually show that the differences between new and old EU members were small enough to allow successful multilateral opening of migration and trade while fostering development. But it would be too sanguine to think that the prospect of immediate gains from trade, combined with development initiatives, will lead to political support for loosening or eliminating migration restrictions. Without more, destination countries will remain reluctant to enter into migration agreements with the countries that are the source of large numbers of migrants with little education or training.

But the connection between trade and migration is complex. Both allow the United States to take advantage of cheaper labor elsewhere. NAFTA, by fostering trade, may reduce U.S. demand for Mexican migrants. Instead of coming to the United States, they can make things that their employers send to the United States. At the same time, trade strengthens

²⁰⁷ For an illuminating account of EU expansion after the breakup of the Soviet Union, see JUDT, *supra* note 95, at 713–36.

²⁰⁸ See Steven Erlanger & Katrin Bennhold, *E.U. Reaches Deal on Migration at Summit, but Details Sketchy*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/world/europe/germany-angela-merkel-migration-eu.html> [https://perma.cc/5JQB-9PG4].

²⁰⁹ See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN MIGRATION IN AN ERA OF ECONOMIC INTEGRATION 161 (2002) (observing that economic development may stimulate more migration at first, but diminish migration over the long-term); see also Guy Stecklov, Paul Winters, Marco Stampini & Benjamin Davis, *Do Conditional Cash Transfers Influence Migration? A Study Using Experimental Data from the Mexican PROGRESA Program*, 42 DEMOGRAPHY 769, 787 (2005) (concluding that increasing household income reduces migration).

ties between two countries in ways—cultural, economic, and social—that make migration a natural, available option.²¹⁰ Moreover, trade fostered by NAFTA can displace some workers in Mexico, intensifying pressures to leave some communities.²¹¹

With more migration, destination countries can lose confidence in their ability to regulate migration with unilateral strategies like a border wall, intensified interior enforcement, temporary admissions, and selective acquiescence in undocumented migration. If Mexican migration to the United States remains at its scale in the past generation, these strategies may work well enough. But if migration increases further—as is likely with armed conflict, environment disaster, or a breakdown of civil society countries not far away—the incentives multiply exponentially to work with other countries to respond to migration. Less able to set migration policy unilaterally, destination countries need the help of countries of origin and transit countries, which gain leverage from their ability to influence migration from or through their territory.²¹²

²¹⁰ On links between trade and individual rights, see JAMES F. HOLLIFIELD, *IMMIGRANTS, MARKETS, AND STATES: THE POLITICAL ECONOMY OF POSTWAR EUROPE* 131, 230–31 (1992) [hereinafter HOLLIFIELD, *IMMIGRATION, MARKETS, AND STATES*]; James F. Hollifield, *The Emerging Migration State*, 38 *INT'L MIGRATION REV.* 885, 900–05 (2004). See also BENHABIB, *supra* note 68, at 85–88, 97–106 (arguing that justice in migration cannot assume societies cut off from each other, but instead must assess interdependencies including trade and colonization).

²¹¹ See JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN THE UNITED STATES* 265–71 (rev. ed. 2011).

²¹² See KELLY M. GREENHILL, *WEAPONS OF MASS MIGRATION: FORCED DISPLACEMENT, COERCION AND FOREIGN POLICY* 12–74 (2010); see also HOLLIFIELD, *IMMIGRANTS, MARKETS, AND STATES*, *supra* note 210, at 40–41 (“[T]hat liberal states have not felt the need to cooperate in the area of migration because it has not been in their interest to do so is facile and tautological . . .”). On efforts to persuade other countries to offer short-term protection or long-term residence to more forced migrants, see Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal Fifteen Years Later?*, in 3 *THE NATION STATE AND IMMIGRATION: THE AGE OF MULTICULTURALISM* 67 (Anita Shapiro, Yedida Z. Stern, Alexander Jakobson & Liav Orgad eds., 2014); Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to A Humanitarian Crisis*, 48 *COLUM. HUM. RTS. L. REV.* 53, 69–73 (2016). Geography has concentrated over half of the world’s forced migrants in just seven countries. See BHABHA, *supra* note 117, at 94. It is unsurprising that the Refugee Convention lacks any responsibility sharing structure, for that would have undercut the premise of national sovereignty. See ALEINIKOFF & ZAMORE, *supra* note 109, at 1–3. The New York Declaration for Refugees and Migrants, adopted by the U.N. General Assembly in 2016, addresses shared responsibility. See G.A. Res. 71/1, *supra* note 174. In 2016, the European Commission proposed a burden-sharing scheme among EU countries based on each country’s GDP and population, but it met resistance and has not been concluded. See *Proposal for a Regulation of the European Parliament and Council*, COM (2016) 270 final (May 4, 2016) (proposing a “recast” of the Dublin III Regulation).

For example, part of the U.S. government's response to Central American migrants arriving on its southern border has been to enlist Mexico's help in keeping them away.²¹³ As Part II mentioned, U.S. and Guatemalan officials signed an agreement in July 2019 that purports to allow the U.S. government first to refuse asylum applications from migrants arriving on the U.S. southern border and then to send them to Guatemala.²¹⁴ In return, the United States agreed to make more temporary work visas available for Guatemalans.

In 2016, the European Union secured Turkey's help in keeping migrants, especially from Syria, from Greece and the rest of the EU.²¹⁵ In return, Turkey received massive monetary incentives, looser travel restrictions for Turkish citizens entering the EU, and resumption of talks on EU membership for Turkey.²¹⁶ The 2016 EU-Jordan Compact called on Jordan to issue 200,000 work permits to Syrian migrants and to expand their access to education. In exchange, the EU pledged to give Jordan over \$1.8 billion in grants and discounted loans, and to allow these workers' products to be imported into the EU on favorable terms.²¹⁷

²¹³ See Azam Ahmed & Kirk Semple, *Mexico Mulls Allowing Migrants to Stay There Pending U.S. Asylum Bids*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/world/americas/mexico-migrant-crisis.html> [<https://perma.cc/JL6Q-3ZHQ>]; Amy Guthrie, *Incoming Mexico Gov't: No Deal to Host US Asylum-Seekers*, ASSOCIATED PRESS (Nov. 25, 2018), <https://www.apnews.com/69f880e7d26240e0b7692f643f31c81d> [<https://perma.cc/HUH9-PPFE>].

²¹⁴ See Shear, Kanno-Youngs & Malkin, *supra* note 126; see also Flores & Aleaziz, *supra* note 126; Gzesh, *supra* note 126 (explaining that the terms and effect of this agreement remain unclear).

²¹⁵ As of 2018, over 3.5 million Syrian migrants registered officially in Turkey. See UNITED NATIONS HIGH COMM'R FOR REFUGEES, TURKEY, TURKEY PROTECTION SECTOR Q3, JULY-SEPTEMBER 2018 (2018), <https://data2.unhcr.org/fr/documents/download/66952> [<https://perma.cc/RU86-E9YU>].

²¹⁶ See Narin Idriz, *The EU-Turkey Statement or the "Refugee Deal": The Extra-Legal Deal of Extraordinary Times?*, in THE MIGRATION CRISIS?: CRIMINALIZATION, SECURITY AND SURVIVAL 61 (Dina Siegel & Veronika Nagy eds., 2018); ANDREA OTT, EU-TURKEY COOPERATION IN MIGRATION MATTERS: A GAME CHANGER IN A MULTI-LAYERED RELATIONSHIP?, CTR. L. EU EXTERNAL REL. no. 4, 2017, at 24; Collett, *supra* note 128.

²¹⁷ See Decision No 1/2016 of the EU-Jordan Association Committee of 19 July 2016, 2016 O.J. (L 233) 6; EUROPEAN COMMISSION, REPORT ON EU-JORDAN RELATIONS IN THE FRAMEWORK OF THE REVISED ENP (June 13, 2017); ALEXANDER BETTS & PAUL COLLIER, REFUGEE: RETHINKING REFUGEE POLICY IN A CHANGING WORLD 168-76 (2017) (discussing the origins and operation of the Jordan Compact); Marion Panizzon, *The EU-Jordan Compact in a Trade Law Context: Preferential Access to the EU Market to 'Keep Refugees in the Region,'* in CONSTITUTIONALISING THE EXTERNAL DIMENSIONS OF EU MIGRATION POLICIES IN TIMES OF CRISIS: LEGALITY, RULE OF LAW AND FUNDAMENTAL RIGHTS RECONSIDERED 220 (Sergio Carrera, Juan Santos Vara & Tineke Strik eds., 2019).

These examples show that with more migration reaching destination countries, they have real incentives to move away from unilateral responses and toward bilateral or multilateral arrangements. This builds on long-standing destination country extraterritorial responses to migration such as interdiction, safe third-country agreements, and other strategies of migration control outside the physical border. What *may* be changing, however, is the traditional narrow focus on outsourced border control. Agreements offer substantial incentives to countries of origin and transit, not just for border control, but also—at least in stated intent—to address the causes of migration originating from or transiting those countries. Especially noteworthy is economic development aid, which can give people reasons not to emigrate, or if they have left, reasons to return.²¹⁸

In 2015, the EU committed 3.2 billion Euros to its Emergency Trust Fund for Africa.²¹⁹ In the United States, the Obama Administration allocated \$750 million for 2016 to the Alliance for Prosperity in El Salvador, Guatemala, and Honduras.²²⁰ The German government offers financial incentives for

²¹⁸ This is consistent with the 2018 United Nations' Global Compact for Safe, Orderly and Regular Migration, which calls for addressing migration at its source. G.A. Res. 73/195, *supra* note 166. The United States withdrew from the Compact in December 2017. See Megan Specia, *U.N. Agrees on Migration Pact, but U.S. Is Conspicuously Absent*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/world/europe/united-nations-migration-agreement.html> [https://perma.cc/67JT-NRRR].

²¹⁹ See EUROPEAN COMM'N, EU EMERGENCY TRUST FUND FOR AFRICA 1 (Nov. 24, 2017), https://ec.europa.eu/europeaid/sites/devco/files/eu-emergency-trust-fund-africa-20171124-3_en.pdf [https://perma.cc/3RVT-4ALC]. The price of the funds is cooperation with the EU on, among things, migration control. See Rebecca Rosman, *Africa: Will EU-Africa Deal Depend on Curbing Migration?*, ALL AFRICA (June 9, 2016), <https://allafrica.com/stories/201606091050.html> [https://perma.cc/3DJW-C4VR]; Kristy Siegfried, *Five False Assumptions Driving EU Migration Policy*, NEW HUMANITARIAN (June 2, 2015), <http://www.thenewhumanitarian.org/analysis/2015/06/02/five-false-assumptions-driving-eu-migration-policy> [https://perma.cc/GMS4-7DZD].

²²⁰ See WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, *The Blair House Communiqué: Joint Communiqué of the Presidents of El Salvador, Guatemala, and Honduras, and the Vice President of the United States of America in Relation to the Plan of the Alliance for Prosperity in the Northern Triangle* (Feb. 24, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/blair-house-communicue-joint-communicue-presidents-el-salvador-guatemala> [https://perma.cc/L6SZ-T2VJ]. The Trump Administration has severely cut U.S. aid to Central America. See Matthew Lee, *US Restores Some Aid to El Salvador, Honduras, and Guatemala*, AP NEWS (June 17, 2019); Katie Rogers, Michael D. Shear & Zolan Kanno-Youngs, *Trump Directs State Dept. to End Aid to 3 Central American Countries*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/politics/trump-mexico-illegal-immigration.html> [https://perma.cc/J2A9-NQ37].

companies investing in Africa.²²¹ These initiatives are complex—promising in theory and potential, but also fraught with defects that merit close study, not just to critique each initiative, but also to draw lessons for the role of legal principles and institutions.

D. Economic Development, Security, and Human Rights

Using economic development aid to create choices for migrants has the intuitive appeal of addressing the root causes of migration. But this path is strewn with obstacles and pitfalls. First, the short-term goal of keeping migrants away can displace economic development priorities. Second, economic development can *increase* emigration, not reduce it.²²² Third, economic development, even if it is an essential and foundational element of sustainable, long-term responses to migration, is never enough by itself as an effective transnational response to migration.

These problems are related to each other. If development fails to reduce and even increases migration in the short run, then funding may dry up for economic development. What passes for development is likely to become outsourced border control,²²³ which is likely to sidestep rights-based obligations owed to migrants. Another likely result is reinforcing the police and military apparatus in countries of transit or origin, leading to real concerns about human rights and security. These three types of problems merit more discussion, keeping in mind these links among them.

First, the tendency for development aid to turn into enforcement funding reflects a combination of politics, psychol-

²²¹ See *German Firms Promised 'Marshall Plan' Tax Breaks for African Projects*, REUTERS (July 8, 2018), <https://uk.reuters.com/article/uk-europe-migrants-africa/german-firms-promised-marshall-plan-tax-breaks-for-african-projects-idUKKBN1JY0SM> [<https://perma.cc/ATJ5-R3GN>].

²²² See Michael A. Clemens & Hannah M. Postel, *Deterring Emigration with Foreign Aid: An Overview of Evidence from Low-Income Countries*, 44 *POPULATION & DEV. REV.* 667, 675 (2018).

²²³ See Loren B. Landau, *A Chronotope of Containment Development: Europe's Migrant Crisis and Africa's Reterritorialisation*, 51 *ANTIPODE* 169, 172–73 (2019); Kate Hooper & Kathleen Newland, *Mind the Gap: Bringing Migration into Development Partnerships and Vice Versa*, *MIGRATION POL'Y INST.*, GERMAN DEV. COOPERATION AGENCY, July 2018, at 6, http://migration4development.org/sites/default/files/migrationanddevelopmentpartnerships_final.pdf [<https://perma.cc/3TPY-TNW4>]; Kevin Sieff, *U.S. Officials Said Aid to El Salvador Helped Slow Migration. Now Trump Is Canceling It.*, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/world/the_americas/us-officials-said-aid-to-el-salvador-helped-slow-migration-now-trump-is-canceling-it/2019/04/01/5a8ca570-540a-11e9-aa83-504f086bf5d6_story.html [<https://perma.cc/SC37-N3QM>].

ogy, and ideology. In many destination countries, politicians intent on enforcement as the primary mode of response to migration reinforce the message that development-based migration policy will have little effect without stronger enforcement. From this perspective, it may be unpersuasive to cite the Marshall Plan after World War II—sometimes hailed as a model for development-based solutions to regional disorder—as a way to reduce migration. Even if in retrospect the Plan was vital to European renewal and to long-term U.S. prosperity and security,²²⁴ the setting for the Marshall Plan may be too different from today's contexts.

One difference may be public and government reluctance to make long-term investments in distant lands that are perceived as racially or religiously different, especially given a policy turn away from long-term government investments generally.²²⁵ But a more basic obstacle may be that development aid is cast as a migration management tool, not the nation-building that was the goal of the Marshall Plan.²²⁶ Paradoxically, framing development aid as a root-cause response to migration suggests migration-focused metrics that make it less likely that development aid will be in place long enough to affect migration patterns.

Why are development-based responses to migration so fragile politically and susceptible to diversion to border control? One explanation is very fundamental. It questions the very premise of development-based responses to migration by observing that it is unclear how long it would take for development aid to reduce emigration from countries receiving that aid. A study by economists Michael Clemens and Hannah Postel is one of several that cast doubt on short-term or medium-term prognoses for aid to affect conditions in countries of origin enough to reduce migration. Clemens and Postel concluded that “aid would need to operate in unprecedented ways, at much higher levels of funding, over generations, to greatly af-

²²⁴ See generally JUDT, *supra* note 95, at 89–99 (analyzing the origins and effects of the Marshall Plan).

²²⁵ For an analysis of public attitudes in Germany toward using development aid to reduce migration, see *Comforting Immigration Critics?: Public Opinion Toward Development Aid as a Tool to Reduce Refugee Inflows to Germany*, MERCATOR DIALOGUE ON ASYLUM AND MIGRATION (2019), <https://www.medam-migration.eu/en/publication/comforting-immigration-critics/> [<https://perma.cc/2TKZ-B9TG>].

²²⁶ See Bret Stephens, *An Immigration Policy Worse Than Trump's*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/opinion/immigration-trump-southern-border.html> [<https://perma.cc/Z4R9-AQCD>] (urging “nation building” as a response to migration).

fect some of the most important plausible drivers of emigration.”²²⁷

In fact, some evidence suggests that development aid *enables* emigration.²²⁸ The reason is that development aid is insufficient to alter the basic decision to emigrate,²²⁹ but it makes the costs of migration more affordable.²³⁰ This view is consistent with arguments that it is a mistake to focus on poverty as a significant push factor in migration. Much more significant—some contend—are violence, political oppression, human rights violations, and other signs of failure to provide safety and security to the people who live in a country.²³¹ Even if a robust economy is sometimes enough to offer viable options to migrants, other settings may require that economic develop-

²²⁷ See Clemens & Postel, *supra* note 222, at 674; see also Sarah Bermeo & David Leblang, *Trump Wants to Cut Immigration and Foreign Aid. Here's How They're Connected.*, WASH. POST (Feb. 22, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/22/trump-wants-to-cut-immigration-and-foreign-aid-heres-how-theyre-connected/> [https://perma.cc/BX49-H5X2] (finding that when donor governments try to restrict migration, they may direct their foreign aid to countries with significant emigration, rather than to countries in greatest need of funds).

²²⁸ See Clemens & Postel, *supra* note 222, at 675–78, 683; see also Sarah Blodgett Bermeo & David Leblang, *Migration and Foreign Aid*, 69 INT'L ORG. 627, 630–34 (2015) (discussing the use of foreign aid as a strategic tool in migration policy); Michael A. Clemens, Caglar Ozden & Hillel Rapoport, *Migration and Development Research is Moving Far Beyond Remittances*, 65 WORLD DEV. 1, 3–4 (2015) (summarizing recent research regarding transfers from migrants back to their home countries); Heaven Crawley & Brad K. Blitz, *Common Agenda or Europe's Agenda? International Protection, Human Rights and Migration from the Horn of Africa*, 45 J. ETHNIC & MIGRATION STUD. 2258, 2261 (2019) (analyzing the relationships among international protection, human rights, and migration in the context of the EU Agenda on Migration).

²²⁹ See Loren B. Landau, Caroline Wanjiku Kihato & Hannah Postel, *Europe Is Making Its Migration Problem Worse: The Dangers of Aiding Autocrats*, FOREIGN AFF. (Sept. 5, 2018), <https://www.foreignaffairs.com/articles/africa/2018-09-05/europe-making-its-migration-problem-worse> [https://perma.cc/XMG6-SQG4] (observing that migration usually begins to fall only when national GDP reaches about \$11,000, far beyond GDP in most African countries).

²³⁰ See Michael A. Clemens, *Does Development Reduce Migration?*, in INTERNATIONAL HANDBOOK ON MIGRATION AND ECONOMIC DEVELOPMENT 152 (Robert E.B. Lucas ed., 2014); Hein De Haas, *Turning the Tide?: Why Development Will Not Stop Migration*, 38 DEV. & CHANGE 819, 833 (2007); Flahaux & De Haas, *supra* note 199, at 4; see also Jean-Claude Berthélemy, Monica Beuran & Mathilde Maurel, *Aid and Migration: Substitutes or Complements?*, 37 WORLD DEV. 1589, 1589 (2009) (investigating impact of bilateral aid and total aid on migration); Hein De Haas, *Migration and Development: A Theoretical Perspective*, 44 INT'L MIGRATION REV. 227, 228 (2010) (critiquing views of the relationship between migration and development).

²³¹ See Crawley & Blitz, *supra* note 228, at 2265 (“[H]uman rights abuse and concerns about the safety and security of family members were the primary drivers of migration . . .”).

ment lay the foundation for considerable political development and security improvements.

Clemens and Postel are careful not to say that development-based approaches to reducing migration are bound to fail. Studies by other economists have found that development aid *can* reduce migration.²³² The overall empirical picture is mixed, though some studies suggest that it matters a great deal *how* development aid is directed and administered. Part III.E will address these variables more fully, but my point for now is that the effectiveness of development aid to reduce migration is uncertain, and that aid may even be counterproductive for this purpose. Under these conditions, proponents of development-based responses to migration are on the defensive from the start, and the turn toward border control is hard to resist.

A second reason for development-based responses to migration to shift focus to enforcement is that outsourced border control offers tempting short-term advantages to destination country governments. They can avoid legal constraints and sidestep many rights-based obligations owed to migrants.²³³ For example, the EU-Turkey agreement gives several billion Euros to Turkey. The Turkish government decides whether migrants meet the refugee definition to qualify for asylum, even with serious doubts about its ability or willingness to treat forced migrants fairly and to assess their asylum claims seriously.²³⁴

²³² See Jonas Gamso & Farhod Yuldashev, *Targeted Foreign Aid and International Migration: Is Development-Promotion an Effective Immigration Policy?*, 62 INT'L STUD. Q. 809, 809 (2018); Mauro Lanati & Rainer Thiele, *The Impact of Foreign Aid on Migration Revisited*, 111 WORLD DEV. 59, 59–60 (2018).

²³³ Cf. Gerda Heck & Sabine Hess, *Tracing the Effects of the EU-Turkey Deal*, 3 MOVEMENTS 35, 38–40 (2017) (treating the EU-Turkey Agreement as externalization of EU border policies); Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 235 (2015) (describing how “wealthier countries have embraced the politics of *non-entrée*, comprising efforts to keep refugees away from their territories but without formally resiling from treaty obligations”).

²³⁴ See, e.g., EUROPE'S GATEKEEPER: UNLAWFUL DETENTION AND DEPORTATION OF REFUGEES FROM TURKEY, AMNESTY INT'L 3–12 (2015), <https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf> [<https://perma.cc/M5V8-KURD>] (detailing reports of unlawful detention and deportation of refugees and asylum seekers in Turkey). Many observers doubt that Turkey is a “safe third country” where forced migrants should be expected to seek protection. See Mariana Gkliati, *The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees*, 3 MOVEMENTS 213, 214–19 (2017). For further criticism of the EU-Turkey Agreement, see A. Zoomers, H.J. van Noorloos & Ilse van Liempt, *Will Tailor-Made Migration Deals Help to Solve the European Migration Crisis?*, in THE MIGRATION CRISIS?, *supra* note 216, at 105.

Similar questions arise with the July 2019 United States-Guatemala agreement, which seems to shunt all asylum seekers on the U.S. southern border to Guatemala. Other U.S. government measures try to require asylum seekers to remain in Mexico rather than in the United States while the U.S. government decides their asylum claims. One purpose and effect of many of these arrangements, even if they include economic development aid, is to restrict movement and reinforce the border.²³⁵ From this perspective, U.S. efforts to foster job creation in Mexico and the EU-Jordan Compact are nothing more than regional containment measures to keep migrants away from the Global North.²³⁶ Likewise, the 2014 EU-Horn of Africa Migration Route Initiative, also known as the Khartoum Process, focuses on “better managing” migration.²³⁷

Outsourced border control also can strengthen authoritarian governments in countries receiving aid, which are often very ready to reinforce their security and police forces with these funds. For example, the EU-Turkey agreement strengthens authoritarian governance by President Tayyip Erdogan, in part by elevating his international role as a partner in a common border control task.²³⁸ Migration control cooperation with

²³⁵ See ALEINIKOFF & ZAMORE, *supra* note 109, at 1-8 to 1-9 (explaining how it serves state interests to respond to forced migration in humanitarian, not rights-based modes).

²³⁶ See, e.g., Daniel Trilling, *Should We Build a Wall Around North Wales?*, 39 LONDON REV. BOOKS 15, 15–18 (2017) (“[T]he truth is that the outcome suits Europe by deterring would-be migrants.”); Christopher Bertram, *Reforming Refuge*, NEW HUMANIST (Aug. 29, 2017), <https://newhumanist.org.uk/articles/5224/reforming-refuge> [<https://perma.cc/DEY2-AK7V>] (noting that giving forced migrants the opportunity for economic participation has the potential to improve their lives, but it could also lead to their refoulement); Ian Birrell, *Refuge: Transforming a Broken Refugee System Review—Flawed and Frustrating*, GUARDIAN (July 30, 2017), <https://www.theguardian.com/society/2017/jul/30/refuge-transforming-a-broken-refugee-system-alexander-betts-paul-collier-review> [<https://perma.cc/R8H4-YNEC>] (criticizing the practices that fend off refugees by keeping them in “haven countries” near war zones); Behzad Yaghmaian, *How Not to Fix the Refugee Crisis—A Response to ‘Refuge,’* REFUGEES DEEPLY (Apr. 20, 2017), <https://www.newsdeeply.com/refugees/community/2017/04/20/how-not-to-fix-the-refugee-crisis-a-response-to-refuge> [<https://perma.cc/TWN2-42GM>] (explaining how turning developing countries into refugee safe havens “relieves Western states of the responsibility of receiving, protecting and integrating refugees and others in need of protection”).

²³⁷ See Lutz Oette & Mohamed Abdelsalam Babiker, *Migration Control à la Khartoum: EU External Engagement and Human Rights Protection in the Horn of Africa*, 36 REFUGEE SURV. Q. 64, 65, 74 (2017) (citing criticism that in the Khartoum Process “the supposedly humanitarian concern to combat human trafficking and smuggling has been used to conceal the underlying purpose of (external) migration control”).

²³⁸ See, e.g., Narin Idriz, *The EU-Turkey Statement or the ‘Refugee Deal’: The Extra-Legal Deal of Extraordinary Times?*, in THE MIGRATION CRISIS?, *supra* note

repressive regimes “may even incentivise a partner State to violate the rights of refugees and migrants in order to demonstrate its capacity to control migration,” as one commentary put it.²³⁹

These factors—the mixed effects of development aid on migration, the temptation to outsource migration control, and governments in countries of transit and origin that are willing and ready to accept funds from destination countries—may combine in ways that keep development aid programs from addressing the root causes of emigration. Worse yet, the focus on migration control may increase the political repression and human rights violations that are a leading cause of migration in the first place.²⁴⁰

These problems are exacerbated by the opaque decision making that shapes arrangements between destination countries and countries of transit and origin. Talks among representatives of governments and private firms may stay closed. The EU-Jordan Compact emerged from a limited circle of negotiators that did not include international organizations and agencies, NGOs, or any representatives of the migrants themselves.²⁴¹ The results may include labor exploitation, retrench-

216, at 61, 62 (explaining that the EU-Turkey deal was controversial in part because it was a collaboration with an increasingly authoritarian regime). *But cf. Refugees and Terror*, ECONOMIST (Mar. 26, 2016), <https://www.economist.com/europe/2016/03/26/refugees-and-terror> [<https://perma.cc/Z22K-26SB>] (“Optimists argue that the strong conditions attached to the promise of visa liberalisation will . . . help stem [Turkey’s] descent into authoritarianism.”); Patrick Kingsley, *By Stifling Migration, Sudan’s Feared Secret Police Aid Europe*, N.Y. TIMES (Apr. 22, 2018), <https://www.nytimes.com/2018/04/22/world/africa/migration-european-union-sudan.html> [<https://perma.cc/964X-FPYP>] (“The Europeans want closed borders and the Sudanese want to end years of isolation from the West.”).

²³⁹ See Oette & Babiker, *supra* note 237, at 80. On support for authoritarian regimes in Eritrea and Sudan, see Kingsley, *supra* note 116.

²⁴⁰ See Zoomers, van Noorloos & van Liempt, *supra* note 234, at 110–11; Crawley & Blitz, *supra* note 228, at 2263; Oette & Babiker, *supra* note 237, at 73; see also Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶ 73, U.N. Doc. A/68/283 (2013) (warning that regional consultation “can lead to a dilution of normative standards and a lack of accountability, monitoring and oversight, thus potentially negatively affecting the human rights of migrants”).

²⁴¹ See VERONIQUE BARBELET, JESSICA HAGEN-ZANKER & DINA MANSOUR-ILLE, THE JORDAN COMPACT: LESSONS LEARNT AND IMPLICATIONS FOR FUTURE REFUGEE COMPACTS 53–54 (2018), <https://www.odi.org/publications/11045-jordan-compact-lessons-learnt-and-implications-future-refugee-compacts> [<https://perma.cc/E2U4-JJTP>]. For similar criticism of EU initiatives in Africa, see Zoomers, van Noorloos & van Liempt, *supra* note 234, at 112; Oette & Babiker, *supra* note 237, at 72 (criticizing the Khartoum Process for “virtually no consultation or meaningful participation of concerned communities in the region”); Jennifer Rankin, *\$2bn EU-Africa ‘Anti-Migration’ Fund Too Opaque, Say Critics*, GUARDIAN (Oct. 31, 2017), <https://www.theguardian.com/global-development/2017/oct/31/2bn-eu-af>

ment of economic and political power in developing countries, and forms of neocolonialism.²⁴² As initiatives are implemented, private sector influence may become both more pronounced and more opaque.²⁴³

Even within destination countries that are liberal democracies, several factors undermine transparency. One is strong tendency to treat migration-related matters as outside the normal constraints on government decision making.²⁴⁴ The plenary power doctrine has this effect in the United States, by limiting judicial review for constitutional defects.²⁴⁵ As responses to migration become less a matter of domestic legislation, then a general body of immigration law may matter less and executive branch decisions may matter more, eroding transparency and accountability.²⁴⁶ The private sector will also expand its practical influence.

E. Lessons, Goals, and the Role of Law

What I have written so far in this Article could lead in two very different directions. Taken together, Parts I and II critiqued the combination of a civil rights-based immigration law and a narrow, sovereignty-based refugee law. Part III suggests so far that though economic development may seem promising as a major element in responses to migration, many arrangements are seriously flawed. Responses to migration in trans-

rica-anti-migration-fund-too-opaque-say-critics [<https://perma.cc/H4TV-8DZS>]; Jonathan Slagter, *An "Informal" Turn in the European Union's Migrant Returns Policy Towards Sub-Saharan Africa*, MIGRATION POLY INST. (Jan. 10, 2019), <https://www.migrationpolicy.org/article/eu-migrant-returns-policy-towards-sub-saharan-africa> [<https://perma.cc/U6D2-3PWA>] (noting that the informal nature of return arrangements leaves unclear what has been agreed).

²⁴² See ALEINIKOFF & ZAMORE, *supra* note 109, at 1–10; Chimni, *supra* note 145, at 361.

²⁴³ See Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 303–04 (2016).

²⁴⁴ See Landau, Kihato & Postel, *supra* note 229 (observing that the EU Trust Fund for Africa is an emergency fund almost entirely outside European Parliament oversight).

²⁴⁵ See generally Martin, *Plenary Power*, *supra* note 27 (providing an overview of the plenary power doctrine's evolution and content); Motomura, *supra* note 27 (same).

²⁴⁶ Traders, investors, and some employees are admitted on exceptionally favorable terms as E-1 and E-2 nonimmigrants if their country has a treaty with the United States. See INA § 101(a)(15), 8 U.S.C. § 1101(a)(15)(E) (2012). Citizens of Chile and Singapore have favorable temporary admission terms under trade agreements. See INA § 214(g)(8)(A), 8 U.S.C. § 1184(g)(8)(A) (2012); U.S.-Chile Free Trade Agreement, U.S.-Chile, ch. 14, § 3, June 6, 2003; U.S.-Singapore Free Trade Agreement, U.S.-Sing. ch. 11, § 3, May 6, 2003.

national terms may even amount to a story of the ultimate and inevitable failure of national borders.

Conceding that some readers may settle on this interpretation, I believe it is essential to avoid doing so. Only time will tell if responses to migration that take transnational contexts seriously will be effective and consistent with coherent justice principles. The complete or partial failures that I have cited reflect misguided choices that could have been made differently. A responsible path into the future requires understanding the many hard choices ahead. Resetting migration law will not be easy, but without this roadmap, the task will slide into impossibility.

A promising start is resisting the tendency for short-term priorities to eclipse comprehensive and far-sighted engagement. The risks are real that efforts to address migration transnationally can shift power to unsavory actors in countries of origin and transit countries, side-step the rights of migrants, erect counterproductive barriers to migration, and undermine fair treatment of migrants. But these efforts yield lessons that can be taken to heart. Effective political leadership must emphasize long-term goals and understand that demands for quick results will undermine sustainable responses. The key is being both aspirational and pragmatic in respecting the shared interests of all affected people and governments.

First, economic development aid is not all the same, and development-based responses to migration are not a simple matter of throwing money at sending countries. One study found that the effects on migration vary between development aid for urban and rural areas.²⁴⁷ Urban populations have more contact with people and cultures outside the national border. Urbanites are more likely to have helpful networks, skills, and information, and development aid in this setting can enhance their emigration options.²⁴⁸ Development aid to urban areas may also incentivize rural populations to move to cities. As new urban dwellers, they may become more likely to emigrate away from the country than they if they had remained rural. But the same study found that although the effects of urban development aid on international migration are hard to assess, the effects of rural aid are more clear in reducing international migration.²⁴⁹ Perhaps because people in rural areas have less

²⁴⁷ See Jonas Gamso & Farhod Yuldashev, *Does Rural Development Aid Reduce International Migration?*, 110 *WORLD DEV.* 268, 273 (2018).

²⁴⁸ See *id.* at 269.

²⁴⁹ See *id.* at 277.

interest and ability to emigrate, even modest economic development may mean that people stay put.²⁵⁰

Other research suggests that aid that fosters economic development is more likely to provide alternatives to emigration when the focus is not on increasing household wealth, but instead on improving health care, schools, air quality, and more generally on improving institutions in the sending country.²⁵¹ Programs to foster youth employment may be more effective to reduce emigration.²⁵² We do not fully understand nor can we confidently predict the effects of development aid on migration. Those effects may be indirect, mediated by urban/rural population patterns, morbidity and mortality, fertility rates, and many other dynamics. It is essential to know more, in order to make the use of development aid in responses to migration far better informed and intentional than it is today. And though the best paths forward are uncertain, some approaches seem perversely counterproductive and misguided, such as the Trump Administration's severe reduction of development aid as part of its response to increased migration from Central America to the United States.

Second, it is essential to investigate how legal migration pathways can relieve the relentless pressure for irregular migration. A major reason for large-scale migration outside the law is the absence of legal channels.²⁵³ If thoughtfully developed, modest lawful migration can counter the perception of "crisis." Lawful migration can also benefit the destination country by providing needed workers, students, and trainees. This can be done with sensitivity to the regional and local needs in destination countries, to offset population loss and aging.²⁵⁴ Regulated temporary migration may help countries of both origin and destination. As with development aid, lawful migration may prompt more short-term migration,²⁵⁵ but over time the

²⁵⁰ See Douglas S. Massey, *Economic Development and International Migration in Comparative Perspective*, 14 *POPULATION & DEV. REV.* 383, 388–90 (1988).

²⁵¹ See Lanati & Thiele, *supra* note 232, at 60 (discussing how aid varies in its effects on income and public goods, production infrastructure, and geographical areas).

²⁵² See Nicholas Kristof, *This Teenager Knows a Secret to Slowing Guatemalan Migration*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/opinion/sunday/migrants-guatemala.html> [<https://perma.cc/5ZY3-WUSG>]; cf. Clemens & Postel, *supra* note 222, at 680–83 (discussing the relationship between youth employment and emigration);

²⁵³ See MOTOMURA, *supra* note 19, at 43–46.

²⁵⁴ See Oette & Babiker, *supra* note 237, at 89.

²⁵⁵ Development-based responses to migration may divert funds from countries where economic distress keeps all but a few residents from leaving. But this discussion's purpose is to suggest responses to migration, not to address global

judicious use of legal migration can reduce migration by improving conditions in sending countries.²⁵⁶ Overall, however, we do not know enough about what works, when, and how, and we seem to lack the necessary political will to find out.

Third, migrants who use lawful pathways may be better able to send money home, providing development aid in the form of remittances.²⁵⁷ Remittances worldwide now triple the amount of official government development aid.²⁵⁸ These funds help educate children, build houses, start and grow businesses, and more. Remittances may further illuminate the relationship between development aid and migration, by suggesting ways of directing development aid even without the migration that is the precondition for remittances.²⁵⁹ They represent a form of fiscal politics in the migrant's county of origin, by allowing migrants to decide where to direct funds. The communities that benefit directly are likely to be the points of origin for many emigrants. The funds generally stay under the control of individuals, families, and other small-scale decision makers, not political leaders and bureaucrats in central or regional governments, who in theory may have more capacity to effect change, but who in practice may not do so for a variety of reasons.

A similar decentralized approach to development aid is inherent in incentives that destination country governments offer for migrants to return to countries of origin. For example, Germany offers cash and financial support for housing and education in a returnee's country of origin.²⁶⁰ Each returnee is a

poverty or human rights in general, where immigration is just one tool. See SONG, *supra* note 68, at 91.

²⁵⁶ See G.A. Res. 73/195, *supra* note 166, ¶ 18 ("Strengthen collaboration between humanitarian and development actors. . ."). The United Nations Global Compacts, on refugees and on migration generally, offer fora for engagement. For an overview, see BHABHA, *supra* note 117, at 111-13. See G.A. Res. 71/1, *supra* note 174.

²⁵⁷ See Zoomers, van Noorloos & van Liempt, *supra* note 234, at 112-15.

²⁵⁸ See G.A. Res. 73/195, *supra* note 166, ¶ 16 ("Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants."); Hooper & Newland, *supra* note 223, at 6. Total worldwide remittances from the United States in 2013 were an estimated \$50 billion to \$100 billion, at least equal the U.S. foreign aid budget. See Natalie Kitroeff, *Immigrants Pay Lower Fees to Send Money Home, Helping to Ease Poverty*, N.Y. TIMES (Apr. 27, 2013), <https://www.nytimes.com/2013/04/28/us/politics/immigrants-find-it-cheaper-to-send-money-home.html> [<https://perma.cc/LPP6-P897>].

²⁵⁹ See German Federal Chancellor Angela Merkel, Office of the German Federal Chancellor, Statement to the European Parliament in Strasbourg (Oct. 7, 2015).

²⁶⁰ See MIGRATION, INTEGRATION, ASYLUM, *supra* note 164, at 58-61, 72-74; Marion MacGregor, *Germany: Drop in Voluntary Returns and Deportations*, IN-

conduit for aid, returning money and often with new skills and savvy.²⁶¹ This, as with remittances, is a way of using development aid to foster not just collective economic prosperity, but also broader civic participation in decision making in the country of origin.²⁶²

Fourth, as Part III.D previewed, poverty alone may be a much less significant driver of emigration than poverty combined with personal insecurity or human rights violations, which typically reflect government oppression or dysfunction. This has been the problem with development aid that strengthens autocrats and in turn exacerbates the conditions that prompt even more emigration. Giving migrants real options to return to their countries of origin or to not migrate in the first place requires economic development, to be sure, and in the long run the alleviation of poverty may be the most basic way to influence migration patterns. But it is also essential that development aid fosters political development and security, which in turn allow migrants to have choices.²⁶³

Fifth, it is essential to explore the role of development aid not to reduce emigration, but instead to expand the capacity of transit countries to absorb migrants. For example, the EU-

FOMIGRANTS (Feb. 27, 2019), <https://www.infomigrants.net/en/post/15417/germany-drop-in-voluntary-returns-and-deportations> [<https://perma.cc/GS9M-KL35>]. On “reintegration” support, see Hooper & Newland, *supra* note 223, at 12.
²⁶¹ See G.A. Res. 73/195, *supra* note 166, ¶16 (“Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries.”). Even nonreturning migrants can foster development in countries of origin, offsetting any “brain drain.” See Michael A. Clemens, *What Do We Know About Skilled Migration and Development?*, MIGRATION POLY INST. (Sept. 2013), <https://www.migrationpolicy.org/pubs/SkilledMigration-Development.pdf> [<https://perma.cc/A94E-86H6>]; Kathleen Newland, *What We Know About Migration and Development*, MIGRATION POLY INST. (Sept. 2013), <https://www.migrationpolicy.org/research/what-we-know-about-migration-and-development> [<https://perma.cc/3E5B-ER2Y>].

²⁶² See FITZGERALD, *supra* note 31, at 55–69, 110–24 (observing that hometown associations can act as a corrective for local and regional governments in the sending country); SONG, *supra* note 68, at 90 (observing that remittances typically go to “the more privileged in the poor countries” that receive them).

²⁶³ On violence prevention reducing emigration, see Sonia Nazario, *How to Secure the Border: Spoiler Alert: A Wall Won't Do It*, Opinion, L.A. TIMES (Apr. 23, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-nazario-what-works-to-end-illegal-immigration-20170423-story.html> [<https://perma.cc/4DCX-GFUD>]. See also Crawley & Blitz, *supra* note 228, at 2270 (observing that the Cotonou Agreement “emphasises poverty reduction, support for national development strategies, the promotion of dialogue between state and non-state actors, and most relevant, enhancing democratic processes and governance in African states”); *id.* at 2271 (“The idea that development financing could prevent humanitarian crises which are political in nature reflects a broader and less instrumental approach to development cooperation which may, in turn, have implications for the propensity or otherwise of people to migrate from the region.”).

Jordan Compact rests on a sound premise—that responses to forced migration should go beyond humanitarian relief and rely on economic initiatives that are more sustainable.²⁶⁴ But the Compact has done very little to reduce barriers, such as inadequate training and transportation, that make it hard for Syrian workers, especially women, to take available jobs. The number of work permits is unlikely to reach the plan's 200,000 target, and Jordan has insufficient factory capacity to produce goods in quantities that would take full advantage of the EU's trade concessions.²⁶⁵ More fundamentally, the EU-Jordan Compact and a similar arrangement in Ethiopia have, at least in the short term, failed to offer migrants work that will let them "build lives with dignity where they are," as Jennifer Gordon has written.²⁶⁶

In addressing all five of these issues, countries of origin and countries of transit may offer different sorts of opportunities for development aid to matter.²⁶⁷ As just mentioned, development aid may be more effective in creating options in transit countries than in countries of origin, depending on the circumstances. Moreover, the bargaining context for agreements between destination and transit countries differs from the context

²⁶⁴ See BARBELET, HAGEN-ZANKER MANSOUR-ILLE, *supra* note 241, at 6 (discussing lessons from the EU-Jordan Compact); Heliodoro Temprano Arroyo, *Encouraging the Employment of Refugees Through Trade Preferences*, MIGRATION POLY CTR., Dec. 2017, at 4–5, https://cadmus.eui.eu/bitstream/handle/1814/49584/PB_2017_35_MPC.pdf?sequence=1 [<https://perma.cc/G8YA-DU96>] (same); cf. *Interview with Filippo Grandi*, *supra* note 166, at 24 (on the New York Declaration: "The idea is not to open more refugee camps, but rather to allow refugees to be included in the local economy and public services").

²⁶⁵ Jordan issued 104,000 work permits, including renewals, by mid-2018. UNHCR estimated that 50,000 workers had permits, omitting many Syrians in the informal economy, but greatly exceeding the 3,000 permits that had been issued eighteen months earlier. As of late 2017, only eight factories employing 145 Syrians were authorized to export under the favorable trade scheme. See BARBELET, HAGEN-ZANKER & MANSOUR-ILLE, *supra* note 241; IZZA LEGHTAS, *OUT OF REACH: LEGAL WORK STILL INACCESSIBLE TO REFUGEES IN JORDAN* 15 (2018); Vicky Kelberer & Denis Sullivan, *Challenges and Successes of Jordan's Work Permit Program for Syrian Refugees After One Year*, ATL. COUNCIL, (Mar. 27, 2017), <https://www.atlanticcouncil.org/blogs/syriasource/challenges-and-successes-of-jordan-s-work-permit-program-for-syrian-refugees-after-one-year/> [<https://perma.cc/V23G-U6ZR>]; Temprano, *supra* note 264, at 1; see also Temprano, *supra* note 264, at 3 (comparing better results in the late 1990s under a superficially similar program, the Qualifying Industrial Zones Initiative).

²⁶⁶ See Jennifer Gordon, *Investing in Low-Wage Jobs Is the Wrong Way to Reduce Migration*, FOREIGN POLY (Jan. 28, 2019), <https://foreignpolicy.com/2019/01/28/investing-in-low-wage-jobs-is-the-wrong-way-to-reduce-migration/> [<https://perma.cc/L898-PETA>].

²⁶⁷ See Clemens & Postel, *supra* note 222, at 685–87 (identifying as a separate inquiry the use of development aid to shape migration, not to deter it).

for agreements between destination countries and countries of origin.

Turkey and Jordan, for example, negotiate with the European Union from positions of new advantage that derive from their geographical location. Turkey, on the EU's eastern boundary, has gained substantial financial benefits and some easing of restrictions on its citizens who travel to the EU.²⁶⁸ This new leverage contrasts with long-stalled negotiations for EU membership. Countries in the Horn of Africa have struck similar agreements with the EU. Jordan, as the first host country for many Syrian migrants, has gained financially and won support for its domestic industry through direct investment and trade concessions.²⁶⁹ Mexico, if it becomes as a quasi-border for the southern United States, might gain development aid and enhance its citizens' access to the United States.

With destination countries needing help, transit countries can apply new bargaining leverage. They may use it in ways that may be hard to control or countenance. As I mentioned in Part III.D, one consequence has been reinforcing autocratic power in transit countries, resulting in outsourced, extralegal border control but not more options for migrants. And many destination countries are all too ready to welcome or even seek these results. Destination and transit countries may gain, but migrants suffer.

But this dire scenario raises a crucial question about the bargaining. Destinations like the European Union and the United States could, as better-resourced partners, refuse to acquiesce in what may seem like the shared short-term goal of border control. Instead, they should demand progress in creating meaningful options for migrants, not just with development aid, but also by conditioning that aid on curbing human rights violations.

In sum, key lessons emerge from numerous failed efforts to respond transnationally to migration. Development aid influences migration in ways that must be better understood. Legal migration pathways can be deployed judiciously to manage migration. It matters how development aid is funneled and spent. Economic development matters, but the drivers of migration go

²⁶⁸ See European Council Press Release 870/15, Meeting of Heads of State or Government with Turkey, EU-Turkey Statement (Nov. 29, 2015).

²⁶⁹ See generally BARBELET, HAGEN-ZANKER & MANSOUR-ILLE, *supra* note 241, at 3–6 (analyzing the achievements of the EU-Jordan Compact and remaining challenges).

beyond poverty to include security and human rights. And more generally, development as part of responses to migration operate differently in transit countries, as opposed to countries of origin.

How can we make sure that decision making takes these lessons seriously? What is the role for law in these domains, where it has done little in the past? Of course, law is not always the answer, especially not if law implies a certain rigidity or universality of framework and a commitment to apply a standard or approach in all future cases. But law can be understood more capaciously, as a coherent set of articulated values and principles that are understood to apply, if differently, to like situations in ways that can give rise to reasonable claims to justice. Toward this end, an essential initial focus is process—to ask how law can bring transparency and accountability to decision making that addresses migration through transnational initiatives. One goal is to increase public scrutiny of arrangements that affect migration, especially outside the immigration law and refugee law boxes where lawyers have traditionally operated. Law has played this process and guidance role only minimally; it could do much more.

A big part of transparency is knowing what to look for, and identifying key factors is a principal goal of Part III. Just as important to transparency is participation in decision making. Many of the efforts by destination countries to work with countries of origin or transit have suffered from failure to allow representation of directly affected migrants and refugees. A related aspect of transparency is disclosure, from initial negotiations through implementation of an agreement. Also important are requirements for advance assessment of the impact of government-supported initiatives on migration and migrants.

These suggestions may seem more aspirational than pragmatic for several reasons. One is that they focus on process more than the substance of transnational responses to migration. More fundamentally, transparency must be in balance with keeping some aspects of negotiations out of public view, both during and after, so that they can reach consensus. Participation is also a delicate matter, with tradeoffs between full participation and a realistic likelihood of reaching agreement. The best response to calls for broader participation may be to emphasize listening broadly over allowing universal participation. The best response to calls for transparency may be to emphasize decision-maker accountability over constant illumination. But even recognizing these limits, the current sys-

tem—with its vast discretion in enforcement and its inattention to the causes of migration—poses serious transparency and accountability problems. The best ways to increase transparency and accountability will vary by setting, but we can do much better than we are doing now.

For example, the EU-Turkey Agreement offered a significant, but ultimately missed, opportunity for accountability. Three asylum seekers sought to challenge the legality of the constraints that the Agreement imposed on their ability to apply for asylum.²⁷⁰ In 2017, the General Court of the EU Court of Justice dismissed these challenges for lack of jurisdiction. According to the General Court, the case involved merely “a political arrangement” between the Turkish government and EU member states but not the European Union itself, so the Agreement was “not intended to produce legally binding effects.”²⁷¹ But this was precisely a moment when institutional scrutiny of a landmark response to migration—after it had been negotiated—would have meant both disclosure and potential modification.

Will the role of law be confined to transparency, accountability, and related process concerns? Or will substantive standards emerge, and if so, what standards? The core substantive concern is the treatment of migrants. They must be able to live their lives in physical security and with their human rights guaranteed. This may be more possible in transit countries than in countries of origin, but nowhere should it be taken for granted. Basic indices of well-being in the transit countries are important guideposts.²⁷² Human rights instruments like the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights can lay a conceptual foundation for substantive standards that can focus on the rights and welfare of migrants. In transit countries, also essential is access to a fair and effective process to seek asylum and other forms of protection.²⁷³

Another question about the substantive standards for evaluating transnational responses to migration is how to define unequal treatment of countries of origin and transit. Migration responses can help some countries but hurt others. This is clear in the European Union, where internal freedom of move-

²⁷⁰ See Case T-192/16, *NF v. European Council*, ECLI:EU:T:2017:128.

²⁷¹ See *id.* at ¶¶ 27, 29.

²⁷² International Covenant of Economic, Social, and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

²⁷³ This was the core of the three challenges to the EU-Turkey Agreement.

ment has led to limited mobility *into* the EU. Likewise, any U.S.-Mexico collaboration may harden Mexico's southern border. Countries in Central America may be disadvantaged economically, and their citizens may find it harder to enter the U.S.-Mexico zone. If the United States treats Mexico better than it treats Central American countries, how can we say if this is unfair?

Important here is a crucial lesson in the United States from the repeal of the National Origins Act in 1965—that equality in treatment requires more than outward uniformity. Imposing formal equality and ignoring historical, economic, and geographical ties between Mexico and the United States has led to the arrival and exploitation of millions of undocumented migrants from Mexico.²⁷⁴ Migration to any country typically reflects this larger context, and so must any comprehensive responses.

Time also matters. U.S.-Mexico cooperation to respond to Central American migration can hurt Central American countries in the short term, but it enhances equality between Mexico and the United States, just as the European Union enhanced equality between Ireland and Germany by allowing free movement between them. Over time, Central American countries can join a Mexico-U.S. agreement, just as the EU has expanded.

From this perspective, U.S.-Mexico cooperation could signal a reset of the U.S. relationship with Latin America, benefiting countries initially left out of a U.S.-Mexico agreement. More generally, it would move toward the essential goal of abandoning pure national self-interest as the touchstone of relations with other countries,²⁷⁵ and instead toward recognizing the interests of countries of emigration and working with mutual respect to pursue shared interests.²⁷⁶ On this path forward, historical, economic, and geographic connections between countries should matter. This does not require consensus support for a comprehensive scheme for global economic

²⁷⁴ See subpart I.B.

²⁷⁵ Mexico may fear that temporary worker programs will reprise the Bracero program's labor abuses and subordination of Mexico as a source of disposable labor.

²⁷⁶ The interests of countries of origin include remittances and other return transfer of wealth; loss and reacquisition of human capital; a release valve for internal political and economic pressure; political influence in both source and destination countries; and dignitary interests associated with the treatment of emigrants. On Mexico's efforts to manage emigration, see FITZGERALD, *supra* note 31, at 65–69.

justice. Nor does it require faith that a full accounting for all past wrongs is possible. But it does require a serious comprehensive search for solutions.

This requires a commitment to deal more forthrightly with migration in the future—by seeing why people move and responding in that register, and not allowing attention to development and security to distract from aspects of race, religion, and historical power imbalances that continue to influence today's migration patterns.²⁷⁷ The aspirational but pragmatically realistic goal is migration patterns that include the temporary, the circular, and the permanent, with ultimate outcomes shaped by development initiatives in sending communities.

Only time can tell how long conflict and unsettled conditions will persist in Syria, Central America, or elsewhere. A migrant's story may become local integration, onward movement, or return to stable conditions in her country of origin.²⁷⁸ It is hard to say in advance. But given the human, political, and fiscal costs of exclusive reliance on humanitarian relief for multiple generations of forced migrants,²⁷⁹ responses that take transnational context seriously are much more promising in the long term. This approach is slow, but steady. Even from the start, it can improve the lives of millions much more than unilateral draconian enforcement or large-scale immigration outside the law.

Broadening the inquiry in these ways highlights the foundational role of transnational context and the need for the new migration law to go beyond the traditional limits that inhere in the words "migration" and "law." This breadth also suggests another inquiry. Just as it is essential to consider how migra-

²⁷⁷ On how far in the past to reach, see MILLER, *supra* note 92, at 77, 113–14; SONG, *supra* note 68, at 81–84, 115; Achiume, *Migration as Decolonization*, *supra* note 81; Linda Bosniak, *Wrongs, Rights and Regularization*, 3 MORAL PHIL. & POL. 187, 210 (2016); Rogers M. Smith, *Living in a Promiseland? Mexican Immigration and American Obligations*, 9 PERSP. ON POL. 545, 545 (2011); cf. Suketu Mehta, *Why Should Immigrants 'Respect Our Borders'? The West Never Respected Theirs*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/opinion/immigration-reparations.html> [<https://perma.cc/QQM3-PB3E>] ("Immigration quotas should be based on how much the host country has ruined other countries.").

²⁷⁸ See BETTS & COLLIER, *supra* note 217, at 179–81; KATY LONG & SARAH ROSEN-GAERTNER, MIGRATION POLY INST., PROTECTION THROUGH MOBILITY: OPENING LABOR AND STUDY MIGRATION CHANNELS TO REFUGEES 8 (2016), <https://www.migrationpolicy.org/research/protection-through-mobility-opening-labor-and-study-migration-channels-refugees> [<https://perma.cc/YZ9V-SU2H>].

²⁷⁹ As of 2017, migrants spent an average of ten years in refugee camps and twenty-five years in exile fleeing conflict zones. See BHABHA, *supra* note 117, at 64.

tion is closely tied to international trade and economic development in countries of origin, we also need to examine the effects of migration in destination countries. This is the task for Part IV.

IV

MIGRATION, ECONOMIC JUSTICE, AND CIVIL RIGHTS

Skeptics of immigration often blame migrants for economic harms, but this perspective often reflects deeper anxieties, resentments, and prejudices prompted by changes in culture as defined by race, ethnicity, religion, or language, among other factors. Just as Part III examined migration in transnational context, this Part IV puts migration in a broader domestic context. I explain why it is imperative to take seriously the argument that immigration has some adverse economic effects on U.S. citizens. This goal is not only worthy in itself, but also lays a foundation for two essential tasks. One is to reject racially and religiously biased responses to immigration and immigrants. The other is to fashion a better admission scheme for temporary and permanent migrants. Part IV then comes full circle to explain how the civil rights framework discussed in Part I is essential for appreciating the urgency of addressing the perceived and real domestic economic effects of immigration.

A. Immigration and U.S. Workers

I start with the consensus among economists that migration boosts the U.S. economy overall.²⁸⁰ New workers produce more, and new consumers buy more. But these general statements do not tell the public what it usually wants to know. How do different types of migrants affect the economy? Who are the winners and losers? A core concern is that migrants may take jobs away from some U.S. workers or adversely affect wages and working conditions.

With the debate so framed, legions of economists have disputed the economic effects of migration. My goal here is not to mediate those disputes. Each study's persuasiveness depends heavily on assumptions that experts themselves contest. Instead, I assume a widespread belief in the United States that some immigration causes economic harm to some citizens and

²⁸⁰ See THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 1–12 (Francine D. Blau & Christopher Mackie eds., 2017); LAW AND ECONOMICS OF IMMIGRATION (Howard F. Chang ed., 2015) (collecting influential articles).

other members of the U.S. society. Then, even assuming that it is unfair to blame immigration for economic harms, why is it important to take this attitude seriously?

One answer to this question goes back to the idea of ethical borders, as subpart I.D explained. Though they separate citizens from noncitizens, borders must not discriminate except by citizenship itself, and they must treat everyone on the inside equally. Borders must promote and must not undermine the civic solidarity that is essential for a national community. But that solidarity may be threatened if the belief wins adherents that immigration harms insiders economically.²⁸¹ If economic anxieties undermine civic solidarity, a likely consequence is political backlash against immigration and immigrants.

A pioneering study in 1990 by economist David Card examined the arrival of about 45,000 Cubans in Miami in 1980.²⁸² They were some of the 125,000 people who sailed for the United States from the port of Mariel during a temporary loosening of Cuban exit controls. Card assessed how these migrants affected workers in the United States by comparing unemployment in Miami with four cities with similar populations—Tampa, Atlanta, Houston, and Los Angeles.²⁸³ He detected no adverse effects on employment or wages for U.S. workers (including African Americans), who did better in Miami than in the four comparison cities.²⁸⁴ Card showed that these Cuban migrants found jobs, but they also generated new de-

²⁸¹ See MILLER, *supra* note 92, at 10 (“[T]here is an issue that has to be faced squarely when significant numbers of immigrants enter an established welfare state, especially when cultural differences create a degree of mistrust between native and newcomer.”); SONG, *supra* note 68, at 167 (“[T]here is a genuine moral dilemma if immigration of low-skilled workers puts downward pressure on the wages of domestic workers.”); David Abraham, *Doing Justice on Two Fronts: The Liberal Dilemma in Immigration*, 33 ETHNIC & RACIAL STUD. 968, 976 (2010) (“[O]pen immigration could constitute a serious threat to trust and the democratic state.”).

²⁸² See David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245, 248–50 (1990).

²⁸³ See *id.* at 245, 249; see also David Card, *Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration*, 19 J. LAB. ECON. 22, 57 (2001) [hereinafter Card, *Immigrant Inflows*] (suggesting that immigrant inflows may have slightly reduced employment rates of low-skilled workers in certain cities, such as Miami and Los Angeles); Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.* 28 (Nat’l Bureau of Econ. Research, Working Paper No. 11672, 2005) (finding that immigration has a positive effect on wages of native U.S. workers); cf. Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. ECON. PERSP. 23, 42 (1995) (finding little support for the belief that immigration has an adverse effect on the wages and employment opportunities of the native-born).

²⁸⁴ See Card, *supra* note 282, at 250.

mand for goods and services, so businesses grew. More people did not mean more unemployment.²⁸⁵ An important reason is that many migrants and U.S. workers do not do the same work. Economists call them complements, not substitutes. Without migrants to do work that U.S. workers do not, the cost of doing business in the United States would rise, especially because they would need to raise wages. Rather than do so, companies would cut jobs done by U.S. workers, forego expansion plans, leave the country, or go out of business.

Does it matter if migrants are in the United States lawfully or not? Many economists have concluded that unauthorized workers—earning the lowest wages or working under the harshest conditions—are the noncitizens most likely to do work that U.S. workers do not.²⁸⁶ In other words, unauthorized workers are especially likely to be complements rather than substitutes for U.S. workers. Card and others also found that the workers most vulnerable to direct competition from newcomers—lawful or unauthorized—are workers who came to the United States immediately before them, but this group is seldom the focus of public concern about effects on U.S. workers.²⁸⁷

Apart from these findings, however, the key political fact is the belief that some U.S. workers are more vulnerable than others. Studies by another leading economist, George Borjas, concluded that recent immigration has hurt low-wage U.S. workers. Borjas criticized Card's Miami study for overlooking links among labor markets, especially that the arrival of low-skilled migrants in Miami drove U.S. workers to other locales. There, U.S. workers did worse economically than if they had stayed in Miami without migrant competition. The harm was real, but it occurred in other cities; labor markets are not separate. Other studies by Borjas found that migrants during the 1980s and 1990s increased the wage gap between U.S. high school dropouts and college graduates.²⁸⁸ These findings do

²⁸⁵ See, e.g., Michael A. Clemens, *Economics and Emigration: Trillion Dollar Bills on the Sidewalk?*, 25 J. ECON. PERSP. 83, 84 (2011); cf. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA, 1848–1865*, at 18 (1988) (explaining how the introduction of labor-saving devices to manufacturing in mid-nineteenth century United States did not displace workers, but instead allowed more workers to be engaged in manufacturing).

²⁸⁶ See GEORGE J. BORJAS, *WE WANTED WORKERS: UNRAVELING THE IMMIGRATION NARRATIVE* 126 (2016); Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work In Riskier Jobs?*, 46 DEMOGRAPHY 535, 543 (2009).

²⁸⁷ See Card, *Immigrant Inflows*, *supra* note 283, at 22, 30–31.

²⁸⁸ See George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1674 (1994); George J. Borjas, *The Labor Demand Curve is Downward Sloping*:

not necessarily rebut the view that many migrants do work that complements and thus helps many U.S. workers. But what matters politically is not who is right—Card or Borjas—or whose study is more pertinent today. What matters politically is Borjas' argument that *some* U.S. workers are adversely affected.²⁸⁹ So who are these workers, and how are they hurt?

It is often said that migrants do work “that Americans won't do.” To the extent that this is true, one cause may be that some types of work have come over time to be seen as demeaning. That said, a logical rebuttal is that U.S. workers would eventually return to doing the work for better wages and working conditions. True enough, but businesses operate in a competitive environment—often a global one—that limits what they can offer workers. Higher labor costs may prompt businesses to relocate or go out of business, eliminating jobs from the U.S. economy. For tasks that are harder to relocate, employers might pay more, but they will also try other ways to rely less on U.S. workers and more on low-cost labor elsewhere. It is hard to think of work that is immune from this pattern. Even the cost of tasks done on-site can be reduced through automation,²⁹⁰ or by using components made outside the United States.²⁹¹

The only effective curbs on these employer decisions would be reducing immigration, *combined with* laws requiring that operations stay in the United States. Employers would then need to improve wages or working conditions to find workers.

Reexamining the Impact of Immigration on the Labor Market, 118 Q.J. ECON. 1335, 1335 (2003); George Borjas, *The Immigration Debate We Need*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/opinion/the-immigration-debate-we-need.html> [<https://perma.cc/2DZA-PVLS>]; see also Philip Martin, *Economic Aspects of Migration*, in *MIGRATION THEORY: TALKING ACROSS DISCIPLINES* 90 (Caroline B. Brettell & James F. Hollifield eds., 3d ed. 2015) (reviewing the economic effects of migration); David Card, *Comment: The Elusive Search for Economic Impact of Immigration*, 10 J. EUR. ECON. ASS'N 211, 211–12 (2012) (distinguishing Borjas' assumptions from those of authors who found a smaller impact on native workers); George J. Borjas, *The Wage Impact of the Marielitos: A Reappraisal* (Nat'l Bureau of Econ. Research, Working Paper No. 21588, 2015) (revisiting the Mariel supply shock analysis).

²⁸⁹ See ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION, *supra* note 280, at 266.

²⁹⁰ See Miriam Jordan, *As Immigrant Farmworkers Become More Scarce, Robots Replace Humans*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/farmworkers-immigrant-labor-robots.html> [<https://perma.cc/LJU8-LYL8>].

²⁹¹ See PETERS, *supra* note 201, at 30; Arlie Russell Hochschild, *Male Trouble*, N.Y. REV. BOOKS (Oct. 11, 2018), <https://www.nybooks.com/articles/2018/10/11/male-trouble/> [<https://perma.cc/2EZ4-698L>] (on “automatability” of occupations).

But employers are generally free to relocate operations. Constraining their choices would be politically improbable as a new basic restraint on market-based business practices that would raise prices throughout the U.S. economy. As long as employers can export work, reducing immigration will not be enough to give U.S. workers better wages and working conditions. Their problem is not immigration; it is a free market.

This broader perspective highlights how immigration is just one of many causes of unemployment and wage stagnation for U.S. workers, especially those with little education or training. Their prospects are bleaker than a generation ago for many reasons that include technology and automation, international trade, outsourcing, a static minimum wage, the decline of unions, the privatization of government, the growth of temporary, part-time, or gig-based work, and insufficient funding for public education. On top of these factors, the impact of immigration in a free market is unclear. Some workers may suffer most where an industry declines for other reasons *and* new migrants arrive.²⁹² But even this finding confirms that it is too simple to blame immigration alone.

B. Immigration and Public Treasuries

Immigration also has consequences for public finance that can generate skepticism or hostility to immigration and immigrants. This is true even though migrants in the United States—including unauthorized migrants—follow the same tax laws as citizens.²⁹³ They pay income taxes and sales taxes, as well as property taxes in their rent or as property owners. They make Social Security contributions. But questions remain that matter both morally and politically. Do noncitizens pay their way in taxes and other contributions to public revenues? Or do they pay less than the cost of the services and benefits that they get? The real or perceived answers to these questions influence immigration politics, regardless of whether the public services and benefits are robust or scant.

As with labor markets, questions about immigration and public finance do not lead to clear answers. A study's assump-

²⁹² See generally Eric D. Gould, *Explaining the Unexplained: Residual Wage Inequality, Manufacturing Decline, and Low-Skilled Immigration* (IZA Inst. of Labor & Econ., Discussion Paper No. 9107, 2015) (explaining how the inequality-increasing effect of the arrival of less-educated immigrants is concentrated in areas with a steeper manufacturing decline); see also JUSTIN GEST, *THE NEW MINORITY: WHITE WORKING CLASS POLITICS IN AN AGE OF IMMIGRATION AND INEQUALITY* 43 (2016).

²⁹³ See Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 7 (2006).

tions and the time period it examines will shape its findings.²⁹⁴ In their first years after arrival, many migrants earn less and tend to pay less in taxes, generally reflecting their training and experience levels. But it is very hard to predict public revenues and expenditures for future years. Moreover, migrants' children and grandchildren will vary even more widely in education, wages, and tax payments, and in their use of public services and benefits.²⁹⁵

Another complexity of immigration and public finance is that tax payments and expenditures are distributed unevenly among federal, state, and local treasuries. Federal income tax revenues and Social Security contributions do not flow proportionally to state and localities that have higher expenditures due to immigration. Fiscal impact also depends on where migrants live. In states with high levels of benefits and services, especially K-12 public education, migrants may receive more in the short term than they pay in taxes.²⁹⁶ In public debate, this imbalance can be powerfully influential if it is blamed for the dilution of government services that many citizens have come to expect.

As with immigration's effects on labor markets, the debate over immigration's impact on public treasures raises questions about the perceived and real effects of immigration. Just as automation and other factors may be more responsible than immigration for any adverse effects on U.S. workers, factors other than immigration may be the source of any adverse fiscal consequences. The real problems are policies that fail to funnel tax revenues fairly to the government entities that need them most. The result may be to cast blame on immigration that should be directed toward the taxation system's inadequate coordination among multiple jurisdictions that tax and spend,

²⁹⁴ Compare JEFFREY S. PASSEL & REBECCA L. CLARK, HOW MUCH DO IMMIGRANTS REALLY COST? A REAPPRAISAL OF HUDDLE'S "THE COST OF IMMIGRANTS" (1994), with Borjas, *The Economics of Immigration*, *supra* note 288. See generally *Of Bedsheets and Bison Grass Vodka*, *ECONOMIST* (Jan. 5, 2008), <https://www.economist.com/special-report/2008/01/05/of-bedsheets-and-bison-grass-vodka> [<https://perma.cc/ZLC4-C2K8>] (discussing various studies of the economic and fiscal effects of immigration); Roger Lowenstein, *The Immigration Equation*, *N.Y. TIMES MAG.* (July 9, 2006), <https://www.nytimes.com/2006/07/09/magazine/09IMM.html> [<https://perma.cc/WQA5-LZKE>] (same).

²⁹⁵ On empirical challenges, see *ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION*, *supra* note 280, at 202–10. For further discussion, see SONG, *supra* note 68, at 163–65.

²⁹⁶ See *ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION*, *supra* note 280, at 7–12.

or the basic gap between the public's expectations of services and benefits and the public's willingness to pay.

C. Deeper Anxieties Beyond Economics

Anxieties expressed in economic terms often run much deeper, rooted in the resistance to newcomers that is endemic in some part of all societies. It is inaccurate and naïve to attribute these anxieties to economics alone.²⁹⁷ To be sure, the economy matters. Skepticism of immigration and support for tough enforcement have risen during downturns. In 1994, at an ebb in California's economic fortunes, its voters passed Proposition 187—the state ballot measure to limit undocumented noncitizens' access to education and other public services.²⁹⁸ But this pattern is inconsistent. Vehement opposition to immigration coalesced in some quarters during the Obama years, despite the steady economic recovery from the 2008 recession. The same pattern continues even more intensely during the Trump presidency.

Immigration's more profound impact is not economic, but cultural. Immigration, like trade, can provoke backlash that politicians can exploit and amplify. Foreign people can be much more unsettling than foreign goods. Newcomers can engender cultural anxiety, a sense of loss of social standing, or a general feeling that a country is no longer one's own.²⁹⁹ These fears and anxieties—often but not always reflecting prejudices based on race, religion, or language—can emerge as skepticism or hostility to some immigration and immigrants.³⁰⁰ Many regions of the United Kingdom that voted solidly in 2016 to leave the European Union had benefited greatly from direct EU subsidies.³⁰¹ Polling and interviews showed that many voted

²⁹⁷ See HONIG, *supra* note 70, at 76–79 (explaining how qualities that make newcomers welcome also lead to compulsion that they assimilate or leave).

²⁹⁸ See MOTOMURA, *supra* note 19, at 70.

²⁹⁹ See Timothy Garton Ash, *Only Respect for the 'Left Behind' Can Turn the Populist Tide*, *GUARDIAN* (Sept. 28, 2017), <https://www.theguardian.com/commentisfree/2017/sep/28/far-right-rightwing-nationalism-populist> [<https://perma.cc/E83S-GQQF>].

³⁰⁰ See Katrin Bennhold, *One Legacy of Merkel?: Angry East German Men Fueling the Far Right*, *N.Y. TIMES* (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/world/europe/merkel-east-germany-nationalists-populism.html> [<https://perma.cc/UM79-UPE4>]; Jan-Werner Müller, *Behind the New German Right*, *N.Y. REV. DAILY*, (Apr. 14, 2016), <https://www.nybooks.com/daily/2016/04/14/behind-new-german-right-afd/> [<https://perma.cc/7HAV-46PQ>].

³⁰¹ *Cf.* Bauböck, *supra* note 200 (discussing how the European “refugee crisis” may be a long-term economic “blessing in disguise”).

against economic self-interest to resist what they saw as threats from immigration.³⁰²

With receptive ears among some citizens feeling economic or cultural anxiety,³⁰³ nationalist demagogues have seized openings to mobilize racist and anti-Muslim fear of immigration and immigrants.³⁰⁴ National security has become an easy slogan for politicians who recycle fears unleashed by the September 11 terrorist attacks well over a decade earlier. A major talking point in the 2014 midterm U.S. congressional elections was the fear that new arrivals would carry the Ebola virus.³⁰⁵ The news that migrants were moving from war-torn regions in the Middle East to Europe to seek protection allowed political opportunists to circulate rumors that some were Islamic State agents who were planning terrorism in the United States. It is no accident that anti-immigration attitudes are often stronger in communities with few immigrants to offer a living counternarrative.

A related message of skepticism or hostility is that the current scale of migration is unprecedented, and that the overall level of immigration is too high. Donald Trump is the first U.S. president in modern times to be openly skeptical of lawful immigration. His principal agency for adjudicating immigration benefits, the U.S. Citizenship and Immigration Services, changed its mission statement to remove the phrase “nation of

³⁰² See Danny Hakim, *Welsh Reject E.U., but Its Money Will Be Missed*, N.Y. TIMES (July 5, 2016), <https://www.nytimes.com/2016/07/06/business/international/welsh-reject-eu-but-its-money-will-be-missed.html> [<https://perma.cc/FPS8-D58C>]; see also Peter Burns & James G. Gimpel, *Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy*, 115 POL. SCI. Q. 201, 221 (2000) (concluding that racial prejudice played a greater role than economic concerns in shaping attitudes toward immigration policy); Jack Citrin, Donald P. Green, Christopher Muste & Cara Wong, *Public Opinion Toward Immigration Reform: The Role of Economic Motivations*, 59 J. POL. 858, 877 (1997) (“The historical connection between restrictionist policies and economic downturns may have more to do with the mobilization of activists and interest groups than with the material calculations of the general public.”).

³⁰³ See GEST, *supra* note 292, at 174–78. On immigration enforcement’s role in warding off such arguments, see generally David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411 (2015).

³⁰⁴ See Srikantiah & Sinnar, *supra* note 40, at 200–02; Patrick Kingsley, *As West Fears the Rise of Autocrats, Hungary Shows What’s Possible*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/world/europe/hungary-orban-democracy-far-right.html> [<https://perma.cc/9RVT-Q8MX>]; Leonhardt & Philbrick, *supra* note 40.

³⁰⁵ See, e.g., Abeyasinghe, *supra* note 120, at 461–62 (explaining that political discussions regarding Ebola were often intertwined with discussions of race and immigration).

immigrants” and to add a focus on “protecting Americans, securing the homeland, and honoring our values.”³⁰⁶

The rise of popular movements fueled by hostility toward immigration or immigrants reflects the power of this viewpoint, just as it has led to a turn against international trade.³⁰⁷ Concentrated hostility can be especially influential if strong views sway party primaries and decide who gets on general election ballots.³⁰⁸ Even if automation, trade, a free market, and other factors are the real causes of economic stress, the blame is placed on immigrants. In this setting, a powerful strain of white nationalism—often finding voice at the very highest levels of government—uses economics as both grievance and cover, and to amplify anxiety with racial prejudice and religious bigotry. About 150 years ago, economic dislocation was a catalyst for the racism that successfully lobbied for Chinese exclusion laws,³⁰⁹ in a pattern repeated time and again.

Given the opportunistic exploitation and exaggeration of cultural anxieties, it is fair to ask: will measures to address immigration’s economic effects really make a difference? To some irreducible extent, the answer is no. Some anxieties, especially if rooted in racial or religious prejudice, are impervious to facts. This reality makes it tempting to dismiss all skepticism or hostility to immigration and immigrants as illegitimate. But not everyone who holds these views is racist or anti-Muslim.³¹⁰ This group of less malign skeptics will be politically pivotal in finding a path forward. No conscientious policymaker should dismiss economic grievances—as racist, for example—without serious efforts to address them forthrightly in economic terms. This is true even if immigration is just one of many contributing factors and its effects are more perceived than real.³¹¹ Dismissive responses invite even more

³⁰⁶ See U.S. CITIZENS & IMMIGR. SERVS., *USCIS Director L. Francis Cissna on New Agency Mission Statement* (Feb. 22, 2018), <https://www.uscis.gov/archive/archive-news/uscis-director-l-francis-cissna-new-agency-mission-statement> [<https://perma.cc/JMK8-UK7Y>].

³⁰⁷ See Steven Greenhouse, *The Unions that Like Trump*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/08/opinion/sunday/the-unions-that-like-trump.html> [<https://perma.cc/9NX3-UUPD>] (discussing attitudes within organized labor toward international trade).

³⁰⁸ See MALEY, *supra* note 110, at 88.

³⁰⁹ See MOTOMURA, *supra* note 7, at 16–17.

³¹⁰ See Chinn, *supra* note 13, at 687–95 (distinguishing cultural from racist arguments for restrictionist immigration laws and policies).

³¹¹ See SONG, *supra* note 68, at 166–67.

exaggeration and falsehoods, a growing sense of victimhood, and more political manipulation.³¹²

D. Sharing Gains and Losses

If immigration creates some winners and some losers among workers and public treasuries, responses should be grounded in the facts, strive toward ethical borders that disallow discrimination, maintain or enhance civic solidarity, and be attentive to cultural and political forces. One crucial role for law is to guide the emergence of vehicles for those who derive direct economic benefits to share some of those gains. The fiscal imbalance of revenues and expenditures between federal and state or local governments requires legislative fixes. In the private sector, sharing gains faces even greater challenges. Under current U.S. law, employers must pay an extra \$1,500 fee for each new or continuing H1-B temporary workers. These fees fund government job training programs for citizens and lawful permanent residents, K-12 science enrichment programs, and college scholarships for low-income students in engineering, math, and computer science.³¹³ But these are extremely modest steps.

Proposals in Congress have tried to expand this approach. In 2005, Representative Sheila Jackson Lee introduced a bill to require employers to recruit citizens and permanent residents, including from minority communities, before hiring H1-B temporary workers. The bill would have assessed employers of H1-B workers a 10 percent surcharge to fund job creation and training for unemployed citizens.³¹⁴ In 2013, the Senate passed a bill that would have raised employers' fees if at least 30 percent of their employees were H1-B workers.³¹⁵ Under another proposal, the government would sell or auction per-

³¹² See Ross Douthat, *Between Folly and Cruelty on Immigration*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/opinion/sunday/between-folly-and-cruelty-on-immigration.html> [<https://perma.cc/ZHF4-ZPDJ>] (“[A] perceived open door can lead to a dramatic rush to enter . . . the most generous societies can find themselves retreating to enforcement and lurching toward populism.”).

³¹³ See INA § 214(c)(9), 8 U.S.C. § 1184(c)(9) (2012); Stuart Anderson, *H-1B Visa Fees Create 87,000 College Scholarships for U.S. Students*, FORBES (Apr. 4, 2019), <https://www.forbes.com/sites/stuartanderson/2019/04/04/h-1b-visa-fees-create-87000-college-scholarships-for-u-s-students/#4590cfb932e1> [<https://perma.cc/AWY4-5T3R>].

³¹⁴ See Save America Comprehensive Immigration Act of 2005, H.R. 2092, 109th Cong., 1st Sess. §§ 201, 403 (2005).

³¹⁵ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess. §§ 4101–05, 4211–14, 4221–25, 4231–37 (2013).

mits to prospective employers of H1-B workers.³¹⁶ All of these measures would call for employers to share economic gains from immigration, but none ever were adopted.

International trade poses similar challenges, so it offers lessons for both policy and law. As with immigration, the consensus among economists is that trade creates economic gains for many consumers and businesses, and for the economy as a whole.³¹⁷ But trade may also dry up the market for some domestic goods and hurt some U.S. workers. In the United States, trade adjustment assistance (TAA) is a long-standing attempt to offset these effects. First established by President John F. Kennedy in 1962, TAA statutes have been modified five times, most recently in 2015.³¹⁸ TAA programs retrain displaced workers in new skills for new jobs, sometimes in industries that are economically more competitive. TAA also offers income support after unemployment insurance runs out, plus wage insurance, health care, job search and relocation allowances, and other benefits.³¹⁹ Three or more workers with the same employer who lose, or expect to lose, jobs because of import competition may apply to the U.S. Secretary of Labor.³²⁰

The design of TAA has drawn much criticism.³²¹ In the early 1970s, imports of TVs depressed domestic TV manufacturing, but U.S. workers who made TV *components* did not qualify for TAA, because the imported TVs were fully assembled. Moreover, TAA did not apply when harm to U.S. workers came from factories outside the United States owned and oper-

³¹⁶ See Alessandra Casella & Adam B. Cox, *A Property Rights Approach to Temporary Work Visas*, 47 J. LEG. STUD. 195, 204–06 (2018).

³¹⁷ See Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 993–94 (2017).

³¹⁸ See Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978 (1975); 19 U.S.C. § 2411(a)–(b) (2012); Trade Act of 2002, Pub. L. 107-210, 116 Stat. 933 (2002); J.F. HORNBECK, CONG. RESEARCH SERV., R41922, TRADE ADJUSTMENT ASSISTANCE (TAA) AND ITS ROLE IN U.S. TRADE POLICY 6 (2013).

³¹⁹ See Katherine Boo, *The Churn: Creative Destruction in a Border Town*, NEW YORKER, Mar. 29, 2004, at 62.

³²⁰ See 19 U.S.C. §§ 2272(a)–(c) (2012). The U.S. Court of International Trade has jurisdiction to review eligibility decisions. See 28 U.S.C. § 1581(d)(1) (2012). Approved workers get benefits through state agencies that also handle other displaced worker programs.

³²¹ See, e.g., EDWARD ALDEN, FAILURE TO ADJUST: HOW AMERICANS GOT LEFT BEHIND IN THE GLOBAL ECONOMY 107–26 (2017); Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT'L L. 797, 800–01 (2012); Jessica Schauer, *Federal Trade Adjustment Assistance for Workers: Broken Equipment*, 26 B.C. THIRD WORLD L.J. 397, 404–07 (2006) (reviewing THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005)).

ated by U.S. companies.³²² Eligibility criteria have loosened over the years but remain strict. The process of taking applications, verifying eligibility, and administering benefits is slow and inefficient, and it relies heavily on applicants' access to information.³²³ The burdensome process deters participation. Critics also argue that training is ineffective because it is unavailable until employees are out of work and because private enterprise is insufficiently involved in design and administration.³²⁴

These shortcomings have combined to erode any backing that TAA once enjoyed. Organized labor turned long ago from strong support to deep skepticism, leaving TAA vulnerable to tightened eligibility and funding cutbacks, especially in the 1980s during the Reagan presidency. Two decades later, TAA eligibility, funding, and benefits expanded substantially under President Obama as part of the stimulus response to the 2008 financial crisis. But funding is low and unpredictable—only \$575 million for 2018, and extended only to 2021 at \$450 million annually for several hundred thousand workers.³²⁵ To put the gap in concrete terms, individual relocation assistance is limited to \$1,250, barely enough to rent a truck to move several states away.³²⁶

Trade and immigration differ from each other, but experience with TAA suggests that any effective immigration adjustment program will face formidable challenges. As with trade, the questions include who is adversely affected, what compensation is effective and fair, and how compensation is delivered. In identifying adverse effects, the simplest case may be a U.S. employer that wants to replace its entire workforce with H-1B temporary workers. But effects are rarely so easy to track,

³²² See ALDEN, *supra* note 321, at 108–09.

³²³ *Id.* at 123–24.

³²⁴ See Park, *supra* note 321, at 842 (arguing for assistance while workers are employed). On evidence that training would be more effective if prospective local employers could more often design and administer a program and jobs were waiting for the trained workers, see Ruth Graham, *The Retraining Paradox*, N.Y. TIMES MAG. (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/magazine/retraining-jobs-unemployment.html> [<https://perma.cc/USJ3-L5LJ>]. See also Schauer, *supra* note 321, at 410–12 (describing a training program for still-employed workers). But employers may be reluctant to help train workers whom other employers might lure away. For a summary, see Park, *supra* note 321, at 847–51.

³²⁵ See ALDEN, *supra* note 321, at 113, 120–21.

³²⁶ See 19 U.S.C. § 2317(a) (2012); U.S. DEP'T OF LABOR, SIDE-BY-SIDE COMPARISON OF TAA PROGRAM BENEFITS UNDER THE 2002 PROGRAM, 2009 PROGRAM, 2011 PROGRAM, AND 2015 PROGRAM 3 (2015), <https://www.doleta.gov/tradeact/pdf/side-by-side.pdf> [<https://perma.cc/7QMZ-V9EH>].

especially if immigration shifts labor costs in regions or industries—affecting prices, consumer preferences, and employment patterns—that are already buffeted by automation, global competition, and other forces.

To identify workers needing assistance, eligibility could depend on job category in industries or areas, not on individual applications.³²⁷ This approach would view the problem more broadly than just pinpointing deserving individuals. This approach also recognizes that immigration, like trade, is never the sole driver of change.³²⁸ But this further implies that measures to address immigration-related economic concerns should look beyond immigration itself, and this broader perspective has political vulnerabilities. As assistance moves beyond mere worker retraining or other narrow measures, it resembles investment in public education generally,³²⁹ which requires substantial funding and a bigger role for government.³³⁰ Both aspects of more robust assistance will attract significant political opposition, especially if higher taxes are involved.³³¹

To understand the magnitude of this obstacle for immigration adjustment assistance, U.S. government funding for programs to reintegrate unemployed workers is a small fraction of funding for analogous programs in other industrialized countries. As a percent of GDP, Denmark spends twenty times more, and France and Germany five times more, than the United States.³³² Even TAA programs with a track record of success, such as the Appalachian Regional Commission, remain severely underfunded. Arguments for broader funding

³²⁷ See Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 87–90 (2018); Meyer, *supra* note 317, at 1009–10; Park, *supra* note 321, at 841–47.

³²⁸ Another question is why workers who feel hurt by immigration should get government help more than workers aggrieved by automation, changing consumer tastes, or other factors. Perhaps a reason is that though other factors may be more causal, immigration more directly reflects government decisions.

³²⁹ See FRIEDMAN, *supra* note 321, at 284 (proposing “lifetime employability”); Meyer, *supra* note 317, at 1017 (“[T]he government might choose simply to put the money into primary and secondary schools in the adversely affected communities.”).

³³⁰ Even more effective might be programs to identify and offset adverse effects, which would require the U.S. government to coordinate industrial policy more comprehensively than it ever has. Cf. FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 166–204 (1987) (discussing industrial policy in Japan).

³³¹ See BORJAS, *supra* note 286, at 207–08 (suggesting a program similar to TAA to respond to immigration, but acknowledging the political obstacles).

³³² See ALDEN, *supra* note 321, at 114; see also *id.* at 125 (noting that the 0.1 percent of U.S. GDP spent on “active labor market policies” is a seventh of the OECD average).

will not convince those who resolutely oppose this role for government.

Another problem is that programs to mitigate economic distress that is perceived to be immigration-related can do only so much, given the constraints of the free market and the traditionally limited role of government and social welfare programs in the United States. Displaced unionized workers are often shunted into economic sectors with weaker unions and lower wages. Foundational responses that emphasize education and training will require time and patience. As TAA has shown, suboptimal design can start a cycle of ineffective assistance that erodes political support. The political headwinds are strong, especially with the Trump Administration proposing large cuts in the federal higher education budget each year.³³³

And yet, it might be politically possible to boost effective regional investments in public education and infrastructure.³³⁴ With economic anxiety often linked directly to worries about education—especially the feeling among displaced workers that their children’s future is bleak—such initiatives could attract political support to offset some concerns about adverse economic effects from immigration.³³⁵ The \$25 billion or more that would be spent for just the first ten years of erecting and maintaining a southern border wall could fund education and training for hundreds of thousands of U.S. workers.³³⁶

In the 1960s, pushing for TAA was a large part of President Kennedy’s strategy to liberalize trade.³³⁷ Though overall support for trade may be stronger than overall support for immigration, adjustment assistance can mitigate injury and blunt political opposition in both arenas. More deeply, it is crucial to neutralize the argument that immigration hurts large numbers of U.S. workers. Helping citizens who feel economically aggrieved by immigration will take time. But objections that pro-

³³³ See Jim Tankersley & Michael Tackett, *Trump Proposes a Record \$4.75 Trillion Budget*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/us/politics/trump-budget.html> [<https://perma.cc/3KBJ-9PYJ>].

³³⁴ See Meyer, *supra* note 317, at 1018 (advocating public infrastructure investments).

³³⁵ See GEST, *supra* note 292, at 2, 63, 157; Tyler Cowen, *It’s Not the Inequality; It’s the Immobility*, N.Y. TIMES (Apr. 3, 2015), <https://www.nytimes.com/2015/04/05/upshot/its-not-the-inequality-its-the-immobility.html> [<https://perma.cc/BB66-T358>].

³³⁶ See Ron Nixon, *U.S. Says It Can Pay for 100 Miles of Wall on 2,000-Mile Border*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/politics/us-mexico-border-wall-funding.html> [<https://perma.cc/8S2W-7J2N>].

³³⁷ On TAA’s political link to support for free trade, see ALDEN, *supra* note 321, at 110–11, 115–18; Garcia & Meyer, *supra* note 327, at 81–86; Meyer, *supra* note 317, at 997, 1009, 1019; Park, *supra* note 321, at 811–12, 821.

gress is too slow are hardly trenchant when immigration is a policy quagmire and any progress can seem impossible.

Facts struggle to make a difference where prejudices are strong, and perceptions about economic impact may matter more than real effects.³³⁸ Governments can never neutralize the effects of changes in the world. But if very little is done, the absence of effort comes across as indifference, and the intensity of opposition to immigration can exaggerate even if opponents are less numerous than loud. Unless this changes, this opposition will have a solid political foundation and prevent progress toward an immigration system that responds effectively to the needs of future generations.

E. Back to Civil Rights

The urgency of addressing the economic impact of immigration on U.S. citizens is also grounded in the perception that adverse economic effects fall most heavily on historically disadvantaged minorities, especially African Americans. After Hurricane Katrina in New Orleans in 2005, the U.S. government announced that it would suspend federal laws and policies to curtail the hiring of unauthorized workers while rebuilding got underway.³³⁹ The arrival of Latino workers—though many were U.S. citizens or noncitizens working lawfully—led to a widespread belief that they were displacing Black workers.³⁴⁰

This view was not new or unique to post-Katrina New Orleans. In 1992, journalist Jack Miles published a widely read article in the *Atlantic Monthly* that depicted a zero-sum game, with gains by Latino migrants undermining African Ameri-

³³⁸ See, e.g., Anna Maria Mayda, *Who Is Against Immigration? A Cross-Country Investigation of Individual Attitudes Toward Immigrants* 25–27 (IZA Inst. of Labor & Econ., Discussion Paper No. 1115, 2004) (examining how both economic and noneconomic factors affect attitudes towards immigrants); Kenneth F. Scheve & Matthew J. Slaughter, *Labor Market Competition and Individual Preferences over Immigration Policy*, 83 REV. ECON. & STATS. 133, 143–44 (2001) (analyzing the determinants of individual preferences over immigration policy).

³³⁹ See BROKEN LEVEES, BROKEN PROMISES: NEW ORLEANS' MIGRANT WORKERS IN THEIR OWN WORDS (Southern Poverty Law Center 2006), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/brokenlevees.pdf [<https://perma.cc/3YJS-CZAX>]; Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 58–64 (2008); Haley E. Olam & Erin S. Stamper, *The Suspension of the Davis Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145, 146–47 (2006).

³⁴⁰ Cf. Hana E. Brown, Jennifer A. Jones & Taylor Dow, *Unity in the Struggle: Immigration and the South's Emerging Civil Rights Consensus*, 79 L. & CONTEMP. PROBS. 5, 20–23 (2016) (discussing immigrant advocates' casting efforts as a civil rights matter).

cans.³⁴¹ Disadvantaged communities that have been marginalized for generations are an easy example—and sometimes a natural audience—for charges that immigration hurts citizens, even if economic problems lie far deeper.³⁴²

The connections between race and immigration to the United States have a long history, as Part I sketched. A core feature is the use of immigration and citizenship law to exclude and discriminate by race. The place of Black America in this history is complex. In earlier times, it may have been defensible to think of Blacks in America as only the descendants of slaves forcibly brought to the United States. The slave trade ended officially in 1808, and for the next 150 years relatively few Black immigrants came to the United States. Some came from the Caribbean and Africa, but they were limited in number by restrictive laws that strongly preferred immigration from northern and western Europe.³⁴³ And so the conventional wisdom contrasted Blacks with immigrants.

Recent Black immigration has changed the demographics. In 1960, 1 percent of Blacks in the United States were foreign-born. By 2005, it was 8 percent. Blacks of Haitian ancestry nearly quadrupled in number, of Jamaican ancestry more than doubled, and the African immigrant population grew even more.³⁴⁴ Today's sizeable Black immigrant population unsettles any simple contrast between Blacks with immigrants, and

³⁴¹ See Jack Miles, *Blacks v. Browns*, ATL. MONTHLY (Oct. 1992), <https://www.theatlantic.com/magazine/archive/1992/10/blacks-vs-browns/306655/> [<https://perma.cc/78H5-PFDM>]; see also Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in *DEBATING IMMIGRATION* 175 (Carol M. Swain ed., 2007) (questioning whether the Congressional Black Caucus effectively represents the interests of African Americans who suffer adverse economic effects from immigration); Peter Schuck, *The New Immigration and the Old Civil Rights*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/civil-rights/new-immigration-old-civil-rights/> [<https://perma.cc/EJ7Y-FU9E>] (explaining the “arresting political irony” that the civil rights victory of the 1965 immigration reform unleashed the forces that “threaten the civil rights coalition that worked so hard to enact it”); cf. HONIG, *supra* note 70, at 82–86 (explaining how embrace of some immigrants enables the continuing marginalization of racial minorities and other subordinated groups).

³⁴² Cf. Sarah Smarsh, *Liberal Blind Spots Are Hiding the Truth About ‘Trump Country,’* N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/opinion/trump-corporations-white-working-class.html> [<https://perma.cc/M62J-LMGQ>] (arguing that race is exaggerated as a factor in resentment).

³⁴³ See *supra* notes 3–19 & accompanying text.

³⁴⁴ In addition to family and employment-based immigration, the diversity lottery was significant. See Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 259–61 (1994); Mary Mederios Kent, *Immigration and America's Black Population*, POPULATION BULLETIN, POPULATION REFERENCE BUREAU, Dec. 2007, at 4–11, <https://www.prb.org/wp-content/uploads/2007/12/62.4immigration.pdf> [<https://perma.cc/5K4Z-LKTR>].

it raises questions about the links in immigration policy between the descendants of slaves in America and Black immigrants. Do Black immigrants undercut—or are they used to undercut—the economic and social position of African Americans? The number of foreign-born Blacks or their children at U.S. colleges and universities has prompted concerns that these institutions achieve racial diversity by preferring the children of Black immigrants over African Americans.³⁴⁵ The economic success of new Black immigrants leads to similar worries.³⁴⁶

It is perilous to generalize about any individual or community's attitudes toward immigration. But it is fair to say that African Americans have deep reasons for common cause with Black immigrants—and with immigrants in general—based on shared history as excluded outsiders to mainstream society. Measures deployed now against many immigrants have pedigrees in anti-Black discrimination, past and present. The twisted cruelty of labor exploitation throughout U.S. history includes slavery, then importing Asian labor, then inviting Latino workers outside the law in settings fraught with systemic exploitation.³⁴⁷ But as long as the sense persists that the government does not take seriously the possibility of economic harms often blamed on immigration, it remains natural for the economically vulnerable to be ambivalent about immigration.

An empirical study published in 2018 of voting behavior of African American state legislators in southern states analyzed when they voted with white legislative colleagues to support restrictionist immigration-related measures. It mattered greatly, the study found, whether the measures were seen as economic interventions in the job market, or instead as target-

³⁴⁵ See Rachel L. Swarns, 'African-American' Becomes a Term for Debate, N.Y. TIMES (Aug. 29, 2004), <https://www.nytimes.com/2004/08/29/us/african-american-becomes-a-term-for-debate.html> [<https://perma.cc/6FTP-BE3B>]; see also Maureen A. Craig & Jennifer A. Richeson, *Hispanic Population Growth Engenders Conservative Shift Among Non-Hispanic Racial Minorities*, 9 SOC. PSYCHOL. & PERSONALITY SCI. 383, 389–90 (2018) (examining whether Hispanic population growth prompts non-Hispanic minorities to support conservative views).

³⁴⁶ See Valerie Russ, *Who is Black in America? Ethnic Tensions Flare Between Black Americans and Black Immigrants*, PHILA. INQUIRER (Oct. 19, 2018), <https://www.inquirer.com/philly/news/cynthia-erivo-harriet-tubman-movie-luvvie-ajayi-american-descendants-of-slaves-20181018.html> [<https://perma.cc/857Z-P5N3>]; Candis Watts Smith, *Black Immigrants in the U.S. Face Big Challenges. Will African Americans Rally to Their Side?*, WASH. POST (Sept. 18, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/18/black-immigrants-in-the-u-s-face-big-challenges-will-african-americans-rally-to-their-side/> [<https://perma.cc/UPW9-U72P>].

³⁴⁷ See MOTOMURA, *supra* note 19, at 41–46.

ing immigrants in other ways.³⁴⁸ African American legislators were more likely to vote with conservative whites to support restrictionist legislation in settings that cast African Americans as competing with immigrants for jobs and resources—such as legislation to penalize employers who hire unauthorized workers.

African American legislators were more likely to vote with immigrants and their supporters in settings that cast African Americans and immigrants as similarly disadvantaged minorities. For example, Black legislators tended to vote against bills to expand the authority of state and local police, and to impose stricter voter identification requirements.³⁴⁹ Similar is the decision by the NAACP and the NAACP Legal Defense and Educational Fund to sue the federal government to block its decision in 2018 to end Temporary Protected Status for Haiti. A core allegation was racial discrimination as shown by the President's comments about Haiti and other "shithole" countries.³⁵⁰

These results highlight a precarity in the alliances that advocates for immigrants may make—or fail to make—with African American communities. On the one hand, many laws and policies that harm noncitizens in the United States may quite naturally be viewed in civil rights terms, as protection against the same discrimination that continues to oppress Black Americans. But other measures that harm noncitizens in the United States allow political entrepreneurs, intent on driving a wedge between African Americans and immigrants, to

³⁴⁸ See Irene Browne, Beth Reingold & Anne Kronberg, *Race Relations, Black Elites, and Immigration Politics: Conflict, Commonalities, and Context*, 96 SOC. FORCES 1691, 1696–99 (2018); cf. R. Khari Brown, *Black Churches and African American Opinion on Immigration Policy*, in FROM EVERY MOUNTAIN SIDE: BLACK CHURCHES AND THE BROAD TERRAIN OF CIVIL RIGHTS 315, 323 (R. Drew Smith ed., 2013) (concluding that when Black church leaders frame political engagement as challenging restrictions on African American life chances, "congregants likely interpret such cues in a manner that places some blame on immigrants").

³⁴⁹ See Browne, Reingold & Kronberg, *supra* note 348, at 1714–15; NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, IMMIGRATION FACTSHEET AND TALKING POINTS 1 (2011), <https://www.naacp.org/wp-content/uploads/2016/04/Immig%20Factsheet%20Tlkn%20Pts%20Final%20July%202011.pdf> [https://perma.cc/U9UY-NF3A] (asserting that state and local enforcement policies "have created a wave of anti-immigrant sentiment that mirror the type of treatment the African American community has historically experienced at the hands of law enforcement").

³⁵⁰ See *NAACP v. U.S. Dep't Homeland Sec.*, 364 F. Supp. 3d 568, 572 (D. Md. 2019); cf. *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1098–1105 (N.D. Cal. 2018) (finding that direct and circumstantial evidence of President Trump's anti-immigrant and anti-Muslim comments raised serious questions that supported granting a preliminary injunction).

argue that what hurts immigrants may help African Americans economically.

Now I come full circle, back to the civil rights framework for immigration law and immigrants' rights discussed in Part I. Its dominance reflects the centrality of issues about the integration of lawful and unauthorized immigrants inside the United States over the past several decades. This emphasis on civil rights has—quite justifiably and importantly—brought long overdue attention to discrimination based on race, nationality, and religion, and to related concerns about the rule of law. But the dominant emphasis on civil rights has diverted attention away from economic justice in matters of immigration and immigrants' rights as a core element of civic solidarity. Unless the new migration law helps shape serious vehicles to mitigate economic jeopardy and cultural anxiety, and to share benefits from immigration, it will cede the ground of economic justice—and in turn, of civic solidarity—to immigration skeptics, and sometimes to bigots.

Sharing gains and losses can also move toward another essential goal: to rework admission categories to meet the needs of the U.S. economy far more effectively than it does today. This is the only effective way to undo the selective admissions, selective enforcement, and vast discretion that has created today's vulnerable and exploited undocumented population.³⁵¹ Though a civil rights framework does vital remedial work in this area, it is inadequate to guide sustainable responses to a broader range of evolving migration challenges. Reworking admissions will require a scheme that combines permanent and temporary admissions, carefully crafted as part of a new migration law that responds to migration in transnational context. But without addressing the corrosive perception of adverse economic effects in the United States, progress in these directions will be politically difficult or impossible.

What about opposition that is rooted so firmly in racial or religious anxiety or bigotry that it is impervious to honest efforts to respond in economic terms? Here a civil rights framework helps in a different way. Exclusion based on race or religion—as in the National Origins Act or its modern descendants, including some executive branch policies—violates the core goal of borders with justice and without racism. Borders must not discriminate on any basis beyond citizenship itself and must treat citizens equally. The need to apply these princi-

³⁵¹ See MOTOMURA, *supra* note 19, at 41–55.

ples to expose and discredit racial or religious exclusion is precisely why it is urgent to take economic concerns seriously. But unless this happens, a civil rights framework—though it has accomplished so much—leaves space for racism and religious bias in immigration law and policy.

CONCLUSION: THE NEW MIGRATION LAW

Drawing this roadmap for a new migration law started by analyzing the limits of a prevailing approaches to immigration law and refugee law. Both are pillars of justice, but they responded to the migration patterns of the second half of the twentieth century. A civil rights framework for immigration law is ill-suited to assessing responses to much of the migration that has become central to today's controversies. The same anachronism hobbles refugee law.

Essential to doing better is thoroughly reassessing the connections between migration and citizenship. This reassessment requires understanding how migration reflects conditions in countries of origin. And so the analysis shifts to trade, economic development, security, and human rights as shaping the transnational contexts in which people migrate or not, and return or not. The flipside of this transnational inquiry is the broader context in destination countries, where the real or perceived economic effects of immigration pose vexing dilemmas. A major blind spot of a civil rights framework—neglecting direct engagement with economic inequality—can provide cover for racism or religious bias.

These four inquiries combine into a complete rethinking of what are commonly understood separately as immigration law, the law of immigrants' rights, and refugee law, as well as domains often seen as outside the reach of law altogether. Also important is understanding the limits of what law can do. As I have acknowledged, readers can draw different conclusions—ranging from deep doubts that ethical borders are possible, to a faith that borders can become ethical over time. The future is uncertain, but if we see the shortcomings of traditional approaches and understand the challenges and possibilities ahead, the new migration law can emerge.

