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laborers in the United States. In September 2009, Alvarado made an impassioned speech to the annual convention of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in Pittsburgh. He reaffirmed the formal partnership that NDLON and the AFL-CIO formed in August 2006,[1] and he urged Congress to pass legislation that would give lawful immigration status to unauthorized migrants in the United States. One striking aspect of Alvarado's speech was how he framed his call for legalization. He said, "The very people being called 'illegal'—who I prefer to call Americans In Waiting—they, like me, will one day be citizens of this country."[2] Six months later, in an April 2010 statement urging opposition to Arizona Senate Bill 1070,[3] Alvarado declared, "Undocumented immigrants are *Americans in waiting*."[4]

Other advocates have taken to calling unauthorized migrants "Americans in waiting." In a contribution to *The Huffington Post*, Jorge-Mario Cabrera, a representative of the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) wrote about marchers in the 2010 May Day rally for immigrants' rights, calling them Americans in waiting.[5] Cabrera continued: "[W]e were all here, 250,000 of us, united by a sea of white t-shirts, American flags that seemed to float on their own atop the crowd, and the dream that one day 'America' will truly mean home for our families."[6] And psychologist William Perez concluded his book on unauthorized students with this plea: "It is time to reform immigration laws and give dignity to the millions of hardworking Americans-in-waiting and their children, recognizing that they are, in many respects, already good citizens of the United States."[7]

When immigrants are unlawfully present in the United States, how might they make persuasive claims to belonging through legalization or some other recognition in immigration law status? To adopt Pablo Alvarado's words, are

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1. *See* Karin Brulliard, *AFL-CIO Aligns With Day-Laborer Advocates*, WASH. POST, Aug. 10, 2006, at A5; Steven Greenhouse, *Labor Federation Forms a Pact With Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A18.

2. Pablo Alvarado, Exec. Dir., Nat'l Day Labor Org. Network, Speech at the AFL-CIO Convention (Sept. 14, 2009), *available at* http://ndlon.com/index.php?option=com_content&view+article&id=239. In HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006), I suggested the phrase as a way of understanding a significant but often overlooked aspect of U.S. immigration and citizenship law.

3. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

4. *Urgent Message from Pablo Alvarado, Director of NDLON, regarding SB 1070*, JORNALERO NEWS: OFFICIAL NEWS BLOG OF THE NATIONAL DAY LABORER ORGANIZING NETWORK (Apr. 16, 2010), http://jornaleronews.ndlon.org/?p=590.

5. Jorge-Mario Cabrera, *May 1st Voices Ring in New Day in America*, HUFFINGTON POST (May 3, 2010, 6:03 PM), http://www.huffingtonpost.com/jorgemario-cabrera/may-1st-voices-ring-in-ne_b_560436.html.

6. *Id.*

7. WILLIAM PEREZ, WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM 149–50 (2009).

unauthorized migrants Americans in waiting? Or are they more like outsiders with no claim to being part of America's future?

This Essay offers some answers to these questions. Part I sets out an analytical framework that shows how viewing immigrants—including unauthorized migrants—as Americans in waiting is essential to reconciling the tension between national borders and a sense of justice that is defined largely by a national commitment to equality. Part II analyzes how, in the historical context of U.S. immigration and citizenship laws, immigrants have—or have not—been treated as Americans in waiting whose integration should be fostered. Generally, U.S. law reflected an assumption that European immigrants would become Americans. In this important sense, U.S. law reflected the idea of immigration as transition to citizenship. In contrast, immigrants were not treated as Americans in waiting if they came from countries viewed as sources of a flexible, expendable labor force. Part III suggests ways to think about possible claims by unauthorized migrants to lawful immigration status and eventually to U.S. citizenship. Viewing immigration as a contract between migrants and the United States and as a form of affiliation with U.S. society can persuasively support treating unauthorized migrants as Americans in waiting to whom the idea of immigration as a transition to citizenship should apply. The Conclusion sets out an agenda for further thought.

I. BORDERS, EQUALITY, AND INTEGRATION

A. Plyler v. Doe

In its landmark 1982 decision *Plyler v. Doe*,[8] the U.S. Supreme Court struck down a Texas statute that effectively barred children from public elementary and secondary schools if they were in the United States unlawfully. In a key part of its decision, the Court treated the children-plaintiffs as future participants in American society, though they were in the country unlawfully. Addressing their future, Justice Brennan reasoned:

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for

8. Plyler v. Doe, 457 U.S. 202 (1982).

> a Nation that prides itself on adherence to principles of equality under law.[9]

This language is significant in several ways. First, the Court did not see these migrants' unlawful presence as an absolute bar to their belonging to American society. Rather, the formal immigration status of these children was just the start of thinking about whether they might integrate and ultimately belong. The Court characterized their exclusion from some aspects of society as a matter of grave concern, and of constitutional dimensions, at least as a general principle: "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[10]

Second, the fundamental question the Court addressed was how these children would participate in American society as they came of age.[11] Justice Brennan's reasoning tracked the lower court finding that "the illegal alien of today may well be the legal alien of tomorrow, and that without an education, these undocumented children, [a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class."[12] Though acknowledging that constitutional doctrine did not treat education as a fundamental right, the Court viewed education as the key to full functional participation in society.[13]

Here the Court stood on constitutional bedrock, quoting *Brown v. Board of Education*[14] and explaining: "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[15] Calling education "the very foundation of good citizenship,"[16] the Court went on: "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[17]

In these ways, *Plyler* affirmed that at least some unauthorized migrants—the children in that case—should be viewed as future contributors to American society, and that their integration was therefore a matter of public concern. But

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9. *Id.* at 218–19 (footnote omitted); *see also id.* at 234 (Blackmun, J., concurring) (emphasizing same point made by majority opinion); *id.* at 239 (Powell, J., concurring) (same).

10. *Id.* at 213 (majority opinion); *see also id.* at 216 n.14, 221–22 (identifying abolition of unfavorable "class or caste" treatment toward any group as a goal of the Fourteenth Amendment and noting that "denial of education to some isolated group of children poses an affront to [this goal]").

11. *Id.* at 221.

12. *Id.* at 207–08 (footnote, internal quotations, and citation omitted).

13. *Id.* at 221.

14. *Id.* at 222–23.

15. *Id.* at 223 (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)); *see also id.* at 221 (emphasizing the importance of education in American society).

16. *Id.* at 223 (quoting *Brown*, 347 U.S. at 493).

17. *Id.*; *see also id.* at 222 n.20 ("[P]ublic schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.").

a further question has arisen in the generation since the decision: Might some unauthorized migrants be Americans in waiting, no matter whether they are children or adults? Answering this question requires thinking about how the integration of immigrants—the concept at the core of the idea of Americans in waiting—is linked to basic justifications for immigration and citizenship laws, and for national borders.

B. Borders Versus Equality

My purpose in addressing the relationship between national borders and equality is not to offer a complete, detailed defense of borders; others have advanced arguments that address various aspects of that task.[18] Rather, I strive to explain how the tension between borders and equality lays a foundation for the rest of this Essay. I will then explain why the most persuasive justifications for borders rely heavily on fostering immigrant integration—and thus require an expansive view of who counts as an American in waiting.

Put in simple terms, the most basic dilemma of immigration and citizenship law in American political culture—or in any liberal democratic society organized as a nation—is a fundamental tension between two ideas that are widely and deeply held. The first is that immigration and citizenship must be regulated, hence the basic justification for some kind of national border. The second is individual dignity based on equality. National borders limit the freedom of movement of noncitizens, severely constraining their life decisions as individuals and thus infringing on the dignity that comes with liberty and choice. This tension between borders and equality is the core dilemma of liberal nationalism.

On the first idea, the basic function of citizenship law is to decide that some individuals belong to society as full and formal members, while others are noncitizens and thus outsiders in some meaningful respects. Immigration law keeps some noncitizens out of the United States. It admits others but might later provide for their deportation. Under both U.S. and international law, a U.S. citizen must be allowed into the United States, and citizens cannot be deported. By regulating noncitizens but not citizens, immigration and citizenship laws inherently discriminate on the basis of citizenship.

This discrimination between citizens and noncitizens conflicts directly with the second idea: the robust view of the equality of all persons that is central to American notions of individual dignity and liberty based on an equal opportunity to pursue happiness, as the founders put it. In American

18. *See, e.g.*, DAVID MILLER, ON NATIONALITY 96 (1995); JOHN RAWLS, THE LAW OF PEOPLES (1999); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 35–42 (1983); Rainer Bauböck, *Citizenship and Free Movement*, *in* CITIZENSHIP, BORDERS, AND HUMAN NEEDS 343, 358–64 (Rogers M. Smith, ed. 2011); Matthew J. Gibney, *Liberal Democratic States and Responsibilities to Refugees*, 93 AM. POL. SCI. REV. 169, 174 (1999); Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, *in* DEBATING IMMIGRATION 63, 69–75 (Carol M. Swain, ed. 2007).

constitutional law, this idea of equality underlies the Fourteenth Amendment's equal protection guarantee, which supplied the rationale for striking down the Texas statute challenged in *Plyler v. Doe*.[19] Beyond constitutional doctrine, a rhetorical commitment to equality has become central to the self-image of the United States. Examples of equality in public culture based on a sense of national heritage abound, starting with the proclamation in the Declaration of Independence that "all men are created equal."[20]

Given the tension between laws that regulate immigration and citizenship and values of equality, why should the United States have such laws and borders in the first place? A pragmatic answer might cite some combination of psychological reality and political feasibility. Human beings have a basic urge to group themselves and find comfort and protection in such solidarity, sometimes at the national level that immigration and citizenship laws reflect. Regulation of immigration and citizenship is also an inevitable fact of modern political life. Even those who advocate for open borders typically recognize that some sense of national belonging and some immigration control at the national border are unavoidable. The world is comprised of nation-states whose very sovereignty and independence is broadly believed to include the right to decide who should be admitted and who should not.

In turn, prevailing thought about public resources persistently frames issues in national terms. For example, will immigrants help *our* American economy? Will they undermine *our* national security? Will they contribute to America? With fundamental questions in policy debates so framed, any candidate for national or statewide public office in the United States would commit political suicide by advocating for open borders.

But political realities, even if sufficient to explain the persistence of national borders in some form, do little to answer more complex questions about the types of borders that might exist. In delving deeper, the real question is not simply, "borders or no borders"? Even if they are here to stay, borders come in many varieties. There are many ways to write, administer, and enforce immigration and citizenship laws. The choices made in making the rules, in designing the institutions, and in exercising discretion in administration and enforcement will determine how well the basic tension between national borders and equality will be reconciled. Assessing any given system of immigration and citizenship laws in these terms raises two basic questions. First, how and why might immigration and citizenship laws be morally justified within a political context that assumes the existence of national borders in some form? Second, how might ideas of equality—and individual dignity more generally—shape immigration and citizenship laws and how they operate?

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19. *See Plyler*, 457 U.S. at 216–30.
20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

C. Reconciling Borders with Equality

The most persuasive justification for immigration and citizenship laws is that national borders create bounded societies in which equality and individual dignity can flourish. Borders foster equality in any society because they reinforce civic solidarity—some sense of bonds among members of a community, some sense of being involved in a joint enterprise for some common purpose. As political scientist Sarah Song reminds us, civic solidarity is important for several reasons.[21] It is integral to the pursuit of distributive justice based on some belief in equal treatment. Mutual trust is necessary before all members of a society will participate in strengthening it. This type of trust requires that members believe that other members are like themselves in some meaningful sense. Civic solidarity is also important for the full sort of democracy that extends beyond voting to meaningful deliberation within a society. Such genuine democracy requires a concern for the common good. That concern requires solidarity. And solidarity is the basis for equal treatment.

Why should civic solidarity be a matter of *national* borders and a *national* framework for equality? One answer is that national civic solidarity is more inclusive and egalitarian than the alternatives. If national civic solidarity matters less, but individuals still find comfort and strength in groups, then what are the alternatives to national citizenship? And what would be the consequence of relying on those alternatives instead of on national citizenship and a national framework for equality? Religion, race, class, localism, and other exclusionary and undemocratic groupings would inevitably matter more. The result might be a world without national walls, but also a world of a "thousand petty fortresses," as political philosopher Michael Walzer put it.[22] Put more generally, erasing borders will dilute or impede gains in equality that can be achieved within national citizenship.

If civic solidarity is important because it lays the foundation for the pursuit of equality within national borders, the next challenge is to define civic solidarity. More specifically, can civic solidarity within a bounded, national civic society be defined in a way that is consistent with equality and individual dignity? This reconciliation is possible, but it requires careful thought about the nature of civic solidarity.

D. The Role of Integration

In any society with an immigrant population, immigrant integration is the key to a civic solidarity that is consistent with equality and individual dignity. Without integration, the arrival of immigrants will, over time, undermine civic solidarity.

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21. *See* Sarah Song, *What Does It Mean to Be an American?*, DAEDALUS, Spring 2009, at 31, 31–32.

22. WALZER, *supra* note 18, at 39 (citing HENRY SIDGWICK, THE ELEMENTS OF POLITICS 295–96 (1891)).

For immigrant integration to maintain and enhance participation in civic solidarity, the society must be open to all who are willing to integrate into the national culture, not just to those with certain bloodlines.[23] What does it mean to integrate and to be open to all who are willing to integrate? At one extreme, defining integration in a way that demands nothing of newcomers and allows anyone to be a newcomer would mean abandoning borders. But borders can reflect a commitment to both meaningful integration and meaningful equality, depending on how immigration and citizenship laws operate. To be consistent with equality and individual dignity, borders and those who make, administer, and enforce them must respect five essential ideas.

The first idea is that immigration and citizenship laws must not discriminate against noncitizens on any basis other than citizenship itself. Though immigration and citizenship laws inherently discriminate between citizens and noncitizens, any immigration or citizenship law loses its most persuasive justification if it discriminates not only by citizenship, but also by race, religion, language, or gender. Such a law would slip back to being no more justified than the petty fortresses that national citizenship can avoid. This first idea thus limits the type of discrimination that is allowed under immigration and citizenship laws that endeavor to be consistent with liberal nationalism. For example, such laws must not make attaining citizenship more difficult for some races than for others.

The second idea is that immigration and citizenship law must treat all *citizens* equally. Take, for example, immigration laws allowing citizens to petition for their relatives to immigrate to the United States. Immigration law may not discriminate among such citizens on any basis that would be impermissible outside of the immigration context. It must not be harder for citizens of Mexican ancestry to sponsor a parent than it would be for citizens of German ancestry to do so. As a consequence of applying this second idea together with the first one, racial discrimination in immigrant admissions is intolerable in any country with a multiracial population. Any such discrimination would fail to treat all citizens equally. Such discrimination also would go beyond citizenship discrimination and thus conflict with the first idea.

The third idea is that the line between being an immigrant and a citizen must be permeable. This idea directly involves immigrant integration. Immigration and citizenship laws necessarily reflect inequality between citizens and noncitizens, insiders and outsiders. Only by way of exception do noncitizens have access to the physical territory of the United States and to membership in the form of U.S. citizenship. But these inequalities may be temporary or permanent. Nothing about immigration and citizenship laws inherently bars *access* to equality. Access starts with lawful admission to the United States. Nothing inherent in being treated less well than citizens at first keeps noncitizens, once lawfully admitted, from acquiring

23. *See* Song, *supra* note 21, at 34–35.

equal treatment over time. Naturalization as a U.S. citizen completes this journey from inequality to the formal equality of membership that is the foundation of civic solidarity. Even though noncitizens are treated unequally at first, this initial unequal treatment can be compatible with equality if it is not permanent and noncitizens have access to equality.

Integration is vital to this access to equality. To retard or reject the integration of immigrants is to keep them permanently marginalized. If this happens, then national citizenship starts to resemble racial or ethnic membership. In contrast, fostering immigrant integration allows national citizenship to include individuals, though they start as outsiders, in the promise of equality based on national citizenship. In turn, robust access to equality means treating new immigrants with the assumption that they will eventually become U.S. citizens. This means adopting a view of immigration as transition and treating new immigrants as Americans in waiting. Borders, equality, and integration are thus all knitted together because laws and policies that seriously undertake to reconcile national borders with equality and individual dignity must also foster immigrant integration.

The fourth idea is that reciprocity and mutual respect are essential ingredients of integration, so that integration reflects an openness to all who are willing to become part of the national culture. In turn, immigrant integration requires a collective national willingness to be changed gradually by newcomers. Over the course of recent U.S. history, the process by which newcomers become part of American society has attracted many different labels that have carried various connotations. "Integration" is the term in broad use today, both in the United States and in similar discussions elsewhere in the world. "Assimilation"—a term widely used in earlier eras—has been associated with pressure exerted by the native majority on immigrants to cut ties with their cultures, languages, or societies of origin as a price of membership in the United States. This sort of pressure turns national borders into a proxy for the forms of discrimination that are inconsistent with a forthright effort to reconcile borders with equality. The result would be a nationalism that is not liberal. In contrast, reciprocity and mutual respect toward immigrants fosters a civic solidarity with not only political but also cultural and social dimensions.

The fifth idea is that integration is a long process over multiple generations. This dimension of time is consistent with the idea that reconciling borders with equality requires access to equality over time, rather than instant equality. What counts is not whether first-generation immigrants become integrated linguistically and participate broadly in national culture, but whether their second- and third-generation children do. The same longitudinal thinking applies to economic mobility, geographical distribution, and other dimensions of integration. Attempts to measure such indicators in only one generation are unhelpfully myopic.

II. IMMIGRATION, CITIZENSHIP, RACE, AND INTEGRATION

A. The Burdens of History

History makes it painfully clear that U.S. immigration and citizenship laws have been decidedly unfaithful to these five ideas, so much so that one might wonder if they are attainable or even realistically aspirational. Some might doubt that any scheme of national immigration and citizenship can ever be consistent with individual dignity and equality. I do not want to dodge this essential issue, so I should first detail the historical support for this skepticism of immigration and citizenship laws, even if that history complicates my attempt to explain how immigration and citizenship laws might be reworked to reflect these five ideas.

Explicit racial, ethnic, and gender discrimination in immigrant admissions and citizenship was common for much of U.S. history, starting with the 1790 federal statute that limited naturalization to "free white person[s]."[24] Immigration laws historically excluded many groups outright and erected formidable barriers to the admission of others. For example, Asian immigrants were excluded outright,[25] and the national origins system for immigrant admissions that prevailed from 1921 to 1965 explicitly sought to preserve the white, European ethnic mix of the U.S. population by tying admissions to the prior percentage of the U.S. population by ancestry.[26] And from the early twentieth century, selective immigration law enforcement and the Bracero program managed Mexican migration as a source of flexible, temporary labor.[27]

One common justification offered for such laws was these groups' alleged unwillingness or inability to integrate into U.S. society. As a notable illustration, the late nineteenth-century U.S. Supreme Court decisions upholding the constitutionality of various laws that combined to exclude most Chinese immigrants asserted that Chinese immigrants could not or would not assimilate. In *Chae Chan Ping v. United States*, the 1889 decision rejecting a constitutional challenge to one aspect of Chinese exclusion, Justice Stephen Field wrote for a unanimous Court: "[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary."[28]

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24. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103 (repealed 1795).

25. *See generally* MOTOMURA, *supra* note 2, at 15–37.

26. *See* Act of May 19, 1921, ch. 8, §§ 2(a), 3, 42 Stat. 5, 5–6 (repealed 1952); Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153, 159–60 (repealed 1952); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 308–11 (1955). *See generally* MOTOMURA, *supra* note 2, at 126–32 (describing the purpose and development of the national origins system).

27. *See* DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 26–34 (2002); MOTOMURA, *supra* note 2, at 48–49, 128–30, 134–35, 178–79; Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2049–53 (2008) [hereinafter Motomura, *Immigration Outside the Law*].

28. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

This attitude toward integration was evident in various racial restrictions embedded in citizenship laws, which only became expressly race-neutral in 1952.[29]

At the same time, laws and policies not only fostered—but also assumed—that European immigrants would integrate, and that because they would integrate, they would ultimately naturalize as U.S. citizens. The legal expression of this assumption and the favorable treatment that it conferred was the declaration of intent to become a citizen.[30] This declaration, which the immigrant could file at any time after arrival, was a prerequisite for naturalization from 1795 until it became optional in 1952. During much of this period, the intending citizens—many of them new arrivals—enjoyed a favored status including the right to vote and other rights of citizenship. Intending citizenship reflected the expectation that immigrants would become citizens. In other words, it reflected the idea of immigration as a transition to citizenship.[31]

Fundamental to the declaration of intent was a presumed equality based on future citizenship, but to qualify as an intending citizen, an immigrant had to be eligible to naturalize. As long as naturalization was racially restricted, this barrier was enormously significant.[32] Only for immigrants who counted as white for the purpose of naturalization eligibility—and after 1870 for the small number of black immigrants—did the declaration convey the special status reflecting the central role that immigration as transition and the idea of Americans in waiting played in thinking about immigration and citizenship.

For much of American history, then, race and ethnicity determined whether integration was fostered and assumed, or resisted and unimagined. In turn, the various facets of this overall scheme—for example, Asian exclusion, the national origins system, and the treatment of Mexican workers as a flexible labor supply that could be sent away when no longer wanted—combined to make the dominant culture of the United States resolutely white, Anglo-Saxon, and Protestant. The integration of immigrants came to mean assimilation into that culture.

The immigration and citizenship laws that shaped and reflected these attitudes would eventually change. Congress finally repealed the national origins system in 1965. The new admissions scheme applied the same limits to immigration from every country in the world, with the aim of restoring some equality into U.S. immigration law.[33] For the first time, the admissions scheme abandoned explicit discrimination on grounds other than citizenship status itself.

The 1965 amendments had several consequences with implications for immigrant integration. With a dramatic increase in the number of immigrants

29. *See* MOTOMURA, *supra* note 2, at 73–75.
30. *See* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (repealed 1802).
31. *See* MOTOMURA, *supra* note 2, at 116–19.
32. *See id.* at 123–24.
33. *See id.* at 130–32.

from Asia and Latin America, the composition of the immigrant population shifted.[34] This change meant that the integration of immigrants would need to cross new lines of race, ethnicity, language, and religion. In addition to this shift in lawful immigrant admissions, generations of lawful and unlawful Mexican immigration had created and institutionalized the expectations of sending communities, employers in the United States, and the migrants themselves. From 1942 to 1964, the Bracero program had provided a lawful avenue for Mexicans to come to the United States temporarily to work. Given the migration patterns that were long established by 1965, it would have been naive to think that the flow would simply stop when the Bracero program ended. Stagnation in the Mexican economy during that period meant that northward emigration, regardless of U.S. immigration law, remained a relatively attractive option for many Mexicans. When lawful admission was unavailable, migrants came outside the law.[35]

The combination of racial restrictions up to 1965, the cultivation of a temporary and flexible labor supply of Mexican migrants, and the dramatic expansion of Asian and Latin American immigration after 1965 helps explain the significant role that race and ethnicity play in today's discussions of immigrant integration. With immigration to the United States broadening beyond the traditional European source countries, the perception emerged over this past generation that non-European immigrants are failing to integrate into American society. Prominent political scientist Samuel Huntington argued in a 2004 book that current immigration patterns threaten the American nation because of the failure of immigrants, especially from Latin America, to assimilate to a core Anglo-Saxon, Protestant culture.[36] Journalist Peter Brimelow called for America to return to its white, European roots, citing the inability of immigrants from Asia, Africa, and Latin America to integrate.[37]

Of course, such skepticism about the ability or willingness of immigrants to integrate is nothing new. Virtually every generation of immigrants has been accused of not integrating, often by Americans whose forebears endured similar accusations just a few generations earlier. Historically, first-generation immigrants

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34. *See id.* at 132–35.

35. *See id.* at 48–49, 128–30, 134–35, 178–79. On expectations, see Douglas S. Massey et al., *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 AM. J. SOC. 1492, 1496–503 (1994). The Bracero program ended on December 31, 1964, with the expiration of the authority granted by the Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992). On the Bracero roots of today's flow, see Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, *in* MEXICAN MIGRATION TO THE UNITED STATES 151, 155–60 (Wayne A. Cornelius & Jorge A. Bustamante eds., 1989); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 664–72, 707–08 (1981).

36. *See* SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 171–77 (2004).

37. *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995).

have tended to cluster in ethnic enclaves in large cities or certain states, reinforcing perceptions that they threaten traditional patterns of American life because of their numbers or regional concentration. Today, some of those who question the willingness or ability of immigrants to integrate into U.S. society also observe that quantum leaps in communication and transportation allow immigrants to maintain closer ties with their home countries than in previous generations.[38]

Developments in national political discourse starting in the mid-1960s contributed to an overall shift in the relationship between immigration and citizenship and other debates involving race and ethnicity in the United States. The legislative coalitions that contributed around the same time to the end of the national origins system in 1965, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 were based on overarching themes of equality and nondiscrimination. The repeal of the national origins system in 1965 marked a triumph of the principle that immigrant admissions should be based on criteria that do not discriminate by nationality. But as I have just described, the new admission scheme would profoundly affect the racial and ethnic composition of the U.S. population. This shared legislative legacy would intertwine the ideas and controversies that these major landmark laws would generate in the decades that followed. And so the pronounced changes in immigration after 1965 gradually came to be perceived as part of the broader demographic shifts measured in part by race and ethnicity. The politics of immigration became intermingled with the politics of diversity, multiculturalism, affirmative action, and racial and national identity.

B. The Cycle of Skepticism

The long history of racial and ethnic exclusion in U.S. immigration and citizenship law is the underappreciated source of a cycle of reciprocal skepticism. Given America's history of immigration law discrimination, Latino, Asian, and African immigrants are especially likely to respond to an ambivalent welcome with reticence of their own. What may seem on the surface like immigrants' inherent resistance to integration may actually be America's own skepticism reflected back.

The dramatic expansion of immigration from Asia and Latin America since 1965 might suggest that these immigrants of the past two generations were or are Americans in waiting. To be sure, immigration has become more faithful to the five ideas that can measure whether immigration and citizenship laws are faithful to liberal nationalism and can reconcile national borders with individual dignity and equality.

As compared to the nineteenth century and the first half of the twentieth, however, even immigrants who are lawful permanent residents of the United States are not treated with the same expectation reflecting immigration

38. *See, e.g.*, MARK KRIKORIAN, THE NEW CASE AGAINST IMMIGRATION 21–23 (2008).

as transition—that they will become citizens—that was historically afforded to nineteenth-century white immigrants. For example, naturalization requirements are more demanding, fees are higher, and fewer noncitizens become citizens than would do so if policies were different.[39] Calls to safeguard the rights of permanent residents are rarely articulated in ways that reflect the idea that they are Americans in waiting.[40]

Moreover, race and ethnicity continue to play a strong if subtle role in restrictive immigrant categories and in entrenched reliance on Latino immigrant labor, much of it outside the law because of restrictions on admissions. For much of living memory, Latino immigrants—and Asian immigrants before them—have been received not as Americans in waiting, but as merely temporary, seasonal, or inexpensive laborers for fields and factories, often with the disposability that comes with being tolerated to be here unlawfully.

Treating immigrants as mere workers and not as future citizens is consistent with the reception of previous generations of Mexican immigrant workers who came to the United States as Braceros or outside the law. Indeed, it was precisely the expectation that workers from Asia and Latin America would *not* assimilate that made them especially attractive to U.S. employers.[41] Their lesser status not only quelled fears that they would penetrate and corrupt U.S. society, but also made it easier to treat them as a disposable labor force.

Essential to escaping this cycle of skepticism between some immigrants and some segments of American society is greater acceptance of immigrants in the United States. Start with noncitizens who are lawful permanent residents of the United States. If they are not treated with the expectation of naturalization—as Americans in waiting—an important opportunity is lost to embolden them to reach outside their own communities and to foster their integration into the broader fabric of American society. Treating immigrants as Americans in waiting is especially crucial to combat the feeling among Latin American, Asian, and African immigrants that no matter what they do, they will always remain strangers in the land—perpetual foreigners because of their names, skin color, languages, or accents. Unless there is meaningful integration of immigrants with reciprocity and respect, they will be marginalized as permanent outsiders. National borders will remain, but equality will not flourish within them to justify those borders in the first place.

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39. *See* MOTOMURA, *supra* note 2, at 155–57.

40. *See id.* at 51–57 (analyzing examples of immigration as contract as an approach to the rights of permanent residents), 80–87 (analyzing examples of immigration as affiliation as an approach to the rights of permanent residents), 139–42 (explaining that immigration as transition plays a less prominent role).

41. *See* Motomura, *Immigration Outside the Law*, *supra* note 27, at 2049–51 & nn.64–65.

III. INTEGRATION AND IMMIGRATION OUTSIDE THE LAW

So far, I have explained the tension between borders and equality and the five ideas the immigration and citizenship laws must respect if such laws are to be justified. A theme shared by these five ideas is the need to be open, without discrimination, to the integration of immigrants over time. I have discussed how immigrants in the United States should be treated, focusing on viewing immigration as transition and treating immigrants like future citizens—as Americans in waiting—regardless of race or ethnicity. For U.S. immigration and citizenship laws to be justified, they must overcome a history that has been unfaithful to the five ideas.

Now this Essay can finally come back to the question it posed at the beginning: what about *unauthorized* migrants? Are they, as Pablo Alvarado put it, Americans in waiting? Or is this favored treatment only for those who come to the United States lawfully? Deciding whether unauthorized migrants should be treated for integration purposes as if they had come lawfully calls for applying the reasons for integration of immigrants in general to the integration of unauthorized migrants in particular.

My answer starts with *Plyler*, which addressed integration by emphasizing the importance of education for children who lacked lawful immigration status.[42] This emphasis on education and children was an especially apt solution in that case, given the children's presumed innocence. The next question is whether the *Plyler* reasoning sweeps more broadly to apply to unauthorized migrants who are not children.

True, Justice Brennan couldn't find four colleagues ready to sign a majority opinion that was broader than necessary to cover the context of K–12 public education. But the Court suggested justifications that might sometimes apply to the integration-based interests of unauthorized adult migrants. Most fundamentally, the Court expressed a view of immigration that fosters the integration of noncitizens, not a view that operates to exclude them. And by relying on *Brown v. Board of Education*, the Court in *Plyler* also celebrated vehicles of social mobility, while abhorring caste-like divisions in American society.[43] More generally, for reasons I will explain momentarily, *Plyler* suggests how arguments for treating lawful immigrants as Americans in waiting would also apply to unauthorized migrants.

A. Immigration as Contract and the Idea of Americans in Waiting

One type of argument is rooted in the *Plyler* Court's recognition that the U.S. government has historically tolerated immigration outside the law to assure

42. *See supra* text accompanying notes 8–17.
43. *See supra* text accompanying notes 14–16.

a supply of labor for the U.S. economy.[44] The argument is that this de facto labor policy creates justified expectations on the part of unauthorized migrants that they will be allowed to stay. This type of argument for treating unauthorized migrants as Americans in waiting is based on a view I call *immigration as contract*.[45] The core concept of immigration as contract is that coming to America reflects migrants' expectations and understandings of their new country, and their new country's expectations and understandings of them.

This is not a legally binding agreement following back-and-forth bargaining. Indeed, there may be no binding agreement in any formal legal sense and no bargaining at all. Instead, I use immigration as contract to refer more generally to a set of ideas, often associated with contracts, that revolve around concepts of fairness and justice—often phrased in terms of promises, notice, and reliance.

Viewing immigration as contract has been a consistent thread in U.S. immigration law for over a century. For example, the early U.S. Supreme Court decisions that severely limited the role of the courts in hearing constitutional challenges to the government's immigration decisions relied heavily on contract-based reasoning. Immigrants, the Court explained, had no basis for complaint if the U.S. government revoked the license that it granted to immigrants when admitting them.[46]

Today, one sometimes hears that immigrants "promise not to go on welfare" or that staying law-abiding is a "condition" of their admission to the United States. At the same time, immigration as contract is sometimes deployed as an argument *for* noncitizens. For example, one of the arguments against the cutbacks in noncitizen welfare eligibility in the 1996 Welfare Reform Act was that changing the rules would upset immigrants' settled expectations about public benefits.[47] Similarly, arguments against retroactive changes to immigration laws cite the unfairness of changing the rules.[48]

Of course, there is much room to debate the terms of the immigration contract. Some might argue that federal immigration statutes set out the terms. Having broken that contract by violating immigration laws, unauthorized migrants would have no persuasive claims to being treated as Americans in waiting. In response, some might contend that U.S. government policies of tolerance or acquiescence have historically allowed employers to invite unauthorized migrants to come to work even though they work outside the law. This is arguably the true immigration contract. Significant changes in the intensity of enforcement

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44. *See supra* text accompanying note 9.

45. *See* MOTOMURA, *supra* note 2, at 30, 33–34 (discussing contract-based reasoning in Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889), and Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

46. *See id.* at 35.

47. *See id.* at 52–53.

48. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289 (2001); *discussed in* MOTOMURA, *supra* note 2, at 56–57.

would wrongly upset expectations and promises, while taking the integration of unauthorized migrants seriously would honor those expectations and promises.

Several compelling rebuttals to this position deserve discussion. Political philosopher Joseph Carens has written that shortcomings in enforcement do not amount to what he calls "complicity."[49] Nor, he argues, is complicity established just because some employers want to hire unauthorized workers. Carens may be right to resist this label, but he continues: "To the extent that irregular migration flows are determined . . . by structural factors beyond the state's control, the state cannot be held responsible for failing to prevent the entry and settlement of the irregular migrants."[50]

This statement seems persuasive as written, but its premise—that structural factors determining migration flows are beyond the state's control—is questionable. Indeed, the concept of control itself may be misleading. Many structural factors influencing migration flows are the product of deliberate government decisions. These include domestic legislation on immigration and other matters as well as patterns of enforcement at the border and in the interior.[51] Migration also reflects various aspects of international relations, including but not limited to economic policy. By making a variety of decisions—often reaching beyond what is typically included in the field of immigration law—governments effectively encourage or discourage population flows.[52] For example, the Homestead Act and other laws that influenced the settlement of the American West were immigration laws in that they shaped populations by encouraging and permitting some migrants to remain while excluding others.[53]

I am not suggesting that every state of affairs that is partially attributable to government policies makes the government responsible for the array of outcomes that emerge. Nor am I suggesting that every such state of affairs justifies legitimate expectations that policies will never change. To go so far would be to assert that implementation of policies should produce results in the future that match results in the past. It is difficult or impossible to find any stopping point for such a broad assertion. I argue instead for a more modest and logical position, which is that government policies that produce outcomes and expectations can be discernible through the effective operation of law in action, such as a policy

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49. Joseph H. Carens, *The Case for Amnesty: Time Erodes the State's Case to Deport*, BOSTON REV., May–June 2009, at 7, 10.

50. *Id.*

51. *See* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE (2d ed. 2009); JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S-MEXICO BOUNDARY (2002).

52. *See generally* Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT'L L. 139 (2008); *see also* Motomura, *Immigration Outside the Law*, *supra* note 27, at 2089–91.

53. Homestead Act of 1862, ch. 75, 12 Stat. 392, 392 (repealed 1976); *see also* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1401 (2009).

to enforce laws lightly or not at all. That approach to enforcement represents government policy, even if the policy seems inconsistent with what is explicitly written in immigration statutes and other texts setting out immigration law.

In assessing whether it makes sense to view unauthorized immigration to the United States as contract, it is pivotal that many of the enforcement mechanisms in U.S. immigration law, both current and historical, reflect employers' labor needs rather than a consistent commitment to enforcement.[54] As a result, it has been de facto policy to rely on the discretionary manipulation of the legal/illegal label, based in significant part on racial and ethnic notions of belonging. Further, it has been de facto policy to acquiesce in immigration outside the law when and where workers are needed, and to apprehend and deport unauthorized workers and their families when they are not.[55] This policy of acquiescing and tolerating immigration outside the law effectively invites immigration outside the law. In turn, this invitation supports contract-based claims by unauthorized migrants that they are Americans in waiting as much as immigrants who are in the United States lawfully. Both groups arrive by accepting an offer of de facto admission to the United States.

B. Immigration as Affiliation and the Idea of Americans in Waiting

Plyler also suggests a second type of argument for treating unauthorized migrants as Americans in waiting. An important part of the Court's reasoning was its reference to "[s]heer incapability or lax enforcement."[56] Several pages later, the Court observed that many unauthorized migrants would never be deported.[57] As I have just acknowledged, there is room to disagree about whether this outcome amounts to de facto government policy and about the significance of any such policy. But the Court's recognition that deportation was unlikely for many unauthorized migrants was based on something else: the various mechanisms in immigration law for recognizing the roots that unauthorized migrants put down.

This type of argument for treating unauthorized migrants as Americans in waiting is based on what I call *immigration as affiliation*.[58] According to affiliation-based arguments, the ties that unlawful migrants have built within the United States deserve recognition. These ties might be based, for example, on migrants' lives as productive members of their communities who contribute to the economy through work, taxes, and civic participation, and whose U.S. citizen children make or will make similar contributions.

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54. *See* Motomura, *Immigration Outside the Law*, *supra* note 27, at 2049–51.

55. *See id.*

56. Plyler v. Doe, 457 U.S. 202, 218 (1982); *see also supra* text accompanying note 9 (discussing the Court's reasoning).

57. *Plyler*, 457 U.S. at 226.

58. *See* MOTOMURA, *supra* note 2, at 80–114 (discussing the emergence of "immigration as affiliation" as a conception of lawful immigration).

U.S. immigration laws include many provisions that recognize the persuasive power of arguments based on concepts of immigration as affiliation. In fact, affiliation-based reasoning is so pervasive in immigration law debates that it is usually taken for granted. The idea that the longer noncitizens are in the United States, the more they are treated like citizens, is the basis for much of the constitutional reasoning in both the law that governs immigration and the law that governs the other rights of noncitizens in the United States.[59] Rules for deportation provide more protection the longer noncitizens have been in the United States.[60] The same is true for discretionary relief from removal, which is typically limited to noncitizens who have been in the United States for a certain period of time and have certain ties to U.S. citizens or lawful permanent residents.[61] Guidelines for prosecutorial discretion similarly recognize ties in the United States.[62]

Affiliation-based arguments are susceptible to serious rebuttals. The core of most of these rebuttals is the idea that these ties have been acquired in violation of the law, and therefore cannot convincingly support arguments by unauthorized migrants that it should be law and policy to view them as Americans in waiting. History is the best lens for evaluating this point of view. Much of the analysis parallels the above analysis of immigration as contract. As I have argued, the ties that give rise to affiliation-based claims by unauthorized migrants are the product of immigration outside the law based on government tolerance, acquiescence, or even encouragement. If so, then affiliation-based arguments for treating unauthorized migrants as Americans in waiting should be as persuasive as contract-based claims. In addition, affiliation-based arguments have further strength based on the ties themselves, regardless of their origin. Contributions to American society, especially if substantial, can offset prior acts even if those acts are viewed as clear violations.

Contract- and affiliation-based arguments for treating unauthorized migrants as Americans in waiting are by no means mutually exclusive. In fact, they easily overlap, and immigrants who have only contract-based claims early in their lives in the United States may gradually acquire a basis for affiliation-based claims. Many unauthorized migrants can rely on both ways of viewing immigration to argue persuasively that they should be treated as if they had come to America lawfully.

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59. *See id.* at 80–87.

60. *See, e.g.*, Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006 & Supp. IV 2010).

61. *See, e.g.,* INA § 240A, 8 U.S.C. § 1229b (2006 & Supp. IV 2010).

62. *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Det., and Removal of Aliens 4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

C. Unauthorized Migrants and Immigration as Transition

What about viewing *immigration as transition* as a way to examine whether unauthorized migrants are Americans in waiting? I have purposefully refrained thus far from invoking immigration as transition as an argument for treating unauthorized migrants as Americans in waiting. The reason to avoid this approach is that immigration as transition underlies the very concept of Americans in waiting as a way of viewing lawful immigrants to the United States. To argue that unauthorized migrants are Americans in waiting because they are or should be making a transition to membership in U.S. society would be to assume what I need to analyze.

In addressing whether unauthorized migrants are Americans in waiting, immigration as transition plays an analytical role that differs somewhat from its role in considering how immigrants who are lawfully present should be treated. Immigration as transition becomes relevant as a rationale for fostering the integration of unauthorized migrants only after showing, on some other basis such as immigration as contract or immigration as affiliation, that some unauthorized migrants should be treated as well as lawfully present immigrants. Only then does the question arise of what this equal treatment should look like.

To that question, the answer depends on a combination of immigration as contract, as affiliation, and as transition. *Plyler* itself demonstrates this relationship between these three views of immigration. The Supreme Court first relied on contract- and affiliation-based reasoning to treat the children as permanent members of American society.[63] Only then did the Court consider immigration as transition, treat them as Americans in waiting, and take steps to foster their integration.

IV. CONCLUSION

The core argument in this Essay has three main elements. First, there is a basic tension between borders and equality. Second, immigrant integration plays an essential role in reconciling that tension. Third, both immigration as contract and immigration as affiliation offer strong justifications for including unauthorized migrants within this imperative to integrate immigrants, and thus to treat them as Americans in waiting.

What does it mean, then, to treat unauthorized migrants as Americans in waiting? This question elicits different ways to foster the integration of unauthorized migrants. The most significant category of such measures consists of mechanisms to provide lawful immigration status on a path to citizenship for unauthorized migrants, or for some of them, based on the strength of their contract- or affiliation-based claims.

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63. *See supra* text accompanying notes 9–17.

Full discussion of these measures is beyond the scope of this Essay, but they would include broad-scale legalization programs.[64] These measures would also include narrower proposals such as the Development, Relief, and Education for Alien Minors (DREAM) Act,[65] which would offer a path to lawful status to a smaller group of unauthorized migrants if they attend college or serve in the military. Much of the political and rhetorical difference among various legalization proposals reflects perceptions that the arguments for being treated as Americans in waiting vary in strength among the unauthorized population of the United States. As an agenda for further thought, the next step in identifying the connections between immigration outside the law and the idea of Americans in waiting is to compare, in the framework of these programs, which unauthorized migrants can make stronger or weaker claims to being Americans in waiting.

64. *See, e.g.*, Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong., 1st Sess. § 601 (2007).

65. Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, H.R. 1842, 112th Cong., 2d Sess. (2011).