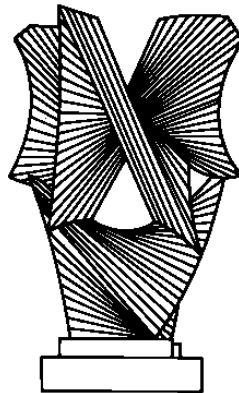


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THE RIGHTS OF MIGRANTS

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THE RIGHTS OF MIGRANTS

Adam B. Cox[†] & Eric A. Posner[‡]

Why do states provide migrants rights associated with citizenship? Existing accounts typically answer this question in terms of obligation—of a duty on the part of states to confer citizenship. Moreover, scholars tend to lump together the bundle of rights conventionally associated with citizenship when they answer this question. In contrast, this Article disaggregates the rights associated with citizenship, asks what both states and migrants want, and inquires into how the suite of rights associated with citizenship might advance those interests. States want to encourage migrants to enter their territory and to make country-specific investments, but have an interest in being able to remove immigrants or make their lives less comfortable if circumstances change. However, migrants will not enter and make country-specific investments if the state can easily remove them or change the conditions in which they live. Accordingly, the “optimal contract” reflects the tradeoffs between commitment and flexibility. We discuss ways in which basic rights to liberty and property, political rights including voting, and other rights may embody the optimal contract in different circumstances.

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INTRODUCTION

The U.S. government's treatment of migrants and other noncitizens has provoked a great deal of public attention in recent years. In the wake of 9/11, the Bush administration adopted discriminatory policies that placed special burdens on people from countries with a significant Al Qaeda presence—that is, certain Muslim countries.¹ Those who had entered illegally were rounded up and expelled; others were interrogated or subjected to surveillance. Even before 9/11, the U.S. government's treatment of noncitizens was a topic of frequent debate. Many critics, for example, complained about the use of deportation to punish noncitizens who committed crimes or to expel potential terrorist threats.² The government's inconsistent approach to noncitizens who had entered illegally, sometimes tolerating and encouraging them, sometimes dealing harshly with them, also received criticism.

At the same time, it is bedrock policy that citizens and noncitizens are to be treated differently. Virtually no one believes that noncitizens should have the right to vote or to run for office. Many noncitizens, including tourists, business people, and the spouses of certain visa holders, do not even have the right to work, or to change jobs. All noncitizens face the risk of deportation if they violate the law; citizens, by contrast, can never be exiled. The Supreme Court has recognized that the constitutional rights of noncitizens are limited. Foreign countries, like the United States, draw a sharp line between citizens and noncitizens, and recognize that citizens have more rights than noncitizens do.

If citizens and noncitizens may be treated differently, *how* differently may they be treated? Most scholars answer this question on the basis of doctrine or political theory. Doctrinal accounts attempt to derive noncitizens' rights

¹ See DAVID COLE, *ENEMY ALIENS* (2004); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alien a Distinction Without Difference*, 38 U. C. DAVIS L. REV. 609, 620–632 (2005); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373 (2004); Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices after the Terrorist Attacks of September 11, 2001: The USA Patriot Act and other Measures*, 63 U. PITT. L. REV. 873 (2002).

² See Andrew David Kennedy, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847 (2007).

form constitutional and legal traditions.³ Political theories derive noncitizens' rights from various theoretical conceptions of democracy and citizenship.⁴

Largely overlooked, however, are equally important descriptive questions: why do governments, such as the U.S. government, grant rights at all to noncitizens? Why have the rights of noncitizens improved over the years, and why do they still fall short of the rights enjoyed by citizens? In other words, if we assume that policy toward noncitizens reflect the interests of states, what policies would we predict, and how do we explain variations across states and across time? These questions have received little attention from legal scholars.

On a naïve view, for example, one might think that states would give noncitizens no rights at all. Why give rights to people who do not belong to one's political community? However, it is clear that states give rights to noncitizens, and particularly migrants, in order to give them certain incentives: to enter the country, to work there and pay taxes, to augment the population. At the same time, the granting of rights to migrants constrains states. Migration policies that serve the national interest during times of peace and economic prosperity may quickly become unpopular when those times change. States prefer flexibility *ex post*, so that they can change migration policy when circumstances call for change, but if they insist on such flexibility and hence grant minimal rights to migrants, migrants will have weak incentives to enter the country in the first place.

Migrants' rights vary along two dimensions. First, they differ in their scope. In the United States, migrants are classified in many different ways, and each class enjoys a different bundle of rights. People who enter the country illegally have certain basic rights—to life, to property, to minimal process—but little more. People who enter legally have more generous rights but their rights are more limited than those of citizens. For example, tourists and the spouses of certain migrants have basic rights to life, property, criminal and civil process, and so forth, but do not have the right to work for pay, and they do not have the right to remain in the country beyond the period of their visa.

³ See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996).

⁴ See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* (1998); PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1984); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. OF POLITICS* 251 (1987); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 *U. PA. L. REV.* 1147 (1997).

Migrants with a work visa have the right to work in certain positions but often no right to change jobs. Lawful permanent residents have the right to work as well as the other rights, but do not enjoy the right to vote. And whereas citizens cannot be “removed” (exiled), lawful permanent residents and other migrants can be removed (deported) for committing certain crimes, posing a security threat, and so forth. Lawful permanent residents are granted an additional important right: the right to become citizens after they have resided in this country for five years, passed a citizenship exam, and satisfied certain other conditions. Some migrants, but not others, are granted the right to acquire full citizenship rights through naturalization.⁵

Migrants’ rights also vary along a second dimension: their “strength,” or, more precisely, the ease with which the government can change them. At one extreme, rights could be administrative: the executive branch determines the rights of migrants at any time and can change them. Rights can also be statutory: Congress determines and changes rights. And rights can be constitutional, in which case they can be changed only by amendment or through judicial interpretation of the Constitution. Migrants enjoy all three types of rights. The Constitution sets some basic minima for process rights, for example, which statutes and administrative regulations have developed.⁶ In addition to investigating the *content* of migrant rights, then, this Article also analyzes variation in their *strength*.

One type of right cuts across these two categories. Voting rights (as well as other rights of political participation) are important citizenship rights. The holder of voting rights has the power to affect political outcomes by influencing the selection of public officials. In one sense, voting rights are an aspect of the content of migrant rights: migrants who can vote have rights that other migrants lack. In another sense, voting rights affect the strength of rights, including themselves. Although in theory Congress could eliminate a migrant’s voting right by repealing the statute that created it, doing so will be more difficult than repealing other types of migrant rights because migrants will likely vote against politicians who appear inclined to repeal their voting rights.

In the United States, nonresident aliens and other migrants rarely have voting rights, and when they do, they are at the municipal level and limited. However, in the past migrants have been granted more substantial voting rights at the state level, as we will discuss. In addition, voting rights remain an important aspect of the incentive system used to lure migrants to the United

⁵ See *infra* Part I.A. & I.B.

⁶ See *infra* Part I.B.

States, in the following sense: migrants are promised that if they qualify as citizens and become citizens, they will have the right to vote. We can thus think of contingent, deferred voting rights as an aspect of the bundle of migrant rights.

To explain the content and strength of migrant rights, we borrow the optimal contract framework developed by economists to analyze contractual behavior.⁷ Although migrants do not enter contracts with the U.S. government, their relationship with the U.S. government is analogous to a contractual relationship. Both sides gain from an implicit deal. The migrant enters the United States, invests in learning English and other aspects of American culture, and obtains a return in the form of higher wages, shares of public goods, and other benefits. The U.S. government—which we use as a stand-in for native citizens—gains in diverse ways. Tax revenues help finance public goods, labor costs are reduced, and the migrant contributes to cultural and social life.

In thinking about these issues, most people focus on the question of how the government should select among migrants. The world presents a large pool of potential immigrants, and states have to figure out how to separate those immigrants it considers desirable from those it does not.⁸ The debate focuses on the desirability of certain characteristics—for example, skills and familial relationships with American citizens. But there is another problem of equal importance, which is how the “contract” between the migrant and the U.S. government should be designed, once a particular migrant is selected. The main problem for the government is that a migrant who is highly desirable at time 1 might turn out to be undesirable at time 2. All else equal, the government would like to retain the option to remove any migrant if events change—a financial downturn, a security threat—such that the benefits from the migrant’s presence no longer exceed the costs.

However, the problem with such flexibility is that a migrant will not enter a country, or will enter but decline to sink roots in that country, if she knows that she can be removed at any time. Many migrants do best by making what we will call “country-specific investments”—like learning the dominant language and developing social networks—but a typically risk-averse migrant will not make such investments if she can be easily removed. Moreover, migrants will worry that the government will wield its removal power opportunistically, trumping up security threats or exaggerating financial downturns in order to justify deportation.

⁷ See, e.g., PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* (2005).

⁸ We focus on those screening issues in Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809 (2007).

Governments, too, often want migrants to make country-specific investments, so it is in their interest to guarantee a migrant's right to remain even if bad events occur—at least, to a limit. It will therefore sometimes be in a state's interest to tie its hands so that it cannot use its deportation power opportunistically. All else equal, the optimal contract will trade off the government's need for flexibility and the migrant's need for commitment. It does so in two ways: by granting migrants more or less generous rights; and by making it harder or easier for the government to change them.

Our approach helps expand the possibilities for legal design by showing why different packages of rights might be conferred on different groups of migrants. Much existing scholarship suggests that there is a relatively static, hierarchical relationship between various migrants' rights.⁹ On these accounts rights increase in lock-step with increasing "membership" in the receiving state. Rights are also arranged hierarchically, with rights like political participation almost always associated with higher levels of membership than rights like occupational freedom. Our account abandons this idea of a lexical relationship between various rights associated with citizenship. It also abandons the prevalent assumption in the literature that all migrants should be accorded the same rights. Migrants come with various desires: some hope to come and work in a receiving state for a short time, others hope to remain for a long time but imagine eventually returning home, and others intend to remain permanently. Each of these groups of migrants will value rights differently: for some the right to remain for a guaranteed period of time will be far more important than occupational freedom; others will have the opposite preferences. As a result, our approach makes it possible to see why we should expect variation in the optimal contracts—variation that is hard to evaluate within the literature's existing frameworks.

The rest of this paper unpacks our argument. Part I introduces the relevant conceptual distinctions and motivates the argument with a brief description of American immigration law and legal history. Part II provides a simple theoretical account of the "optimal contract" between migrant and government. Part III addresses some real-world complications by relaxing the basic model's assumption that the contract involves only two parties. Part IV discusses ways in which the immigration policies of different countries interact.

⁹ To be clear, there is some ambiguity in this literature about whether it is intended as a descriptive account of existing practices or instead as a normative account of what the structure of migrants' rights should look like. Often the literature appears to make both claims.

This paper builds on the economic approach to immigration law that we originated in an earlier paper.¹⁰ In this approach, the relationship between the receiving country and the migrant is treated as though it were a contractual relationship, which allows one to use ideas from the optimal contract literature in economics. As in all contractual relationships, the two parties have partially overlapping interests. States gain by allowing migrants to enter, and migrants gain by entering states, but each side of the transaction does better by retaining flexibility unavailable to other. The contracting problem is to choose “terms”—that is, immigration laws—that maximize the joint benefit.

The theme of this paper is that the “optimal contract” between migrant and government—that is, the package of rights that the migrant receives—is shaped by a central precommitment problem and depends on (and hence changes with) a host of exogenous variables. Rights will be weaker, for example, when governments expect that the risk of future adverse events are high, and stronger when governments gain more when migrants make country-specific investments. With an understanding of the relationship between the variables, one can explain some of the variation in the rights granted to migrants.

I. BACKGROUND

A. *Conceptual Distinctions*

In determining how many people to admit, and what type, the “host” (or “receiving”) country must also resolve a number of difficult questions regarding how these people, once on the host country’s territory, are to be treated. Consider the following baseline: migrants are treated the same as citizens. The baseline system entails that once a person is lawfully admitted into the host country, she would have the right to vote, to criminal process, and so forth; she would also have certain obligations—to follow the law, to pay taxes, to serve on the jury. She could not be removed, for removal is identical to exile, and citizens may not be exiled.

¹⁰ See Cox & Posner, *supra* note 8. As we explain in that paper, much of the existing literature focuses on first-order issues—the optimal number and types of migrants—while in this research agenda we evaluate second-order issues, that is, issues of structure and design. For some related work in the law and economics literature, see Mohammad Amin & Aaditya Mattoo, *Can Guest Worker Schemes Reduce Illegal Migration?*, (World Bank Policy Research Working Paper 3828, February 2006); Nancy Chau, *Strategic Amnesty and Credible Immigration Reform*, 19 J. LABOR ECON. 604 (2001); Gordon M. Myers & Yorgos Y. Papageorgiou, *Immigration Control and the Welfare State*, 75 J. PUB. ECON. 183 (2000). For emerging work by immigration scholars, see Eleanor Brown, *Outsourcing Immigration Compliance* (working paper, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131022.

In practice, this baseline never prevails. No state treats migrants exactly the same as citizens. To clarify the differences, we make several conceptual distinctions:

Rights versus obligations. Citizens have various obligations. Broadly, they must obey the law, which usually involves paying taxes, sitting on juries (in the United States), serving in the military (in many countries), and so forth. Citizens also have rights, such as the right to free speech, to a trial prior to punishment for crime, and to own property. There have been cases in history where noncitizens have had privileges not to obey the laws, or all the laws, that bind citizens.¹¹ Today, these privileges are relatively minor—such as the privilege not to serve on a jury in the United States. For the most part, we will assume that citizens and noncitizens have the same obligation to comply with general law, such as tax law. Our focus is on rights.

Rights to political participation. In democracies, citizens have the right to vote, to join political organizations, to make political arguments, and to participate in other ways in the democratic process. Noncitizens generally have no voting rights; there are some minor exceptions.¹² Noncitizens may also be subject to certain restrictions on lobbying.¹³ For the most part, however, noncitizens enjoy the same speech and association rights that citizens do.¹⁴ In principle, political participation rights could be disaggregated. Noncitizens could be given the right to vote but not to join parties, for example; or to vote on certain issues but not on certain other issues, or to vote for candidates for some offices but not for candidates of other offices.

Rights to remain. In the United States and most other countries, citizens have a right not to be exiled. Historically, exile was a common punishment,¹⁵ but no more. By contrast, noncitizens have circumscribed rights to remain. In the United States, noncitizens may be removed if they pose a security threat or commit a serious crime.¹⁶ In addition, noncitizens may be removed if their visa expires and they do not obtain the right to permanent residence; and noncitizens who leave American territory may, under certain circumstances, be

¹¹ Foreign diplomats are the classic example here. See 22 U.S.C. § 254 (2000).

¹² See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* (2001).

¹³ See Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 *YALE L. & POL. REV.* 503 (1997).

¹⁴ See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.” (citing *Bridges v. California*, 314 U.S. 252, 263 (1941))).

¹⁵ See, e.g., GORDON P. KELLY, *A HISTORY OF EXILE IN THE ROMAN REPUBLIC* (2006).

¹⁶ See Immigration and Nationality Act (“INA”) § 237, 8 U.S.C. § 1227 (2000) (enumerating grounds of deportability).

denied reentry, unlike citizens.¹⁷ These rights could be further disaggregated; one could imagine that one has the right to remain unless, for example, a war involving one's country occurs.

“Basic” rights. Citizens in the United States and most other democracies have many other rights, including the right to criminal process if they are accused of a crime, the right to own property and to receive compensation if it is confiscated by the state, the right to bring civil actions, and so forth. In principle, noncitizens could be denied these rights, or given weaker protections; at least in the United States today, they generally are not—though there are exceptions and ambiguities.¹⁸ The most important exception is the right to work: many migrants do not have the right to work or they do not have the right to change jobs.¹⁹ We will call these general or baseline rights “basic rights.”

The temporal dimension of rights. As a broad generalization, noncitizens gain more and stronger rights, the longer they lawfully remain in the host country.²⁰ One might distinguish people on temporary visas, lawful permanent residents, and citizens. Migrants in these different categories are often accorded different rights;²¹ in addition, they are also often given the right to move from one category to another.²² Our focus will be principally on lawful permanent

¹⁷ See INA § 101(a)(13) (specifying circumstances under which even a lawful permanent resident who travels abroad will be considered to be “seeking admission” and, therefore, subject to the grounds of inadmissibility); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (upholding the government’s decision to deny re-entry to a long-time permanent resident who traveled abroad).

¹⁸ See, e.g., U.S. CONST. art. III, sec. 2 (“The judicial power shall extend to all cases . . . between a state, or the citizens thereof, and foreign states, citizens or subjects.”); *Wong Wing v. United States*, 163 U. S. 228 (1896) (holding that noncitizens are entitled to the Constitution’s criminal procedure protections); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931) (holding that the Takings Clause applies to property in the United States owned by noncitizens). Historically, of course, some of these basic rights were restricted. For example, property ownership by noncitizens was a quite controversial in early America.

¹⁹ See, Juan C. Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 DENV. J. INT’L. L. & POL. 321, 329–37 (2006).

²⁰ See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”).

²¹ For example, lawful permanent residents can remain indefinitely and are free to work almost anywhere (or not at all); many migrants in the United States on temporary employment visas, however, must leave the country after a few months or years and are not free to change jobs. See THOMAS ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (6th ed. 2008).

²² See INA § 245 (adjustment of status); INA § 316 (naturalization rules).

residents, who are people given permission to remain in the country indefinitely. But an important issue is whether and on what conditions migrants are permitted to move from one category to another.

The expressive value of citizenship. Citizenship may have distinctive value irrespective of the legal rights and obligations associated with it. Imagine that the formal status of “citizen,” a label, is a separate legal right. That label might itself be important, even if it does not directly create any formal rights or obligations.²³ For example, the state could use the formal status as a signaling mechanism—as a signal to others about the person accorded the status, or as a signal to the person herself.²⁴ To keep our analysis within reasonable bounds, we will ignore the expressive dimension of citizenship. Citizenship is a valuable status in large part because of the legal rights and privileges associated with it. Those rights will be our focus.

As we proceed with our analysis, we will hold the baseline rights of citizens constant and ask, what explains the difference between the migrant’s rights and the citizen’s rights.

B. *The Contingency of Migrant Rights in the United States*

Our general approach assumes that migrant rights are a policy choice. While this assumption is certainly an oversimplification, it is not contrived. The legal relationship in the United States between the bundled rights often associated with citizenship is complex, but a central feature is clear: the government retains considerable flexibility to adjust these rights.

This is true even if we treat constitutional law as an exogenous constraint on government action. American constitutional law imposes only modest restrictions on Congress’ authority to grant to, or withhold rights from, migrants who have not acquired the formal legal status of citizenship. Constitutional law requires the most with respect to basic rights: it obligates the state to afford all resident noncitizens basic criminal protections;²⁵ to refrain from discriminating against noncitizens on the basis of race,²⁶ and so on. As we saw before, the main exception is the right to work.

²³ Consider the analogy to contemporary debates about gay marriage, where some argue that the legal label of “marriage” is important even if *identical* legal rights and obligations attach to both marriage and some other status like domestic partnership. See George W. Dent, Jr., “How Does Same-Sex Threaten You?”, 59 RUTGERS L. REV. 233, 252–253 (2007).

²⁴ See ERIC A. POSNER, LAW AND SOCIAL NORMS (2002); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

²⁵ See *Wong Wing v. United States*, 163 U.S. 228 (1896).

²⁶ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

But modern constitutional law places few limits on the government's ability to adjust up or down the right to remain and the participation rights of noncitizens. The right to remain is almost entirely unprotected by the Constitution. The Supreme Court does place some *procedural* restrictions on deportation and may (though it is contested) prohibit the government from deporting noncitizens on the basis of their race or the content of their speech.²⁷ Those limits aside, the government is free to remove noncitizens from the country for essentially any reason, and it can change retroactively the grounds of deportation.²⁸ Matters are similar for political rights. There are a few constitutional protections: the First Amendment protects noncitizens' freedom to speak out on political matters.²⁹ Migrants cannot be excluded from some forms of government employment.³⁰ Nonetheless, the government can deny the most valuable right of participation: the right to vote.³¹ And the government also has wide latitude to restrict the rights of noncitizens to contribute to election campaigns.³²

For citizens, matters are quite different. American constitutional law provides citizens an absolute right against exile and confers on them considerably more robust protection for political rights.³³ Moreover, it prevents governments from circumventing these rights by stripping people of citizenship.³⁴

It is important to note, however, that nothing prevents the government from giving this more generous suite of rights to noncitizens. While constitutional law provides a floor of certain rights, it generally does not establish a ceiling. It need not be this way. The Constitution could prohibit the government from granting voting rights to noncitizens, or even from

²⁷ See *Yamataya v. Fisher*, 189 U.S. 86 (1903) (procedural due process protections); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (selective deportation on the basis of First Amendment activity).

²⁸ See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (retroactive change to deportability grounds).

²⁹ See *supra* note 14.

³⁰ See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1980); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

³¹ See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391 (1993).

³² See Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997).

³³ See SAMUEL ISSACHAROFF, RICHARD H. PILDES & PAMELA S. KARLAN, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007).

³⁴ See *Afroyim v. Rusk*, 387 U.S. 253 (1967).

offering them the right of permanent residence without naturalization. And the Constitution does contain at least one such ceiling: it prohibits noncitizens from holding certain elected offices. A person must have been a citizen for many years to be eligible for election to the Senate or the House of Representatives (nine years for the Senate, seven years for the House).³⁵ To be eligible for the Presidency, a person must be not only a long term resident but a “natural born citizen, or a citizen of the United States at the time of the adoption of [the] Constitution.”³⁶ In general, however, the absence of such ceilings is part of what gives the government such flexibility.

In practice, the United States often does grant legal rights that are more generous than what the Constitution requires. The generosity of rights mainly depends on visa status. In addition, migrants’ rights generally strengthen with their length of residency. This is true for access to public assistance, which federal law makes available to permanent residents after five years;³⁷ for the right to reside, which immigration law protects somewhat more for long term residents;³⁸ and for the right to vote, which is usually provided only upon naturalization after an extended period of residence.³⁹ Finally, the rights are often treated by American law as though they have a sort of necessary hierarchy—with basic rights at the bottom, the right to reside in the middle, and participation rights at the top. But there is nothing about American constitutional law that makes this hierarchy necessary.

The current law should not blind one to the possibility of different patterns, and indeed American history supplies a striking example that is germane to our focus on migrant voting rights. In the nineteenth century, when many parts of the country were sparsely populated, encouraging settlement was a priority. Migrants could provide much-needed labor and, it was hoped, “raise land values, stimulate economic development, and generate tax revenues.”⁴⁰ In 1789, the first Congress authorized aliens to vote in the Northwest territories.⁴¹ And beginning in the 1820s, western states began

³⁵ U.S. CONST. art. I, sec. 2.

³⁶ U.S. CONST. art. II, sec. 5.

³⁷ 1996 Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. § 1612 (1996).

³⁸ See INA § 240A (describing “cancellation of removal,” which allows long term residents to avoid deportation in some situations where they have engaged in otherwise deportable conduct).

³⁹ See INA §316 (setting out the durational residency requirement for naturalization).

⁴⁰ KEYSSAR, *supra* note 12, at 38.

⁴¹ See Raskin, *supra* note 31, at 1402 (“The [Congress’s re-enactment of the 1787 Northwest] Ordinance gave freehold aliens who had been residents for two years the right to vote for

conferring voting rights on so-called “declarant” noncitizens. Immigrants in this period could officially declare their intention to become citizens (by filing what were known as “first papers”) after living in the United States for two years.⁴² Just like today they were ineligible to naturalize until they satisfied the full five year residency requirement. But western states trimmed their wait for voting rights to a short two years by conditioning the franchise on the declaration rather than on naturalization.⁴³

The spread of declarant voting laws suggests that the franchise was a valuable inducement for immigrants. During a fight over the adoption of such a rule in Illinois, one legislator remarked that the right to vote was “the greatest inducement for men to come amongst us.”⁴⁴ Thus, competition for settlers seems to have played an important role in the expansions of noncitizen voting. While noncitizen voting rules eventually waned, at their peak they were adopted by more than a dozen states and were common everywhere outside the densely populated Northeast.⁴⁵

So the U.S. government, and the states as well, have had a great deal of flexibility in granting rights to migrants, and have used this flexibility for the purpose of attracting migrants and encouraging them to invest. We turn now to an analysis of the costs and benefits of the different rights allocations.

II. THE BASIC THEORY

To explore the question why migrants might be accorded a particular suite of rights, this Part first examines the reasons that noncitizens would value different types of rights in different ways. Noncitizens may value rights differently, depending on their purposes for entering a country, and the various institutional, political, and economic aspects of that country that attract (or repel) them. The Part then turns from migrants to states, examining the “costs” that states incur when they grant rights to noncitizens. Here, we focus on the citizens of these states and ask what they lose when they give rights to noncitizens, and thus what rights they would be willing to grant to noncitizens in order to obtain the benefits of migration into their country. Putting these arguments together, we develop several hypotheses that explain what

representatives to territorial legislatures, and gave wealthier resident aliens who had been residents for three years the right to serve in these bodies.”).

⁴² See MOTOMURA, *supra* note 4, at 115–16 (describing the declaration process).

⁴³ KEYSSAR, *supra* note 12, at 33.

⁴⁴ *Id.* at 38.

⁴⁵ *Id.* at 33.

conditions might prompt a state to give a particular bundle of rights to migrants.

We begin with a simplified setup where a host country like the United States has migration policies that reflect the interests of its citizens. We assume that citizens benefit from a certain amount and type of migration. This assumption is uncontroversial; very few states, if any, prohibit immigration. However, there is a great deal of variation in how states benefit from immigration. Let us suppose that our hypothetical host state, modeled on the United States, gains from both unskilled and skilled labor. A larger workforce reduces the cost of goods and increases tax revenues that finance public goods, and while migration also reduces wages and increases congestion, we will imagine that our host country will choose a quantity of migration that maximizes net benefits. Note also that the host country will have varying preferences for different types of migrants, including skilled versus unskilled, temporary workers versus people who intend to establish permanent residence, people who have family relationships with citizens, and refugees.

A. Demand Side: What Migrants Want

Migrants benefit from rights for the same reason that citizens do: rights protect them from the actions of individuals and governments that might harm their interests. All else equal, a migrant will gain when the host country grants her legal and constitutional rights. Legal rights protect her from other people, arbitrary actions by the executive branch, and so forth; constitutional rights protect her from the state.

Let us make these points more concrete. A person who lives in a foreign country and contemplates migrating to a receiving state must make two decisions: whether to enter or not, and the degree of country-specific investment to make. The first dimension is straightforward; the second requires some discussion.

Entering and living in a foreign country entails two types of costs: variable costs and fixed costs. Variable costs include the day-to-day costs of living and working—renting a residence, buying food, and dealing with other people. Many of these costs are financial; others are psychological or emotional but just as real—for example, the cost of being far away from one's family or from native speakers of one's language or from people of a common culture.

Fixed costs are those expenses that a person incurs in the course of obtaining skills or assets that enable her to reduce her variable costs over the long term. In this straightforward sense, the fixed costs are investments: one incurs the costs at some early time, and enjoys the returns (in the form of reduced variable costs) over a period of time. For example, a person might

learn the language of the host country—prior to entry or after entry. Learning the language is an investment; once the person learns the language, the variable costs of living in the host country will be lower. It will be easier to deal with people, fewer mistakes will be made, and translators and interpreters need not be hired. Other fixed costs include learning and absorbing cultural and social norms that enable one to interact more effectively with people in the host country.

These fixed costs are often, but not always, country-specific. A country-specific investment is an investment (in money, time, effort) that generates a return that has value only (or mainly) in a particular country.⁴⁶ An American who learns Japanese in anticipation of moving to Japan makes a country-specific investment: the American can enjoy the benefits of knowing Japanese only to the extent that she stays in Japan. To be sure, she may also enjoy these benefits by staying in her own country and dealing with Japanese people in commercial or social settings, or by enjoying Japanese literature, but these benefits are trivial compared to the gains from being employed in Japan. A Japanese citizen who learns English also makes an investment, but this investment is not nearly as country-specific: she can travel to the United States, the United Kingdom, Australia, and other English-speaking countries, and indeed probably can obtain quite substantial returns even by staying in Japan. Still, we will generally refer to language-learning and related activities as country-specific investments.

As noted above, country-specific investments can take place prior to admission to the host country. But probably the most significant country-specific investments occur after admission. Many migrants learn the host country language only after migration; others improve their linguistic skills by interacting with citizens of the host country.⁴⁷ Also of great importance, migrants make country-specific investments by learning social and cultural norms, acquiring friends and associates among members of the host country, and in a general way obtaining local knowledge that is necessary to live successfully.⁴⁸ All these investments are country-specific because they are lost—that is, the return on the investments cannot be obtained, or can be obtained only in greatly diminished form—if the migrant is forced to leave the country prematurely.

Our basic claim is that many (but not all) potential migrants can benefit most from migration if they make country-specific investments and remain in

⁴⁶ For a discussion of this concept, see Cox & Posner, *supra* note 8, at 828.

⁴⁷ See RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2003).

⁴⁸ See *id.*

the country long enough to obtain the full return on those investments, which may often be a lifetime. A migrant in this group will therefore naturally worry that the premise of a country-specific investment—that she will remain in the country for a long period of time (if she so chooses) and that, as we will explain, certain social and institutional features of the host country remain constant—may be incorrect. She will therefore only make country-specific investments if she can predict that this premise will remain correct with a high enough probability. (Other migrants, however, may have no desire to make a country-specific investment and seek instead to migrate temporarily in order to engage in (typically) low-skill labor; these migrants are not the focus of our analysis.)

It should now be clear that our framework provides one central reason why migrants value rights. Rights protect their country-specific investments. Of course, minimal *basic rights*—such as the right to own property—matter to the migrant. If she cannot keep the returns on her investment—such as her paycheck—she will not make the investment. But these minimal rights will often be insufficient.

The *right to remain* is also valuable. One might think that as long as a migrant can keep her paychecks and sell her property before being removed, she should not need a right to remain. After all, these benefits should cover her variable costs from living in the host country, and so she gains on net. However, she values the right to remain in part because she cannot recover her country-specific investments unless she can stay in the host country for a long enough period of time. The longer the right to remain, the more valuable is the country-specific investment, and therefore—a point we will get to in the next section—the greater the country-specific investment that the migrant will make.

Political rights will also often be quite important to migrants. Even a migrant who enjoys the basic right to keep her property and the right to remain takes risks from migration. The migrant also cares about her quality of life in the host country, and this includes such things as the quality of the schools (if she has children), the convenience of parks, the degree of public safety, and other goods supplied by the government. In particular, migrants will always be concerned about xenophobic reactions that result in harassment of migrants or new laws that limit their freedom.⁴⁹ History shows with great clarity that a population that welcomes migrants when jobs are plentiful and the world is at peace will often turn against them during an economic

⁴⁹ See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (1981).

downturn or an international crisis.⁵⁰ Strong migrant rights bar such a reaction or mitigate its consequences.

Basic rights to ownership and the like, and the right to remain, will, if enforced, prevent the worst forms of harassment. But migrants would prefer greater protection. One might imagine that migrants would want some sort of guarantee that the host country does not change in some undesirable way. However, this is surely impractical. Conditions change and governments must adopt new policies to address new problems that arise. Thus, the migrant's most realistic protection against new policies that reflect change but that unreasonably disappoint the migrant's expectations is the right to vote and engage in other forms of political participation. The migrant can use her vote to block policy changes that benefit citizens very little while harming migrants a great deal, but not to block policy changes that benefit citizens a great deal while harming migrants only a little—policy changes that are most likely justified by new conditions. To be sure, one vote doesn't make a difference; but when a large number of migrants have located in the host country, or within a particular town or other area of the host country, their combined voting power may limit the amount of official and unofficial harassment that would occur during a period of stress.⁵¹

Our final point is that basic rights, the right to remain, and political rights matter more to people who make greater country-specific investments, and therefore need a longer period of time, and freedom, in order to obtain the return. If migrants do not make country-specific investments, they may still value rights, but they will not value rights as much. For that reason, permanent migrants value rights more than temporary migrants. Permanent migrants seek to establish a permanent residence in the host countries; for them country-specific investments are highly valuable. Temporary migrants seek to stay only for a limited period—to work, to obtain an education, to tour, to visit friends—and for them country-specific investments are often much less valuable. For example, a Russian exchange student is likely to value rights much less than a Japanese academic who joins a university faculty and expects to remain in the United States for the indefinite future.

⁵⁰ See A. ZOLBERG, *A NATION BY DESIGN* (2006); GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

⁵¹ As the discussion below will make clear, uncertainty about the future and changing circumstances are not the only reason migrants might value political rights. They are also valuable as a precommitment device. For case of exposition, however, we discuss precommitment in Part II.C below.

To sum up, in our simple setup, migrants who make greater country-specific investments value rights more than migrants who make more limited or no country-specific investments. But migrants will value all rights at least a little. This point can be put in another way. Holding the type of migrant constant, a migrant or potential migrant will make greater country-specific investments, the greater are the rights protections in the host country.

B. *Supply Side: What States Want*

When states grant rights to migrants, they incur costs. Some of these costs are straightforward. If a migrant has a right to enjoy her property, then the state cannot confiscate her property and distribute revenues to grateful citizens. If a migrant has the right to criminal process, then the state cannot summarily throw her in jail if it suspects she committed a crime or poses a threat to others. Also the state must divert valuable police and judicial resources to the protection of migrants from citizens who seek to harass them. Thus, the state will incur costs if it confers basic rights on migrants.

Why, then, do states give migrants these basic rights? We could imagine a host country announcing that migrants are welcome but they have no rights. As a matter of historical practice, this type of situation sometimes occurs.⁵² But it is hard to imagine that the host country would attract many migrants. A migrant who entered a country where she was given literally no rights would take the risk of being immediately stripped of all her possessions. The government could take all her possessions and enslave or kill her. Ordinary people could do the same, and she would have no ability to call the government to her aid. Thus, a state would attract no migrants—except in unusual cases, such as a Wild West situation where people band into groups for protection and try to quickly exploit natural resources—unless it gave migrants at least minimal basic rights. For that reason, *basic rights* would seem to be a sine qua non of migration.⁵³

As we noted from the start, all states benefit from migration but states have different needs and interests. Consider a state that needs only seasonal

⁵² Descriptions of gold mining in California during the gold rush sometimes have this flavor. See, e.g., JOHN UMBECK, *A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH* (1981).

⁵³ However, as noted above, some basic rights—including the right to choose one's employer, or even to work at all—can be restricted. And historically other basic rights, such as the right to own property, were often restricted. Cf. *Oyama v. State of California*, 332 U.S. 633 (1948) (holding unconstitutional part of California's Alien Land Laws, which prohibited land ownership by persons ineligible for citizenship—which under naturalization rules at the time meant principally Japanese immigrants).

unskilled labor from people who live just across the border. Suppose further that these people would earn a higher wage in the host state than they do at home. Such people, if granted only basic rights, would likely be willing to engage in seasonal migration, for their and the host state's mutual benefit.

Now let us consider the *right to remain*. Let us imagine that the state faces two possible futures: a "good condition," where the current demand for the migrants' labor continues; and a "bad condition," where the demand collapses because of an economic downturn, and local citizens turn against migrants and want them expelled. If the good condition occurs, then granting rights to remain is relatively cheap for the state. Although it might prefer to remove the noncitizen to satisfy some passing political demand—perhaps reflecting temporary changes in public sentiment or institutional spasms or occasional opportunistic desires to extract revenues from them—the political benefits from such removal are likely to be minimal and hence the cost of the right to remain is low. But if the bad condition occurs, then granting rights to remain is highly costly. The state cannot satisfy popular demand to expel the migrants, and there will be political as well as financial costs from respecting the right to remain.

Clearly, the state has little reason to grant the right to remain to the seasonal migrants described above. Those seasonable migrants do not value the right to remain very much because they do not intend to remain for long periods and are much less likely to make country-specific investments. To put this point more precisely, the joint value of the migration for the migrants themselves and the host state is not maximized from a country-specific investment on the part of the migrants. Accordingly, the state does not need to grant the right to remain in order to secure the desired level of entry and investment.

Suppose, however, that a state seeks migrants who will settle permanently. The state might seek unskilled people or it might seek skilled people; for present purposes, the distinction is unimportant. What is important is that migrants who plan to settle permanently in the host state will need to learn the language and make other country-specific investments. More precisely, a migrant will obtain the highest return from settling in the country permanently if she first makes a country-specific investment in language and other local skills and continues to make country-specific investments once she arrives. Since she can obtain the return on the country-specific investment only if she can remain in the host country for as long as she wants, she will want more than basic rights: she will want the right to remain.

The problem for the state is that if it grants migrants the right to remain, it will not be able to remove them if circumstances change and the bad condition occurs. So the state will grant migrants the right to remain only if

the expected cost of that right is less than the benefit to the state. The migrant might well prefer an absolute right to remain—that is, a right that prevails in the bad as well as in the good condition. But if the states can credibly promise to remove the migrant only in the bad condition, many people will still migrate and make country-specific investments—just as long as the bad condition is sufficiently unlikely, such as a major war or catastrophe.

Remember that migrants care about their environment, not just their right to reside in the host state. Basic rights can protect some aspects of their lives, but *participation rights* give them a way to affect the future bundle of public goods supplied by the government. Thus, participation rights are an important way migrants can improve their well-being in the host country. For the host state, however, participation rights may enable migrants to influence public policy in a manner that hurts the interests of citizens. Suppose, for example, that citizens have a strong preference for maintaining high-quality public parks. A class of migrants cares less about parks and more about the quality of the roads. If migrants have participation rights, then they could cause the government to reduce spending on parks and increase spending on roads. Ex ante, citizens will prefer their state not to grant participation rights to migrants, so as to maintain complete control over public policy.

The state will make the same cost-benefit calculation as it did before. If more migrants will enter and make optimal country-specific investments if they receive participation rights, such that the gains for citizens (in the form of lower taxes, cheaper goods, and so forth) are greater than the costs for citizens (in the form of congestion and public policy biased against them), then the state will grant participation rights to noncitizens. There is a further consideration here, however. Granting participation rights to migrants may be less costly to citizens, the closer the migrants' political preferences are to those of citizens. Thus, a state may be more willing to grant participation rights, as opposed to merely rights to remain, when the expected migration will consist of people very much like citizens. However, by the same token, those migrants may also value participation rights less because they do not fear that that people similar to themselves will vote for policies they dislike.⁵⁴

As an aside, note that states will not be likely to “bribe” people to migrate by offering them significant cash payments. Such cash payments will not encourage people to make country-specific investments unless the payments are conditioned on those investments, which is likely to be impractical. Instead, states offer people legal rights that protect the value of their labor and other aspects of their lives, which should encourage people to make optimal

⁵⁴ In Part III we relax this constraint, considering different ways in which participation rights might impose costs on, or in some cases bring benefits to, the host state.

country-specific benefits, as long as the state can keep its commitment not to renege on the rights guarantees or otherwise reduce the migrant's payoff.

C. *The Optimal Content of Migrant Rights*

To evaluate policy choices, we imagine two agents, a migrant and the state. At time 0, the migrant enters the state and has an initial choice to make a country-specific investment or not. The investment is costly, but has positive net present value for the migrant as long as she is permitted to stay for a sufficient length of time, during which she can recover the cost by working and earning a wage. (We focus here on financial costs for expository simplicity; but the model can encompass all sorts of nonmonetary costs and benefits.) The migrant earns a higher wage if she invests than if she does not invest. At the same time, the state benefits from the migrant's presence because she reduces labor costs and pays taxes.

At time 1, events change. Normally, the state has no reason to expel migrants or change the living conditions of migrants, but let us put this normal condition aside for expository clarity. Let's define the good condition as one in which the state gains by removing migrants or subjecting them to harsher conditions, but the gain is relatively low. The bad condition—a crisis, a war, an economic downturn, an influx of refugees—is the same except the gain is relatively high. The state gains from removing migrants in both conditions, but gains much more in the bad condition.

We assume that from the state's standpoint the optimal policy at time 0 is one in which the migrant can be removed, or her living circumstances worsened, if the bad condition occurs, but cannot be removed or otherwise harmed if the good condition occurs. The reason is the state gains more from time 0 taxes than it loses in time 1 if the good condition occurs, but the state gains less from time 0 taxes than it loses in time 1 if the bad condition occurs. Moreover, the migrant will enter and make a country-specific investment only if she can recover that investment in time 1, and we suppose that she can, in an expected sense, as long as she can stay in the good condition and the probability of the good condition is high enough. Yet she knows that the state will have an incentive to remove her or make her life worse even if the good condition occurs. Thus, in order to encourage migration and investment, the state must commit itself not to remove the migrant, and to maintain her conditions, in the good condition but not in the bad condition.⁵⁵

⁵⁵ This is the classic problem of time inconsistency, first analyzed in the economics literature by Finn Kydland & Edward Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

An optimal “contract” between the state and migrant would provide that the state can remove the migrant if the bad condition prevails and not if the good condition prevails. How might such a contract appear in practice? History suggests two prominent types of bad conditions: war (and other security alarms) and economic downturns. During wars, migrants (especially those from the enemy state) may be suspected of disloyalty and even espionage or sabotage.⁵⁶ During economic downturns, native citizens might seek the expulsion of migrant who compete for scarce jobs.⁵⁷ The optimal contract therefore might state that the migrant remains in the country unless a war or economic downturn occurs.

In practice, we observe migrant contracts that contain the war condition but not the economic downturn condition. Governments typically retain the right to deport migrants if war breaks out with the country of which they are nationals.⁵⁸ Migrants probably understand these rules and indeed, as far as we know, migration between traditional enemies is unusual. An important exception is British migration to the United States during the first half of the nineteenth century but this case is unusual, given the historic ties between the two countries.

In contrast, it is considerably more rare for countries to reserve an explicit right to deport migrants during economic downturns. Why is this? The problem with such a rule is that economic downturns are hard to define—harder to define than a war. If the law provided that governments can remove migrants if an economic downturn occurs, migrants might fear that the government will engineer economic numbers that reflect a downturn or seize on weak evidence to rationalize expulsions. But if the law is more specific, then the government might fear that it will exclude a genuine crisis that does not meet the law’s definition. If governments reserved the right to deport migrants during economic downturns, then migrants would not have the security necessary to make country-specific investments and hence would not migrate or invest but not invest.⁵⁹

States usually take another tack. Instead of reserving a right to deport under specified economic conditions, governments divide migrants into classes

⁵⁶ See STONE, *supra* note 50.

⁵⁷ See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2002).

⁵⁸ See *An Act Respecting Alien Enemies*, 50 U.S.C. §§ 21–24 (1798).

⁵⁹ Note that migrants’ uncertainty about the verification process stems both from the difficulty of specifying a clear rule and the worry that the state will interpret any less-than-clear rule it adopts in a self-interested fashion. Third-party verification organizations could in theory be used to reduce the second concern, but we do not observe these in practice.

and reserve discretionary rights with respect to one class and not with respect to the other. In the most common arrangement, migrants have limited rights for a period of years; stronger rights for another period of years; and then maximal rights, those of citizens. For example, in the United States many migrants enter with an H1-B visa, which allows them to work for a particular employer but not for anyone else.⁶⁰ The visa expires after three years but can usually be renewed once.⁶¹ At the expiration of the second visa, the migrant may be able to become a lawful permanent resident.⁶² The LPR has the right to change jobs and the (conditional) right to stay indefinitely, but not the right to vote. After five years as an LPR, the migrant has the legal right to naturalize, whereupon she obtains the right to vote and other privileges of citizenship.⁶³ Thus migrants often enter and belong to the first class with the expectation that if they remain in the country for a certain amount of time they will be able to transition to the higher classes.

From the perspective of our model, these tiered classifications reflect several priorities. First, they reflect the government's interest in different types of migrants. Governments classify migrants according to how much the state desires a particular class of migrants, how much the successful migration of a particular class hinges on country-specific investments, and so on. Highly desirable migrants are given more generous rights; less desirable migrants are not. Migrants for whom country-specific investments are crucial are given more robust rights to remain than migrants who value entrance regardless of their ability to recoup any country-specific investment. But even highly desirable migrants do not have the right to preserve the conditions under which they enter; such a right would be much too costly. Occasionally states do give migrants some control over the conditions of their lives by giving them voting rights, as some American states did during the nineteenth century, but in the United States today those rights do not come until naturalization.⁶⁴

Second, the tiered classifications reflect an implicit compromise between the two competing goals of encouraging entrance and country-specific

⁶⁰ See INA § 214.

⁶¹ See INA § 214 (g)(4); 8 C.F.R. § 214.2(h)(9)(iii)(A), (h)(15)(ii)(B).

⁶² See ALEINIKOFF ET AL., *supra* note 21, at 400, 437; *cf.* INA § 101(a)(15)(b) (exempting H-1B visa holders from the general requirement that any recipient of a temporary visa have "a residence in a foreign country which he has no intention of abandoning"); 8 C.F.R. § 214.2(h)(16)(i) (permitting H-1B nonimmigrants from entering on the visa and simultaneously seeking to become a permanent resident).

⁶³ See INA § 316.

⁶⁴ See *supra* text accompanying notes 40–45.

investment, on the one hand, and government flexibility, on the other hand.⁶⁵ During an economic downturn, the government can expel short-term migrants, or refuse to renew their visas, thus relieving some of the political pressure from native workers, while allowing long-term migrants to stay, thus encouraging some degree of country-specific investment for future migrants. The legal rights relating to transition are consistent with this compromise. In the United States, for example, migrants have no formal right to transition from their status as a temporary worker—say, on an H1-B visa—to the status of lawful permanent resident.⁶⁶ This lowers the cost to the government of deciding during an economic downturn to cut off these migrants' access to LPR status. (In fact, during the current financial crisis there have been calls in Congress for significant restrictions on the H1-B visa program.⁶⁷) In contrast, the government lacks legal discretion to deny naturalization to lawful permanent residents who satisfy the residency requirement and a few others.⁶⁸

A further point is that even in the bad condition, migrants enjoy basic rights—for example, they may keep their property. Thus, from an ex ante perspective, migrants expect to retain at least some of their gains even if not all of their expected gains. This compromise reflects the fact that governments care most about eliminating security threats or labor unrest in the bad condition, and can probably obtain little value by confiscating migrants' property when the latter can remit money to relatives overseas and in most cases do not accumulate much in the first place. Basic property rights in the bad condition give the migrants at least some incentive to make country-

⁶⁵ An additional possibility relates to immigrant screening. An interesting feature of this progressive accumulation of rights is that the migrant has a weaker incentive to make country-specific investments initially, but the incentive strengthens over time. Correlatively, the receiving country's flexibility decreases over time. One plausible explanation for this arrangement is that the receiving country obtains better information about the migrant over time. It is optimal for the country to have flexibility when little is known about the migrant; the country can cede flexibility as it becomes increasingly clear that the migrant poses no threat and has integrated effectively. See Cox & Posner, *supra* note 8.

⁶⁶ See ALEINIKOFF ET AL., *supra* note 21, at 437 (discussing the formal legal distinction between nonimmigrants and immigrants and describing the way in which the immigration system has come in recent years to treat nonimmigrants admissions more like the transition model described above than like an entirely separate track).

⁶⁷ See Laura Crimaldi, *Walls Closing on All Sides for Immigrants: Economic Crisis, Crackdown Hit Community Hard*, BOS. GLOBE, Feb. 22, 2009, at A6; Editorial, *Immigration Crackdown Written Into The New Stimulus Law Will Damage New York's Financial Sector*, DAILY NEWS, Feb. 23, 2009.

⁶⁸ See INA §§ 311–331. Whether naturalization is discretionary or as a matter of right is an important design decision about which the United States has long taken a quite different approach than most of western Europe.

specific investments, while giving the government flexibility where it most needs it.

The model suggests other ways in which the optimal migrant contract could be designed. Suppose, for example, that the receiving country retains a right to expel the migrant only upon payment of some large sum to the migrant. The migrant might be willing to make the country-specific investment knowing that even if she can be expelled, she will be compensated to a degree for her investment.⁶⁹ The country retains flexibility and, if the demand for entry is high enough, could even offset the cost by requiring the migrant to pay fees upon entry. Such a system would approximate an insurance scheme, where migrants in essence purchase insurance policies upon entry—policies that pay out if the bad condition occurs and the migrants are required to leave.

We do not observe such a system, though close variations have recently cropped up. Spain, which absorbed large numbers of low-skilled migrants during a decade-long economic boom, has recently begun offering those migrants cash if they leave the country.⁷⁰ While the cash-for-leaving policy is structured as an option rather than a requirement, it reflects the basic logic: Spain can remove migrants today while setting a precedent that encourages future migrants to make country-specific investments when the economy recovers.⁷¹ This also suggests an additional wrinkle on our earlier discussion of precommitment. Spain may have been legally authorized to revoke these migrants' work visas, but doing so might have made future migrants more wary about immigrating to Spain or investing after they arrived. To the extent

⁶⁹ Options play an important role in the design of optimal contracts; see, for example, BOLTON & DEWATRIPONT, *supra* note 7.

⁷⁰ See Christine Spolar, *Spain Tries to Buy Out Immigrants*, CHICAGO TRIBUNE, Oct. 13, 2008, at 7; see also *Czech Republic to Pay Unemployed Foreign Workers to Go Home*, REUTERS, Feb. 9, 2009, available at <http://www.reuters.com/article/worldNews/idUSTRE5185Y920090209> (offering to pay plane fare for foreign workers unable to pay for their own return).

⁷¹ The Spanish policy is also likely driven by the fiscal consequences of the low-skilled migrants. Over the last decade, Spain has frequently regularized the status of irregular workers and extended the social safety net to cover large numbers of immigrant workers, in part to encourage their integration. As Spain's economy soured, however, these migrants' eligibility for public assistance increased the state's fiscal burden. Spain then offered many of the migrants lump-sum payments of a fraction of their unemployment benefits in exchange for promises that the migrants would leave the country and not return for at least three years. See Spolar, *supra* note 70.

that a state's reputation for visa compliance affects the decisions of future migrants, its reputation can also play a role in promoting precommitment.⁷²

Finally, states may try to compromise their need for flexibility and the migrant's interest in security by granting voting rights to migrants. Voting rights give migrants the power to form coalitions that can block adverse legislation but, as long as migrants remain in the minority, not enough power to block adverse legislation that is overwhelmingly in the interest of natives. If natives cannot form powerful anti-migrant coalitions in the good condition, but can in the bad condition, then voting rights may have the same effect as the optimal contract.⁷³

The arrangements we have discussed are vulnerable to shifts in the underlying variables. Consider first our claim that a war is more easily verifiable than an economic downturn. This may well be true in general but there are telling exceptions. The conflict with Islamic extremists falls somewhere between a true war and a law enforcement operation. In the wake of 9/11, the U.S. government did not expel large numbers of migrants from Arab and Muslim lands with heavy Al Qaida presence but it did subject these migrants to intrusive monitoring programs.⁷⁴ These programs may well have seemed to Arabs and Muslims a breach of the implicit migration contract; for the U.S. government, a change in circumstances justified a change in the law. However one looks at it, migrants from the relevant countries will be more reluctant to enter the United States and to make country-specific investments.⁷⁵ The U.S. government response has introduced uncertainty, which makes the war condition more like the economic downturn condition, possibly leading to an outcome where few or no migrants enter and invest.

To sum up, the optimal contract will provide that the government may deport migrants if bad conditions occur, but if the bad condition is unverifiable, then the government may retain discretion to remove the migrant or alter conditions or the government loses that discretion or the bulk of it. We observe the intermediate solution most vividly in war-related government rights; otherwise, governments tend to divide people in classes that enjoy little

⁷² See Eric A. Posner & Jack L. Goldsmith, *THE LIMITS OF INTERNATIONAL LAW* ch. 4 (2005); Rachel Brewster, *Unpacking the State's Reputation*, 50 *HARV. INT'L LAW J.* (forthcoming 2009).

⁷³ We discuss this argument in more detail in Parts II.D. and III.C.

⁷⁴ See sources cited *supra* note 1.

⁷⁵ Indeed, there are anecdotal accounts of Muslim immigrants choosing other destination states, like Canada, over the United States because of this uncertainty. See Interview with Ahilan Arulanantham, American Civil Liberties Union of Southern California (February 2009).

protection or a great deal of protection. As a result, many migrants do not make country-specific investments; others do, either because they receive protection immediately or they are willing to risk removal during the first period in the hope of obtaining protection starting in the second period.

When the underlying variables change, so should the law, and here we can offer some rough predictions. If the technology for verifying conditions change so that verification becomes difficult, then governments will choose an extreme outcome—our Al Qaida example. If the risk of the bad condition increases, then migrants' rights should become weaker. And if the value of country-specific investments increases—as might happen, as a country moves from an agricultural or traditional market economy to a “knowledge-based” economy—then migrants' rights should become stronger.

D. The Optimal Strength of Migrant Rights

The optimal contracting problem has an additional dimension not present in ordinary contractual relations, where it can be assumed that courts will enforce the contracts to which parties agree. Even if it were possible to describe precisely the good and bad states of the world, prospective migrants may worry that the state will renege on its obligations under the agreement. The state might retroactively change deportation policy in a way that makes many noncitizens removable even in the good state of the world. Or, short of deportation, the state might harass the migrants or otherwise make their lives miserable, akin to constructive firing in the employment setting. This raises the problem of the strength of rights, or, more precisely, their degree of entrenchment.

Consider the difference between statutory and constitutional rights. If migrants are given an absolute right to stay and this right is statutory, then the state can eliminate this right merely by changing the law. Now, in fact, it might be difficult to change the law, in which case the right is robust. But it might also be easy to change the law. Alternatively, the right could be constitutional. If the right is constitutional, it can still be changed, but doing so will be more difficult. It should be clear that generous rights (such as an absolute right to stay) that are weakly entrenched may offer less protection than weaker rights (such as a right to stay unless there is a war) that are more strongly entrenched.

The three main source of rights can be arranged from weakest to strongest. Repeal of administrative rights can occur at the behest of the

executive alone.⁷⁶ Repeal of statutory rights requires the participation of Congress. Repeal of constitutional rights requires the satisfaction of various supermajority rules or the acquiescence of the courts.⁷⁷ All else equal, entry and country-specific investment will be greater when rights are more highly entrenched than when they are not. By the same token, the flexibility of the state is reduced. If it fails to anticipate a crisis or type of crisis, and thus does not incorporate an option to remove into the basic legal scheme, it will not be able to add such an option if the right to remain is sufficiently entrenched.

Now consider a third possibility: giving the migrant the right to vote. The right to vote is distinctive. Like the right to stay, it can (in principle) be statutory or constitutional, and thus can be more or less easy for other (citizen) voters to eliminate. Yet the migrant herself can exercise her right to vote and use it to elect officeholders who will support the migrant's rights. So the right to vote is, to a degree, self-entrenching. To be sure, it is worth little by itself; but if there is a critical mass of migrants, the right to vote can be quite powerful. Thus, unlike the right to stay, the value of the right to vote is a function of how many other migrants have that right, and how native citizens are likely to exercise their own votes. If few other migrants exist or few have votes, or if citizens make up a large majority and vote in blocs, then a migrant is not likely to value the right to vote. But in many cases, migrants will be able to form blocs and then make coalitions with other groups of citizens.⁷⁸ This will allow them to protect whatever interests they value the most. This shows that participation rights can have distinctive value as a mechanism for overcoming immigration law's precommitment problem.

How might states choose among these options? Our starting point—that many migrants gain from making country-specific investments but states want to be able to remove migrants in the bad condition—entails that some level of security less than absolute will prevail. Let's assume a baseline where the state simply exercises administrative discretion and can retain or remove migrants at will. Migrants might fear that the executive will remove them for political reasons even when the bad condition does not occur, and thus refrain from investing. How might a state improve on this outcome?

- First, a state might pass a statute that provides for fully secure rights. If migrants expect judges to interpret the statute fairly, and if the legislature can repeal the statute only with great difficulty—for example, only if an emergency (the bad condition) exists—then the statute might be an

⁷⁶ See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law* (unpublished manuscript 2009).

⁷⁷ See U.S. CONST. art. V.

⁷⁸ See *infra* text accompanying notes 94–108.

adequate solution. However, the legislature itself might be no less trustworthy than the executive.

- Second, a state might constitutionalize the statute, thus eliminating the ability of the legislature to overturn it. A state will do this if it expects that it can amend the constitution in an emergency or (what is more likely) that courts will fairly carve out exceptions for emergencies. Migrants would also need to trust the courts.
- Third, a state might instead grant the migrant voting rights, thus giving her the ability to block self-serving interpretations by the government or statutory revisions by the legislature. As we noted above, a state will most likely grant voting rights to migrants who share the basic values and preferences of existing citizens. Migrants will be most likely to value these rights if they believe they can form a coalition that is large enough to protect their interests.

It should be clear, then, that states can commit themselves in two ways, substantively and procedurally. If a law can reflect the optimal contract—that is, removal only in the bad condition—then it is optimal if it cannot practicably be changed but not if it can too easily be changed. If the law gives migrants blanket protections but can be changed with difficulty—and only, in practice, when the bad condition prevails—then such a law can be optimal as well. In the United States, the rights of long-term migrants have, over the centuries, become to a limited extent constitutionalized. Yet these constitutional rights remain minimal and mostly procedural rather than substantive. For example, Congress is free to pass statutes requiring the deportation of long term residents on almost any basis—and to apply the new deportation rules retroactively.⁷⁹ At the same time, the executive has gained increasing control over the rights of migrants, especially in the form of enforcement actions against migrants who have entered illegally.⁸⁰ Thus, the strength of rights varies according to the type of migrant and the type of right in question, and, as we expect from our theory, the rights of short-term migrants are weakest, that is, easiest to change.

To sum up, migration policy presents a precommitment problem for the state. The state seeks to encourage migrants to enter and make country-specific investments so that it can obtain greater tax revenues and other

⁷⁹ See *Galvan v. Press* 347 U.S. 522 (1954) (upholding the retroactive application of the Subversive Activity Control Act); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104-208, 110 Stat. 3009 (making many retroactive changes to the grounds of deportability); *INS v. St. Cyr*, 533 U.S. 289 (2001) (discussing IIRIRA's retroactive application).

⁸⁰ See Cox & Posner, *supra* note 8.

benefits. At the same time, the state has a strong interest in being able to remove migrants, or significantly reduce their living circumstances, *ex post*. If the content of rights could be perfectly specified in advance—so that the state can take adverse actions against migrants if and only if doing is socially optimal for citizens from an *ex ante* perspective—then the rights should be the strongest possible. But because the rights cannot be perfectly specified in advance, the state faces a second-order tradeoff between granting weak rights (so that the state can change them at will but with the result that migrants will be reluctant to invest) and strong rights (so that migrants can invest but the state will not be able to change them when doing so is optimal).

We can again offer some predictions. When verification costs are low and so states can offer state-contingent contracts, the strength of rights should be high. When verification costs are high, then states will offer stronger rights (for example, statutory rather than administrative) to migrants who optimally make country-specific investments than to migrants who do not. In the United States, skilled workers who enter on visas have statutory rights; unskilled workers who enter illegally have quasi-administrative rights, that is, they remain on the sufferance of the executive.⁸¹

III. COMPLICATIONS

We have offered a very simple model with potentially testable predictions. The real world is more complex, however, and here we suggest some ways for complicating the analysis.

A. *Exit Rights*

All migrants have the right to exit. In our setup, this right is irrelevant, because the problem on which we focus is that of the self-commitment of the receiving country. But one can imagine the opposite problem, namely, that countries fear that if they welcome migrants and incur costs in training, educating, and assimilating them (for example, bilingual programs in schools), the migrants will leave the country before working and paying enough taxes that the country recovers its investment.

If this problem is real, receiving countries could deny migrants the right to exit, or require migrants to post a bond before they enter, which they lose if they voluntarily leave the country before a specified period of time has expired. In practice no modern democracy formally limits migrants' (or citizens') exit

⁸¹ See Cox & Posner, *supra* (discussing the *de fact* low-rights system of illegal entry); Cox & Rodriguez (working paper).

rights, and we do not observe the bonding system. This suggests that the problem is theoretical rather than real. Nonetheless, some countries do require migrants to repudiate their citizenship in other countries before accepting citizenship in receiving countries.⁸² This requirement reduces the value of the exit option, as the exiting migrant would need to reapply for citizenship in her native country or go elsewhere. We will discuss dual citizenship in greater detail in Part V.B.

If migrants have the right to exit, the value of that exit right varies greatly. Migrants from high-wage countries have more valuable exit rights than migrants from low-wage countries; the latter lose more future income if they leave the receiving country. Refugees also have high exit costs: if they return to their native country, they may be harassed or killed. One might predict that receiving countries would offer weaker rights to migrants with low-value exit options: the receiving country need not fear that migrants will leave if they are treated poorly for political reasons, and thus can depend on them making country-specific investments. One observes this pattern of regulation in the United States, where high-skilled workers from prosperous nations in Europe and elsewhere are often accorded substantial legal rights, while low-skilled workers from much poorer nations in Central and South America are admitted on very restrictive terms or permitted to enter without any legal status at all.⁸³

B. Families

Our basic theory assumed just two agents—a monolithic state and a solitary migrant. But migrants are seldom solitary. States can encourage migrants to enter and invest by promising rights to family members and relatives such as children. As before, however, the state risks tying its hands in a way that may hurt it *ex post*.

Sending and Receiving States face similar choices with respect to the treatment of children and other family members. A migrant may have any number of family relationships, current (as of the time of migration) and prospective (after migration). Let us distinguish a few dimensions. First, at the time of arrival she may have many or few relatives, and these may be close or distant. Second, she may bring these relatives (some or all) with her or they

⁸² See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); Simone Tan, Note, *Dual Nationality in France and the United States*, 15 *HASTINGS INT'L. & COMP. L. REV.* 447, 461–462 (1992).

⁸³ See Cox & Posner, *supra* note 8 (describing this pattern). Refugees are an exception in the United States. They are formally provided generous rights, including legal status and the right to eventually become lawful permanent residents. See INA §§ 208, 209.

may stay in the Sending State. Third, she may establish new family relationships in the Receiving State—in particular, a spouse and children (but also in-laws, nephews, nieces, and so forth). Fourth, her new relations may have stronger or weaker connections with the Receiving State (they might be noncitizens, for example). The Sending and Receiving States must make numerous choices about how to treat these relations and therefore the migrant herself, given that the migrant will care about maintaining these relationships and (usually) staying in proximity with her relations.

We can speak broadly of favorable family policies or unfavorable family policies, where the degree of favor refers to the extent to which the migrant may exercise an option to enter with pre-entry family connections and to exit with post-entry family connections. To keep things simple, however, let us focus on perhaps the most important issue from the standpoint of policy: the rights of children.

Consider a migrant who enters the Receiving State and then has a child while on that country's territory. The basic conceptual divide is between *jus sanguinis* and *jus soli*.⁸⁴ *Jus sanguinis* provides that the child derives her citizenship from her parents: so a child of German citizens who is born in the United States has German citizenship.⁸⁵ *Jus soli* provides that the child derives her citizenship from the state on whose territory she is born.⁸⁶ So the child in our example would have United States citizenship. Actual laws deviate from these paradigms, and various rules resolve conflicts or permit dual citizenship.⁸⁷ But we will limit ourselves to the paradigm cases.

What are the costs and benefits of the two systems? For the migrant, a host country with *jus soli* is more attractive than a country with *jus sanguinis* because only in the first country can her child, if born in the Receiving State, have Receiving State citizenship. Given that a child who is born and spends several years in the Receiving State will be a native speaker of that language, and may have trouble learning the language of the Sending State, the migrant's interest in obtaining citizenship for her child may be very strong. To be sure, this citizenship might not be worth anything if she leaves.⁸⁸ But, compared to *jus sanguinis*, *jus soli* gives the migrant the option to obtain citizenship for her

⁸⁴ See Weil, *supra* note 82.

⁸⁵ See RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW*, 31–33 (1994).

⁸⁶ See *id.*

⁸⁷ We discuss the variations in citizenship rules more fully in Part IV.B.

⁸⁸ In theory, the children's citizenship in the Receiving State may be limited by Sending State rules. In practice, however, this is seldom true.

child if she decides to remain permanently in the Receiving State, so her child, as an adult, may stay as well.

At the same time, the migrant will also prefer the system of *jus sanguinis* in the Sending State. This ensures that if she decides to return, then her child will be able to return with her and reside permanently as a citizen.⁸⁹

Consider now the Receiving State's perspective. With respect to immigrants, it encourages immigration and country-specific investment by adopting *jus soli*. Immigrants are more likely to enter, and to invest in country-specific assets, if they expect children whom they bear in the Receiving State to become citizens. There is some evidence that the United States adopted a *jus soli* regime in part for these reasons; it was a fledgling nation with vast tracts of land and a strong interest in attracting labor.⁹⁰

The cost of *jus soli* is that these children will have voting rights. Now, often this cost is very low. The children of immigrants often easily learn the language of the Receiving State and adopt the values and absorb the culture of the people who live there. However, in countries where assimilation is difficult, the cost could be very high. The Receiving State might fear that descendants of migrants will form an unassimilated and hostile group; and if the group has voting power, it may distort political outcomes away from what is preferred by native citizens and their descendants. If the Receiving State fears such an effect, it will prefer *jus sanguinis*, even though *jus sanguinis* will deter migration. Indeed, if *jus sanguinis* laws do not deter migration, they can create a self-fulfilling prophecy, as migrants teach their children the Sending State language so that the children will have a viable exit option, in which case these children may not learn the Receiving State language well enough for assimilation. It may not be a coincidence that *jus soli* prevails in the United States, with its successful history of assimilation, and *jus sanguinis* has historically in European countries such as Germany and France, which have unassimilated national minorities—but the direction of causality is unclear.⁹¹

⁸⁹ This point applies with diminishing force as generations pass. The migrant probably thinks very little about the rights of her great- or great-great-grand children. Many states—including the United States—have a generational cutoff. See INA § 301. But a state is less likely to have such a cut-off if it identifies strongly as a diaspora nation founded on a shared ethnic or religious identity. Such states will want to extend citizenship even to the remote descendants of citizens in order to encourage their entry. In that light it is unsurprising that Israel permits distant descendants to enter the country and quickly become Israeli citizens. See Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WISC. INT'L. L. J. 345, 368–69 (2008).

⁹⁰ Peter H. Schuck, *The Transformation of International Law*, 84 COLUM. L. REV. 1, 8–9 (1984).

⁹¹ See Weil, *supra* note 82, at 17 (describing this historical pattern).

The Sending State can choose to benefit the emigrant by creating a system of *jus sanguinis*. If *jus soli* prevails, the emigrant's foreign-born children will not have Sending State citizenship. This lowers the value of the emigrant's option to exit the Sending State. By contrast, if *jus sanguinis* prevails in the Sending State, the emigrant can be sure that her children will be citizens in that state. Thus, the Sending State might use a system of *jus sanguinis* to encourage out-migration, and *jus soli* to discourage out-migration.

However, it should be clear that states need not have the same system for emigrants and immigrants. A country that seeks to encourage immigration and emigration, for example, might have *jus soli* for immigrants and *jus sanguinis* for emigrants. This is, in fact, close to the practical effect of United States citizenship policy, which combines elements of both *jus soli* and *jus sanguinis*.⁹² Various rules can also be used to soften the edges of the paradigm regimes. A *jus soli* state, for example, might allow a returning migrant to obtain citizenship status for children born overseas, with greater or lesser hurdles, such as waiting periods, fees, and so forth. And, indeed, since World War II countries with different migration law traditions have been gradually converging toward a system that combines elements of *jus soli* and *jus sanguinis*.⁹³

Our point, for now, is that what one might call child-citizenship rights—*jus soli*, *jus sanguinis*, and the variations—are similar to basic rights, participation rights, and the right to stay, but with an additional twist. Like the other rights, they are used by the Receiving State to attract migrants and encourage investment, and will be particularly attractive for the Receiving State when assimilation can be expected. The twist is that child-citizenship rights can also be used by the Sending State to increase or reduce the value of the exit option of citizens in foreign states.

C. *Voting Rights*

Our simple model above assumed that the cost of political participation by migrants stemmed exclusively from their potentially divergent preferences. The truth is more complicated. From the Receiving State's perspective, there are several different reasons why it might be costly to extend voting rights to migrants.

Consider first the problems of information and inculcation. The Receiving State might worry that voters need certain information to cast intelligent ballots; without that information voters might vote in ways that are

⁹² See ALEINIKOFF ET AL., *supra* note 21, at 15–55.

⁹³ See Weil, *supra* note 82, at 25–32 (describing recent convergence of laws).

detrimental to the state and perhaps themselves. The concern is that new immigrants do not have sufficient information. The inculcation issue is related: the state might worry that new immigrants will vote in ways detrimental to the existing polity because they will initially not have absorbed the values of the existing community. Both of these concerns track parallel arguments in American voting rights jurisprudence. As recently as the 1960s several states (and some local governments) had durational residency requirements for voting.⁹⁴ New residents were ineligible to vote until they had resided in the state for a fixed period—sometimes up to one year. When these laws were challenged in court, the states defended them on information and inculcation grounds. These arguments were squarely rejected by the Supreme Court.⁹⁵ But the Court did not reject the arguments as implausible; rather it concluded as a normative matter that these were impermissible concerns where inter-local or interstate (rather than international) migration was at stake.⁹⁶

The informational and inculcation issues are both transitional concerns. They suggest that the cost of conferring political rights on migrants might decline over time. If these were the only costs, they could be alleviated through durational residency requirements—such as the current five year residency requirement prior to naturalization—or by other mechanisms designed to lower information costs or reshape migrants' preferences.

But even if migrants all have good information and fixed preferences, the Receiving State might worry that those preferences diverge from the existing polity in a way that imposes costs on the state. Importantly, however, this does not mean that the Receiving State need always strive to pick migrants with political preferences close to those of existing citizens, as is sometimes assumed by commentators.

If politics is driven by the median voter, for example, then the state need only ensure that extending voting rights to migrants doesn't move the median. The Receiving State could accomplish this in one of two ways. First it could grant voting rights only to migrants whose preferences are quite close to the existing median voter. Second it could extend the franchise to migrants with diverse preferences, so long as it ensured that these voters' preferences were

⁹⁴ See, e.g., Tenn. Const. art. IV, § 1 (1970) ("Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for . . . members of the General Assembly and other civil officers for the county or district in which such person resides . . .").

⁹⁵ See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965).

⁹⁶ See *Blumstein*, 405 U.S. 330.

distributed around the same median as the existing polity. On this account, the cost of migrant voting is a function of the median migrant's preferences but not of the diversity of migrants' views.⁹⁷ Homogeneity itself is relatively unimportant -- and could actually be quite costly if the Receiving State picks a homogenous group of migrants but misjudges their preferences.⁹⁸

Relatedly, it is not just migrant voters' preferences that will concern the Receiving States. Governments are powerful agents of redistribution. This raises the concern that migrants—even migrants who have ideological preferences identical to existing citizens—might try to use their political power to redistribute the state's wealth to themselves. If this is the state's central concern, then it will worry much more about the organizational capacities of the immigrant pool rather than their ideological distribution. Migrants who can more easily overcome collective action problems and band together as a group will be more likely to engage in successful rent seeking.⁹⁹ Shared cultural, ethnic, or linguistic identity might be one feature that facilitates such collective action—consider, for example, the Cuban immigrant community, whose political power has been widely documented.¹⁰⁰ Thus, a state concerned most about rent seeking might try to limit large scale migrations from a single source, to pick migrants with diverse ethnic and linguistic backgrounds, and so forth.¹⁰¹

⁹⁷ As a technical matter, the cost is also a function of the size of the migrant pool. If the median migrant's preferences diverge from the existing electorate, the extent to which this will actually shift the receiving state's policies depends on the relative size of the existing polity and the pool of potential migrant voters.

⁹⁸ There are other theories on which the Receiving State might favor homogeneity in the electorate. Governments produce public goods. A trope of local government literature is that the efficiency of public good production can be improved by increasing the homogeneity of the electorate. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). This can be true where there are economies of scale associated with public goods, or where supplying one public good interferes with the supply of another (this could be true because the goods themselves are in conflict, as with open spaces and highways, or because the production of public goods is costly and the government is fiscally constrained). If the efficient supply of public goods were all one cared about, then one would want to use immigration law to increase the homogeneity of the electorate. While this might be a plausible account for very small states, it seems relatively implausible for a large and quite diverse state like the United States.

⁹⁹ See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1971).

¹⁰⁰ See, e.g., Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L. J. 869 (1995).

¹⁰¹ The United States quota system includes some such limits. Per-country caps limit the number of migrants from sending state who may receive visas. For most states these restrictions are irrelevant, but they impose tremendous restrictions on migration from places like Mexico and the Philippines. See INA § 202 (setting per-country caps); see also ALEINIKOFF ET AL., *supra* note 21, at 308–11 (describing the per-country caps and the effect they have on

As should be clear from the examples, different theories about the structure and function of democracy lead to quite different, often conflicting prescriptions. For example, a government concerned about producing public goods efficiently might favor a homogenous migrant pool; but a homogenous pool of migrants is the last thing a government concerned about rent seeking would want. Moreover, understanding more fully the political implications of immigration policy highlights a potential tension in a state's immigrant-selection system. States select immigrants along several dimensions. One important dimension is the labor market dimension: states often choose immigrants who promote particular labor market goals. In the United States today, this might mean admitting a large number of low-skilled workers. But the state's selection preferences regarding the labor market might conflict with the state's ideological selection preferences.¹⁰² Low skilled workers might turn out to have ideological preferences far from that of the existing electorate. Where this is true the state must make a trade-off: it must either compromise along one of these dimensions or attempt to avoid the compromise by admitting the immigrants while excluding them from participation in the political process.¹⁰³

This trade-off might help explain why the United States today is contemplating the use of temporary migration programs (which really means a quite slow path to permanent residence and eventual voting) for low-skilled workers but a much quicker path for high-skilled workers. The comprehensive reform legislation that failed to make it out of Congress in 2006 reflected this structure.¹⁰⁴ Several versions of that legislation combined a large increase in the green-card quota for high-skilled workers with the creation of a large-scale temporary worker program for low-skilled workers.¹⁰⁵ The high skilled workers given green cards and admitted to lawful permanent residence would have been eligible to naturalize in five years.¹⁰⁶ In contrast,

China, India, Mexico, and the Philippines); Department of State, Visa Bulletin, No. 4, Vol. IX (January 2009) (showing current backlogs that the caps create).

¹⁰² See Francesc Ortega, *Immigration Quotas and Skill Upgrading*, 89 J. PUB. ECON. 1841 (2004).

¹⁰³ This also suggests that, on the margin, states will be more likely to try to attract ideologically dissimilar immigrants with other forms of security—such as security from deportation.

¹⁰⁴ See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (passed by the Senate on May 25, 2006).

¹⁰⁵ See *id.* tit. V (raising employment quota that goes mostly to high-skilled workers from 150,000 per year to 450,000 per year and altering the diversity lottery in some ways to promote the entry of even more high skilled LPRs); *id.* tit. IV (establishing H-2C temporary worker program for low-skilled workers).

¹⁰⁶ See INA § 316.

the low-skilled workers would have had to work for at least four years (and typically longer) before becoming eligible to apply for lawful permanent residency—and their applications would be further delayed if they were unable to pass English and civics exams from which the high-skilled migrants were exempt.¹⁰⁷ This would mean that low-skilled workers would have to wait nearly twice as long as high-skilled workers (under the best of circumstances) to obtain political rights. One account of this differential treatment is that the government believed that high-skilled workers are more likely—because of their countries of origin, their high levels of education, etc.—to have ideological preferences closer to those of the existing electorate in the United States.

The European Union presents another interesting example. Article 19 of the EC Treaty gives every citizen of the EU the right to vote in municipal elections wherever she is a resident.¹⁰⁸ A Pole living in Paris can thus vote in Paris's mayoral elections; she cannot vote in French parliamentary or presidential elections. The rules clearly reflect the goal of European integration—to strengthen incentives for workers to move to places where their labor is most highly valued. They increase the incentive to make country-specific investments by giving migrants the ability to form political coalitions that block policies that harm them. At the same time the rules implicitly recognize that foreigners do not share all of the values and interests of nationals, and hence limit the ability of foreigners to affect policy by depriving them of the vote at the national level.

D. *The Role of Employers*

As noted above, many U.S. employment visas permit the migrant to enter only with the sponsorship of the employer. The migrant can remain in the country only as long as she continues to work for that employer.¹⁰⁹ This feature of the law gives the employer a great deal of bargaining power, and makes the migrant vulnerable to hold-up and other forms of opportunism.¹¹⁰

¹⁰⁷ See Comprehensive Immigration Reform Act of 2006 tit. VI (providing eventual path to LPR status, through self-petition or through existing visa applications).

¹⁰⁸ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 18.

¹⁰⁹ See INA §§ 247(a). Some employment visas permit migrants to change jobs but make it cumbersome to do so, thereby limiting labor market mobility as a practical matter. See, e.g., INA § 214(n) (H-1B portability provision).

¹¹⁰ See NGAI, *supra* note 57 (criticizing the Bracero program on these grounds); CINDY HAHAMOVITCH, *THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870–1945* (1997); Levins, Congressional Research Service, Programs Funded by the H-1B Visa Education and Training Fee (2007).

As a consequence, the migrant will make employer-specific investments rather than country-specific investments at the margin. The reason is that the migrant can recover the costs of her investments only by remaining with the employer. From the perspective of the receiving country, this arrangement may not be ideal. The receiving country does better from country-specific investments than from employer-specific investments. However, employers may gain from this arrangement—it increases their bargaining power with respect to the migrant, which may enable them to recover the cost of luring the migrant to the country and training her—and, from the perspective of the receiving country, the difference between employer-specific investment and country-specific investment may be slight.

A further consideration is that migrants may be hesitant about entering a country and making country- and employer-specific investments if the employer has so much bargaining power. The employer has a strong *ex post* incentive to hold up the migrant, forcing her to choose between low wages that do not cover her *ex ante* investments or to return to her native country where her wages are even lower.¹¹¹ To attract migrants who are hesitant for these reasons, employers would need to establish a reputation for fair *ex post* treatment or agree to contractual obligations along the same lines.

E. *Internal Political Economy*

Up to this point, we have assumed that the state is a monolithic entity that steadfastly pursues the interests of its citizens. This oversimplification helps highlight some important dynamics, but it obscures the internal political economy of the state. Decisions about which immigrants to admit and whether (or how quickly) to confer voting rights are themselves the product of the existing political process.¹¹²

Perhaps the most important possibility is that insiders will use immigration policy to try to lock themselves in power. They might attempt to do this in several ways. First, they might do so by keeping out migrants with

¹¹¹ Historically this has been a significant problem in the United States. See NGAI, *supra* note 57. Today it is often a principle objection to those who oppose the creation of larger temporary worker programs, particularly for low-skilled workers. See Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007).

¹¹² In this sense there is a very important and overlooked parallel between immigration law and the law of democracy: both contain a basic endogeneity because the legal rules regulate the boundaries that determine who will participate in the setting of future legal rules. This endogeneity is a central theme of modern voting rights scholarship. But it is largely ignored by immigration scholars.

different electoral preferences, or about whom there is more uncertainty about their preferences. These migrants might be excluded at the border; or the state might admit them but either deny them voting rights or delay their access to the franchise. This could be accomplished by making migrants ineligible for citizenship or by requiring a longer period of residence before the migrants are eligible for citizenship. Second, this dynamic could also operate in reverse, with political insiders encouraging immigration by potential supporters and speeding their access to the franchise (by, for example, shortening the naturalization period or granting voting rights prior to naturalization). A third possibility is that political insiders would encourage out-migration by political opponents, either by deporting them or by making their day-to-day lives much less comfortable.

The third possibility seems quite unlikely in the United States. First, voters in national elections today are all citizens, and the Constitution prohibits the deportation of citizens.¹¹³ Second, the cost of exit from the nation is often quite high, so it is hard to imagine the state successfully encouraging or coercing voters to leave by making their lives more difficult. That said, there is some evidence that this strategy has been used at the local level.¹¹⁴ And the deportation provision in the 1798 Alien and Sedition Act suggests that the possibility is not unheard of at the national level.¹¹⁵

The first possibility seems considerably more plausible. In fact, some historical episodes in America are consistent with this explanation. Consider, for example, the rapid changes made to U.S. naturalization rules in the period immediately following the ratification of the Constitution. Over the course of a few short years in the 1790s, Congress sharply expanded the durational residency requirement for naturalization—from two years to five, and then from five to fourteen years.¹¹⁶ These changes had the effect of keeping some new migrants out of the voting booth for very lengthy periods of time by delaying access to citizenship; and even in situations where citizenship was not required for voting, it precluded office holding by migrants. Many historians have argued that these early changes to naturalization law were in part the

¹¹³ See *supra* text accompanying note 15; See *Afroyim v. Rusk*, 387 U.S. 253 (1967).

¹¹⁴ One prominent example is James Michael Curley, the Irish American mayor of Boston, who over decades contributed to the dramatic depopulation of the city's anglo protestant citizens. See Edward L. Glaeser & Andrei Schleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J. L. & ECON. 1 (2005).

¹¹⁵ See Alien Enemies Act of 1798, U.S.C. §§ 21–24.

¹¹⁶ See Act of March 26, 1790, 1 Stat. 103 (establishing requirement of two years residence before naturalization); Act of January 29, 1795, 1 Stat. 414 (extending the required residency period to five years); Act of June 18, 1798, 1 Stat. 556 (extending residency period to fourteen years), *repealed by* Act of April 14, 1802, 2 Stat. 155 (returning residency period to five years).

product of a fight between nascent American political parties—an attempt by the emerging Federalist part to keep the government out of the hands of the Republicans.¹¹⁷

Since the Alien and Sedition Act episode, the naturalization delay has been formally stable in American immigration law. Lawful permanent residents have for the last 200 years been required to live in the United States for five years before becoming eligible to naturalize.¹¹⁸ Thus it is tempting to conclude that durational residency requirements have not been used to shape the composition of the electorate. But there are two important exceptions. First, until well into the twentieth century immigrants from Asia were ineligible to naturalize because of racial bias in the naturalization rules.¹¹⁹ Second, while the formal residency rule has remained fixed, other changes to the immigration law have created considerable variation in practice. Much of that variation is the product of changes in who falls into the legal category of lawful permanent resident. In the nineteenth century basically all immigrants fell into this category. But the twentieth century brought the growth of two new groups: temporary migrants who were entitled to enter for fixed periods of time, and so-called illegal immigrants who were not legally entitled to reside in the country.¹²⁰ It might seem like a mistake to consider these migrants, as neither is formally on the path to citizenship. But in practice both groups often are. Modern immigration law sometimes offers temporary immigrants the option, after some period of time, to become lawful permanent residents. For such migrants, the effect of their initially “temporary” admission is simply to lengthen the period of residence required before naturalization.¹²¹ Relatedly, unauthorized migrants have sometimes been provided the opportunity (through periodic legalizations, the INA’s cancellation of removal provisions, etc.) to become lawful permanent residents and eventually citizens.¹²² But as a

¹¹⁷ See, e.g., SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* (2008).

¹¹⁸ See Act of April 14, 1802, 2 Stat. 155.

¹¹⁹ See Cox, *supra* note 1, at 404 (outlining racial restrictions on naturalization, some of which remained until 1952).

¹²⁰ See INA § 101(a)(15) (describing categories of “nonimmigrants”); NGAI, *supra* note 57 (describing the creation of the category of illegal aliens).

¹²¹ See, e.g., ALEINIKOFF ET AL., *supra* note 21, at 437–38; MOTOMURA, *supra* note 4; see also American Competitiveness in the Twenty-First Century Act, § 106, Pub. L. 106-313, 114 Stat. 1251 (2000) (recognizing the transitional status of many who enter initially on an H-1B nonimmigrant visa).

¹²² See Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (2006) (creating a legalization program under which more than two million illegal immigrants obtained green cards); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. tit. VI (passed by the Senate on May 25, 2006) (creating large-scale legalization program); INA

practical matter these immigrants face a much longer naturalization delay than those first admitted as LPRs.

Thus, longer naturalization periods might be evidence of attempted insider lockup. But a lag between admission and the acquisition of voting rights has a potential upside as well. Legal rules that delay immigrant access to the franchise (and that make it difficult for insiders to change that rule) can lessen the likelihood that insiders will attempt to manipulate immigration policy to advance their own political interests. They do so in two ways. First, the delay makes it more difficult for insiders to predict the electoral preferences of immigrants admitted under the system. Their preferences may be well known at the point of entry, but there will be considerably more uncertainty about what those preferences will look like years down the road. In this way naturalization lags operate somewhat as a temporal veil of ignorance. Second, the delay may reduce the incentive of political insiders to manipulate the immigration rules in self-interested ways. This is because political insiders likely have somewhat limited time horizons. While political parties may lower politician's discount rates to a certain extent, those politicians are still unlikely to care as much about elections several electoral cycles out than they are to care about the next few election cycles. Thus, naturalization lags may have a salutary effect on the political economy of migration policy.¹²³

Even putting aside the possibility of insider lock-up, focusing on the political rights of migrants makes clear that the political economy of migration policy is much more complicated than is often assumed. Consider policies concerning wealth redistribution. There is a large literature on the ways in which immigration and redistributive policies interact. The bulk of the scholarship focuses on the fiscal consequences of migrants—on whether they will be net payers or payees in the system.¹²⁴ But the above discussion shows that such an approach is incomplete, because immigration policy will (unless migrants are excluded indefinitely from the political process) affect the composition of the electorate voting on such policies in the future.¹²⁵

§ 240A (providing, through “cancellation of removal,” a mechanism for a small number of unlawful immigrants who satisfy a number of criteria to become legal permanent residents).

¹²³ See Adam B. Cox, *Designing Redistricting Institutions*, 4 ELECTION L. J. 412 (2006) (describing these features of temporal veil rules).

¹²⁴ See, e.g., GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 105–27 (2001).

¹²⁵ See, e.g., Jess Benhabib, *On the Political Economy of Immigration*, 40 EUROPEAN ECON. REV. 1737 (1995); Edith Sand & Assaf Razin, *The Role of Immigration in Sustaining the Social Security System: A Political Economy Approach* (CESifo Working Paper No. 1979).

There is some historical evidence that support for immigration policy is affected by related sorts of interest group dynamics. Consider Claudia Goldin's fascinating study of immigration restrictionism during the first two decades of the twentieth century.¹²⁶ The study highlights the role immigrants themselves can play in the political economy of immigration legislation. From the mid-1890s and until the passage of the National Origins Quota Act in 1921, anti-immigrant forces tried to close the door to immigrants. On several occasions Congress passed restrictive literacy requirements that were vetoed by the President. Twice the House managed to override the presidential veto, but until 1917 both chambers could not together muster the votes needed to write the literacy requirement into law. Goldin shows that the political power of the immigrants themselves were a central reason why it took restrictionist forces twenty years to succeed. Examining city-level data, she finds that increases in the percentage of foreign born in a city initially raised the possibility that the city's representatives in Congress would vote in a restrictionist direction—on her account, by depressing wage growth and producing a backlash among native voters. But once the foreign born fractions reached a certain level though—about 30 percent of the city's total population—almost all representatives voted against restriction. This finding “underscores the critical importance of reinforcing flows of immigration in building and maintaining the open immigrant vote.”¹²⁷

Goldin's work, together with the recent work on immigration and welfare policy, highlights the twin concerns a state might have about conferring political rights on migrants: first, that the migrants will change the sorts of public goods that the state provides; second, that they will affect the state's immigration policy itself. These twin concerns point to an overlooked design possibility: that migrants could be given voting rights with respect to one set of policies but not the other. This might initially seem implausible, because we generally don't think about extending the franchise in issue-specific ways. But it is important to realize that the most prominent contemporary proposals concerning noncitizen voting actually do embody this sort of separation.

Today advocates of noncitizen voting argue most vociferously for local rather than national voting rights. (In fact, a smattering of local governments

¹²⁶ See Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, in *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* 223 (1994).

¹²⁷ See *id.* at 24 (arguing that flows were reinforcing from 1900 to 1910 but diluting from 1910 to 1920).

around the country have responded and authorized noncitizen voting.)¹²⁸ The argument for local voting is usually cast in the language of membership and obligation: the claim is that noncitizens truly are “members” of their local community, even though they are not yet full members of the national community, such that they deserve local voting rights. But our approach suggests a quite different argument for local but not national voting rights. Local voting rights give immigrants considerably more control over many of the local public goods that most directly affect their daily lives—like public schools, zoning laws, and so forth. But local voting rights give them much less control over immigration decisions, which are made principally by the national government. Thus, separating the local and national franchise for noncitizens may provide a rough and ready mechanism by which the state can give migrants some control over policies that affect them without raising the possibility of the immigration feedback loop.

IV. INTERACTION EFFECTS

The basic model in Part II assumed that there was only one state in the picture. In reality, multiple host states compete for migrants, especially wealthy and highly skilled migrants. Moreover, the preferences of sending states will often interact with receiving state preferences in ways that affect migrants’ rights. This Part discusses some insights that follow when we relax the single-state-actor assumption in the basic model.

Before proceeding we should address a conceptual possibility of sending states bargaining directly with receiving states. In principal, all states could enter a treaty that provided for migration where migration makes all states better off. The treaty would provide the terms of admission and the conditions under which states could deport migrants or otherwise affect their way of life. Such a treaty would protect country-specific investments by migrants and would limit the adverse effects from competition for migrants.

Historically such bargaining has sometimes been important; migrants’ rights have often turned on explicit agreements or coordination strategies. In the United States, migrants’ rights to own property were often regulated through bilateral arrangements with other nations;¹²⁹ the rights of Chinese migrants who sparked the first wave of restrictionist immigration policy in the

¹²⁸ See, e.g., Gerald Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977); Raskin, *supra* note 31.

¹²⁹ The process started with the Jay Treaty of 1794.

United States were also the product of a treaty with China.¹³⁰ In Europe, the civil law tradition also often led migrants' rights to be based on reciprocity with the country of nationality.¹³¹ Today such bargaining between states is less important than one might expect.¹³² In fact, a pressing question is why capital flows are pervasively the subject of bilateral agreements, and trade to multilateral agreements, but migration flows are much less frequently the subject of international agreement. Nonetheless, because this question and others concerning direct bargaining are beyond our framework, we leave them aside for now.

A. Labor Competition and Market Segmentation

It is a familiar idea that states compete for certain migrants—those with particular skills, for example.¹³³ It is a less familiar idea that the competition might affect a state's design of migration rights. As we have noted at various points, a state's optimal choice of migration rule may depend on the choice of other states. These interactions are sometimes obvious, and sometimes not.

Suppose that a Sending State (say, India) has numerous sophisticated computer engineers who can earn higher wages in foreign states. Imagine there is only one possible Receiving State. Employers in the Receiving State will compete for the engineers and will offer them a wage equal to their marginal productivity. This will in fact equal the wage of native workers with the same skills, or perhaps undercut it slightly as the market adjusts to the influx of labor. Whatever the case, the migrant workers will likely enjoy a considerable increase in their wage.

Now, the employers may be dissatisfied with this regime for, at least, two reasons. First, suppose that the Receiving State law provides migrants with

¹³⁰ See LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (describing the Burlingame providing that Chinese immigrants in the United States would be entitled to same privileges as citizens of most favored nation).

¹³¹ See T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* (Aleinikoff & Klusmeyer, eds. 2001).

¹³² Refugee treaties the only kind of multi-lateral agreements relating to migration that are common today. See *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

¹³³ See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006); Petra Zaletel, *Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration*, 12 EUR. L. J. 613 (2006).

few rights, so that migrants make few country-specific investments. As a result, the migrants are less valuable to the employers than they would otherwise be. The employers might lobby the Receiving State government to improve protections for migrants. The costs will be largely borne by other citizens of Receiving State, who may be unable to organize to resist new migration laws. Or they might not; it is possible that greater protections for migrants would benefit nearly everyone or harm people very little.

Second, employers might try to use Receiving State laws to cartelize the migrant labor market. Because employers must compete for migrants, the migrants' wages will be relatively high. But suppose that a new law allows migrants to stay in the Receiving State only as long as they remain employed with a particular sponsoring employer.¹³⁴ Such a rule will greatly decrease the bargaining power of the migrant once she arrives. To be sure, such a rule would reduce migration and also country-specific investment; but for individual employers, the gains could exceed the costs, some of which will be borne by others.

If, however, the number of possible Receiving Countries increase, then it will be more difficult for a particular Receiving State that seeks migrant labor to adopt laws that restrict the rights of migrant workers once they arrive. They will, in effect, be outbid by other Receiving Countries, which will provide a more appealing package of rights and privileges—for example, greater flexibility to change jobs or a much quicker and more certain path to citizenship. We might predict, then, that as the number of possible Receiving Countries increases, the legal packages offered to migrants will become more generous and uniform.

Another hypothesis is that market segmentation will occur. Suppose that there are two types of Receiving States: those that can easily assimilate migrants (the United States) and those that cannot easily assimilate migrants (Japan). It is cheaper for the easy-assimilators to offer generous migration rights such as quick paths to citizenship. These packages will attract a certain type of migrant—for example, younger people who seek to start families after migration. As a result, neither the Receiving State nor employers on its territory will need to “bribe” the migrant to come by offering generous pay. By contrast, the difficult-assimilators may have to offer financial inducements in order to compensate the migrant for the higher risk of removal or other adverse action. In these countries, guest- or contract-workers might be more common.

¹³⁴ Many U.S. employment visa categories significantly restrict job mobility. See *supra* note 109.

Finally, consider another interesting asymmetry: some receiving states are more alike than others. A Brazilian who learns English does not make a country-specific investment; a Brazilian who learns Japanese does. The English-speaking Brazilian can obtain work in all the Anglophone countries—the United States, the UK, Australia, New Zealand, Canada, and so forth—as well as the numerous European and other countries where English has become a lingua franca in the business world. The Japanese-speaking Brazilian can recover the cost of her investment in only one place as a practical matter—Japan.¹³⁵ All else equal, therefore, Japan must offer migrants more generous rights than an Anglophone country in order to attract them and persuade them to learn the language. Anglophone countries thus have immense competitive advantages in the market for migrants: they can attract many more migrants without offering them generous rights, thus retaining valuable flexibility.

Not all investments exhibit this interaction effect. For example, Anglophone countries may still have to offer generous rights to the extent necessary to encourage migrants to form marital and other emotional bonds with citizens. These investments in personal relationships are more consistently country-specific. And their existence has important implications in light of globalization. To the extent that globalization homogenizes some basic aspects of societies and increases the dominance of a few languages like English, Spanish, and Chinese, migration will involve fewer country-specific investments and migrants need worry less about opportunistic state behavior. We might predict, therefore, that immigration contracts will become more flexible in the future as the precommitment problem becomes less severe. Yet even in a radically globalized world, personal and social relationships will continue to be important country-specific investments for which many migrants will demand protection.¹³⁶

B. *Dual Citizenship*

Dual citizenship exists when a person is the citizen of two countries. Some nations permit dual citizenship and even citizenship in more than two countries; Canada, France, and the United Kingdom, for example, have historically been open to plural citizenship.¹³⁷ Other nations, such as Austria

¹³⁵ See *supra* text accompanying notes 46–47.

¹³⁶ This would not be true, of course, in a world where physical proximity was unimportant for these relationships. But despite the rise of social networking and a variety of other forms of relationships in the virtual world, primacy of presence is almost certainly going to be central to human relationships for a long time.

¹³⁷ See Aleinikoff & Klusmeyer, *supra* note 131, at 76–77.

and Japan, have more restrictive regimes. Austria requires naturalizing immigrants to expatriate themselves from their countries of origin; Japan even requires those who acquire dual citizenship at birth to choose a single nationality before they turn twenty-two.¹³⁸ The phenomenon of dual citizenship raises some interesting questions within our framework.

Consider an example that simplifies the law but also brings out clearly the differences between the approaches. A person migrates from a Sending State to a Receiving State. Under the single citizenship approach, the Receiving State grants the migrant citizenship rights only if she renounces her citizenship of the Sending State. Under the dual citizenship approach, the Receiving State grants the migrant citizenship rights even if she does not renounce her citizenship of the Sending State. Note that the Sending State faces the same choices: it can withdraw citizenship from migrants who accept Receiving State citizenship or it can permit dual citizenship. Thus, a person can have dual citizenship only when her sending and receiving state permit it. How might the Receiving State and the Sending State choose among these two approaches?

The main difference between the two approaches, from the Receiving State's perspective, is that the dual citizen maintains the right to the protection of the Sending State. In practice, this right could mean different things. At a minimum, the migrant retains an exit option—the option to leave Receiving State and resettle in the Sending State if conditions in Receiving State turn unfavorable.¹³⁹ This right is clearly more valuable than the simple right to leave retained by the non-dual citizen because she may not be able to find an appealing country to accept her if she chooses to leave, and usually the Sending State, as her native land, will be the most appealing alternative to the Receiving State. Dual citizenship could offer other protections. The migrant might have access to diplomatic protection of the Sending State, for example, if the Receiving State violates her rights.¹⁴⁰

¹³⁸ See *id.* at 77.

¹³⁹ To be sure, even for dual citizens the exit option is often not absolute. Sending States sometimes refuse to permit emigrants to return home—though this is most common in deportation contexts. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); William Glaberson, *Release of 17 Guantanamo Detainees Sputters as Officials Debate Risk*, NY TIMES, Oct. 16, 2008, at A20.

¹⁴⁰ As a formal matter, international law may prohibit diplomatic intervention in some such cases. See 1930 Convention Concerning Certain Questions relating to the Conflict of Nationality, Art. 4 (“A State may not afford diplomatic protection to one of its national against a State whose nationality such person also possesses.”). But this formal rule will often not stop a citizen for requesting state protection or a state from coming to a citizen's aid. See Aleinikoff & Klusmeyer, *supra* note 131, at 73–75.

From the Sending State's perspective, allowing outgoing migrants to retain citizenship creates obligations for the state without any immediate benefits. The Sending State has an obligation to accept the migrant if she returns and perhaps also to offer diplomatic aid and protection in Receiving State. Thus, the Sending State is more likely to grant dual citizenship rights if it wishes to encourage emigration, or if believes that it benefits from maintaining ties with those who would choose to emigrate regardless of the Sending State's policy.¹⁴¹

From an *ex ante* perspective—that is, at the time of migration—the Receiving State must weigh the competing effects on country-specific investment and flexibility. On the one hand, a migrant who is allowed to retain dual citizenship will have greater bargaining power once she arrives. For example, she may be able to persuade the Sending State to put pressure on the Receiving State if the Receiving State is inclined to deprive migrants of certain rights or to ignore their interests. Thus, a state may strengthen its precommitment, and hence encourage country-specific investment, by allowing the migrant to draw on the resources of the Sending State. Moreover, permitting a naturalizing immigrant to retain her prior citizenship lowers the cost of naturalization, because she is not required to forfeit formal ties to her homeland that she might value. This may spur naturalization and bring greater country-specific investment.¹⁴² Of course, an immigrant's maintenance of her original citizenship could also undermine her incentive to engage in country-specific investment because she is more likely to retain ties to the sending state and to see the option of returning there as valuable.¹⁴³ Whatever the ultimate

¹⁴¹ In recent years, a number of emigration-encouraging states in South East Asia, Africa, and elsewhere have relaxed their citizenship policies to permit dual citizenship (or sometimes dual nationality) for citizens living abroad. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigrant Context*, 81 N.Y.U. L. REV. 11, 49–50 (2006) (discussing changes in this direction by the Philippines, Turkey, and India); Eva Ostergaard-Nielsen, *International Migration and Sending Countries: Key Issues and Themes*, in INTERNATIONAL MIGRATION AND SENDING COUNTRIES: PERCEPTIONS, POLICIES, AND TRANSNATIONAL RELATIONS 3, 19 (Eva Østergaard, ed. 2003) (discussing dual citizenship policies in Latin America, Africa, and South East Asia). For a general discussion about why states may benefit from these ties and about what strategies they use to maintain them, see *Symposium: A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. (2006).

¹⁴² There is some evidence that traditionally restrictive countries like Sweden have begun to allow dual citizenship in an effort to increase immigrant integration—that is, to promote country-specific investments by migrants. See Tanja Brøndsted Sejersen, "I Vow to Thee My Countries"—*The Expansion of Dual Citizenship in the 21st Century*, 42 INT'L MIGRATION REV. 523, 535 (2008).

¹⁴³ Compare Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L. J. 1435 (1997) (arguing that the retention of a former nationality will not slow assimilation) with

effect on levels of investment over time, dual citizenship will afford the migrant more power to prevent the Receiving State from making needed policy changes in response to crises or changes in preferences of native citizens. If the migrant remains loyal to the Sending State, and the crisis involves a breakdown in the relationship between the two countries, the migrant's citizenship-derived political power in the Receiving State may be deeply unattractive for the native citizens of that country.

Seen in this way, dual citizenship appears as just another right that, like basic rights, the right to stay, and participation rights, can be used to encourage migrants to enter and make country-specific investments but that, by the same token, tie the hands of the Receiving State and prevent it from modifying its demos if events change.¹⁴⁴

But dual citizenship also has distinctive features. Unlike the other rights, its value for the migrant (and hence for the Receiving State as a commitment device) is a function of the interests and diplomatic power of the Sending State. The value of dual citizenship for the migrant is high when two conditions are met. First, the Sending State is powerful enough that its diplomatic pressure on behalf of the migrant will affect the policies of the Receiving State. Second, the Sending State has an interest in protecting its overseas diaspora.

The first factor is straightforward; the second is more complex. Why would the Sending State have an interest in protecting emigrants? There are a number of interconnected answers: to reduce population pressures, to obtain remittances, to establish links with other countries, to meet a demand for employment opportunities abroad. None of these possible motives is necessarily clear, however. Consider the Sending State's interest in remittances. On the one hand, by protecting emigrants, it encourages them to make country-specific investments, which should lead to higher wages and thus higher remittances. On the other hand, by protecting emigrants and encouraging them to make country-specific investments, it may cause them to become more deeply assimilated, and thus to lose their loyalty to the old country and the people who live there—driving down remittances.

A number of propositions follow. One is that, all else equal, countries with high internal demand for emigration will be more likely to permit migrants to become dual citizens, and countries with high demand for

SCHUCK, *supra* note 4, at 238 (questioning Spiro's claim and suggesting that there is little evidence about the effect of dual nationality on assimilation rates).

¹⁴⁴ See generally Aleinikoff & Klusmeyer, *supra* note 131, at 77 (discussing some other reasons why a state's openness to dual citizenship may turn on whether the country is one of immigration or emigration).

immigration will be more likely to permit migrants to become dual citizens. But our main point is different, and is taken from our discussion of participation rights. The Receiving State will be more likely to permit dual citizenship if it does not believe that the Sending State will use diplomatic pressure to advance the interests of migrants in a manner than injures the Receiving State.¹⁴⁵ As noted above, the likelihood that the Sending State will do this depends both on its interests and its power. The Receiving State need not worry about a weak Sending State; it also need not worry if the Sending State's migrant-derived interests do not differ much from the interests of the Receiving State. This is most likely when the migrants have political preferences that are similar to those of Receiving State native citizens.

The possible interaction problems can be multiplied indefinitely. We have already discussed how states might compete with child-citizenship rights.¹⁴⁶ Problems could also arise where conflicting citizenship rules lead to children having no citizenship—for example, if the two parents are from different countries, each of which grants citizenship rights only to children with two parents from that country.¹⁴⁷ These problems—some of which are interesting, others of which are simply confusing—are best left to future work.

C. Refugees and Asylum-Seekers

Interaction effects are also important for refugee law. Refugees typically flee civil wars and other forms of political, religious, and ethnic conflict. By accepting refugees, Receiving States essentially grant them exit options that are conditional on the domestic conflict reaching a threshold level of severity.

From the perspective of refugees or potential refugees, the exit option is of mixed value. On the one hand, the availability of refugee status gives one the ability to escape a dangerous situation. On the other hand, a person who is inclined to stay and fight will find that others will leave rather than join the

¹⁴⁵ The flip side is that sending states will be more likely to permit dual citizenship if they believe their citizens will use their political influence in the Receiving State to benefit the Sending State. There is some evidence that this motivation played a part in Mexico's recent decision to permit emigrants naturalized abroad to retain their Mexican nationality. See Barry, *supra* note 141, at 46–47; see also Eva Østergaard-Nielsen, *Politics of Migrants' Transnational Political Practices*, 37 INT'L MIGRATION REVIEW 760, 765 (2003) (describing, in the context of U.S.-Latin American relations, “attempts of sending country governments and elites to co-opt nationals abroad in an attempt to tap into their various economic and political resources”).

¹⁴⁶ See *supra* Part III.B.

¹⁴⁷ This citizenship coordination problem led to attempts during the twentieth century to craft an international legal solution. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89.

fight if refugee status is available. So liberal refugee laws will encourage flight and might also increase the incentive for governments or other groups to try to drive out populations that are not loyal to them, including ethnic minorities.

In this fashion, the policies of the receiving (asylum) state interact with those of the sending state. Nonetheless, despite the potential theoretical costs of undermining resistance movements and encouraging strategic behavior by governments in conflict-ridden states, in practice the humanitarian costs of civil war and domestic persecution are often too great for other countries to deny refugee status as a formal matter.

But this leads to a second interaction effect—one between the potential receiving states. These states may all want refugees to have an available place of asylum, but each state would prefer that the refugees be taken in by another state. Moreover, because the cost of refugee flows fall disproportionately on neighboring countries, they may threaten to deny entrance unless other countries either accept a share of the refugee population or offer financial incentives. Recognizing this collective action problem, countries have developed various cooperation mechanisms, including treaties.¹⁴⁸

There is also the problem of distinguishing sincere refugees from other migrants, such as economic migrants. Refugee status can be quite valuable: while refugees in many countries are confined to camps near the border of their home country, in countries like the United States refugees are given generous rights, including work permits and the ability to become lawful permanent residents and then citizens.¹⁴⁹ Consequently, much refugee law and policy are concerned with screening for valid refugee claims and deterring invalid ones.¹⁵⁰ Where there are many potential asylum states, their screening policies may interact. States with more stringent standards for asylum are

¹⁴⁸ See Ahilan T. Arulanantham, *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System*, 22 HUMAN RIGHTS Q. 1 (2000); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

¹⁴⁹ See INA § 208(c)(1)(B) (requiring the Attorney General to provide work authorization to successful asylum applicants); INA § 209(a) (permitting asylees to adjust their status to that of a lawful permanent resident after one year).

¹⁵⁰ To be sure, many states also attempt to deter claimants who can clearly establish their status as refugees. This is in part because of the collective action problem identified above: states would prefer that even valid refugees end up in some other state. The desire to deter valid claimants is also driven by perceived capacity constraints. For example, when faced with the mass influx of potential refugees from Cuba and Haiti, the United States has adopted interdiction policies and refugee screening procedures that seem deliberately designed to screen out high numbers of valid applicants. See Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39 (1999).

likely to attract more applicants with strong claims, because those with weaker claims are less likely to satisfy the stringent standard. Those with weaker applications will be more likely to seek asylum in states with a lower bar. This means that a state's optimal refugee screening rules will depend on the rules in other receiving states. Without coordination, this interaction could lead to a race to the bottom, in which all states adopt screening policies that are excessively stringent.¹⁵¹

CONCLUSION

We have only scratched the surface of a complex topic, but we hope that the perspective we offer will help other scholars analyze other aspects of migration law. We see many directions for future research, including the following three.

First, we have offered two basic models that greatly simplify the problem of optimal migration law. In an earlier paper, we treated the relationship between the receiving country and the migrant as akin to an employment relationship, where the migrant has private information about her "type" and the receiving country must devise mechanisms for discovering that information.¹⁵² In this paper, we treat the relationship as a generic contractual relationship, where the receiving country seeks to attract entry and investment while retaining some flexibility, and the migrant must decide whether to invest. There are other possible approaches to the basic relationship, and focus can be turned on other variables than we have just touched on—such as the value of the migrant's exit option and the extent to which that exit option limits the receiving country's policy choices.

Second, there are numerous immigration rules that are of great importance but whose incentive effects have received little attention. For example, various rules limit the employment options of foreign students, tourists, and spouses of migrants. These rules deserve more attention.

Finally, the topic of "interaction effects" is of great importance but also has received little attention. States compete and cooperate with respect to migration in complex ways. What determines the conditions under which

¹⁵¹ See Ryan Bubb, Michael Kremer, & David Levine, *The Economics of International Refugee Law* (WCFIA working paper 2008), available at <http://www.wcfia.harvard.edu/node/2741> (modeling the refugee system and suggesting that "as more states use a high standard of proof, the best response of other states may be to increase their standard of proof"); Jenny Monheim & Marie Obidzinski, *Optimal Discretion in Asylum Lawmaking* (working paper 2007), available at <http://econpapers.repec.org/paper/ulpsbbeta/2007-31.htm> (same).

¹⁵² Cox & Posner, *supra* note 8.

states grant dual citizenship? How does competition for migrants affect the determination of rights? Why is it that in the past many states restricted the rights of native citizens to emigrate, and why is that so rare today? Why do states offer different types of rights to people from different countries? We have suggested some angles for approaching these questions, but much work remains to be done before satisfactory answers are reached.

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