Title

Mexican Migration and the Law

ISBN

1588268934

Author

FitzGerald, David

Publication Date

2011

Peer reviewed

Beyond *la* Frontera

The History of Mexico–U.S. Migration

Edited by

MARK OVERMYER-VELÁZQUEZ

University of Connecticut

2011

New York Oxford

OXFORD UNIVERSITY PRESS

an umbrella concept for describing diverse patterns of collective action (Fox 2007). Migrant civil society refers to *migrant-led membership organizations and public institutions*, which includes four very tangible arenas of collective action—membership organizations, nongovernmental organizations, communications media, and autonomous public spaces. Some elements of migrant civil society could be seen as representing a U.S. "branch" of Mexican civil society, others reflect the Mexican branch of U.S. civil society, and still others embody arenas of overlap between the two, as in the case of the FIOB itself. Although Mexican migrant organizations are increasingly engaged both with U.S. civic and political life and with Mexico, the FIOB is still one of the very few mass organizations that represent members both in the United States and in Mexico.

CONCLUSIONS

The collective practices that are beginning to constitute a specifically indigenous arena within Mexican migrant civil society show us a new side of what otherwise is an unrelentingly devastating process for Mexico's indigenous communities—their abrupt insertion into globalized capitalism through international migration in search of wage labor. Their migratory experience has both broadened and transformed previously localized identities into ethnic, pan-ethnic, and racial identities, while also questioning widely held homogenous understandings of Mexican national identity. At the same time, "long-distance membership" in their home communities, as well as the construction of new kinds of organizations not based on ties to the land, raises unanswered questions about the classic close association among land, territory, and indigenous identity. The Mexican indigenous migrant experience also raises questions about how to think about the racialization process, which has been largely seen through U.S. lenses. The now substantial literature on Oaxacan migrants shows that, for many indigenous Mexicans, "racialization begins at home"—that is, in Mexico and among other Mexicans in the United States.

Mexican migrants and indigenous peoples both pursue self-representation through multiple strategies, coalitions, and repertoires. They also share the experience of having long been widely perceived by others as faceless masses—both in Mexico and in the United States. Until recently, they have been recognized as either victims or threats, but not as collective actors. Both migrants and indigenous Mexicans are now in the midst of a long-term process of building their capacities for self-representation in their respective domains. Indigenous Mexican migrants are no exception. Do their organizations represent the indigenous wing of a broader cross-border migrant movement that would otherwise leave them out? Do they represent the migrant wing of the broader national indigenous movement that would otherwise leave them out? Yes, and yes, but most of all they represent themselves, both indigenous and migrants.

CHAPTER 8

Mexican Migration and the Law

David FitzGerald
University of California, San Diego

More people of Mexican birth lived in the United States in 2008 than the total number of immigrants in any other country in the world. Equally striking, more than half are living in the United States illegally (Pew Hispanic Center 2009b, 1). How have U.S. and Mexican law shaped and reacted to this massive migration?

One misconception about immigration from the United States to Mexico is that the Mexican government has always encouraged its citizens to leave as an economic and political escape valve. The following pages uncover the largely forgotten efforts of the Mexican government to manage emigration and migrants over the past century. Mexican policy has been regularly undermined by much more consequential U.S. policies. Ineffective early attempts by the Mexican government to control emigration flows have given way to new forms of institutionalized ties between the Mexican government and Mexicans abroad.

I then show how U.S. law regulates immigration from Mexico. American commentators and politicians frequently ask why Mexicans don't simply "get into line" to immigrate through official channels.[1] In practice, many Mexicans do get into line. The 5.7 million Mexicans legally living in the United States in 2008 represented 21 percent of all legal immigrants, far outnumbering any other immigrant nationality of origin (Pew Hispanic Center 2009b, 2). Yet for the many Mexicans who lack specialized skills or ties to close family members in the United States, the supply of immigrant visas is dramatically lower than the high U.S. demand for their labor. For them, the line to become a legal immigrant never moves forward. Efforts to prevent unauthorized Mexicans from entering and working in the United States have proved largely ineffective, although those efforts have unleashed a set of unintended and often harmful social consequences. I conclude by outlining the bilateral challenges of a comprehensive immigration reform.

1. See, for example, http://blog.thehill.com/2007/05/21/illegal-immigrants-need-to-get-in-line-with-everyone-else-rep-john-culberson.

AN UNSTOPPABLE EXODUS

From the onset of mass emigration to the United States at the turn of the twentieth century to the beginning of the bracero temporary worker program in World War II, Mexican officials and intellectuals were generally critical of the demographic, economic, and ideological effects of emigration. They believed that Mexico's population was insufficient to achieve its full economic potential, particularly in the vast northern provinces. The 1848 loss of the northern half of Mexico to the United States was blamed on the weak Mexican population base in Texas and California prior to the war. Preventing further emigration of Mexicans to the United States thus became central to elite understandings of national demographic health (Loyo 1935). Ideological objections to emigration complemented economic and demographic calculations. The government sought to unify a populace splintered by ethnicity and class around the common foreign menace of the United States, a country that had intervened militarily in Mexico as recently as 1919. Nationalists objected that emigration to the northern nemesis stripped many Mexicans of their cultural and legal nationality (González Navarro 1994, 253.)

A Campaign of Dissuasion, 1900–1942

Attempts to dissuade emigration began as early as 1904, when Mexican federal and state authorities ordered county governments to stop issuing travel documents used by U.S.-bound workers. Governors of states with high levels of emigration repeatedly asked the Secretariat to restrict or prohibit emigration, but federal officials usually argued that although they wished to discourage emigration, they could not constitutionally prevent it. The constitution leaves room for situational interpretations, however. Article 11 of the 1857 constitution, in effect until 1917, established freedom of exit and travel within the country subject to administrative restrictions in criminal and civil matters. Exit in the 1917 constitution was restricted further by reference to a separate body of migration law and Article 123, specifying that county authorities must ensure that workers emigrating abroad have signed contracts detailing wages, hours, and repatriation costs borne by the employer.[2]

Officials rarely applied the constitutional measures restricting labor emigration. The United States contracted seventy thousand Mexican workers from 1917 to 1921 as a unilateral wartime emergency measure. In violation of Mexican law, the contracts were not visaed by U.S. consuls. Yet the Mexican government did not try to block the exit of contracted workers with anything other than a propaganda campaign, largely because the presidency and Secretariat of Foreign Relations (SRE) did not want to antagonize the United States during the vulnerability of revolutionary turmoil (Aguila 2000).

Subnational governments promulgated many of the most vigorous antiemigration policies. The governments of sparsely populated northern states like Sonora and Chihuahua prohibited the exit of scarce workers by instructing the migration offices in Ciudad Juárez and Nogales to deny workers exit permits and to prevent the operation of *enganchadores* (labor recruiters from U.S. companies). In 1918, Tamaulipas raised

2. *Constitución Federal de los Estados Unidos Mexicanos*, 1857; *Constitución Federal de los Estados Unidos Mexicanos*, 1917. See Fitzgerald (2009).

its international bridge fees to discourage emigration, which was pulling labor away from its industries. The following year, the government of Jalisco restricted the issuance of passports to appease local industrialists and farmers complaining of worker shortages and asked municipal presidents to select poor emigrants most in need of repatriation aid from the state government. Given Jalisco's dense population, ostensible fears of labor shortages were more about reduced labor supplies driving up wages than the absolute shortages that sometimes occurred in northern states (Fitzgerald 2009).

Following the end of World War I, the Carranza government feared the prospect of massive deportations of Mexican workers and selectively financed repatriations as a preemptive measure to avoid national humiliation. Simply the potential for restrictive U.S. policies shaped Mexican policy even before the U.S. government acted. The Mexican government sponsored fifty thousand repatriations at a cost of $1 million during the 1921–1922 U.S. depression. The expense of repatriation prompted the federal government to suspend its program in 1923 and once again rely on periodic public warnings not to emigrate and a 1925 ban on selling railway tickets in the interior to laborers heading to the United States (Reisler 1976; Alanís Enciso 1999).

A 1926 migration law gave authority to the Secretariat of the Interior to prevent workers from leaving Mexico without contracts approved by the municipal president in the place of origin. To enforce this law and fine violators, emigration control officers were deployed along the border, in trains, and in major cities of the interior (Landa y Piña 1930). The 1917 Mexican prohibition of leaving without a contract, combined with the 1885–1952 U.S. prohibition on entering with a contract, meant that Mexican labor migration to the United States was illegal according to the laws of at least one of the countries. Although the United States made exceptions for Mexicans to the ban on contracted workers during the "wartime emergencies" of 1917–1921 and beginning in the 1942 Bracero Program (Reisler 1976), from 1921 to 1942, the anticontract provision in U.S. law meant Mexico could not enforce its own contract laws aimed at protecting emigrants.

Encouraging repatriation of emigrants in the United States had been Mexican federal policy since the Porfirian era (1877–1911; Aguila 2000), but the state's ability to control the flow of repatriates and design effective reintegration programs was sharply limited by Mexico's asymmetric interdependence with the United States. With the onset of the Great Depression, U.S. officials at all levels of government began using multiple forms of persuasion and even deportation to repatriate an estimated 400,000 Mexicans. Trying to make the best of a difficult situation by framing repatriation as the calling home of the nation's sons by a state dedicated to protecting all of its workers, the Mexican government cooperated with U.S. authorities and paid for thousands of repatriates' transportation home from the border (Alanís Enciso 2003a). The Mexican government attempted to avoid social and political unrest by encouraging the repatriates to disperse across Mexico's territory. It initiated agricultural colonies with modern farming methods, mostly in sparsely populated northern states. To the government's disappointment, most repatriates returned to their heavily populated states of origin in the central west, where they did little to transform local agriculture. Authorities rarely backed repatriate agricultural colonies with sufficient planning or resources (González Navarro 1994; Alanís Enciso 2007a). Since its onset, migration patterns had largely

been determined by U.S. policies and labor demand despite the attempts of Mexican federal, state, and county governments to protect their interests.

The Bracero Program, 1942–1964

Mexican federal policy shifted dramatically in 1942 when the U.S. and Mexican governments negotiated a series of agreements that ended in 1964, providing for 4.6 million bracero contracts for temporary agricultural work in the United States. There were a further 5 million apprehensions of illegal immigrants by U.S. authorities during the same period (García y Griego 1983; Durand and Massey 1992). The immediate cause for the shift in Mexican policy was a sudden increase in its bargaining power with the United States, brought on by the historical conjuncture of a wartime alliance with the Allied powers and increased U.S. demand for agricultural workers. These circumstances allowed the Mexican government to negotiate a favorable bilateral agreement that hypothetically would exchange a pool of unemployed laborers for a source of remittances and modernizing influences (García y Griego 1983; Cohen 2001).

Long-standing disagreements between Washington, D.C., and Mexico City over government supervision of contracts, wages, and working conditions erupted in October 1948. Mexican officials pressured the U.S. government to make concessions by refusing to allow workers to cross into the United States. Under pressure from employers, U.S. immigration officials opened the border at El Paso, allowing an estimated four thousand illegal entrants across in three days. Mexico responded by abrogating the agreement, which was not renegotiated until August 1949 (Craig 1971; Cohen 2001). Similarly, when the U.S. government adopted a policy of unilateral contracts in January 1954, Mexican troops clashed with thousands of rioting workers attempting to cross the border illegally. Successful crossers were welcomed by American immigration officials and shipped to the fields (Calavita 1992; Cohen 2001).

The practical application of U.S. immigration policy, even when it contravened U.S. law, once again undercut Mexico City's stance on emigration. Mexico City attempted to restrict illegal migration, whereas important elements of the U.S. government encouraged it. Throughout the mid-1950s, a similar cycle in which the Mexican government promoted bracero emigration and then suddenly tried to stop all emigration continued with the vicissitudes of the guest worker negotiations. Unfortunately for Mexico, the United States had the option of replacing Mexicans with workers from other areas like the Caribbean, whereas Mexican labor emigration was exclusively dependent on the United States (Craig 1971). Given the asymmetries in their relationship and a proven inability to stop emigrants from leaving, the Mexican government had few means of forcing U.S. concessions.

Laissez-Faire, 1965–1989

Through the early 1970s, the Mexican government unsuccessfully attempted to revive the bracero agreements that ended in 1964. The U.S. government saw little reason to resume the program so long as undocumented immigrants met U.S. labor demand. Both governments tacitly accepted massive illegal migration. From the experience of the Mexican government, emigration appeared practically impossible to regulate. The rapidly increasing Mexican population, which rose from 19.7 million in 1940 to 48.2 million in 1970, meant serious emigration restriction was no longer needed in

any case. The demographic deficit had been resolved so well that population growth was becoming a new problem. Whereas the 1947 Law of Population outlined the government's attempt to increase population through natural growth, immigration, and repatriation, its 1974 reform noted that population increases were a growing strain on the economy and state services, and the government began to successfully reduce the national fertility rate (Fitzgerald 2009).

As part of this effort to slow demographic growth, official policy shifted from taking "measures to prevent and avoid emigration" and fining workers who emigrated without a contract in 1947 to "restrict[ing] the emigration of nationals when the national interest demands it" and removing the penalties for leaving without a contract in 1974. In October 1974, President Echeverría told President Ford that Mexico no longer sought a renewal of the Bracero Program (Secretaría de Gobernación 1996; de la Garza and Szekely 1997). The policy of laissez-faire continued through the 1980s, when a series of economic crises sent growing numbers of mostly unauthorized migrants north. Without enough jobs being created each year for adolescents entering the labor force, Mexican authorities had little incentive to stem the flow. Emigration became an economic escape valve at a national level that had the added benefit of relieving pressure on the political system.

Embracing Emigrants Abroad, 1990–2009

Mexico's policies toward emigrants already abroad changed dramatically in the early 1990s. Underlying migration patterns had changed, in large part because of the U.S. 1986 Immigration Reform and Control Act (IRCA), which accelerated a trend toward permanent settlement by legalizing 2.3 million Mexicans. The newly legalized then sponsored the immigration of their family members. A pattern of circular, mostly male migration gave way to permanent migration of whole families (Massey, Durand, and Malone 2002). Emigrants and their resources became less accessible within Mexico, prompting the Mexican government to try to embrace them better abroad.

Mexican partisan politics spilling over into the Mexican population in the United States was the proximate cause of the policy reorientation. For the first time since the 1920s, the ruling party and competitive opposition parties vied for the favor of the Mexican population in the United States. Cuauhtémoc Cárdenas, the center-left opposition candidate for president in 1988 who later founded the Party of the Democratic Revolution (PRD), drew large crowds of Mexican migrants while campaigning in California and Chicago. Cárdenas appealed to Mexican citizens to influence the vote of their family members in Mexico and promised emigrants dual nationality and the right to vote from abroad. Emigrant rights groups, many of which were affiliated with the PRD, formed to demand a voice in Mexican politics.

The ruling Institutional Revolutionary Party (PRI) responded quickly to counter the PRD's overtures toward migrants. Most points of the Mexican political spectrum now agree, at least publicly, that Mexicans outside the country should be included somehow in Mexican political life. In his 1995–2000 National Development Plan, PRI President Ernesto Zedillo declared that "the Mexican nation extends beyond the territory contained within its borders." These were not irredentist claims, but rather discursive moves seeking the political and economic resources of Mexicans in the United States.

The creation of a Mexican lobby in the United States became one of Mexico's primary foreign policy goals beginning with the 1993 campaign to pass the North American Free Trade Agreement in the U.S. Congress. The Mexican consulates also worked with Mexican American political organizations to try to defeat California's 1994 Proposition 187, which would have sharply restricted unauthorized immigrants' access to social services had the proposition not been struck down in federal court after it passed. In general, there has been little to show for the lobbying effort, in part because Mexicans in the United States tend to be quite suspicious of the Mexican government (de la Garza et al. 2000; Suro and Escobar 2006).

Remittances have proved to be a much richer resource. Mexico received US$25 billion in remittances in 2008, notwithstanding a fall-off during the global economic crisis.[3] Remittances tend to be private, household-level transfers that can only be taxed when they circulate in the local economy. Many government agencies have tried to channel remittances toward collective projects. The Mexican government has institutionalized ties with emigrants through the SRE's Program for Mexican Communities Abroad (PCME) since 1990. The PCME creates formal ties between hometown associations (formed by migrants from the same community of origin) and the Mexican government at the federal, state, and county levels. These relationships are the basis for matching funds programs like *Tres por Uno* (3×1), in which migrants and Mexican government agencies jointly develop infrastructure projects in migrants' places of origin. By 2008, the program was spending roughly US$125 million a year on nearly twenty-five hundred community projects, with a quarter of the funding coming directly from migrants.[4] Levels of collective remittances are modest overall, although they can improve the quality of life in impoverished rural areas. Most importantly, collective remittances strengthen the more diffuse hometown ties that channel the massive volume of household remittances.

Matching fund programs and other emigrant initiatives survived the change in administration from the PRI to the center-right National Action Party in 2000. One of President Fox's first official acts in 2000 was to inaugurate a Presidential Office for Communities Abroad directed by Juan Hernández, a dual national literature professor born in Texas. The cabinet-level position was abolished in 2002 after conflicts with Secretary of Foreign Relations Jorge Castañeda over how to manage two cabinet agencies simultaneously conducting foreign policy. In 2003, the PCME and the presidential office were folded into the new Institute for Mexicans Abroad, which includes an advisory council composed of 105 Mexican community leaders and 10 Latino organizations in the United States, 10 special advisors, and representatives of each of the 32 state governments in Mexico. In 2009, the advisory council of the Institute for Mexicans Abroad called for the creation of a new cabinet-level position that would coordinate Mexico's emigration policy.[5]

3. Banco de México. http://www.banxico.org.mx/documents/%7BB7CBCFAF-AB7D-BE65-F78F-6827D524C418%7D.pdf

4. Secretaría de Desarollo Social. http://www.sedesol.gob.mx/archivos/8015/File/4totrim08/penccg/03_3x1_para_Migrantes.pdf

5. On emigration policy since 1989, see Fitzgerald (2004) and Godoy's (1998) analysis of Mexican congressional debates.

Homeland Politics and Dual Nationality

One of the principal novelties in the relationship between the Mexican government and its emigrants is the former's promotion of dual nationality. Naturalizing abroad has been grounds for losing Mexican citizenship or nationality since 1857. Since the adoption in 1886 of a mixed system of attributing nationality based both on descent (*jus sanguinis*) and on birth in the territory (*jus soli*), many children born to Mexican nationals in *jus soli* countries like the United States or born in Mexico to foreigners from *jus sanguinis* countries were *de facto* dual nationals. "Voluntary" foreign naturalization was grounds for denationalization beginning in 1934, but the interpretation of voluntary narrowed in 1939 and 1993, so that emigrants who adopted a foreign nationality as a requirement of employment were considered to have involuntarily naturalized and thus were able to maintain their Mexican nationality. They became *de facto* dual nationals as well. Although 1993 nationality legislation adopted the principle that nationality should be singular and required *de facto* dual nationals to choose a single nationality at the age of majority, just five years later, the "nonforfeiture" (*no pérdida*) of nationality law taking effect in 1998 protected native Mexicans from mandatory denationalization, although they may still voluntarily expatriate. In effect, the nonforfeiture legislation was a dual nationality law. The term "dual nationality" was likely not adopted in official documents to avoid raising the hackles of those who discursively associate dual nationality with "dual loyalty" and to maintain a semblance of continuity in Mexican law (Fitzgerald 2005).

The substantive prerogatives of dual nationals remain contested and ambiguous. On its face, the Mexican constitution prohibits dual nationals from holding public offices, including those of federal deputy, federal senator, president, and state governor. The 1917 Constitution still in effect specifies that these positions are reserved for "Mexicans by birth," and Article 32 specifies that positions for which one is required to be Mexican by birth "are reserved for those who have this quality and do not acquire another nationality." The question of whether dual nationals can serve as federal deputies has not been resolved conclusively, however. Manuel de la Cruz, a dual U.S. and Mexican national and long-time California resident, was believed to have won election to the Mexican Congress's Chamber of Deputies based on his position on the PRD's party list in 2003. Despite the controversy over whether a dual national was legally eligible for the office, none of the Mexican political parties formally challenged de la Cruz's election with election authorities, likely because they wanted to avoid antagonizing emigrants. At the last moment, after de la Cruz had already been issued a key to his new congressional office, the Federal Electoral Tribunal ruled that to rectify a technical miscalculation, it would reapportion to another party the PRD's seat that de la Cruz thought he had won (Fitzgerald 2006b).

De la Cruz never took federal office, but the question of the political rights of dual nationals will likely resurface as it becomes increasingly common for Mexicans residing in the United States to run for office in Mexico. Andrés Bermúdez, a successful farmer known as the "Tomato King" living in the Sacramento area, was elected mayor of his native town of Jerez, Zacatecas, in 2001, but was denied his office by the state electoral commission because he was not a local resident. In response, his allies in the Zacatecas state conference passed a law in 2003 that allows binational Zacatecano residents to run for state and local office. Bermúdez was subsequently elected again and served his

term. The same law established an extraterritorial election district for Zacatecanos in the United States who now elect two senators to the state congress (Smith and Bakker 2007). Demands by the PRD for a national extraterritorial district have not been successful, although there is precedent for such districts in countries as diverse as Italy, Colombia, and Poland (Ellis 2007).

Mexico allowed expatriate voting for the first time in its 2006 presidential election. Roughly 3 of 10 million Mexicans in the United States were eligible to vote. Yet only 57,000 tried to register, and fewer than 33,000 cast a valid ballot. Part of the reason for the low turnout is that emigrant interest in Mexican politics is widespread but shallow. Moreover, Mexican authorities did not carry out voter registration abroad. Voting was only allowed by mail, in the first instance to deliberately suppress turnout, but also to avoid provoking a potential nativist backlash in the United States. A new ban was put on Mexican presidential campaigning abroad under the logic that the Mexican electoral authorities would not be able to supervise campaigning if it were done in another country (Smith and Bakker 2007; Waldinger, Porzecanski, and Soehl 2009). The introduction of subnational external suffrage in the major migrant sending state of Michoacán's 2007 gubernatorial election yielded equally meager results. Only 997 Michoacanos abroad tried to register to vote, of which 691 fulfilled the requirements and 349 mailed in valid votes.[6] Future voting is likely to yield higher rates of participation as emigrants become accustomed to the procedures, which might also be streamlined under emigrant pressure, but it appears that the emigrant vote will only affect the tightest elections.

Emigration Policy

Although emigrant activists, Mexican political parties, and the Mexican government have created new ways for emigrants to engage in Mexican politics, the fundamental story of emigration policy since the end of the Bracero Program is one of continuity in accepting both legal and illegal labor emigration as inevitable. Emigration control is implemented now by the Grupo Beta police force, which first formed in Tijuana in 1990 and later expanded across the northern and southern borders. In 2000, the 75 Grupo Beta agents stationed on the two thousand-mile U.S. border arrested around one hundred *coyotes* a month for violating the ban on human smuggling in the 1996 amendments to the General Law of Population. A debate within the Mexican government arose in June 2001 over whether Grupo Beta could forcibly prevent emigrants from crossing in the most dangerous areas. The government ultimately decided that migrants could not constitutionally be prevented from leaving, and in August 2001, Grupo Beta gave up its control functions altogether to focus on protecting undocumented migrants from bandits, conducting rescue operations, and supplying information about how to cross safely. The Secretariat of the Interior's National Migration Institute has a multimedia campaign asking citizens to report *coyotes* to a toll-free telephone number and to avoid crossing into the United States in dangerous wilderness areas in which hundreds of migrants die every year (Fitzgerald 2009). In 2005, the National Migration Institute began distributing over a million copies of an educational comic booklet for undocumented migrants with detailed tips on how to avoid the

6. *Cambio de Michoacán* (2007); Instituto Electoral de Michoacán, http://www.prep.com.mx.

major risks of undocumented crossings by carrying water, following power lines north, and always keeping the *coyote* in sight.

A disclaimer on the back of the booklet summarizes the federal government's current stance toward illegal migration: "This consular protection guide does not promote the crossing of the border by Mexicans without the legal documentation required by the government of the United States. Its objective is to publicize the risks that [such crossings] imply, and to inform about the rights of migrants regardless of their legal residence."[7] The right to exit in the Mexican constitution has always been subject to situational interpretations and tempered by qualifications, however, including the authorization to use coercion in the 1926 migration law. The 1974 General Law of Population still in effect requires departing labor migrants to present themselves to Mexican migration authorities, show a work contract authorized by the destination country consulate, and provide proof that they met the entry requirements of the destination country (Secretaría de Gobernación 1996). Clearly, undocumented migrants hiking across the Arizona desert do not meet these criteria. There are no longer penalties for violating this article in the General Law of Population. The argument for a constitutional right of exit is a convenient way of legitimating the federal government's minimal efforts to restrict unauthorized emigration.

Temporary Migrant Programs

Although there are no bilateral guest worker programs between the United States and Mexico, individual Mexican states effectively help to administer the U.S. government's H2B program for temporary, unskilled, nonagricultural workers. For example, since 2001, the government of Jalisco has recruited workers and helped them to apply through the U.S. consulates to fill positions mostly as golf course landscapers. In 2004, 136 H2B visas were issued with the office's assistance. The alternative is to leave the program to what one state official called "a mafia" of H2B veterans who arrange the paperwork for newcomers for an exorbitant fee. In response to a new breed of *enganchador* charging $1,500 to $4,000 in recruitment fees, the government of Zacatecas went a step further in 2001 by negotiating a pilot program with the U.S. consulate in Monterrey that recruits temporary workers under the direction of the Zacatecas government. Although these guest worker programs operate independently of the Mexican federal government, they are a window into the sort of large-scale, truly bilateral programs that are the federal government's goal (Fitzgerald 2009).

Mexican President Vicente Fox (2000–2006) made a migration accord with the United States a pillar of his foreign policy. A fundamental philosophical shift has taken place in the SRE away from the "policy of no policy," in which Mexican authorities long turned a blind eye to massive unauthorized migration across its northern border, to a more active stance. Mexican officials do not want to repeat their lack of involvement in U.S. legislation like IRCA, whose debate they did not participate in based on the premise that Mexican intervention in sovereign U.S. policy making would legitimate U.S. interventions in Mexican politics. High-level bilateral meetings in 2001, including a presidential meeting in Washington, D.C., on September 7, 2001, centered on the design of a new temporary-worker program, an increase in the number of visas issued

7. Instituto Nacional de Migración, http://www.inami.gob.mx.

to Mexicans, and regularization of unauthorized migrants in the United States. Four days later, the 9/11 attacks derailed the bilateral talks (Rosenblum 2004). President Felipe Calderón (2006–present) downplayed his predecessor's vocal expectations of a bilateral migration accord but was clearly interested in the same goal of legalized flows.

U.S. IMMIGRATION LAW

Immigration law in the United States has sometimes treated Mexicans differently than other nationals, but even where the law is universal, it affects Mexico with particular intensity given the Mexican dominance of contemporary U.S. immigration stocks and flows. The following sections describe the legal line to get into the United States and efforts to control unauthorized migration at the border, in the U.S. interior, and at U.S. workplaces. Like the Mexican government, the U.S. government has struggled to control migration flows, but U.S. policy has been far more consequential in shaping migration outcomes, even when those outcomes are not intended. Local and state governments in the United States are attempting to address the perceived failures of federal policy within the sharp constraints of constitutional interpretation, giving control over immigration to the federal government. A restrictive turn at all levels has increased the value of U.S. citizenship and prompted a wave of naturalizations by Mexicans in the United States. At the same time, the issue of illegality continues to loom large, prompting renewed efforts at a comprehensive immigration reform.

Contemporary Legal Migration

Most people who enter the United States legally come on various kinds of nonimmigrant visas meant to allow temporary stays for tourism, business, or work. In 2007, a total of 7.4 million entries were made by Mexicans—more than the nationals of any other country—under the "I-94" nonimmigrant category for long-term stays in the United States or for entry at airports. These figures do not include the millions of entries by holders of border crossing cards, which permit travel within twenty-five miles of the border for as long as a month. From 1998 to 2002, the U.S. State Department issued over 5.8 million border crossing cards to residents of Mexican border cities (DHS 2008b, Table 26; GAO 2008).

The line to work in the United States begins with several temporary worker programs. Of the 462,000 H-1B visas issued to highly skilled workers in 2007, a total of 3.9 percent were issued to Mexicans, putting Mexico in fourth place ahead of China. Mexicans were issued 91 percent of the more than 87,000 H-2A temporary agricultural visas and 68 percent of the 155,000 H-2B and H-2R seasonal nonagricultural worker visas (DHS 2008b). Congress sets visa caps on the programs, with the exception of the H-2A agricultural visas, which do not have a cap but remain unpopular among farmers because of their onerous requirements and the ready supply of unauthorized labor (Martin 2005).

The line to immigrate for permanent settlement is governed by a separate set of regulations. Immigrant visas, or "green cards," authorize a legal permanent resident (LPR) status that is renewable every ten years. In 2007, nearly 150,000 Mexicans comprised 14 percent of all new LPRs, almost twice as many as any other national-origin group. In most years, more than half of "new" LPRs were already living in the United States when they gained LPR status. In 2007, a total of 59 percent of new LPRs of all nationalities adjusted their status rather than entering for the first time (DHS 2008c, 1).

A preference system regulates the number of green cards issued every year. In 2007, a total of 226,000 annual visas were available for family preferences, broken down into subcategories for different kinds of family relationships (see Figure 8.1). The employment preference system allots 147,148 visas, the vast majority of which are for skilled workers. In a putative attempt to maintain the diversity of new immigrants and in an effort to keep any one country from dominating flows, each country in the world is limited to receiving 7 percent of the total number of family-sponsored and employment preferences, meaning a cap of 26,120 visas per country under the preference system in 2007. Spouses and children of U.S. citizens and parents of adult citizens are exempt from the caps in the family preference system. Exempt immediate family members comprised 46 percent of all LPRs in 2006 (DHS 2008c).

How do Mexicans benefit or suffer discrimination under the current system? Informal discrimination, whether practiced by Border Patrol agents (Heyman 1995), immigration officers at points of entry (Gilboy 1991), or immigration courts (Coutin 1998), is difficult to assess systematically, although scholars have made important contributions in this area. Within the formal sphere, the same policies can be considered discriminatory or universalistic depending on whether the unit of analysis is the *source country* or the *individual citizen* of the source country. During the national origins quota system from 1921 to 1965 that differentially assigned immigration quotas to different countries based on their ethnic desirability, Mexico and the rest of the countries in the western hemisphere were exempt from the quotas. Most policy makers preferred Mexican immigrant workers because they were thought to have an extremely circular immigration pattern and reluctance to settle permanently. A limit was first set on immigrants from the western hemisphere in 1968. Seven years later, the State Department dropped its opposition to country limits on Mexico and Canada, which

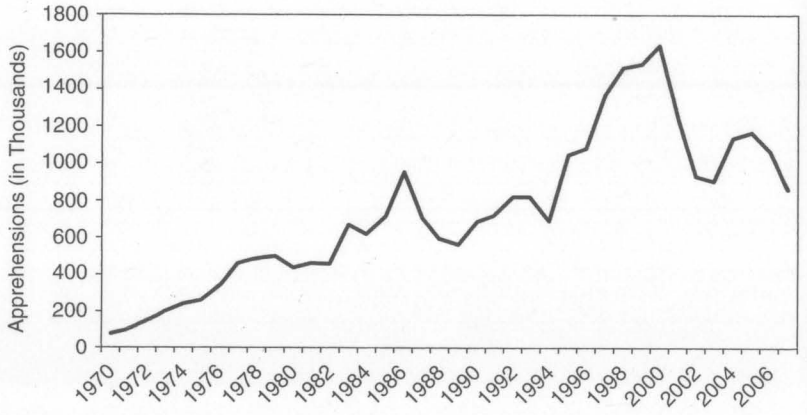

Figure 8.1 Apprehensions along the Southwest Border, 1980-2007.

Source: INS/DHS Annual Yearbooks

it had historically rejected based on the logic that they were neighboring countries. When country limits within the western hemisphere were introduced in 1976, legal immigration from Mexico immediately fell by 40 percent. Presidents Ford and Carter unsuccessfully urged a reform that would provide more visas for Mexicans (Massey, Durand, and Malone 2002, 43; Zolberg 2006, 343–44).

All independent countries now receive the same maximum number of immigrant visas under the employment and family preferences (DHS 2008c). The country quotas are nondiscriminatory where the source country is the unit of analysis. At the same time, provisions for the reunification of the closest family members outside of the country caps have favored Mexico as a country, given its long, sustained, massive migration to the United States. There were 150,000 new Mexican LPRs in 2007 despite the country quota of 26,120 because of the prevalence of strong family ties.

Where the individual is the unit of analysis, the limit of 26,120 visas per country discriminates against individuals from countries where there is a high level of demand to immigrate to the United States. Under the current system, Mexico is treated the same as small countries such as Monaco or countries with little history of migration to the United States such as Djibouti. Consequently, the waiting period to process an immigrant visa through family preference categories under the country limits varies widely among national origin groups. For example, in 2006 unmarried adult daughters and sons of U.S. citizens waited twelve years if they were Mexican, fifteen years if they were Filipino, and "only" five years on average if they were nationals of other countries (see Table 8.1).

Policies vary in the extent to which their discriminatory effects are intended or unintended. Where national origin is not an explicit criterion for selection, discriminatory effects may still be intended in the degree to which policy makers are aware that social attributes are differentially distributed among national populations. A preference for highly skilled migrants will thus favor Britons as a group, for example, and disfavor Mexicans as a group, even if highly skilled Mexicans are treated the same as highly skilled Britons. On the other hand, the large Mexican presence in U.S. agriculture gives Mexicans an advantage relative to other potential agricultural migrants in Central American and the Caribbean. For instance, the 1986 IRCA was universalistic in form, but Mexicans comprised three quarters of the immigrants that it legalized, and the percentage was even higher in the Special Agricultural Worker program under which legalization requirements were looser (Massey, Durand, and Malone 2002, 90).

Notwithstanding the large numbers of Mexicans who do benefit from the current U.S. immigration system, it is practically impossible for those who are low skilled to obtain an immigrant visa under the employment preferences. Even for those who have an immediate family member who is a U.S. citizen, financial requirements for sponsors create a class barrier to legal entry. Since 1996, family sponsors have been legally responsible for economically supporting an immigrant until he or she works ten years, naturalizes, or leaves the United States. Sponsors must be able to financially support their own household as well as sponsored immigrants at 125 percent of the federal poverty guidelines ($26,500 for a family of four in 2008).

Given the insatiable U.S. demand for Mexican labor and the persistent wage gap between the two countries in a context of massive migration sustained for a century,

Table 8.1. Years to Process Immigrant Visas for Mexicans, Filipinos, and All Other Nationals, 2006

PREFERENCE CATEGORY	MEXICANS	FILIPINOS	OTHER NATIONALS
1st (unmarried adult sons & daughters of US citizens)	12	15	5
2A (spouses & children of legal permanent residents)	7	4	4
2B (unmarried sons & daughters of legal permanent residents	14	10	9
3rd (married sons & daughters of US citizens)	12	15	8
4th (brothers & sisters of adult US citizens)	13	22	11

SOURCE: Department of Homeland Security. www.dhs.gov.

the current system guarantees that many Mexicans will continue to enter legally when they can under family sponsorships. When they cannot, many will choose to enter illegally.

Illegality[8]

The Department of Homeland Security (DHS) estimates that there were 7 million unauthorized immigrants from Mexico in the United States in 2008, representing 61 percent of the total unauthorized population (DHS 2009a). Just over half of all Mexicans living in the United States are unauthorized, and among Mexicans who have been in the country for less than five years, 85 percent are unauthorized (Passel 2005a, 16).[9] Nearly 89 percent of the 961,000 foreign nationals apprehended by the DHS in 2007 were Mexican (DHS 2008a).

There are several principal modes of illegality. The most obvious is what the U.S. government terms "entry without inspection"—clandestine entry or entry through an official crossing point with fraudulent documents. Most migrants apprehended when entering clandestinely forgo their right to an immigration hearing and are quickly returned to Mexico with little further consequence through the "voluntary removal" process (Cornelius, Fitzgerald, and Borger 2009). In 2007, more than 891,000 migrants were detained and agreed to return without a removal order. About 83 percent involved Mexicans (and a handful of Canadians) who were apprehended by the Border Patrol.

8. Most terms used to refer to the legal status of migrants are heavily freighted with political baggage. Restrictionists typically use the term "illegal aliens." Sympathizers typically prefer terms like "undocumented migrants." Here I generally follow Bean et al.'s (2001) less-charged usage of "unauthorized migrants" to describe persons living and/or working in the United States without the authorization of the U.S. government.

9. Because of its illegal nature, precise figures on the unauthorized population are impossible to obtain, but demographers have created estimates that most scholars believe to be reliable using the "residual method" calculated by subtracting the number of known legal immigrants from the total foreign population known through census and government survey data. Statistical adjustments are made for deaths, emigration, and other factors. The "residue" is the estimated unauthorized population (Passel 2005a).

An estimated 25 to 40 percent of all unauthorized immigrants entered the United States legally and then overstayed their visas, a figure that is probably lower for Mexicans than for other unauthorized immigrants (Passel 2005a, 3). Other foreigners are living in the country legally as tourists or students, but are violating the terms of their visa by working. An unknown number temporarily fall out of status because of long bureaucratic delays while adjusting their visas.

Building on the legal fact that Mexicans are disproportionately represented among the unauthorized population, restrictionist politicians have been effective in discursively presenting illegal immigration as a "Mexican" problem (De Genova 2004). For example, in former California Governor Pete Wilson's 1994 reelection campaign, television advertisements showed surveillance video of scores of migrants running up the freeway past a U.S. border entry point as an announcer ominously intoned, "They keep coming." Wilson's campaign used the advertisements to present an image of Mexicans pouring across a border out of control. He won reelection and helped support the passage of Proposition 187, which stripped unauthorized migrants of the right to a wide range of social services, although most of the proposition was subsequently declared unconstitutional in federal court (Barkan 2003).

Around the same time as Wilson's reelection campaign, the Clinton administration began an intensive buildup of agents and control infrastructure along the border with Operation "Hold the Line" in El Paso in 1993 and "Gatekeeper" in San Diego in 1994. Similar programs were eventually extended along urbanized sections of the entire border. The number of Border Patrol agents between 1996 and 2008 grew from 5,878 to 17,819. The proposed 2009 DHS budget soared to $10.94 billion for Customs and Border Protection and $5.68 billion for Immigration and Customs Enforcement (DHS 2009b).[10] New fencing and sophisticated surveillance systems have been added amid enthusiasm for increased enforcement from both Republicans and Democrats in Congress.

Apprehensions by the Border Patrol along the southwest border increased from roughly 80,000 in 1970 to just shy of 1 million in 1986, when the economic crisis in Mexico and the prospect of legalization under IRCA sent unprecedented numbers of citizens north. At the beginning of concentrated border enforcement in 1993, annual apprehensions were running around 820,000. They increased to 1.6 million in 2000 and have since declined to 858,000 in 2007 (see Figure 8.1).[11]

Although the Department of Homeland Security claims that the decline in apprehensions since 2000 is attributable to its increased enforcement efforts, there are reasons to be skeptical that enforcement alone is responsible for the downturn. The most notable declines were in 2007 and 2008—likely the result of job losses in U.S. sectors like construction, in which Mexican immigrants are overrepresented (Pew Hispanic Center 2009a), at least as much as because of increased border enforcement. The greatest paradox is that the border policy has bottled up unauthorized migrants in the United States once they have crossed. The DHS estimates that between 2000 and 2008,

10. Department of Homeland Security, http://www.dhs.gov. The "Minutemen" vigilante group has also conducted widely publicized efforts on small stretches of the border since 2005 to make a symbolic stance against illegal migration by reporting unauthorized crossers to the Border Patrol.

11. These data measure apprehension events, not the number of persons caught.

the number of unauthorized Mexican immigrants living in the United States *grew* from 4.7 to 7 million (DHS 2009a). Unauthorized migrants are increasingly likely to stay in the United States for long periods to avoid the physical risks and high costs of multiple clandestine crossings. The probability that unauthorized migrants would return to Mexico fell from 0.25 to 0.30 per year before IRCA in 1986 to 0.10 by 1998, with most of the decline following the onset of concentrated border enforcement in 1993 (Massey, Durand, and Malone 2002, 131–32).

Annual studies between 2005 and 2010 conducted in three small Mexican towns of large-scale emigration in the states of Jalisco, Oaxaca, and Yucatan, and the U.S. destinations of their migrants, tell the same story of limited deterrence. There are two ways to measure the effectiveness of border deterrence strategies. The first is to measure the extent of *remote deterrence*—that is, whether border enforcement policy inhibits potential migrants from deciding to migrate in the first place (Zolberg 2003) by making people in the Mexican interior aware of illegal migration's high price and physical dangers. The second measure is the extent of *immediate deterrence*—whether border enforcement policy prevents unauthorized migrants who do attempt to cross the border from successfully entering the United States.

The evidence for *remote deterrence* is mixed. In the 2010 study of every adult from Tlacuitapa, Jalisco, a series of logistic regression models measured the effects of knowledge and perceptions of border enforcement on the intent to migrate to the United States among individuals in the prime migration age cohort (15–45) who had never received any legal permission to enter the United States. Having previous migration experience, being male, not having children, and having more family members in the United States proved to be robust predictors of a Tlacuitapense's intent to migrate to the United States in the coming year. In some of the models, a perception that crossing the border without papers was very dangerous predicted that a Tlacuitapense would be less likely to self-report an intention to migrate in the next year. However, the primary danger at the border was not seen to be the Border Patrol per se, but rather gang violence and the bandits who prey on migrants. It appears that Tlacuitapenses associated border gangs with the escalation in drug violence along Mexico's northern border following Felipe Calderón's election to the presidency, a wave of violence that resulted in 28,000 deaths between 2006 and mid-2010 (Duran-Martinez, Hazard, and Rios 2010).

There is little evidence that U.S. policy has an immediate deterrent effect on attempted crossers. Among unauthorized migrants interviewed in the three communities, between 24 and 47 percent were apprehended on their most recent attempt to cross the U.S. border. Between 92 and 97 percent were able to successfully cross eventually, almost all on their first or second try (see Figure 8.2) (Cornelius, Fitzgerald, and Lewin Fischer 2007; Cornelius, Fitzgerald, and Borger 2009; Cornelius et al. 2010; FitzGerald, Alarcón, and Muse-Orlinoff, forthcoming). Among Tlacuitapenses, the probability of being apprehended at least once in his or her attempt to enter the United States trended upward, from 27 percent before implementation of the 1986 Immigration Reform and Control Act to 44 percent between 2002 and 2009. The *eventual* success rate, however, remained steady at 95 percent or higher (FitzGerald, Alarcón, and Muse-Orlinoff, forthcoming).

There is strong evidence that the major effect of enforcement efforts has not been to deter unauthorized migrants, but rather to unleash a series of unintended

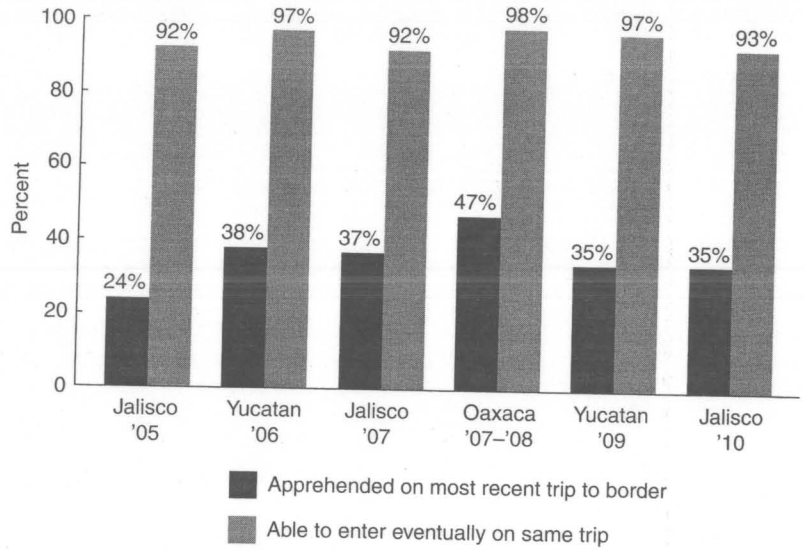

Figure 8.2 Percent of Unauthorized Migrants from Three Mexican Communities Apprehended at Least Once and Border Crossing Success Rates, 2005-2010.

Source: Mexican Migration Field Research Project surveys. N = 1289.

consequences. Usage of coyotes has soared. The same surveys show that more than nine of ten migrants now use coyotes, most of whom are contracted in the sending community to provide guaranteed door-to-door service for a set fee. Coyote fees have increased from several hundred dollars in the early 1990s to about $2,500 in 2008. In a 2009 survey of unauthorized migrants from a new migrant sending community in Yucatán, migrants reported working an average of five months after migration to pay off their coyote debt. Mom-and-pop coyote operations have become sophisticated networks of operatives on both sides of the border using safe houses, tunnels, falsified papers, and other expensive ways to move clients.[12] Broadly speaking, coyotes are providing efficient services.

Border enforcement in urban areas has channeled unauthorized migrants toward wilderness areas and shifted clandestine entry strategies at official ports of entry (Massey, Durand, and Malone 2002). The fee charged by coyotes to enter illegally through an official border crossing point is roughly similar to the fee for crossing clandestinely, but in 1996, the consequences of falsely claiming to be a U.S. citizen became severe—a lifetime ban on legal immigration to the United States. Consequently, unauthorized migrants surveyed in 2007 reported a drop in crossings through official ports

12. Mexican Migration Field Research Project surveys by the Center for Comparative Immigration Studies at the University of California, San Diego, in Tlacuitapa, Jalisco (2005); Tunkás, Yucatán (2006); Tlacuitapa (2007); San Miguel Tlacotepec, Oaxaca (2007–2008); Tunkás (2009); Tlacuitapa (2010); and their satellite communities in the United States.

of entry from 37 percent prior to 1993 to 22 percent between 2000 and 2006 ($N = 196$). Of those crossing through a port of entry, 82 percent hid in vehicles between 2000 and 2006, up from 39 percent prior to 1993 ($N = 51$). Showing false, "rented," or borrowed documents has become a less popular strategy given the 1996 law, falling from 57 percent before 1993 to 12 percent from 2000 to 2006.[13]

Most importantly, the rechanneling of unauthorized migration has indirectly caused the deaths of thousands of clandestine migrants who seek to circumvent border fortifications by crossing in wilderness areas and rivers and canals with an elevated risk of dying from exposure or drowning. From 1998 to 2008, a total of 4,331 bodies of Mexican nationals who died trying to enter the United States illegally were recovered—an average of more than one migrant a day (Cornelius 2001; Secretaría de Relaciones Exteriores 2010). An unknown number of bodies remain lost in remote regions.

To the extent that border control policy channels illegal migrants into remote corridors where their lives are at risk, and the poor state of the U.S. economy makes it more difficult to find family in the United States who can finance the coyote's fee, border control has some weak remote deterrent effect. The lack of jobs in the United States is probably even more consequential in reducing apprehensions, because the U.S. labor market is the primary pull factor for labor migrants. In any case, almost all of those who do try to circumvent border controls eventually succeed.

Enforcement of immigration laws has been concentrated at the border since the mid-1990s even as changes in the law have resulted in increasing numbers of Mexicans detained in the interior. The 1996 Antiterrorism and Effective Death Penalty Act and 1996 Illegal Immigration Reform and Alien Responsibility Act, which were enacted in the wake of the bombing of the Oklahoma City federal building, made it easier to deport noncitizen criminals and mandate their detention until they are deported. Most importantly, these laws subjected noncitizens to mandatory deportation for an expanded list of "aggravated felonies," applied the harsher new standard retroactively to crimes for which punishment had already been served, and sharply restricted judicial discretion over how the law is applied. Immigrants brought to the United States as children have increasingly been deported to Mexico and other countries with which they have no substantive social ties. The 1996 laws tripled the number of immigrant detentions in the 1990s (Hernández 2008).

Most unauthorized Mexican immigrants who are detained are returned to Mexico without passing through a formal legal proceeding. Of migrants who went through a formal removal process in 2007, 65 percent, or 209,000 migrants, were Mexicans. Formal deportation carries serious legal and social consequences, including a permanent bar to legal reentry for aggravated felons and up to twenty years for certain other kinds of deportees and imprisonment for subsequent illegal reentry to the United States (DHS 2008a).

An estimated half-million unauthorized migrants have standing deportation orders. Since 2003, the National Fugitive Operations Program has sought increased funding from Congress by emphasizing its focus on arresting dangerous illegal aliens

13. Mexican Migration Field Research Project surveys.

with serious criminal backgrounds. (Entry without inspection by itself is a minor violation).[14] Yet through fiscal 2007, nearly three quarters of the 96,000 migrants the program detained at a cost of $625 million did not have any criminal convictions. By 2007, only 9 percent of the migrants arrested by the program's teams had a criminal record, and 40 percent of the detainees were nonfugitives without a deportation order whom agents picked up as "collateral damage" during raids looking for someone else (Mendelson, Strom, and Wishnie 2009).

Historically, most attempts to punish U.S. employers for hiring workers without legal authorization have failed because employers have asserted their preferences for cheap, flexible labor. Perhaps most famously, the "Texas Proviso" inserted by the farm lobby in the 1952 immigration act explicitly excluded employment as a form of "harboring" illegal immigrants. A 1986 IRCA provision for the first time made knowingly hiring or continuing to employ unauthorized immigrants a federal crime (Brownell 2005).

Employer sanctions dropped sharply in the immediate aftermath of IRCA. The number of Immigration and Naturalization Service (INS) audits of employers per fiscal year dropped 77 percent from almost 10,000 in 1990 to less than 2,200 in 2003. Warnings to employers declined from 1,300 to 500 over the same period. The number of fines assessed for illegal hiring dropped 82 percent from nearly 1,000 in 1991 to 124 in 2003 (Brownell 2005). Changes in government record-keeping make direct comparisons between years difficult, but despite a recent uptick, the chances of an employer being investigated, much less fined, remain extremely small. In 2008, Immigrations and Customs Enforcement carried out workplace raids resulting in 1,103 criminal arrests, mostly for harboring or knowingly hiring illegal immigrants. The raids yielded 5,184 administrative arrests of immigrants, mostly for immigration violations.[15] Given that there are 8.3 million unauthorized immigrants among the 154 million workers in the United States (Passel and Cohn 2009, 3), the chances of being caught in such a raid are extremely slim.

The number of unauthorized workers continued to soar after the employer sanctions in IRCA were put into place, but the sanctions did have serious and damaging consequences on the labor force. Businesses in sectors with a large presence of unauthorized workers shifted to more subcontracting to protect themselves from employer sanctions. For example, rather than directly hiring janitors, a business might hire a janitorial contracting company. If immigration authorities determined that a janitor was working illegally, the janitorial subcontractor would be legally liable, not the business where the cleaning took place. A second effect of employer sanctions was to lower the wages of Mexican workers of all legal statuses as employers in effect insured themselves against the costs of a government fine for hiring unauthorized workers by lowering all of their workers' wages (Massey, Durand, and Malone2002). Wages fell for unauthorized Mexican workers even more than for authorized Mexican workers. After controlling for different levels of human capital, unauthorized Mexican men earned an average of 12 percent less than authorized Mexican men following the advent of employer sanctions in 1986 (Brownell 2008).

14. U.S. Code: Title 8, Section 1325.

15. DHS. http://www.ice.gov/pi/news/factsheets/worksite.htm

Although the requirement that employers examine workers' legal documents was deliberately written so loosely that it is almost impossible to prosecute employers who make cursory checks, employers can still get a sense from the documents about which workers are unauthorized and thus more easily subject to retaliation (Brownell 2008). A study of union organizing campaigns from 1998 to 1999 found that more than half of the campaigns involving unauthorized workers included employers' threats to call the INS on their own workers (Bronfenbrenner 2000). Another study of workplace raids by the New York district office of the INS from 1997 to 1999 found that more than half of the workplaces were subject to federal or state labor agency proceedings (Wishnie 2004). From the standpoint of immigration authorities, raiding workplaces whose owners ask to be raided has the advantage of avoiding a political backlash from businesses (Brownell 2008).

The Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB (National Labor Relations Board)* underlines how the law post-IRCA is not deterring unauthorized immigration, but rather is making the increasing number of unauthorized workers more vulnerable to exploitation. The court ruled 5–4 that an employer who unlawfully fires a worker for union organizing activities is immune from ordinary labor law liability for back pay if the employee is an illegal immigrant whose unauthorized status was only learned by the employer after the firing. In effect, the decision limits the labor rights of unauthorized immigrants and arbitrarily rules that immigration law trumps labor law (Martin and Schuck 2005).

IRCA also established pilot employee verification systems in which employers voluntarily check the eligibility of potential employees with a government database to make sure they are eligible to work legally. The pilots evolved into the electronic employment eligibility verification program known as E-Verify in 2007. As of February 2009, a total of 113,000 employers had registered for E-Verify, representing only 2 percent of businesses nationwide. Even if participation were made mandatory at a national level, the development and maintenance of a database would be enormously expensive both for the U.S. Citizenship and Immigration Services and the Social Security Administration. The databases are also riddled with errors (GAO 2007; Sacchetti 2009).

Subnational Law

The U.S. federal system opens up opportunities for an extremely wide variety of responses to immigration at different levels of government. Contradictions develop within jurisdictions and across jurisdictions as different policy makers attempt to liberalize or restrict immigration. A series of Supreme Court cases settled in the 1880s around the exclusion of Chinese laborers established the "plenary power" of the federal government to have sole authority within the U.S. federal system to control immigration (Zolberg 2006). Nevertheless, there is significant variation among states, counties, and municipalities in the way that immigrants are treated under certain kinds of law. In 2007, a total of 1,059 immigration-related bills were proposed in subnational jurisdictions, 16 percent of which passed. Of the 167 bills passed, 60 expanded the rights of immigrants, 26 contracted their rights, 24 regulated their employment, 30 regulated law enforcement and criminal justice, and 64 served other functions. The top five states that passed immigration-related legislation were Hawaii,

Texas, Arizona, California, and Colorado (Laglagaron et al. 2008; Varsanyi 2006). As at the national level, subnational measures are often as much about symbolic politics as practical efforts.

Many parts of the United States have a long tradition of offering some form of noncitizen voting, or "alien suffrage." Between 1776 and 1926, noncitizens intending to naturalize in the United States who lived in twenty-two states and territories could vote in local, state, and even federal elections. In 1996, however, during a period of backlash against immigrants, Congress made it a federal crime for noncitizens to vote in federal elections. States are still able to determine qualifications for voting at the local and state levels. Contemporary examples of municipal governments allowing noncitizen voting are typically confined to small liberal cities in the Northeast, like Cambridge and Amherst, Massachusetts, and Takoma Park, Maryland. School boards have been much more open to noncitizen voting, including Chicago since 1988 and New York City from 1970 to 2003 (Hayduk 2006).

Many cities have created "sanctuary" policies that aim to prevent municipal employees from enforcing federal immigration law. For example, San Francisco's City of Refugee Ordinance mandates that that "no department, agency, commission, officer or employee... shall use any city funds or resources to assist in the enforcement of federal immigration law... unless such assistance is required by federal or state statute, regulation, or court decision" (Hendricks 2008). Narrower policies against local law enforcement agencies routinely enforcing federal immigration laws are more common. The most influential of these policies is Los Angeles's 1979 "Special Order 40," still in effect. Similar policies have been adopted in New York, Chicago, San Diego, Houston, Miami, Phoenix, Atlanta, Denver, and Seattle.

On the other hand, mostly smaller police agencies have sometimes deliberately sought out unauthorized immigrants to arrest and turn over to federal authorities. Police in Chandler, Arizona, rounded up 432 unauthorized migrants over five days in 1997. In the aftermath of the 9/11 terrorist attacks, Attorney General John Ashcroft asked state and local police to volunteer to enforce immigration laws. Some police have informally adopted such a policy, whereas others have entered into formal "287(g) agreements" (named after Section 287(g) of the Immigration and Nationality Act) to turn over unauthorized immigrants to federal authorities. As of October 2008, Immigration and Customs Enforcement had signed 287(g) agreements with sixty-seven law enforcement agencies, which detained 43,000 immigrants in fiscal 2008 (GAO 2009; Pham 2004, 2008).

Proponents of 287(g) agreements argue that the only way to effectively enforce immigration law is to draw on the greater resources of subnational police agencies and that for local police to turn a blind eye to immigration status tacitly accepts lawbreaking. Opponents of routine local enforcement of federal immigration law, including many police chiefs in large metropolitan areas, argue on practical grounds that such enforcement undermines the willingness of unauthorized migrants to cooperate with the authorities, which makes policing more difficult in cities with large unauthorized populations. Searching out the unauthorized to punish them for the civil infraction of entry without inspection would also divert police resources from dealing with criminal violations, a disadvantage that would be compounded if a federal mandate to enforce immigration laws were unfunded. Civil rights activists argue that police lack training in immigration law and would inevitably fall back on racial profiling to search out the unauthorized (Pham 2004, 2008).

Unauthorized minors have had a de facto right to public primary and secondary education since the Supreme Court invoked the Fourteenth Amendment's equal protection clause in its 1982 *Plyler v. Doe* ruling against the Tyler, Texas, school board, which had attempted to charge unauthorized minors $1,000 each to attend public school (Martin and Schuck 2005). Of the estimated 2 million unauthorized immigrant children, about 70,000 graduate from U.S. high schools each year. Their eligibility to attend public universities and colleges and pay in-state tuition emerged as a hot political issue in the late 1990s. Some states have tried to restrict unauthorized students from higher education outright. The Alabama State Board of Education passed a policy effective in 2009 mandating that prospective students at Alabama's two-year colleges prove their legal residence in the United States to gain college admission (Chishti and Bergeron 2008b).

Congress attempted to prevent states from charging in-state tuition to unauthorized immigrants in 1996. Section 505 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act mandates that unauthorized immigrants "shall not be eligible on the basis of residence within a State for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit without regard to whether the citizen or national is such a resident." Nevertheless, ten states, including the major immigrant gateways of California, New York, Texas, and Illinois, offer in-state tuition to unauthorized immigrant students who have graduated from their high schools, subject to conditions that vary by state. In-state tuition policies for the unauthorized are associated with a 2.5 percentage point increase in the college enrollment of noncitizen Mexican young adults (Kaushal 2008; Konet 2007).

Supporters of excluding the unauthorized argue that taxpayers should not subsidize the education of people who are in the country illegally and that out-of-state citizens should certainly not pay more than unauthorized foreigners for the same education. The average cost for in-state tuition and fees at a four-year public university is $5,836 compared with $9,947 for out-of-state residents. Unauthorized students are not eligible for federal loans and grants, and they cannot legally work to support themselves, so efforts to prevent unauthorized immigrants from eligibility for in-state tuition all but cuts off access to higher education. Supporters argue that children should not be penalized for their parents' decision to bring them to the United States illegally, that years of residence confer the right to a higher education, and that restrictionist policies will retard the unauthorized population's social mobility and depress performance for unauthorized high school students who will lose the incentive to study hard to get into college. A second set of arguments against restriction claims that the 1996 act infringes on legitimate state rights, university personnel should not be required to enforce federal immigration law, and universities should be able to set their own in-state tuition criteria (Konet 2007).

Congressional attempts to create another avenue for some unauthorized immigrant minors to gain legal status and go to college have been unsuccessful as of this writing. In 2007, a Senate vote to end a filibuster on the Development, Relief, and Education for Alien Minors (DREAM Act) failed by eight votes. The measure would have granted provisional legal residency to unauthorized immigrants who entered

the United States as children and graduated from a U.S. high school, subject to various conditions. The students would then be required to complete a college associate's degree or serve in the military as a condition of remaining in the United States (Passel 2003; Konet 2007).

The mayor of Hazleton, Pennsylvania, a small town in the Rust Belt experiencing a sudden influx of Latino immigrants, opened a new front in local municipal efforts to target unauthorized immigrants through a 2006 city ordinance that prohibited landlords from leasing to unauthorized immigrants and that penalized businesses employing unauthorized immigrants. Several small cities across the country, including Farmer's Branch, Texas; Valley Park, Missouri; Riverside, New Jersey; and Escondido, California, adopted similar policies. The model was short-lived. A federal judge struck down the Hazleton ordinance as a violation of the plenary power rule the following year and the California legislature passed a bill prohibiting cities from requiring landlords to check whether their tenants are legal residents (Pham 2008).

However, subnational efforts to restrict the hiring of unauthorized workers have been given a boost by an Arizona law effective in 2008 that requires all employers in Arizona to use the federal E-Verify system to check the employment eligibility of future hires. Employers with unauthorized workers can have their business licenses suspended for up to ten days and be put on probation; a second offense leads to revocation of their license. Supporters of the bill argued that IRCA allows states to impose employer sanctions through "licensing and similar laws," whereas opponents invoke the federal government's plenary power over immigration (Chishti and Bergeron 2008a; Pham 2008).

Nine states issue driver's licenses regardless of the bearer's immigration status (National Immigration Law Center 2008). Proponents argue that issuing driver's licenses even to unauthorized immigrants recognizes the fact of their integration into U.S. society, helps track that population by bringing it within the government's documentary controls, and reduces uninsured motoring. Opponents marshal the same arguments used against other forms of accommodation of unauthorized immigrants, with the additional argument that issuing driver's licenses to the unauthorized is a security threat in light of the 9/11 attacks in which eighteen of the nineteen terrorists used driver's licenses to pass airport security checkpoints. In 2005, Congress passed the REAL ID Act stipulating that by May 2008, federal government agencies would only accept licenses from states that excluded unauthorized immigrants and fulfilled expensive technical requirements (*Migration News* 2008).

Citizenship

The restrictive turn in many immigration laws since the mid-1990s has underlined the increasing value of holding U.S. citizenship. Like most countries, the United States offers birth citizenship through a mixed regime of *jus sanguinis*, passing U.S. citizenship to children born anywhere of a U.S. parent, and *jus soli*, giving U.S. citizenship to children born in U.S. territory (Weil 2001). Where the United States stands out from most other liberal countries of immigration is an unusually strong form of *jus soli* that affords U.S. citizenship even to children born in the United States to unauthorized parents. This expansive view of *jus soli* is rooted in the Supreme Court's 1898 interpretation

of the Fourteenth Amendment in *U.S. v. Wong Kim Ark*, which has created a significant constitutional hurdle for those who have periodically attempted to remove birthright citizenship for children of unauthorized immigrants (Schuck and Smith 1985).

Naturalization is the third path to citizenship. In most cases, the requirements for naturalization include legal permanent resident status, five years of U.S. residence, and the completion of an English language, civics, and history test. Historically, Mexicans have been among the immigrant groups least likely to naturalize, given high levels of temporary migration and a political culture in Mexico that long viewed U.S. naturalization as a quasi-traitorous act. In an effort to boost the naturalizations of Mexicans in the United States so they would become more politically powerful, the Mexican government began to allow dual nationality in 1998 (Fitzgerald 2005).

In 1995, 19 percent of eligible Mexican immigrants naturalized compared with 66 percent of Europeans and 56 percent of Asians. By 2001, more than one third of eligible Mexican immigrants were naturalizing. The increase in Mexican naturalization rates is probably a reaction to the anti-immigrant U.S. political climate in the mid-1990s, which yielded California's 1994 Proposition 187, the 1996 Illegal Immigration Reform and Alien Responsibility Act easing deportations of legal residents, and the 1996 Personal Responsibility and Work Opportunity Reconciliation Act limiting welfare benefits for noncitizens. In 2007, Mexicans were 18.5 percent of the more than 660,000 naturalizations that year, far more than the nationals of any other country in absolute terms. Mexicans have naturalized to protect themselves from the growing practical distinction between being a legal resident and citizen (Passel 2005b; but see Balistreri and Van Hook 2004).

CONCLUSION: A NEW IMMIGRATION REFORM?

President George W. Bush announced a unilateral plan for reforming U.S. immigration policy in 2004. Although the plan was not meant to establish an accord with Mexico, any changes in U.S. law would disproportionately affect Mexicans. The Bush proposal eventually evolved into the Comprehensive Immigration Reform Act of 2007, which failed to pass a Senate filibuster in June 2007. The bill would have provided a path to legalization for most of the unauthorized already living in the United States, increased spending on border enforcement, made the electronic employee eligibility verification system mandatory, increased the financial penalties on employers who hire unauthorized workers, established a new temporary-worker program, and created a Canadian-style "point system" for selecting immigrants in a way that would favor occupational skills, higher education, and English fluency (*Migration News* 2007).

As efforts to achieve immigration reform have continued to be discussed under the administration of President Obama, policy makers have considered several major questions to be resolved in a comprehensive reform:

- Should unauthorized migrants living in the United States have a path to become legal residents and/or citizens? If so, what should be the required period of residence, English-speaking ability, and fines, and should there be a requirement to leave the United States before legalizing?

- What kinds of employer sanctions for hiring unauthorized workers, databases for identifying eligible workers, and enforcement strategies should be developed without seriously elevating the risk of discrimination against Latinos or foreigners legally eligible to work?
- Should there be a new temporary-worker program or simply a revision of existing temporary-worker programs? How many times should temporary-worker visas be renewable, and should they offer the holders the possibility of eventually becoming a citizen? Should the visas be portable among different employers, what should be the incentives for migrants to return to their home country, what labor rights should temporary workers have, and what provisions should be made for family reunification?
- What border enforcement measures should be in place, and should further elements in a comprehensive reform be contingent on first reducing unauthorized crossings?

Perhaps the most fundamental issue is whether Mexico should be given special consideration in U.S. immigration policy. The 1921–1965 national origins quota system has long been discredited as racist, yet the vestiges of a nationality-specific system remain in the per-country limits for employer and family preferences. Through the 1970s, U.S. presidents supported a continuation of special consideration for Mexico and Canada given their status as friendly neighbors with long migratory and economic ties to the United States. The massive demand for immigrant visas in Mexico makes it stand out as a special case. At the same time, Mexico is not alone as a country with some kind of "special relationship" with the United States or a much higher demand for immigrant visas than the current supply. If special consideration were given to Mexico, might it not also be due to former U.S. colonies like the Philippines and Cuba, which are also the source of hundreds of thousands of immigrants and many more who would like to come? If it seems egregious that Mexico, with its 100 million citizens, is treated the same as Djibouti, is it not stranger still that China and India, with their hundreds of millions, have the same per-country limit of 26,120? The most liberal solution may be to end the country-of-origin criterion altogether for purposes of new immigrant admissions and replace it with a worldwide ceiling in which any foreigner could compete for slots divided along universalistic grounds of family reunification and a diverse range of skill sets for which there is demand in the U.S. economy.

On the Mexican side, even in the unlikely scenario that a bilateral immigration agreement were reached, it is unclear whether the political will exists in Mexico to regulate unauthorized migration in return for a larger share of legal flows. The right to exit that is enshrined in the 1948 Universal Declaration of Human Rights and the 1917 Mexican constitution is routinely invoked in Mexican policy circles, although that right has never been absolute in international law (Aleinikoff 2002), Mexican law, or Mexican administrative practice.

Given the high U.S. demand for Mexican labor, the maturity of the social networks linking particular Mexican communities of origin and U.S. destination and a culture of emigration and dependence on remittances in many parts of Mexico, a

legal immigration system that does not make significantly more room for Mexican immigrants is almost guaranteed to result in massive, unauthorized migration. Many migrants would prefer to come as temporary workers, and a well-designed program could channel much of that demand into legal temporary migration, even as scholars recognize that much of that temporary migration would inevitably become permanent and require some regular means of status adjustment to avoid creating a large permanent underclass of noncitizens. What is certain is that without a legal queue to admission that moves forward, large numbers of Mexicans will continue to jump across the border line in the desert sands of the Southwest.