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IMMIGRATION OUTSIDE THE LAW  
*108 Columbia Law Review 2037-2097 (2008)*

*by*

HIROSHI MOTOMURA

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# COLUMBIA LAW REVIEW

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# ESSAY

## IMMIGRATION OUTSIDE THE LAW

Hiroshi Motomura\*

*In current debates about undocumented or illegal immigration, three themes have emerged as central: the meaning of unlawful presence, the role of states and cities, and the integration of immigrants. This Essay's starting premise is that a reappraisal of these themes is essential to a conceptual roadmap of this difficult area of law and policy.*

*This Essay argues that it is too narrow and too shallow to examine any of the three themes in isolation, as is typically done. Rather, each theme pairs up with another to reveal and elucidate a more fundamental question. The meaning of unlawful presence is connected to the role of states and cities; together they illuminate enforcement authority in immigration law. The role of states and cities combines with the integration of immigrants to show how communities that include immigrants are built. The meaning of unlawful presence and the integration of immigrants jointly shed light on how we think about the dimension of time in immigration law, and especially how we balance lessons from the past, present, and future.*

*The conceptual roadmap generated by this new look at immigration outside the law is important for two reasons. First, it explains why disagreements often run deep, and it reorients debate around more productive questions. Second, it shows why finding common ground will require looking at broader questions of international and domestic economic development as well as domestic educational policy.*

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## INTRODUCTION

How do we think about immigration outside the law?<sup>1</sup> Why are some disagreements so deep and some voices so vehement, while many reasonable minds remain ambivalent and uncertain? What will durable, politically viable solutions require? I offer answers to these questions by drawing a more complete conceptual roadmap of this terrain than is conventionally assumed. As a framework for constructive disagreement, accurate topography is the essential first step.

In the past quarter-century, virtually all discussion of immigration outside the law has focused on one of three issues: the meaning of unlawful presence, the role of states and cities, and the integration of immigrants. My core argument in this Essay is that it is too narrow to assess any of these themes in isolation, because they are intertwined in underappreciated ways that are essential to understanding debates and finding solutions.

I start with *Plyler v. Doe*,<sup>2</sup> a 1982 U.S. Supreme Court decision that today occupies a curious place in the legal and public imagination. As a

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1. I use this phrase deliberately as an attempt to be more literally accurate and more neutral than “illegal” or “undocumented” immigration. As Part II.A explains, the terminology is contested for the same reasons that the meaning of unlawful presence is contested. On terminology, see Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 1291 (6th ed. 2008) [hereinafter Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*] (discussing debate surrounding terminology used to refer to migrants “whose presence in the United States is in violation of law”); Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 18 *Immigr. & Nat’lity L. Rev.* 3, 13 (1997) (“The term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering.”). To be clear, I do not suggest that unlawfully present individuals are in a domain in which law is nonexistent or irrelevant. It is a construct of the law itself that places them on the “outside.” See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 13 (2005) (examining experiences of individuals “who variously comprised illegal aliens, alien citizens, colonial subjects, and foreign contract-workers—all liminal status categories that existed outside the normal teleology of immigration, that is, legal admission, permanent-resident status, and citizenship”).

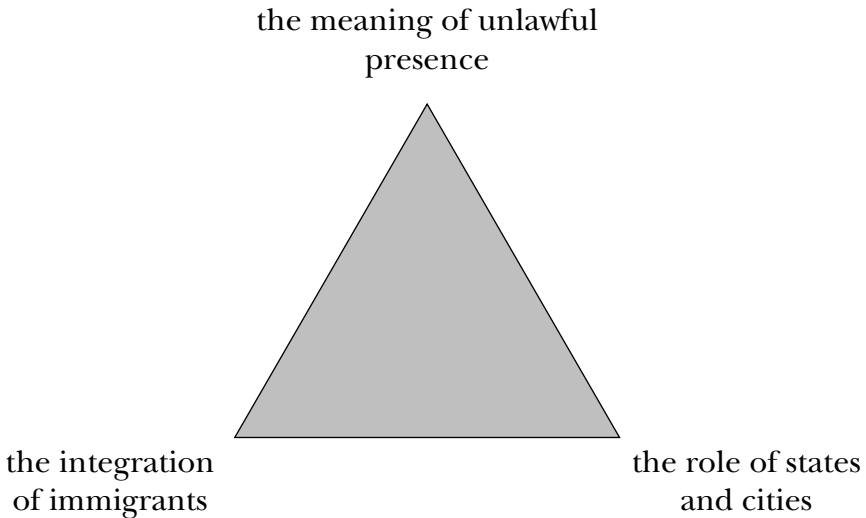
2. 457 U.S. 202 (1982).

decision of constitutional law, *Plyler* held that immigration status may not be used to limit the access of any child in the United States to elementary and secondary education in public schools. But *Plyler* is more than a constitutional decision: It has broader, enduring meaning because it invites analysis of fundamental assumptions about immigration outside the law.

Part I of this Essay revisits *Plyler* and briefly sketches the three key themes that explain the wide gulf between the majority and the dissent and which have become central to current debates. The first theme is the meaning of unlawful presence: Is immigration outside the law a matter of egregious lawbreaking, or does it represent an invited contribution to the U.S. economy and society that the government tolerates? The second theme is the role of states and cities: Can states and cities try to force out unlawful migrants by making it hard to find work or housing, or may they welcome immigrants who come outside the law? The third theme is the integration of immigrants: Should unlawful immigrants be given access to education, work, lawful immigration status, or even a path to formal citizenship? What measures—if any—should we take to foster their integration into American society?

For the visually inclined, here is a diagram of Part I:

FIGURE 1: THREE THEMES IN *PLYLER*

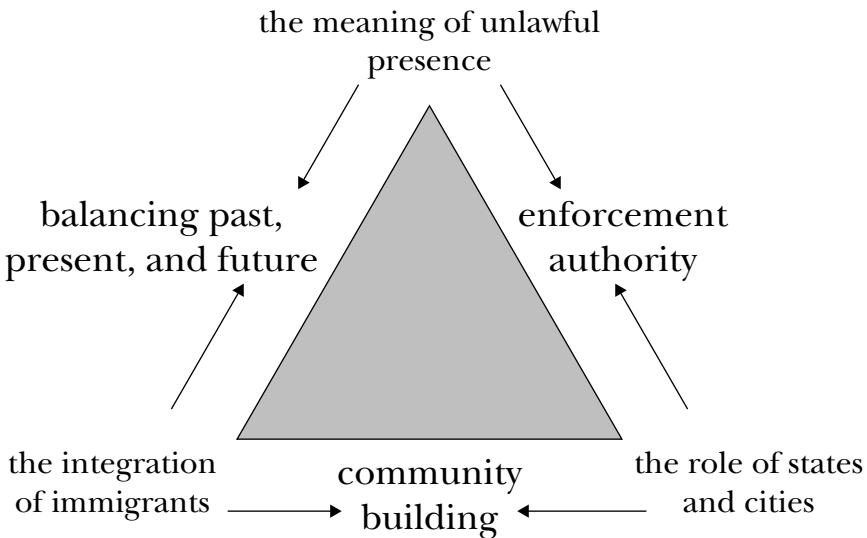


Of course, these are not the only basic themes. This triangle is useful only if we understand it within the confluence of larger factors. The global economy, race, and national security come immediately to mind. But while such factors matter in many different ways, they are also so pervasive that they help little as organizing principles. My topographic starting point, therefore, is that the three *Plyler* themes are analytically essential because they show *how* pervasive factors like race, the economy, and national security make a difference.

Parts II, III, and IV present my core argument: Moving beyond the impasse that bedevils current debates requires understanding how the meaning of unlawful presence, the role of states and cities, and the integration of immigrants combine to raise deeper questions. Specifically, Part II starts with themes that are in the public eye, showing that the meaning of unlawful presence and the role of states and cities jointly elucidate the more fundamental question of enforcement authority in immigration. Part III delves deeper, analyzing how the role of states and cities and immigrant integration merge to illuminate the building of communities that include both citizens and noncitizens. Part IV reaches the most fundamental issues. It explores how the meaning of unlawful presence and the integration of immigrants together clarify how we think about the dimension of time with regard to immigration outside the law, and in particular discusses how we can balance lessons from the past, present, and future. Part IV further asks: Should policy mainly reflect historical considerations, the fact that certain immigrants are unlawfully in the United States today, or a need to integrate these immigrants into American society in the future?

This diagram captures the basic dimensions of Parts II, III, and IV:

FIGURE 2: CONNECTING THE THREE *PLYLER* THEMES



Part V concludes this Essay by drawing some lessons for durable, politically viable responses to immigration outside the law. Specifically, Part V sketches connections between enforcement authority, community building, and balancing past, present, and future with three larger areas of public policy. One is international economic development, which generates and shapes migration. The others are economic and educational policies in this country, which determine how new immigrants affect the lives and futures of U.S. citizens. These areas of policy determine how we

should enforce immigration law, build communities that include immigrants, and think about the dimension of time with regard to immigration outside the law.

### I. THREE THEMES IN *PLYLER*

In 1975, the State of Texas adopted Education Code § 21.031, which allowed local school districts to deny enrollment in their public schools to any children who were not “legally admitted” to the United States.<sup>3</sup> Some school districts planned no measures to limit enrollment by unlawfully present students, while others moved to exclude them entirely. Still others planned to charge tuition.<sup>4</sup> For instance, Tyler Independent School District in eastern Texas enrolled unauthorized children without cost for the first two years under the new law, but then decided in July 1977 to impose an annual tuition of \$1,000. The Mexican American Legal Defense and Educational Fund (MALDEF) sued the district and its superintendent, James Plyler, challenging the implementation of the state statute as a violation of the U.S. Constitution. This lawsuit was combined with other pending actions against local school boards and Texas state agencies and officials.<sup>5</sup> The consolidated cases eventually led to the Supreme Court’s 1982 *Plyler* decision.<sup>6</sup>

Writing for a bare majority of five justices, Justice William Brennan concluded in *Plyler* that the Texas statute was unconstitutional. Because the decision is one of the most significant modern judicial decisions concerning the rights and responsibilities of noncitizens generally and unauthorized migrants particularly, it is essential to understand the deep chasm that separated the majority and the dissent. We should start by examining the majority and dissent at face value.

In the majority opinion, Justice Brennan concluded that “the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.”<sup>7</sup> Though demanding considerably less than a “compelling state interest,” *Plyler* held that the Texas statute served no such substantial goal and was therefore unconstitutional as a violation of equal protection. Moreover, the Court opined, the U.S. Constitution forbids reliance by a state on the immigration status of children to limit their access to public elementary and secondary edu-

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3. Tex. Educ. Code Ann. § 21.031 (Vernon Supp. 1981).

4. For more on the litigation and its aftermath, see Michael A. Olivas, *Plyler v. Doe*, the Education of Undocumented Children, and the Polity, in *Immigration Stories* 197, 197–220 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter Olivas, Education].

5. In re Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), was consolidated with the Tyler litigation for review in the Supreme Court.

6. 457 U.S. 202.

7. Parts of Brennan’s analysis seemed to require only that the statute have a “rational basis,” but in the end he blended both rational basis and “intermediate scrutiny.” See *id.* at 218 n.16, 224; see also *id.* at 217 (requiring “substantial interest”).

cation.<sup>8</sup> Although the Court's equal protection analysis relied heavily on the distinction between state and federal statutes, in a footnote the Court declined to address whether the Texas statute was preempted by federal law.<sup>9</sup>

Chief Justice Burger dissented, relying on two propositions that the majority did not contest. First, unlawfully present noncitizens are not a suspect class that would trigger the most stringent form of judicial scrutiny.<sup>10</sup> Second, as the Court held nine years earlier in *San Antonio Independent School District v. Rodriguez*, education is not a fundamental right.<sup>11</sup> According to Burger, the Court should therefore have upheld the Texas statute—even if it was profoundly unwise—because it had a rational basis.<sup>12</sup>

To trigger the Court's finding that the Texas law violated equal protection, it especially mattered that children were involved. The early stages of the *Plyler* litigation took place during the presidency of Jimmy Carter, whose Justice Department intervened in support of the children. But the Reagan Administration told the U.S. Supreme Court in September 1981, one month before the oral argument in *Plyler*, that though it accepted that the Fourteenth Amendment applied to all persons, the federal government would not take a position on whether Texas had violated the children's constitutional rights.<sup>13</sup>

In a series of recently available memoranda, Justice Brennan wrote about the *Plyler* deliberations. These documents indicate that he drafted and redrafted his opinion to get Justice Powell's vote by emphasizing the innocence of children and the importance of education.<sup>14</sup> That Powell might become the swing vote was not lost on the litigants. As journalist Barbara Belejack recounts: "The day the opinion was issued, a little-known Department of Justice lawyer co-wrote a memo chastising the U.S.

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8. The Court rejected three state objectives: (1) that the statute was intended to allow the state "to protect itself from an influx of illegal immigrants"; (2) that "undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education"; and (3) that "undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State." *Id.* at 228–30.

9. *Id.* at 210 n.8.

10. *Id.* at 219 n.19.

11. 411 U.S. 1, 27–37 (1973); see *Plyler*, 457 U.S. at 221, 223 (citing *San Antonio Independent School District v. Rodriguez* in support of claim that education is not a fundamental right).

12. 457 U.S. at 242–54 (Burger, C.J., dissenting).

13. See Olivas, Education, *supra* note 4, at 208 (noting Reagan Administration refused to "formally enter its amicus brief on the side of the plaintiffs . . . and it took no position on the crucial equal protection issue").

14. See Earl M. Maltz, The Chief Justiceship of Warren Burger, 1969–1986, at 56–57 (2000) (explaining Justice Powell's vote as reflecting his views on treatment of children and on education).

Solicitor General for not filing a brief taking Texas' side. Had such a brief been filed, future Supreme Court Chief Justice John Roberts suggested, Powell might have voted differently.<sup>15</sup>

Following the *Plyler* decision, the *New York Times* editorialized that "the 5-4 vote was too close and the legal rule too narrow to make the case one of liberty's landmarks."<sup>16</sup> This editorial echoed a sentiment in Chief Justice Burger's dissent: "[T]he Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."<sup>17</sup> From the beginning, the *Plyler* majority's reasoning came under trenchant criticism as analytically flawed and result-oriented.<sup>18</sup> To be sure, the decision has turned out to have fundamental significance, partly for the majority's ruling on education, and partly for the more general proposition—adopted by all nine Justices—that the Constitution protects noncitizens as persons even if they are in the United States unlawfully.<sup>19</sup> But the fact that the majority's analysis relied heavily on viewing children as innocent parties—who should not suffer the consequences of their parents' decision to enter or remain in the United States unlawfully—may explain why *Plyler*'s constitutional holding has been confined to public education, kindergarten through the twelfth grade. In this sense, *Plyler* remains a high-water mark of immigrants' rights.<sup>20</sup>

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15. Barbara Belejack, A Lesson in Equal Protection: The Texas Cases That Opened the Schoolhouse Door to Undocumented Immigrant Children, *Tex. Observer*, July 13, 2007, at 14; see also Michael A. Olivas, Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement, 2007 U. Chi. Legal F. 27, 39 [hereinafter Olivas, State and Local Ordinances] (explaining that Chief Justice Roberts's views on *Plyler* surfaced during his Senate confirmation hearings).

16. Editorial, Teaching Alien Children Is a Duty, *N.Y. Times*, June 16, 1982, at A30 [hereinafter Editorial, Teaching Alien Children].

17. *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting).

18. See, e.g., Michael J. Perry, Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, *Plyler v. Doe*, 44 U. Pitt. L. Rev. 329, 337–41 (1983) (suggesting multiple grounds for criticizing majority opinion in *Plyler*).

19. See *Plyler*, 457 U.S. at 210 (majority opinion) (rejecting argument that "undocumented aliens . . . are not 'persons within the jurisdiction' of the State of Texas, and that they therefore have no right to the equal protection of Texas law"); *id.* at 243 (Burger, C.J., dissenting) (agreeing with majority that equal protection applies to illegal aliens); Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 77–78 (2006) [hereinafter Motomura, *Americans in Waiting*] ("*Plyler* extended constitutional protections to the undocumented not based on immigration as contract or affiliation, but rather on presence on U.S. territory."); Linda Bosniak, *Persons and Citizens in Constitutional Thought* 6 (Feb. 11, 2008) (unpublished manuscript prepared for Harvard Public Law Conference on Religion, Multiculturalism, and Citizenship, Feb. 29–Mar. 1, 2008, on file with the *Columbia Law Review*) (suggesting it would be "almost unthinkable" for current Supreme Court to undo *Plyler*'s recognition of "undocumented immigrants as constitutional persons").

20. See, e.g., Olivas, Education, *supra* note 4, at 210–11 (asserting that reasoning in *Plyler* "has not substantially influenced subsequent Supreme Court immigration jurisprudence"); Nina Rabin, Mary Carol Combs & Norma González, Understanding

If the *Plyler* holding on educational access was narrow in its application as constitutional doctrine, then this very limitation makes it invaluable for its elucidation of policy debates. Indeed, the same *New York Times* editorial that emphasized the narrow gauge of the *Plyler* holding went beyond constitutional law to tackle policy and offered this appraisal: “[Y]et any other result would have been a national disgrace. It was intolerable that a state so wealthy and so willing to wink at undocumented workers should evade the duty—and ignore the need—to educate all its children.”<sup>21</sup> Why, then, did the *Plyler* majority adopt this view of what was intolerable? What perspectives on immigration outside the law moved the majority to strike down the Texas statute? I pose these questions as a deliberate effort to see *Plyler* not as source of constitutional doctrine, but rather as a window into policy debates about immigration outside the law.

The *Plyler* majority’s approach to three key themes explains the Court’s school access holding. First, the majority viewed the fact that the Texas children were in the United States unlawfully as merely the beginning of the analysis, since they might never be deported.<sup>22</sup> In contrast, the dissent saw the children’s illegal presence as automatically precluding any serious judicial scrutiny of their constitutional claims.<sup>23</sup> This theme—the meaning of unlawful presence—is central to debates today. For example, some advocates start—and end—their arguments by pointing out that some noncitizens are “illegal aliens.” *New York Times* editorial writer Lawrence Downes put it (ironically): “[W]hat part of ‘illegal’ don’t you understand?”<sup>24</sup> This unforgiving approach to unlawful immigration finds broad resonance in a post-9/11 climate that sometimes gives trump card status to national security, and, by extension, to strict law enforcement. Others, however, respond that unlawful presence is merely a formal status that overlooks contributions made to U.S. society and ties acquired here with government acquiescence. From this perspective, those who immigrate outside the law are simply “undocumented.”<sup>25</sup>

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*Plyler’s Legacy:* Voices from Border Schools, 37 J.L. & Educ. 15, 15 (2008) (characterizing *Plyler* as “the high water mark in the Court’s immigrants’ rights jurisprudence”). Since 1982, the Court’s membership has changed almost completely and in ways that suggest that the current Court would adopt a different constitutional analysis, and perhaps a different outcome. This further contributes to the limited reach of *Plyler* as constitutional precedent.

21. Editorial, Teaching Alien Children, *supra* note 16.

22. See *Plyler*, 457 U.S. at 218–19 (“This situation raises the specter of a permanent caste of undocumented resident aliens . . .”).

23. *Id.* at 244–46 (Burger, C.J., dissenting).

24. Lawrence Downes, Op-Ed., What Part of ‘Illegal’ Don’t You Understand?, *N.Y. Times*, Oct. 28, 2007, at WK11.

25. In portraying this spectrum of views, I do not overlook the fact that the *Plyler* Court was unanimous that persons unlawfully in the United States may invoke the protections of the U.S. Constitution. See *supra* note 19 and accompanying text. However, my focus is not on the threshold question of whether the Constitution applies, but rather on further questions—addressed *infra* in Parts II and IV—about the consequences of unlawful presence.

Second, the majority's equal protection analysis left little room for subfederal<sup>26</sup> efforts to address immigration outside the law by disadvantaging children who were unlawfully in the United States.<sup>27</sup> According to the majority, equal protection can bar states and localities from treating citizens and noncitizens differently, even if the federal government may constitutionally draw the same distinctions.<sup>28</sup> The dissent countered with deference to Texas's rationales for excluding children who lacked lawful immigration status.<sup>29</sup> Today, the role of states and localities in immigration-related matters is a hotbed of controversy.<sup>30</sup> Advocates of stronger enforcement argue that if aliens are in the United States illegally, then it is logical and wise for federal immigration authorities to enlist and deputize state and local officers as "force multiplier[s]."<sup>31</sup> But skeptics counter that state and local officers are more prone to mistaken understandings of immigration law or race or ethnic discrimination,<sup>32</sup> that immigration enforcement undermines more compelling police priorities,<sup>33</sup> and that the required nationwide uniformity in immigration enforcement precludes subfederal involvement as both constitutional com-

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26. I use the term "subfederal" to include states, counties, cities, school districts, special districts, and all other government entities below the federal level. Throughout this Essay, I will use the phrases "states and localities," "states and cities," and "state and local"; I intend these phrases to refer to the same government entities as the term "subfederal."

27. See *Plyler*, 457 U.S. at 220 (explaining that it is "difficult to conceive of a rational justification for penalizing these children for their presence within the United States").

28. *Id.* at 225.

29. *Id.* at 245–46 (Burger, C.J., dissenting).

30. See generally Lisa M. Seghetti, Stephen R. Vina & Karma Ester, Cong. Research Serv., *Enforcing Immigration Law: The Role of State and Local Law Enforcement* (2006) (examining role of state and local law enforcement in enforcing immigration law).

31. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 181 (2005) ("The nearly 800,000 police officers nationwide represent a massive force multiplier.").

32. See Olivas, *State and Local Ordinances*, *supra* note 15, at 35 ("[S]hifting immigration enforcement powers to sub-federal levels . . . is bad policy and will lead to bad results both with immigration enforcement and local enforcement."); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1104 (2004) [hereinafter Wishnie, *State and Local Enforcement*] ("[P]ermanent involvement of state and local police in routine immigration enforcement raises the further risk of racial profiling and selective immigration enforcement beyond moments of real or perceived national threat."); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 Ariz. L. Rev. 113, 119 (2007) (describing "evidence of racial profiling when state and local officers have teamed up with federal officers to investigate immigration violations"); see also Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 Geo. L.J. 777, 781 (2008) [hereinafter Pham, *Private Enforcement*] (noting that some discrimination may be consequence of mistaken understandings of immigration law, which may prompt overenforcement against individuals believed to lack lawful immigration status).

33. See Wishnie, *State and Local Enforcement*, *supra* note 32, at 1087 (noting that some law enforcement officials object to immigration measures because they believe they will "deter crime reporting by noncitizens" and "divert resources from local policing priorities").

mand and sound policy.<sup>34</sup> At the same time, other states and localities have adopted measures intended to protect unauthorized migrants against immigration law enforcement, and to integrate them into their communities.

Third, the majority's analysis relied heavily on its approach to the integration of immigrants, especially to the link between education and the prevention of permanent disadvantage as unauthorized immigrant children come of age. Essential to overriding the Texas statute was the majority's view that, as evidenced in *Brown v. Board of Education*,<sup>35</sup> American public law rejects the emergence of a permanent subcaste.<sup>36</sup> In contrast, the dissent dismissed these factors as policy matters inappropriate for judicial consideration.<sup>37</sup> This third *Plyler* theme has also become prominent today. With regard to immigration generally, integration issues include English-language acquisition and other cultural markers, as well as immigrant contributions to the U.S. economy. With regard to immigration outside the law, these questions replicate themselves. The aspects of integration that are most obviously tied to immigration outside the law involve formal immigration and citizenship status. Formal status is partly a matter of legalization, bringing us back to the first *Plyler* theme: the meaning of unlawful presence. Some advocates urge Congress to approve proposals to grant some unauthorized migrants in the United States lawful status,<sup>38</sup> and to further a path to citizenship,<sup>39</sup> not just as a formal status but also as the foundation for functional integration in social, economic, and other ways. Opponents of these proposals counter that these illegal aliens are intruders who are unworthy of any recognition through lawful status or other forms of integration.

At the time of *Plyler*, the unauthorized population of the United States was about three or four million.<sup>40</sup> Now, a generation later, immigrants without lawful status number about twelve million, of whom over

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34. See Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965, 995 (2004) (arguing that subfederal immigration enforcement "violat[es] the constitutional mandate for uniform immigration laws" and creates "foreign policy concerns" by "exacerbat[ing] uncertainty as to how a country's nationals will be treated within the United States").

35. 347 U.S. 483, 493 (1954).

36. *Plyler v. Doe*, 457 U.S. 202, 222–23 (1982) (quoting *Brown*, 347 U.S. at 493).

37. *Id.* at 252–53 (Burger, C.J., dissenting).

38. For an overview, see Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 1347–50.

39. See, e.g., Editorial, *One Argument, 12 Million Holes*, N.Y. Times, Jan. 18, 2008, at A20 (describing immigration bill that died in Congress that would have "dealt with the 12 million illegal immigrants already here, through a tough path to earned citizenship").

40. Jeffrey S. Passel, Pew Hispanic Ctr., *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey 3* (2006).

forty percent have arrived since 2000.<sup>41</sup> Of almost forty million foreign-born persons in the United States today, about thirty percent are here outside the law.<sup>42</sup> Equally dramatic is the fact that the numbers of new lawful and unlawful immigrants are close to equal.<sup>43</sup> Virtually everyone agrees that something must be done—but then consensus evaporates, giving way to deep disagreements and persistent polarization. For example, serious proposals regarding immigration outside the law range from amnesty on the one hand to zero-tolerance enforcement on the other.

As illustrated above, the public debate about immigration outside the law centers around the three *Plyler* themes: the meaning of unlawful presence, the role of states and cities, and the integration of immigrants. However, Parts II, III, and IV explain why it is too narrow to address any of these three themes in isolation. Instead, they pair up to produce complex policy tectonics. Indeed, each theme appears twice in the rest of this Essay, for it is useful, if admittedly heuristic, to see each theme as having two faces. With policy antagonists tending to talk past each other, a conceptual roadmap that accurately captures this topography is essential to understanding debates, identifying the fundamental issues, and finding durable, politically viable solutions.

## II. ENFORCEMENT AUTHORITY

Part II begins by looking separately at the first two *Plyler* themes—the meaning of unlawful presence in Part II.A, and the role of states and cities in Part II.B. But, as the rest of Part II explains, they are two facets of the more fundamental question of enforcement authority in immigration law. By “enforcement authority,” I mean not just who should have the authority to enforce immigration law, but also what the scope of that authority should be.

### A. *The Meaning of Unlawful Presence*

Though Justice Brennan’s majority opinion referred to the *Plyler* plaintiffs as both “undocumented” and “illegal” immigrants, the interpretation of unlawful presence reflected in the opinion generally characterized unauthorized migrants in ways that “undocumented” connotes.<sup>44</sup> Specifically, the majority’s observation that “there is no assurance that a child subject to deportation will ever be deported,”<sup>45</sup> reflects two related

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41. Michael Hoefer, Nancy Rytina & Christopher Campbell, U.S. Dep’t of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, at 2–3 (2008); Passel, *supra* note 40, at 1–3.

42. Passel, *supra* note 40, at 4.

43. *Id.* at 2.

44. In a much narrower sense, “unlawful presence” is also a term of art under section 212(a)(9)(B)–(C) of the Immigration and Nationality Act (INA). INA § 212(a)(9)(B)–(C), 8 U.S.C. § 1182(a)(9)(B)–(C) (2006) (defining aliens unlawfully present).

45. *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

thoughts that remain crucial today. First, it may be unclear whether someone's presence is unlawful, and second, even those whose presence is indisputably unlawful might not be deported.

On the first point, federal law offers many avenues to lawful status. Some unauthorized migrants may qualify based on employment or family relationships with U.S. citizens or permanent residents. Some of these noncitizens have met all requirements and immediately qualify for lawful status, but must wait for paperwork to process.<sup>46</sup> Others have met all requirements, but must wait because of an annual limit on the number of admissions in their category. Still other noncitizens have legally recognized temporary statuses that protect them from removal.<sup>47</sup> Professor David Martin estimated in 2005 that between 1 and 1.5 million noncitizens were in these "twilight statuses" in that they either met the substantive requirements for lawful status or they enjoyed formal protection from removal.<sup>48</sup>

More significantly, an unauthorized migrant may qualify for discretionary relief that results in permanent residence. For example, an immigration judge may allow a noncitizen to stay in the United States under a form of discretionary relief that is now called cancellation of removal.<sup>49</sup> Such relief may be granted on the basis of the immigrant's ties in the United States, especially a close relative who is a citizen or lawful permanent resident. Since *Plyler* was decided, Congress has made it more difficult to obtain cancellation of removal, but it remains true, as the majority noted, that "[a]n illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen."<sup>50</sup>

Alternatively, as the *Plyler* majority observed, Congress may adopt a legalization program.<sup>51</sup> In fact, just four years after *Plyler*, Congress did so as part of the Immigration Reform and Control Act (IRCA) of 1986, which granted amnesty in the form of eventual permanent residence for most noncitizens who had been in the United States unlawfully since January 1982.<sup>52</sup> This legislation conferred lawful immigration status on

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46. The U.S. Citizenship and Immigration Services website provides information on processing times. U.S. Citizenship & Immigration Servs., Processing Dates, at <https://egov.uscis.gov/cris/jsps/ptimes.jsp> (last visited Aug. 13, 2008) (on file with the *Columbia Law Review*).

47. See, e.g., INA § 244 (defining temporary protected status).

48. David A. Martin, Migration Policy Inst., *Twilight Statuses: A Closer Examination of the Unauthorized Population 1* (2005).

49. See INA § 240A(b) (granting Attorney General power to cancel removal and adjust to permanent resident status any alien who is deportable if alien meets certain conditions).

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

51. See *id.* at 207 n.4 (acknowledging existence of "congressional proposals to 'legalize' status of many unlawful entrants").

52. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1255a (2006)).

several million unlawful migrants, about sixty percent of the pre-IRCA unauthorized population.<sup>53</sup>

Interestingly, the *Plyler* majority's prediction against deportation was confirmed by the life stories of the sixteen children who were unnamed *Plyler* plaintiffs. In the 1990s, a *Los Angeles Times* reporter traced thirteen of them, who had become lawful permanent residents of the United States. Ten finished high school in Tyler and many had gone on to college, though none had graduated from a four-year institution.<sup>54</sup> In 2007, another journalist interviewed three of the plaintiff children and found that two had become U.S. citizens.<sup>55</sup> Though these are just individual stories, they are typical within the statistical picture of IRCA legalization.

Between individualized grants of discretionary relief and broad-scale legalization, the history of U.S. immigration law includes occasional episodes during which large groups of previously unlawful migrants were brought into the lawful fold. Prominent recent examples include the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>56</sup> and the Haitian Refugee Immigration Fairness Act,<sup>57</sup> which granted lawful immigration status to large numbers of previously unlawful immigrants from Nicaragua, El Salvador, Guatemala, and Haiti.<sup>58</sup> Taken together, these episodes show that it may not be unreasonable for some groups of unauthorized migrants to hope for legislative or administrative protection against deportation, and even permanent residence.

On the second distinct point about the meaning of unlawful presence, the *Plyler* majority acknowledged that even noncitizens who lack any avenues of relief and whose presence in the United States is clearly outside the law are unlikely ever to be apprehended, let alone adjudicated as violators and deported.<sup>59</sup> The reason is that chronic and intentional underenforcement of immigration law has been de facto federal policy for over a century, even if enforcement is sometimes visible and severe. Much of this policy emerged in the American Southwest around the turn of the twentieth century, when growers began to rely heavily on Mexican immigrants to satisfy new labor demands generated by the irriga-

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53. See *id.*; U.S. Immigration & Naturalization Serv., U.S. Dep't of Justice, 1993 Statistical Yearbook of the Immigration and Naturalization Service 183 (1994) (noting that "[i]n 1987–88, approximately 3 million persons applied for legalization under [IRCA]"); U.S. Immigration & Naturalization Serv., Report on the Legalized Alien Population (1992) (outlining INS's legalization program and its impact on aliens).

54. Paul Feldman, Texas Case Looms over Prop. 187's Legal Future, *L.A. Times*, Oct. 23, 1994, at A1.

55. Lucy Hood, Educating Immigrant Students, *Carnegie Rep.*, Spring 2007, at 2, 6–8.

56. Pub. L. No. 105-100, §§ 201–204, 111 Stat. 2160, 2193–201 (1997); see also discussion of NACARA *infra* Part V.

57. Pub. L. No. 105-277, §§ 901–904, 112 Stat. 2681, 2681-538 to -542 (1998).

58. See Susan Bibler Coutin, Nations of Emigrants: Shifting Boundaries of Citizenship in El Salvador and the United States 46–72 (2007) (describing immigrants' fight to gain permanent residency through NACARA).

59. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

tion of new croplands and the invention of the refrigerated railroad car.<sup>60</sup> Many Mexicans entered legally, often as commuters or temporary farmworkers rather than as lawful immigrants. Others came outside the law.

Formal regulation of Mexican immigration in the first part of the twentieth century consisted of qualitative exclusion grounds, not the numerical limits that have become familiar in modern admissions. Mexicans were exempt from some of these grounds—such as the literacy test—and other grounds were applied to them only selectively.<sup>61</sup> Border control was scant.<sup>62</sup> The minimal enforcement at that time primarily targeted Chinese immigrants who tried to evade the Chinese exclusion laws by entering the United States from Mexico.<sup>63</sup>

The hallmark of enforcement against Mexican immigrants was discretion that reflected the needs of employers, who often preferred to hire Mexican workers with temporary legal status or no legal status at all. They were a flexible, disposable workforce, ready to work when needed, but as compared to Europeans, more easily sent home when they were not.<sup>64</sup> Heavily influenced by a variety of racial perceptions that cast Mexicans as a subordinate, expendable, and nonassimilable labor force,<sup>65</sup>

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60. See generally Motomura, *Americans in Waiting*, *supra* note 19, at 129–30 (describing how restrictions on Asian immigration in late nineteenth and early twentieth century forced employers to seek new sources of labor, most prominently from Mexico).

61. See Ngai, *supra* note 1, at 56–90 (describing selective application of exclusion grounds and eligibility for discretionary relief).

62. This was true even after the Border Patrol was founded in 1924. See Act of May 28, 1924, Pub. L. No. 68-153, ch. 204, 43 Stat. 205, 240 (appropriating funds for land border enforcement).

63. Mounted border inspectors were patrolling the U.S.-Mexico border by 1904. In March 1915, Congress authorized funding for mounted “Chinese inspectors” operating out of El Paso, Texas, but they never numbered more than seventy-five. See Clifford Alan Perkins, *Border Patrol: With the U.S. Immigration Service on the Mexican Boundary 1910–54*, at 7–14 (1978) (recalling his own appointment as a “Chinese inspector”); see also John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* 118 (2000) (noting that there were not enough agents to effectively patrol border).

64. The 1911 final report of the Dillingham Commission, established by Congress in 1907 to study the origins and consequences of immigration to the United States, observed: Because of their strong attachment to their native land . . . and the possibility of their residence here being discontinued, few become citizens of the United States. The Mexican migrants are providing a fairly adequate supply of labor. . . . While they are not easily assimilated, this is of no very great importance as long as most of them return to their native land. In the case of the Mexican, he is less desirable as a citizen than as a laborer.

Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in *Mexican Migration to the United States: Origins, Consequences, and Policy Options* 151, 155–59 (Wayne Cornelius & Jorge Bustamante eds., 1989) [hereinafter Calavita, *Immigration Policy Debate*] (quoting Immigration Comm’n, *Reports of the Immigration Commission: Abstracts of the Reports of the Immigration Commission with Conclusions and Recommendations and Views of the Minority*, S. Doc. No. 61-747, at 690–91 (1911)).

65. See Martha Gardner, *The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870–1965*, at 209 (2005) (describing how U.S. employers viewed Mexican

economically driven fluctuations gave rise to a de facto policy of discretionary enforcement and partial tolerance of unlawful immigration that continues today.<sup>66</sup>

Some of this de facto policy is evident in the federal immigration statutes themselves. For example, until 1986 it was not unlawful under federal law to hire an unauthorized worker.<sup>67</sup> In *Plyler*, Justice Brennan observed for the majority: “Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”<sup>68</sup> In 1986, IRCA introduced penalties for employers who knowingly hire or continue to hire unauthorized workers, but the scheme has been ineffective.<sup>69</sup> Employers must only check to see if identity and work authorization documents “reasonably appear[ ] to be genuine.”<sup>70</sup> Further probing may expose employ-

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immigrants strictly as laborers without permanent, emotional, or legal ties to the United States); Ngai, *supra* note 1, at 52–53 (“Anti-Mexican rhetoric invariably focused on allegations of ignorance, filth, indolence, and criminality.”).

66. See Calavita, *Immigration Policy Debate*, *supra* note 64, at 155–59 (chronicling historical nexus between U.S. immigration policies and Mexican migration).

67. In 1952, Congress made it a felony to “harbor” an alien unlawfully in the United States and expanded the Border Patrol’s enforcement authority. At the insistence of southwestern growers and other agricultural interests, Congress added the so-called Texas Proviso, which excluded the employment of an unauthorized worker from the definition of harboring. Act of June 27, 1952, Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29; Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*, at 121 (2004) (discussing “the infamous ‘Texas proviso,’ which stipulated that employment of illegal aliens, ‘including the usual and normal practices incident to employment,’ did not constitute ‘harboring’”); Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* 194 (2002) (noting that Texas Proviso “highlighted the lengths to which congressional champions of national origins quotas were willing to go to preserve Mexican labor immigration, both legal and illegal”). When IRCA became law in 1986, at least twelve states had some kind of employer sanctions law. Select Comm’n on Immigration & Refugee Policy, *U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy* 565 (1981).

68. *Plyler v. Doe*, 457 U.S. 202, 218 (1982). Justice Brennan also noted that, “despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States,” and even a child subject to deportation may never in fact be deported. *Id.* at 205, 226.

69. See INA § 274A, 8 U.S.C. § 1324a(e)–(f) (2006) (listing penalties for violations); Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & Soc’y Rev. 1041, 1046–55, 1057, 1060 (1990) [hereinafter Calavita, *Employer Sanctions*] (detailing study finding widespread disregard for laws against hiring undocumented workers due to industry competitiveness and ease with which employers can escape punishment using “good faith” defense).

70. INA § 274A(b)(1)(A); see also *Collins Foods Int’l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (holding that employer did not violate § 1324a(b)(1)(A) by failing to closely inspect employee’s social security card or compare it to example in INS handbook, and observing that “Congress intended to minimize the burden and the risk placed on the employer in the verification process”).

ers to liability for discrimination, though only with proof of discriminatory intent.<sup>71</sup> Fake green cards and other false documents are readily available.<sup>72</sup> As long as employers check documents and do the paperwork, their risk of liability under the statute is minimal.<sup>73</sup>

Moreover, employers have incentives for hiring a flexible, disposable, unauthorized workforce. The reason is that labor law protections for unauthorized workers are limited in both formal and practical ways.<sup>74</sup> As a formal matter, they may not be awarded backpay for violations of the National Labor Relations Act.<sup>75</sup> There are also practical limits to protection because workers without lawful immigration status are less able, or at least more reticent, to assert their workplace rights.

The absence of incentives for employers to check employee documents thoroughly, combined with incentives to hire unlawful workers, leaves work-related immigration law enforcement to depend on workplace raids. Beginning in the winter of 2006–07, after a period of dormancy, worksite enforcement has surged upward with severe and well-publicized raids,<sup>76</sup> and enforcement initiatives in general have become more intense, especially with an increase in some criminal prosecutions for immigration law violations.<sup>77</sup> However, this recent trend does not change the U.S. economy's overall reliance on over seven million unauthorized workers, who account for an estimated five percent of the total U.S. workforce—and a much higher percentage in certain occupations

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71. INA § 274B(a)(6).

72. See Wayne A. Cornelius, *The U.S. Demand for Mexican Labor*, in Cornelius & Bustamante, *supra* note 64, at 25, 43–44 (surveying California employers who describe ease with which undocumented workers attain false identification).

73. See Calavita, *Employer Sanctions*, *supra* note 69, at 1046–55, 1057, 1060 (describing employer reactions to IRCA sanctions and illustrating degree to which employers are, paradoxically, protected by IRCA despite their employment of undocumented workers).

74. See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 993–94 (explaining practical limits on workplace protections for undocumented workers).

75. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002) (holding that National Labor Relations Board does not have discretion to “award backpay to illegal aliens” for National Labor Relations Act violations).

76. In fiscal year 2002, the federal government arrested 510 unauthorized workers and employers in workplace raids. Worksite arrests rose to 1,292 in fiscal year 2005 and then leapt to 4,940 in 2007. U.S. Immigration & Customs Enforcement, *Frequently Asked Questions About Worksite Enforcement*, at <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last updated Aug. 12, 2008) (on file with the *Columbia Law Review*). Large-scale raids resulted in the arrests of 1,297 workers at six branches of meat processor Swift & Co. in December 2006; of 350 workers at a New Bedford, Massachusetts, leather goods factory in March 2007; and 390 workers at the Agriprocessors meat plant in Postville, Iowa in May 2008. See Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid: New Bedford Factory Employed Illegals*, *US Says*, *Boston Globe*, Mar. 7, 2007, at 1A; *Dashboard: Migrant Crackdown*, *Time*, May 26, 2008, at 14.

77. See *infra* notes 216–219 and accompanying text.

and industries.<sup>78</sup> If history is any guide, worksite enforcement will decline when the political advantages recede or when the fallout becomes too intense, perhaps when employers need the workers or when citizen children are left behind after the government arrests and deports their parents.<sup>79</sup> Moreover, workplace raids must compete for enforcement resources with the less politically complex goal of apprehending noncitizens with criminal convictions that make them deportable—a group that has grown considerably over the past two decades, as the Immigration and Nationality Act has broadened several categories of deportable crimes.

Broad tolerance of immigration outside the law prevails today, even if enforcement puts on a strong public face and frequently results in harsh practices that visit severe hardships on the particular migrants who are targeted at the border and in the interior.<sup>80</sup> Powerful interests oppose any law that would stanch the flow of unauthorized workers who are paid less, laid off more easily, and have fewer workplace protections.<sup>81</sup> The jobs of citizen workers often depend on the availability of immigrant coworkers, without whom their companies cannot survive, let alone prosper. Consumers want lower prices. The remittances sent home by workers are not only a vital part of U.S. foreign aid,<sup>82</sup> but also a tolerated alternative to initiatives that might foster economic development in migrants' home countries.<sup>83</sup>

This de facto policy also reflects resistance to a more regulated labor market, and to intrusive monitoring and detection mechanisms—as for

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78. See Passel, *supra* note 40, at 9–14 (presenting data showing “unauthorized workers” remain overrepresented in low wage and low education occupations).

79. See, e.g., Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. Times, July 6, 2008, at A1 (“Under pressure from the toughest crackdown on illegal immigration in two decades, employers across the country are fighting back in state legislatures, the federal courts and city halls.”).

80. See Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* 111 (2000) (suggesting that a “winning image” has become politically viable alternative to successful enforcement). Such enforcement is very real and not just symbolic, but it remains selective.

81. See David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. Legis. & Pub. Pol’y 525, 544–45 (2007) (noting that interest groups have slowed legislative efforts to reduce illegal immigration); see also Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 1312–40 (examining evolution of congressional strategies for border enforcement, detention, and deportation in wake of IRCA-imposed employer sanctions); Tichenor, *supra* note 67, at 243 (“[O]dds were stacked against the efficacy of employer sanctions in curbing illegal immigration at the outset.”).

82. See Julia Preston, *Fewer Latinos in U.S. Sending Money Home*, N.Y. Times, May 1, 2008, at A1 (reporting on remittance levels in recent years).

83. See, e.g., Louis A. Perez, Jr., *Op-Ed.*, *Consider the Context That Sparks Migration*, News & Observer (Raleigh), May 12, 2008, at 9A (arguing U.S. policies have impeded Latin American efforts to ameliorate conditions that impel emigration).

example, a national identity card—that may affect citizens as well.<sup>84</sup> Tolerance of a substantial undocumented population may even be a rational admissions scheme. Inviting immigrants outside the law and then periodically legalizing those with strong work histories—an approach that relies heavily on a flexible notion of unlawful presence—may be more accurate and efficient than trying to identify *ex ante* who the best economic contributors will be.<sup>85</sup> Today, even more than a generation ago, the resources devoted to immigration law enforcement are a mere fraction of what would be needed to significantly reduce immigration outside the law. At the same time, conditions in migrants' home countries make them more willing than ever to brave burning deserts and suffocating truck trailers in search of a better life in the United States.

Fundamentally, the Supreme Court's reasoning in *Plyler* was both perceptive looking back and prescient looking forward:

[T]he confluence of Government policies has resulted in "the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them."<sup>86</sup>

Based on this understanding, the *Plyler* majority refused to have noncitizen children's rights extinguished by their apparently unlawful presence, especially when their parents had made the crucial choices. In contrast, Chief Justice Burger's dissent was premised on these noncitizen children's status as illegal aliens.<sup>87</sup> Similarly, much of today's immigration debate reflects a conflict between these two views of unlawful presence: The unlawfully present are either "illegal" or "undocumented."

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84. See Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 Cal. L. Rev. 199, 230–32 (2007) (discussing privacy-based objections to automated enforcement of traffic laws). Any comprehensive system used to check work authorization will likely generate an intolerable number of false positives, including citizens with inaccurate entries. See, e.g., Kathy Kiely, *Employer-Verification Proposal Draws Fire: Provision Part of Immigration Bills' Debate*, USA Today, May 25, 2007, at 7A (describing report by Social Security Administration's inspector general finding four percent error rate in files that proposed immigration program would use to determine eligibility to work).

85. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan. L. Rev. 809, 844–49 (2007) (arguing that current enforcement system operates as *ex post* mechanism and explaining why this may be preferable to an *ex ante* system). For a response, see Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 Stan. L. Rev. 857, 869 (2007) (noting that "lessons in *Second-Order Structure* about *ex post* screening are less convincing for noncitizens who are lawfully in the United States, and especially unconvincing for permanent residents").

86. *Plyler v. Doe*, 457 U.S. 202, 219 n.18 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

87. *Id.* at 246 (Burger, C.J., dissenting) ("[A]ppellees' status is predicated upon the circumstances of their concededly illegal presence in this country . . .").

The question, then, is how to understand the wide range of meanings of unlawful presence that fall on the wide spectrum between the labels “illegal aliens” and “undocumented immigrants.” And although this is the range of conventional debate, the meaning of unlawful presence has much broader implications. Some of those implications will be the focus of Part IV, which considers how the meaning of unlawful presence interacts with the third *Plyler* theme, the integration of immigrants, to raise the fundamental question of how we balance the past, present, and future in making immigration law and policy. Other aspects of the meaning of unlawful presence lead to a deeper exploration of enforcement authority in immigration law when considered together with the role of states and cities in immigration law, to which I now turn.

### B. *The Role of States and Cities*

A second major theme in debates about immigration outside the law is the role of states and cities. In April 2008, the National Conference of State Legislatures reported that in the first quarter of 2008, forty-four state legislatures considered over 1,100 bills relating to immigrants, and twenty-six states enacted forty-four laws and adopted thirty-eight resolutions or memorials relating to immigrants.<sup>88</sup> This level of activity is similar to 2007, when state immigration-related legislative proposals increased significantly as compared to 2006.<sup>89</sup>

When directed against unauthorized migrants, these new state legislative proposals and resolutions focused most prominently on law enforcement, employment, housing, and identification documents, but issues of higher education, welfare benefits, trafficking of workers, and health care were also addressed. In addition, many local immigration-related proposals and enactments have appeared, often modeled after a May 2006 proposal in San Bernardino, California. It was never implemented, but if the San Bernardino ordinance had become law, it would have denied city funds and permits to businesses that employed unauthorized workers, allowed police to seize automobiles used by employers to pick up day laborers, barred housing rentals to unauthorized migrants,

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88. Nat'l Conference of State Legislatures, Overview of State Legislation Related to Immigrants and Immigration, January–March 2008, at 1, 8 (2008).

89. See Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration 1 (2007), available at <http://www.ncsl.org/print/immig/2007Immigration831.pdf> (on file with the *Columbia Law Review*) (finding that number of state laws relating to immigration and immigrants increased from 84 in 2006 to 170 in 2007); see also Cristina Rodríguez, Muzaffar Chishti & Kimberly Nortman, Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures 8–9, 23–24, 32–43, 47–52 (2007) (summarizing recent state and local measures); Walter F. Roche, Jr., Number of State-Level Immigration Laws Is Growing, L.A. Times, Aug. 6, 2007, at A15 (reporting dramatic increase in number of state-level immigration laws from 2006 to 2007); Stephen Yale-Loehr & Ted Chiappari, Cities and States Rush in Where Congress Fears to Tread, N.Y.L.J., Feb. 26, 2007, at 3, 6 (summarizing recent developments in state immigration laws and relevant applications of federal preemption).

and required city business to take place in English only.<sup>90</sup> Following the San Bernardino model, a number of localities throughout the country have considered and sometimes adopted similar proposals. Typical local measures impose civil penalties on property owners who rent housing to individuals who cannot prove that they are lawfully in the United States.<sup>91</sup>

Other states and localities have adopted measures that run in the opposite direction, toward protecting noncitizens against federal immigration law enforcement, or more broadly toward fostering their integration. Such protective subfederal measures are most helpfully considered with the third *Plyler* theme of immigrant integration, so I will defer this side of subfederal activity to Part IV, which analyzes the connections between unlawful presence and integration. For now, Part II addresses the role of states and cities in enforcing immigration law, because it is this subfederal role that interacts with the meaning of unlawful presence to shed light on the fundamental question of enforcement authority.

The recent upsurge in state and local enforcement activity has prompted a flood of commentary, but subfederal immigration-related laws are not new. In this nation's first century, laws regulating the movement of people were almost entirely subfederal, perhaps understandable at a time when U.S. national borders were porous. Many of these early laws do not fit our modern conception of immigration law because they governed citizens and noncitizens alike.<sup>92</sup> The shift to federal immigration law began around 1875 and was made possible by the Civil War, when the end of slavery and the clear primacy of the national government and of national citizenship allowed federal regulation of the movement of individuals to emerge. Around the same time, concerns about Chinese immigration prompted demands that the federal government

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90. See Editorial, *Hazy Days of Immigration*, N.Y. Times, July 20, 2006, at A20 (indicating strict immigration laws proposed by San Bernardino spread to other locales); Ashley Powers, *Law Aimed at Migrants Faces Hurdle*, L.A. Times, June 27, 2006, at B3 (discussing judicial ruling increasing required petition signatures before immigration measure could be placed on the ballot in San Bernardino).

91. See Jill Esbenshade, *Am. Immigration Law Found., Division and Dislocation: Regulating Immigration Through Local Housing Ordinances 3* (2007) (noting that 43 of 104 locations studied had "debated or passed rental restrictions alone or as part of broader [immigration] ordinances").

92. State and local laws barred criminals, or restricted the movement of free blacks, or quarantined anyone with a contagious disease. Other laws limited migration of the poor. Some state and local laws required shipmasters to post bonds to guarantee that their passengers would be financially self-sufficient after arrival. There were also head taxes on immigrants, paid into a welfare fund for any who became indigent. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1834–37, 1850–51 (1993) (noting that immigration policy in eighteenth to mid-nineteenth centuries was not as open as is often perceived, with state and local laws limiting admission to those with certain economic and racial backgrounds and requiring head tax on immigrants); see also Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* 74–76 (2006) (explaining that state and local laws restricted movement of criminals, free blacks, the poor, and those with contagious diseases).

negotiate limits with the Chinese government. The resulting emergence of direct federal regulation established the general rule that federal statutes, by occupying the immigration field, preempt subfederal immigration laws.<sup>93</sup> This rule is easy to articulate but hard to apply, because the definition of “immigration law” is elusive. Even assuming that states and cities cannot have admission schemes or border inspectors, they may be able to address immigration and immigrants in other ways.

The nature of subfederal immigration authority partly reflects the distinction between direct and indirect enforcement of federal immigration law. Direct enforcement can take two forms. First, it may be based on the idea that state and local governments have inherent authority to enforce laws, including some federal immigration laws. It seems well-settled that state and local officers may enforce the criminal provisions of federal immigration law.<sup>94</sup> Second, but open to debate, is the inherent authority of state and local officers to enforce the civil provisions of federal immigration law.<sup>95</sup> Under Immigration and Nationality Act section

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93. See *Chy Lung v. Freeman*, 92 U.S. 275, 280–81 (1875) (striking down direct state immigration regulation); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 274–75 (1875) (same). Following the Supreme Court’s decisions in *Henderson* and *Chy Lung*, California’s congressional delegation successfully lobbied for federal limits on Chinese immigration. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (setting federal limits on Chinese immigration); Act of Mar. 3, 1875 (Page Act), ch. 141, §§ 1, 5, 18 Stat. 477, 477–78 (same). See generally Motomura, *Americans in Waiting*, supra note 19, at 21–26 (examining California’s congressional delegation’s ability to influence federal limits on Chinese immigration).

94. See *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (discussing how INA House Conference Report shows clear intent to allow all officers meant to enforce criminal law authority to arrest those violating the Act). This civil-criminal line matters because some federal immigration violations are civil, while others are criminal. A first offense of unlawful entry is a federal misdemeanor punishable by six months imprisonment and a civil fine. See INA § 275, 66 Stat. 163, 229 (1952) (current version at 8 U.S.C. § 1325 (2006)) (providing for fining alien apprehended by immigration officer at least fifty dollars for each apprehension, with possible imprisonment of not more than two years); see also *id.* § 274 (providing criminal penalties for alien smuggling and harboring); *id.* § 276 (providing criminal penalties for unlawful entry after removal). Mere unlawful presence is not a crime, but it can prompt an inadmissibility or deportability finding and removal from the United States. See *id.* § 212(a)(6)(A)(i) (stating that any alien in the United States who has not been admitted or paroled is inadmissible); *id.* § 237(a)(1)(B)–(C) (stating that any alien in the United States who is present in violation of law or who has failed to maintain nonimmigrant status is deportable); see also *id.* § 266 (making willful failure to register as an alien a federal misdemeanor).

95. The Office of Legal Counsel of the U.S. Department of Justice addressed inherent state and local authority to enforce federal immigration laws in two conflicting opinions, one in 1996 by the Clinton Administration, and the other in 2002 by the Bush Administration. See Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26, 32 (1996) (“State and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws.” (emphasis added)). But see Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, 26 Op. Off. Legal Counsel 1, 1–2 (2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (on file with the *Columbia Law Review*) (withdrawing 1996 civil enforcement analysis).

287(g),<sup>96</sup> however, the federal government may expressly authorize states and localities to carry out immigration law enforcement functions, typically under a “Memorandum of Agreement” (MOA).<sup>97</sup> Though only a small fraction of the total number of subfederal government entities have entered into MOAs, any such express delegation of enforcement power under section 287(g) renders moot the question whether these entities would have inherent authority absent the MOA.<sup>98</sup>

Beyond direct enforcement of federal immigration laws, much subfederal activity governs the lives of noncitizens, and thus may regulate immigration indirectly. For example, the 1975 Texas statute struck down in *Plyler* was not an attempt to regulate unlawful immigration directly, but rather to deter it and to limit its effects. Similarly, California voters passed Proposition 187 in 1994.<sup>99</sup> Though its provisions denying public education and other services to undocumented children never went into effect,<sup>100</sup> its supporters intended—in Governor Pete Wilson’s memorable phrasing—to induce illegal aliens to “self-deport.”<sup>101</sup>

Following a decade of relative dormancy after Proposition 187, in the past few years state and local immigration-related activity has increased dramatically—but not surprisingly. The past decade has seen the arrival

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96. See also INA § 103(a)(10) (allowing authorization of state or local law enforcement officers to enforce federal immigration laws if “an actual or imminent mass influx” of aliens off the coast or near a land border presents “urgent circumstances requiring an immediate Federal response”).

97. See U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) (2008), at [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (on file with the *Columbia Law Review*) (establishing procedures whereby state and local officers are authorized and trained to enforce immigration law under section 287(g) of Immigration and Nationality Act).

98. In 2002, Florida and the federal government signed the first section 287(g) MOA, allowing thirty-five state officers to enforce federal immigration laws. In 2003, Alabama entered into a similar MOA. As of February 2008, section 287(g) has authorized thirty-seven state and local government entities to check the immigration status of individuals in custody or even of anyone stopped by law enforcement officers. Jennifer V. Hughes, *Police Seek Help in Criminal Deportation*, N.Y. Times, Feb. 24, 2008, at WE2; see also Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 1015–16 (describing federal authorization of at least twenty-eight local governmental entities to check immigration status of prisoners); Seghetti et al., supra note 30, at 17–21 (describing memoranda of understanding entered into by Alabama, Arizona, Florida, and Los Angeles County Sheriff’s Department with Attorney General).

99. Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994).

100. A federal district court found that Proposition 187 was preempted by federal law except for its new criminal penalties for manufacture, sale, and use of false documents. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995). The case settled while on appeal. Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, L.A. Times, July 30, 1999, at A3.

101. On “self-deportation,” see Janet Boss & Carol Kasel, *Proposition 187 Feedback and Fallout*, Rocky Mountain News (Denver), Nov. 21, 1994, at 3N (reporting that according to Governor Wilson, “Proposition 187 would effectively lead people to ‘self deport’”).

of unlawful immigrants to new destinations in the United States.<sup>102</sup> State and local laws often react to an influx perceived to be foreign, illegal, and threatening.<sup>103</sup> But this history of subfederal immigration-oriented laws merely brings us back to the key question: When may states and localities enact such immigration-related laws?

*Plyler* suggests one approach. By striking down the Texas statute, the Court adopted a robust view of federal supremacy that leaves little room for subfederal efforts to address immigration outside the law. But the *Plyler* analysis speaks in terms of equal protection, not federal preemption,<sup>104</sup> applying limits to subfederal laws that treat citizens and noncitizens differently, even if the federal government may do so.<sup>105</sup> Given the unique combination of children and education in *Plyler*, the majority's equal protection analysis may have achieved rough justice. However, the more typical constitutional challenge to a subfederal immigration-related law is framed as preemption.

The key preemption precedent with respect to subfederal immigration laws is the unanimous 1976 U.S. Supreme Court decision in *De Canas v. Bica*, which Justice Brennan also authored.<sup>106</sup> In *De Canas* the Court set out several tests for preemption, which amount to asking in overlapping ways whether the subfederal law conflicts with federal immigration law.<sup>107</sup> Under scrutiny in *De Canas* was a California statute prohibiting

102. See Hoefer et al., *supra* note 41, at 4 (detailing increases in percentage of unauthorized residents in Georgia, Washington, Arizona, Texas, and North Carolina).

103. See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007) (noting local population increase from 23,000 in 2000 to estimated 30,000 to 33,000 in 2005, primarily because of influx of migrants, most of them Latino). In the nineteenth century, the influx of Chinese to California led to state anti-Chinese laws before leading to federal Chinese exclusion. See Motomura, *Americans in Waiting*, *supra* note 19, at 21–26 (tracing development of state and then federal regulation of Chinese immigrants).

104. See *Plyler v. Doe*, 457 U.S. 202, 215–16 (1982) (concluding that relevant inquiry in case at bar was “whether the equal protection clause ha[d] been violated” by Texas’s refusal to reimburse local school boards for education of undocumented children).

105. See *id.* at 225 (explaining that states “enjoy no power with respect to the classification of aliens,” and that the power is “‘committed to the political branches of the Federal Government’” (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))); *id.* at 237–38 n.1 (Powell, J., concurring) (noting exclusivity of federal immigration power and limits on state power to regulate in area).

106. 424 U.S. 351 (1976); see also *Toll v. Moreno*, 458 U.S. 1, 12–13 & n.18 (1982) (commenting on significance of *De Canas*).

107. A state or local law relating to immigration or immigrants is preempted if it meets any of the three tests set out in *De Canas*. First, federal law preempts any state attempt to regulate immigration. *De Canas*, 424 U.S. at 354. Second, state law is preempted if Congress intended to “occupy the field” in that it was the “clear and manifest purpose of Congress” to effect a “complete ouster of state power—including state power to promulgate laws not in conflict with federal laws.” *Id.* at 357–58 (citation omitted). Third, a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or conflicts with federal law so as to make compliance with both state and federal law impossible. *Id.* at 363 (citations omitted). See generally Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 *Vand. L. Rev.* 787 (2008) (exploring role of federalism in immigration context).

employers from “knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”<sup>108</sup> The Court found no conflict with federal immigration law because the state statute reflected “Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country.”<sup>109</sup> But when does a subfederal law “conflict” with federal law? Answering this question requires returning to the first *Plyler* theme: the meaning of unlawful presence.

### C. Defining Immigration Federalism

Four recent federal district court rulings illustrate how the meaning of unlawful presence is linked to the role of states and cities, and demonstrate that these two themes jointly reveal a much larger topic: enforcement authority in immigration law. Specifically, these four cases—addressing the constitutionality of local immigration-related measures—reveal a spectrum of views on whether immigration law is self-executing or discretionary. Courts that view immigration law as self-executing tend to conclude that subfederal enforcement does not conflict. In contrast, courts that view immigration law as discretionary tend to view subfederal enforcement as conflicting.

The first local measure, adopted by the City of Farmers Branch, Texas, required any lessor of rental housing to have “evidence of citizenship or eligible immigration status for each tenant family.”<sup>110</sup> The district court blocked enforcement because the “eligible immigration status” was based on eligibility for federal housing subsidies.<sup>111</sup> The court explained

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108. *De Canas*, 424 U.S. at 352 (quoting Cal. Lab. Code § 2805(a) (West 2003)).

109. *Plyler*, 457 U.S. at 225 (summarizing this part of reasoning in *De Canas*); see also *De Canas*, 424 U.S. at 365 (determining federal statute did not preempt state law). Writing in the shadow of his own opinion for the Court in *De Canas*, Justice Brennan had to concede in writing for the *Plyler* majority: “[T]he States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.” *Plyler*, 457 U.S. at 225. But he distinguished the Texas statute by explaining that the California law “mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws.” *Id.* at 208 n.5. As amended ten years after *De Canas*, federal law expressly preempts state employer sanctions, see INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006), with one exception that has been at issue in recent litigation, as discussed *infra* note 126.

110. *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 762 (N.D. Tex. 2007) (granting preliminary injunction); see also *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371-L, 2008 WL 2201980, at \*1, \*19 (N.D. Tex. May 28, 2008) (granting permanent injunction). In January 2008, the City of Farmers Branch adopted a new ordinance requiring tenants to obtain a “residential occupancy license,” which requires the city building inspector to verify with the federal government that the individual is “lawfully present” in the United States. See *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371-L, 2008 WL 2201978, at \*5 (N.D. Tex. May 28, 2008) (denying defendant’s motion for leave to file defendant’s original counterclaim for declaratory judgment).

111. *City of Farmers Branch*, 2008 WL 2201980, at \*9–\*10.

that noncitizens might be in the United States lawfully—as students, for example—but be ineligible for subsidies under U.S. Department of Housing and Urban Development criteria.<sup>112</sup> This distinction turned the local law into an unconstitutional attempt to regulate immigration because it burdened noncitizens who were lawfully present under federal immigration law.<sup>113</sup>

Because the Farmers Branch ordinance strayed from the federal definition of unlawful presence, the court found preemption with relative ease. Similar reasoning is apparent in *Equal Access Education v. Merten*, which addressed an opinion issued in 2002 by the Virginia Attorney General that unlawful immigrants should not be enrolled in Virginia public institutions of higher education.<sup>114</sup> As in *City of Farmers Branch*, the federal district court assumed that states may not burden noncitizens who are lawfully present under federal immigration law. The Virginia Attorney General's opinion, when implemented, would thus be preempted if Virginia used "standards different from those established under federal law to determine an applicant's immigration status."<sup>115</sup>

If a subfederal law purports to rely on federal standards, the connection between the meaning of unlawful presence and the scope of subfederal enforcement authority prompts a more complex inquiry. According to the district courts in *Equal Access Education* and *City of Farmers Branch*, full reliance on federal immigration law standards eliminates any conflict between federal and subfederal law, thus avoiding preemption. Adopting similar reasoning, a federal court of appeals rejected a preemption challenge to Arizona's employer sanctions law, which required employers to check their workers' employment authorization with a federal database.<sup>116</sup> These decisions reflect no concern that subfederal authorities may be inadequately trained or otherwise error-prone in applying federal standards.<sup>117</sup>

112. *Id.* at \*10.

113. *City of Farmers Branch*, 496 F. Supp. 2d at 766–69; see also *City of Farmers Branch*, 2008 WL 2201980, at \*19 (granting permanent injunction).

114. 305 F. Supp. 2d 585, 591 (E.D. Va. 2004).

115. *Id.* at 608. The court allowed the claim to proceed subject to factfinding on whether Virginia relied on federal standards, but it never decided that issue because it dismissed the plaintiffs' preemption claim for lack of standing. *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 660–72 (E.D. Va. 2004); see Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. Rev. 47, 53 (2008) (noting that court never decided whether Virginia was using nonfederal standards).

116. See *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536, at \*7–\*8 (9th Cir. Sept. 17, 2008) (upholding state statute's requirement that Arizona employers use E-Verify by finding no conflict with employer sanctions provisions of IRCA); accord *Gray v. City of Valley Park*, No. 4:07CV00881ERW, 2008 WL 294294, at \*12–\*19 (E.D. Mo. Jan. 31, 2008) (finding no preemption by federal immigration laws of city ordinance provisions against landlords leasing to illegal immigrants or employment of illegal immigrants).

117. See Lenni B. Benson, *Separate, Unequal, and Alien: Comments on the Limits of Brown*, 49 N.Y.L. Sch. L. Rev. 727, 733–34 (2004) (commenting on complexities of determining "lawful" immigration status in *Equal Access Education*).

In contrast, the federal district court in *Garrett v. City of Escondido* adopted a rather different rationale.<sup>118</sup> *City of Escondido* involved a local ordinance in Escondido, California that penalized housing owners for “harbor[ing] an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.”<sup>119</sup> The ordinance required city officials to check the occupant’s immigration status with the federal government.<sup>120</sup>

*City of Escondido* blocked enforcement of the statute with a temporary restraining order.<sup>121</sup> Addressing preemption, the court found that the ordinance “could stand as a burden or obstacle to federal law” *because* it would use a federal database to check unlawful presence.<sup>122</sup> Significantly, the court looked beyond federal immigration law categories to examine enforcement in practice, and found that having local and federal enforcement rely on the same database put them into competition and thus into conflict. In particular, the court noted, “[t]hat the Ordinance uses the Immigration and Nationality Act to define ‘illegal alien’ implies that it will likely place burdens on the Departments of Justice and Homeland Security that will impede the functions of those federal agencies.”<sup>123</sup> By finding preemption in spite of reliance on federal immigration standards, *City of Escondido* took a big step beyond *City of Farmers Branch* and *Equal Access Education*.

If *City of Escondido* reflected concern that a city might impede federal enforcement, then the district court decision in *Lozano v. City of Hazleton* reflected the opposite concern: that a city might assist federal enforcement too much.<sup>124</sup> The City of Hazleton, Pennsylvania adopted several ordinances: One barred the employment and harboring of unlawful immigrants; another required renters to have occupancy permits, which could only be obtained with proof of lawful residence or U.S. citizenship.<sup>125</sup> Hazleton, like Escondido but unlike Farmers Branch, seemed to use federal immigration categories.

The district court in *City of Hazleton* held that the ordinances were preempted because federal law struck a different “balance between finding and removing undocumented immigrants without accidentally re-

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118. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

119. *Id.* at 1047–48.

120. *Id.* at 1048.

121. Several weeks after this order, the city consented to a permanent injunction barring enforcement of the ordinance, and to paying \$90,000 in plaintiffs’ attorney fees. *Garrett v. City of Escondido*, No. 06CV2434JAH (NLS) (S.D. Cal. Dec. 15, 2006) (order granting stipulated final judgment and permanent injunction).

122. 465 F. Supp. 2d at 1057.

123. *Id.*

124. 496 F. Supp. 2d 477 (M.D. Pa. 2007), appeal docketed, No. 07-3531 (3d Cir. Aug. 30, 2007).

125. *Id.* at 484–85.

moving immigrants and legal citizens, all without imposing too much of a burden on employers and workers.”<sup>126</sup> It is wrong, the court explained, to assume that “the federal government seeks the removal of all aliens who lack legal status.”<sup>127</sup> Here the court echoed the *Plyler* analysis of twilight statuses and the improbability of actual removal even when unlawful presence is clear and a noncitizen has no avenue to lawful status. But unlike *Plyler*, where the meaning of unlawful presence drove equal protection analysis, *City of Hazleton* relied on the meaning of unlawful presence to find the local ordinance preempted, reasoning that “it is completely within the discretion of the federal officials to remove persons from the country who are removable.”<sup>128</sup>

*City of Farmers Branch* and *Equal Access Education* concluded that it is constitutional for subfederal laws to burden noncitizens who are present in violation of federal immigration law. In contrast, *City of Escondido* and *City of Hazleton* held that such applications of federal immigration categories by state and local officials are irrelevant, because unlawful presence and its consequences are never clear enough to allow subfederal enforcement, even assuming that subfederal officials are no more likely than federal officials to make mistakes. *City of Escondido* and *City of Hazleton* also reflected the view that subfederal authorities are not simply filling a vacuum created by the absence of federal policy. There is no vacuum. De facto policy is still policy, and federal immigration law is a matter of inaction as much as affirmative decisionmaking. Consequently, any decisions by state and local officials put them in conflict with the knowing balance of enforcement and tolerance that constitutes actual federal immigration law.

The spectrum from a self-executing view of federal immigration law to the very contingent and discretionary view reflected in *City of Hazleton* illustrates how subfederal immigration authority can only be defined in connection with the meaning of unlawful presence. If immigration law as set forth in the Immigration and Nationality Act and other federal enact-

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126. *Id.* at 527–33. Compare Cortez, *supra* note 115, at 64 (approving this aspect of *City of Hazleton*), with Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 620–28 (2008) [hereinafter Rodríguez, Significance of the Local] (criticizing this aspect of *City of Hazleton*). The court also found that the savings clause in IRCA, codified at INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006), did not expressly allow states to adopt employer sanctions schemes that penalized employers through revocation of their business licenses. See 496 F. Supp. 2d at 519–20 (finding employment provisions preempted by IRCA). In contrast, the federal court of appeals that rejected a preemption challenge to the Arizona employer sanctions statute found that this savings clause expressly authorized the Arizona scheme. See *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536, at \*4–\*7 (9th Cir. Sept. 17, 2008) (finding authorization for state licensing statutes in IRCA’s savings clause); accord *Gray v. City of Valley Park*, No. 4:07CV0081ERW, 2008 WL 294294, at \*9–\*12 (E.D. Mo. Jan. 31, 2008) (same).

127. 496 F. Supp. 2d at 530.

128. *Id.* at 530–31. The court also found that only federal immigration judges can determine immigration law status. *Id.* at 532.

ments is essentially simple and self-executing, then it is logical to enlarge the group of government officials with authority to act on findings of illegality.<sup>129</sup> But our exploration of the meaning of unlawful presence in the context of de facto U.S. immigration policy suggests that immigration law is not self-executing.<sup>130</sup> A noncitizen's removal from the United States reflects complex choices. Resources can be devoted to a mix of the interior and the border. Interior enforcement can focus on the workplace, on noncitizens who are deportable due to crimes, or on those who abscond after removal orders. Likewise, border enforcement could target airports, the border with Mexico or Canada, or preinspection stations outside the United States. Assuming enforcement, government officials may impose civil immigration penalties or, in certain instances, criminal sanctions.<sup>131</sup> After these systemic choices are made, individual officers target some individuals and leave others alone. And once a noncitizen is in the system, ultimate removal reflects intricate procedures with multiple opportunities for accuracy or error.

Implicated here are questions of discretion and delegation, and in turn the task of identifying who the relevant actors should be. The role of discretion is pivotal. To be sure, law enforcement always involves discretion, but discretion seems unusually important in immigration law, because unlawful immigrant activity enjoys acceptance in many circles, and because rates of investigation, detection, apprehension, and prosecution are extremely low.<sup>132</sup> If unlawful presence is hard to define for federal enforcement, it is even more elusive for subfederal laws that only indirectly address immigration outside the law. Given the gray areas of unlawful presence, it is pivotal to ask *who* makes the decisions that affect immigrants' lives so profoundly. It is crucial not only who picks enforcement targets, but also who allocates resources, and who balances enforcement against competing concerns like inappropriate reliance on race or ethnicity.

It is essential to think of the role of states and cities from this decisionmaking standpoint because the conventional focus on preemption is fragile. A section 287(g) agreement or a federal statute authorizing subfederal measures might, in any given situation, moot constitutional questions of preemption and maybe even equal protection.<sup>133</sup> But such fed-

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129. Here I do not—and need not—assume a default rule in favor of federal over subfederal immigration regulation in the absence of extensive federal enactments. But given that such enactments exist and are pervasive, it is fair to array contrasting views of preemption along a spectrum from the self-executing to the discretionary.

130. See generally Gerald L. Neuman, *Discretionary Deportation*, 20 *Geo. Immigr. L.J.* 611 (2006) [hereinafter Neuman, *Discretionary Deportation*] (exploring consequences of discretion in deportation policy).

131. See, e.g., INA § 276 (prosecution for illegal reentry).

132. See Cox & Posner, *supra* note 85, at 845–46 & nn.133–134 (analyzing enforcement statistics).

133. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (“Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.” (citing

eral action does not moot fundamental policy questions about the proper subfederal role, particularly if state and local measures are rooted in animus against newcomers, especially unlawful migrants who come outside the law from Latin America. With the unique combination of children and education in *Plyler*, this concern found awkward if compelling expression in an equal protection challenge. For the typical subfederal law targeting immigration outside the law, however, the only available constitutional challenge is preemption—a poor vehicle for articulating the policy dimensions of such concerns based on animus. In contrast, a serious policy discussion of immigration federalism in enforcement authority not only allows—but also requires—appreciating the connection between the role of states and cities and the meaning of unlawful presence.

#### D. *Problems of Federal Enforcement*

Once we see how the meaning of unlawful presence and the role of states and cities combine to raise the more basic question of enforcement authority, it becomes apparent that the same deep complexity is inherent even when immigration decisionmaking is entirely federal. Consider the issue of federal court jurisdiction to review the government's immigration decisions. One difficult question is whether judicial review should focus only on individual cases or expand to include more systemic challenges. If the meaning and consequences of unlawful presence are straightforward, then the core inquiry in any challenge to a government immigration law decision will be whether a noncitizen is lawfully present. Thus, for example, Chief Justice Burger's dissent in *Plyler* found the children's illegal presence to be decisive. In turn, so defining the question present for judicial determination argues for narrowing the scope of judicial review, for example by limiting class actions or deferring review until a final removal order is issued.<sup>134</sup> From this perspective, any efforts to broaden the judicial inquiry may appear to be dilatory, or at least to introduce

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Shapiro v. Thompson, 394 U.S. 618, 641 (1969))). Compare *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (holding New York law that denied Medicaid benefits based on legal alien status violated equal protection), with *Soskin v. Reinertson*, 353 F.3d 1242, 1244 (10th Cir. 2004) (holding Colorado law which repealed optional Medicaid coverage for legal aliens did not violate equal protection). See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 1246–60 (discussing implications of federal government's grant of authority to states to provide benefits to noncitizens).

134. See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 1185–89 (discussing limitations on class action litigation under the INA); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 Geo. Immigr. L.J. 385 (2000) (discussing judicial review of immigration decisions). But cf. David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 Geo. Immigr. L.J. 313, 321, 327 (2002) (arguing for strong consolidation provisions that are nonetheless designed to “keep open a real and meaningful chance for judicial consideration of all issues”). For criticism of restrictions on class actions in immigration litigation, see Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 Wash. U. J.L. & Pol'y

unjustified complexities that cause delay, expense, and substantive distortion, when in fact immigration law decisions can be made most accurately by focusing on the questions that arise in an individual case.<sup>135</sup>

Suppose, however, that the immigration law decision in a given case reaches beyond unlawful presence to questions about a noncitizen's treatment in the wider context of enforcement discretion, either because the lawfulness of presence is unclear, or because unlawful presence is clear but racial profiling or some other selective enforcement may be at work. Then it matters that the judge use a wider angle lens that perceives more than the individual case. It would be important, for example, to adopt a narrow reading of INA section 242(b)(9), which generally requires that court challenges relating to individual removal proceedings be consolidated and deferred until a final removal order issues. From this point of view, there is a real danger that any rule that limits the inquiry to individual cases will keep courts from seeing that some problems related to removal orders are systemic, reaching beyond the question whether the order appears lawful in isolation.<sup>136</sup> By raising the more fundamental question of enforcement authority, the differing meanings of unlawful presence that are evident in *City of Farmers Branch*, *Equal Access Education*, *City of Escondido*, and *City of Hazleton* implicate not only the role of states and cities but also the design of judicial review of the federal government's immigration enforcement decisions.

Another set of choices within federal immigration authority concerns the element of time. In deciding how immigration law should be enforced, how firmly should a decisionmaker today be bound by an earlier finding of unlawful presence—and perhaps even an earlier removal order? Consider INA section 241(a)(5), which allows reinstatement of prior removal orders against any noncitizen who later reenters the

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(forthcoming 2008), available at <http://ssrn.com/abstract=1024812> (on file with the *Columbia Law Review*).

135. From this perspective, judicial review is problematic as a whole—not just whether judicial inquiry is narrow or broad—for it delays and distorts determinations that are relatively straightforward and thus prone only minimally to error. This explains the bars to judicial review in certain immigration cases, see INA § 242(a)(2), as well as skepticism of judicial review of agency decisions in other areas of law.

136. 8 U.S.C. § 1252(b)(9) (2006). The need to assess a pattern or practice that went beyond the individual case was the conceptual basis for court decisions that heard systemic challenges before the enactment of section 242(b)(9) in 1996. See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 489–94 (1991) (upholding general collateral challenge to procedures used by INS in administration of certain IRCA provisions). A similar choice between individual and systemic inquiries explains the divide in *Hoffman Plastic Compounds, Inc. v. NLRB*, where the majority and the dissent reached opposite conclusions about the status of unauthorized workers under the National Labor Relations Act, depending on how narrowly or broadly they viewed unlawful work. 535 U.S. 137, 151, 153 (2002) (disagreeing about whether “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy”).

United States unlawfully.<sup>137</sup> This mechanism is a key enforcement tool, since the original order is not reexamined and the noncitizen is ineligible for discretionary relief. Moreover, federal immigration regulations generally call for an immigration officer to make the relevant determinations—identity, prior order, and unlawful reentry—without immigration judge review.<sup>138</sup>

The deep divides between the majority and dissent in a recent U.S. Supreme Court case on reinstatement illustrate how radically different views of the meaning of unlawful presence can lead to conflicting views of enforcement authority in immigration cases. For instance, Humberto Fernandez-Vargas, a citizen of Mexico, first came unlawfully to the United States in the 1970s. He was deported for immigration violations but reentered on several occasions, the last time in 1982. The government caught him in November 2003 and sought to reinstate an old deportation order by invoking section 241(a)(5), which had taken effect on April 1, 1997.

Did reinstatement apply to Fernandez-Vargas, who reentered unlawfully before the law's effective date? He argued that applying reinstatement to prior reentries would be impermissibly retroactive. In 2006, the U.S. Supreme Court rejected this argument.<sup>139</sup> Justice Souter's majority opinion reasoned that unlawful reentry after a deportation order and remaining in the United States after reentry are continuing violations, so it was not retroactive to apply reinstatement.<sup>140</sup> The conceptual foundation of Justice Souter's analysis of retroactivity is that the unlawful presence found by the original immigration judge was a clear fact and an irrevocable foundation for any consequences that Congress might attach, even years later.

Justice Stevens's dissent echoed the contingencies that the *Plyler* majority had injected into the meaning of unlawful presence. Unlawful reentry could be offset by Fernandez-Vargas having lived for twenty years undetected in Utah, where he started a family and a trucking business. According to this flexible understanding of unlawful presence, the unsurprising fact that the government had not enforced the prior removal order against Fernandez-Vargas was more significant than that removal or-

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137. 8 U.S.C. § 1231(a)(5). See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 1077–92 (discussing lawfulness of reinstatement of removal orders).

138. If the noncitizen expresses a fear of returning to the country designated in the prior removal order, the case will be referred to an asylum officer for a decision whether removal must be withheld under INA section 241(b)(3). See 8 C.F.R. § 241.8 (2008).

139. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006) (“[S]tatute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA . . .”). For a similar divide between majority and dissent, see *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (en banc) (“[A] previously removed alien who reenters the country illegally is not entitled to a hearing before an immigration judge to determine whether to reinstate a prior removal order.”).

140. 548 U.S. at 42–44.

der's declaration that he was in the United States illegally. Noting the availability of discretionary relief despite unlawful presence, Stevens wrote: "At the time of his entry, and for the next 15 years, it inured to [Fernandez-Vargas's] benefit for him to remain in the United States continuously, to build a business, and to start a family."<sup>141</sup> Section 241(a)(5) would be impermissibly retroactive if it were applied to cut off his options. According to Stevens's view of unlawful presence, the prior order should not be totally determinative. Justice Stevens's dissent amounts to an argument that those involved in enforcement today must be allowed to defer to equities created in the past by decisions not to enforce immigration law. From this perspective, Stevens expressed a certain view of enforcement authority—namely that it is important not to apply a default rule that the prior removal order is determinative in the same way that a prior adjudication in ordinary civil litigation might be preclusive. In this view, another decisionmaker much later in time should have authority to award discretionary relief, and thus to temper enforcement in the rein-statement context.

#### E. *The Role of Private Actors*

Decisions about the structure of judicial review and the element of time demonstrate not only that the meaning of unlawful presence and the role of states and cities should be analyzed together, but also that these two *Plyler* themes jointly shed light on the more fundamental question of enforcement authority in immigration law. Additionally, once we see that the question of authority includes different structures for the sharing of authority among federal actors, it becomes clear that the question of enforcement authority also raises general issues of delegation and accountability. This, in turn, provides a way to analyze the role of private actors in enforcement.

My focus is not "privatization" in the sense of full delegation of government functions to a private entity, since such full delegation has become widespread in immigration law only (though significantly) in immigration detention. Rather, my concern is the role of private actors in immigration enforcement.<sup>142</sup> Just as with subfederal involvement or different structures for the exercise of federal authority, the increasingly pervasive role of private actors can magnify the consequences of differences in the interpretation of unlawful presence. This is because private

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141. *Id.* at 51 (Stevens, J., dissenting).

142. For more detailed analyses of this phenomenon, see generally Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *Stan. L. Rev.* (forthcoming 2009), available at <http://ssrn.com/abstract=1272238> (on file with the *Columbia Law Review*) (exploring role of employers in immigration enforcement); Pham, *Private Enforcement*, *supra* note 32 (analyzing effectiveness of private enforcement of immigration laws). My focus on private actors in enforcement excludes other types of private involvement in immigration decisionmaking more generally, such as the role of family and employers who file immigrant petitions for relatives and employees.

involvement means there will be more decisionmakers who can make mistakes or exercise discretion in deciding whether or not to assist in immigration law enforcement.

A milestone year for private action in the immigration context was 1986, when the advent of employer sanctions in IRCA expanded the private sector's role in enforcement. Since then, the federal government has required employers to verify identity and work authorization,<sup>143</sup> but they can choose to comply with varying diligence and punctiliousness. As in earlier eras of Mexican labor recruitment both inside and outside the law,<sup>144</sup> employer interests can range from desperately needing workers to wanting just as desperately to get rid of them because they are no longer needed, or are organizing, or are otherwise causing some kind of trouble.<sup>145</sup> To be sure, most employers do what the law requires to avoid penalties for noncompliance, but many will use the law as an opportunity to solidify their power over workers, authorized and unauthorized.<sup>146</sup> Even if an employer never calls in federal immigration authorities, its constant threat can make workers' lives precarious—always reminding them that they are powerless.

F. Ray Marshall, Secretary of Labor in the Carter Administration, once said that immigrants who come outside the law work "scared and hard."<sup>147</sup> This statement is especially true when an employer insulates itself from liability by examining documents that "reasonably appear to be genuine," but suspects that workers are actually unauthorized.<sup>148</sup> Exposing unauthorized workers to the federal government is an effective tool against unwanted workers, not only because the employer is then required to discharge them, but also because unauthorized workers have limited labor law protections.<sup>149</sup> In these ways, private involvement by way of employer sanctions in their current form magnifies variations in the meaning of unlawful presence and broadens the range of discretion

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143. See INA § 274A, 8 U.S.C. § 1324a(b)(1) (2006); see also *supra* Part II.A (discussing employer sanctions).

144. See discussion *supra* Part II.A.

145. See Lee, *supra* note 142, at 27–30 (describing selective employer-government collaboration).

146. See Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* 49–50 (2005) (describing employer use of employer sanctions to combat worker organizing); Lee, *supra* note 142, at 11–15 (discussing how employers can utilize immigration laws to manipulate and control employees).

147. F. Ray Marshall, *Economic Factors Influencing the International Migration of Workers*, in *Views Across the Border* 163, 169 (Stanley R. Ross ed., 1978).

148. See *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 553–55 (9th Cir. 1991) (explaining employer's obligation to verify identity and work authorization documents); Calavita, *Employer Sanctions*, *supra* note 69, at 1046–55, 1057, 1060 (describing how IRCA protects employers of unauthorized workers).

149. E.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002) (finding "that awarding backpay to illegal aliens runs counter to policies underlying [the Immigration Reform and Control Act of 1986]"); see also *supra* note 74 and accompanying text.

in immigration law enforcement.<sup>150</sup> The dynamic is similar to the possibility that state and local immigration law enforcement introduces incentives, motives, and priorities that may be in tension with even-handed enforcement.<sup>151</sup>

Analysis of the role of private actors should also go beyond employer sanctions to include other aspects of immigration law enforcement.<sup>152</sup> Significant here is the emergence of the Minutemen and other militia or vigilante groups patrolling the U.S.-Mexico border, as well as the government relationship to them. Government authorities may simply acquiesce in private activity, for example by allowing armed, private individuals access to border areas. However, authorities may also support private enforcement efforts more actively. For example, Texas Governor Rick Perry ordered the installation of webcams along the U.S.-Mexico border in order to allow private monitoring of border crossings.<sup>153</sup>

In sum, we cannot fully understand the role of states and cities without analyzing the competing meanings of unlawful presence in the United States. Put differently, different understandings of unlawful presence lead to different views on the proper subfederal role, and of various federal and private actors. Nor can we fully understand the meaning of unlawful presence without studying the cast of actors—not just state and local, but also federal and private—whose decisions and actions forge the practical consequences of unlawful presence. All of these matters are facets of the more fundamental question of enforcement authority in immigration law.

### III. COMMUNITY BUILDING

Part II examined the connections between the meaning of unlawful presence and the role that states and cities have come to play directly or indirectly in immigration law enforcement. Those connections shed light on the deeper question of enforcement authority in immigration law.

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150. Modifying the role of employers and other private actors in immigration law enforcement would ease some of the concerns mentioned here, if those changes reduced the complexity and discretion in their decisions.

151. For example, one local sheriff explained his reasons for entering into a section 287(g) agreement with the federal government by describing Mexicans: “‘Their values are a lot different—their morals—than what we have here,’ [the sheriff] said. ‘In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . They do a lot of drinking down in Mexico.’” Kristen Collins, *Sheriffs Help Feds Deport Illegal Aliens*, News & Observer (Raleigh), Apr. 22, 2007, at 1A.

152. See, e.g., Deborah Sontag, *Deported, By U.S. Hospitals: Immigrants, Spurned on Rehabilitation, Are Forced Out*, N.Y. Times, Aug. 3, 2008, at A1 (describing how some U.S. hospitals return impecunious patients to their home countries).

153. See Alicia A. Caldwell, *Associated Press, Texas Governor Proposes WebCams Along Border*, S. Fla. Sun-Sentinel, June 9, 2006, at 2A (describing plan to put live feed of private property-mounted border monitoring videos on internet); Associated Press, *Texas Border Cam Test Catches 10 Illegal Immigrants*, Chi. Sun-Times, Jan. 8, 2007, at 49 (describing website and resulting apprehensions).

But in contrast to subfederal enforcement activity, other states and cities adopt varying degrees of noncooperation with immigration law enforcement. For example, some subfederal policies adopt protective zones that affirmatively impede federal enforcement and thus become “sanctuaries.”<sup>154</sup> Other states and cities limit their cooperation with federal officials in more modest ways that may hamper federal enforcement.<sup>155</sup>

We could look at subfederal sanctuary and related policies as another facet of subfederal involvement in immigration law enforcement. So viewed, sanctuary is the flip side of the enforcement authority explored in Part II and thus continues that discussion. But a different, complementary view of state and local sanctuary emerges if we view this aspect of the subfederal role as connected to the third *Plyler* theme—the integration of immigrants. This Part III explores the second pairing of the *Plyler* themes—the role of states and cities as connected to the integration of immigrants—to elucidate the fundamental issue of building communities that include both citizens and noncitizens.

In identifying “community building” as a fundamental issue, I acknowledge that this term encompasses many topics, all of which are heavily contested. But it is precisely my point that this is a basic question to which many reasonable answers exist. For example, it is controversial whether states and localities should embrace or reject immigrants who lack lawful status—or any immigrants, for that matter. Another uncertain aspect is whether states and cities are communities that are smaller-scale versions of national citizenship, or instead stand as a bulwark against national citizenship. My purpose in Part III is not to venture definitive answers to these community building questions, but rather to illustrate how the range of disagreements evident in public debate reflect different combined views of two *Plyler* themes—the role of states and cities, and the integration of immigrants.

#### A. *The Integration of Immigrants*

*Plyler* began with the threshold finding that the U.S. Constitution affords some protections to noncitizens who come to the United States outside the law. According to Justice Brennan’s majority opinion, the basis for their protection is their presence on U.S. territory: “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>156</sup> On this point, the Justices were unani-

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154. See Rodríguez, Significance of the Local, *supra* note 126, at 600–05 (discussing evolution of sanctuary laws and congressional response to them).

155. See Rose Cuison Villazor, What Is a “Sanctuary”?, 61 SMU L. Rev. 133, 151–54 (2008) (complicating rhetorical use of “sanctuary” and highlighting subtler policies used by cities and states to limit cooperation with federal enforcement of immigration laws).

156. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); see also Motomura, Americans in Waiting, *supra* note 19, at 77–78 (explaining *Plyler* established territorial jurisdiction as basis for conferring certain constitutional protections on undocumented immigrants).

mous. But if territoriality was the rationale for applying the Constitution, the majority and dissent in *Plyler* gave different *content* to constitutional protections.

The majority's view of unauthorized migrant children as future participants in American society was the basis for its harsh view of the Texas statute that effectively excluded them from public schools:

This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.<sup>157</sup>

The *Plyler* majority evidently saw immigrant integration not just as formal status but also as functional participation in American society. The key to this functional participation was, according to the majority, the connection between education and the prevention of permanent disadvantage as immigrant children come of age. Though it acknowledged that education is not a fundamental right as a matter of constitutional doctrine, the majority explained: "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>158</sup> Quoting *Brown v. Board of Education*,<sup>159</sup> and noting the "special constitutional sensitivity" of education,<sup>160</sup> the *Plyler* majority was troubled that the Texas statute would contribute to the creation of an underclass.<sup>161</sup> "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."<sup>162</sup> Underscoring the notion that meaningful integration into society was at stake, the majority called education "the very foundation of

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157. 457 U.S. at 218–19 (footnote omitted); see also *id.* at 234 (Blackmun, J., concurring) (emphasizing same point made by majority opinion); *id.* at 239 (Powell, J., concurring) (same); Motomura, *Americans in Waiting*, *supra* note 19, at 160–61 (discussing public education as integral transitional instrument for undocumented immigrants).

158. *Plyler*, 457 U.S. at 223 (majority opinion); see also *id.* at 221 (emphasizing importance of education in American society).

159. *Id.* at 222–23 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

160. *Id.* at 203.

161. See *id.* at 207–08 ("[T]he illegal alien of today may well be the legal alien of tomorrow, and that without an education, these undocumented children, [a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class." (internal quotations and citation omitted)). On Reconstruction era restrictions on education for African Americans as a way to deny full citizenship, see generally James D. Anderson, *The Education of Blacks in the South, 1860–1935* (1988).

162. *Plyler*, 457 U.S. at 213; see also *id.* at 217 n.14, 221–22 (identifying abolition of unfavorable "caste or class" treatment toward any group as a goal of the Fourteenth Amendment and noting that "denial of education to some isolated group of children poses an affront to [this] goal[ ]").

good citizenship”<sup>163</sup> and explained that “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>164</sup>

These ideas about education and immigrant integration have retained great persuasive power in the generation since *Plyler*, and they play a key role in current debates.<sup>165</sup> For example, the constitutional guarantee of access to public elementary and secondary schools figured prominently in the mid-1990s litigation that successfully challenged California’s Proposition 187, part of which would have barred unlawfully present children from public schools.<sup>166</sup> Around the same time, efforts failed in Congress to enact a federal law to abrogate *Plyler* by authorizing states to adopt legislation like the 1975 Texas statute.<sup>167</sup> Though efforts persist to limit educational access for unauthorized immigrants, restrictive proposals focus on public colleges and universities, not K–12 public education, and they have encountered stiff opposition. In fact, a trend runs in the opposite direction; proposals granting *access* to higher education by conferring lawful immigration status on undocumented students have come close to congressional approval.<sup>168</sup>

More fundamentally, *Plyler* reflected a particular type of response to the basic dilemma of immigration and citizenship. The entire topic is premised on the threshold assumption that citizens and noncitizens are unequal, and yet equality is a basic tenet of the American tradition of justice. *Plyler*’s apparent resolution was to tolerate a *temporary* inequality between lawful immigrants and citizens, even if permanent second class status is unacceptable. The key is providing *access* to equality. This distinction explains the Court’s emphasis on education and integration. To be sure, this was a particularly apt solution for children who lacked lawful immigration status, given their presumed innocence. But the reasoning in *Plyler* expresses a view of immigration that looks to integration, celebrates vehicles of social mobility, and abhors castelike divisions in

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

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

165. See discussion of DREAM Act *infra* Part IV.A.

166. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774, 785–86 (C.D. Cal. 1995) (holding denial of “public elementary and secondary education to (i) children who are in the United States in violation of federal law, and (ii) children who are citizens or otherwise legally present, but whose parents or guardians are in the United States unlawfully” is in direct conflict with federal law).

167. This proposal was deleted from what became the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.). It passed the House as a separate bill (H.R. 4134, 104th Cong. (1996)), but the Senate did not consider it. See Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 1372–73 (discussing California Proposition 187).

168. See discussion of DREAM Act *infra* Part IV.A.

American society. As a result, the decision's deeper policy rationale protects unauthorized adult migrants as well as children, even if five Justices were not ready to extend the holding beyond children as a matter of constitutional doctrine.<sup>169</sup> The majority found it essential to view immigration as a possible transition to citizenship, and to view immigrants, whether unlawfully or lawfully in the United States, as potential Americans in waiting.<sup>170</sup> Similarly, political philosopher Michael Walzer, writing around the time of *Plyler*, argued that guestworkers "must be set on the road to citizenship,"<sup>171</sup> because "a family with live-in servants is—inevitably, I think—a little tyranny."<sup>172</sup>

The same ideas resonate in current debates. Proposals to address immigration outside the law often include the admission of temporary workers. In support, some argue that many migrants prefer either to return regularly to their countries of origin in circular migration patterns, or to maintain such close ties to those countries that integration into U.S. society is a weak desire and a remote prospect. Some further argue that the U.S. economy needs temporary or circular migration—particularly for jobs requiring little training or formal education—more than it needs permanent migration. Why, they ask, should the integration of immigrants be a goal of U.S. policy, especially when the consequence of treating all newcomers as Americans in waiting by giving them a path to citizenship is arguably to reduce the number of those admitted?<sup>173</sup>

There are, of course, persuasive views that are skeptical of temporary admissions. One objection is that temporary admission programs would bring in a servant class, and that instead, all guestworkers must have some sort of "path to citizenship."<sup>174</sup> From the point of view adopted by *Plyler*,

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169. See discussion of Justice Powell's vote at *supra* text accompanying notes 14–15; see also Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1121–23 (1994) [hereinafter *Bosniak, Membership, Equality*] (explaining that Justice Brennan's majority opinion showed "enormous compassion" for undocumented children but not their undocumented parents).

170. The rationale behind this model of integration is that full integration requires access to formal citizenship. This perspective on naturalization may express part of the American "nation of immigrants" tradition, as opposed to other countries where naturalization traditionally is a way to recognize or memorialize integration, not a means of fostering it. See Motomura, *Americans in Waiting*, *supra* note 19, at 145–46 (comparing naturalization in Germany and the United States).

171. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 60 (1983); see also *Bosniak, Membership, Equality*, *supra* note 169, at 1068–87 (discussing Walzer's contribution to immigration scholarship).

172. Walzer, *supra* note 171, at 52.

173. See Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 Mich. L. Rev. 1111, 1122–23 (2008) ("If we commit to treating immigrants as citizens, we may well erode what support exists for large-scale immigration, giving rise to policies that more strictly limit the number of people permitted to enter.")

174. See, e.g., Sarah Lueck, *Bush Touts His Immigration View as House Republicans Push Theirs*, *Wall St. J.*, July 6, 2006, at A4 (reporting on President Bush's support for a "path to citizenship" for some illegal immigrants in the United States); Jim Rutenberg, *G.O.P. Draws Line in Border*, *N.Y. Times*, May 26, 2006, at A1 (describing House

Walzer, and the idea of Americans in waiting, this path is important to prevent permanent marginalization of temporary workers as a group. This is true even if many of them have no interest in staying in the United States long term, and even if the government tries to make migration more circular through incentives, especially through attractive conditions in countries of origin that entice migrants to return. Efforts to coercively induce circular migration by erecting impenetrable barriers to equality are troubling because that approach would create the permanent marginalization that is deeply problematic for the reasons articulated by *Plyler*. What matters is offering some possibility of citizenship for those who decide, either now or in the future, that they want to stay.<sup>175</sup>

### B. *States, Cities, and Belonging*

Reflecting its approach to the integration of immigrants, *Plyler* abhorred permanent marginalization and brought unlawful immigrant children into public elementary and secondary education regardless of immigration status. But did the decision impose any constitutional limits on the treatment of noncitizens who are in the United States unlawfully, beyond the abstract principle that the Constitution applies in general terms? This question matters, for if the concern expressed in *Plyler* about the marginalization of an underclass of unlawful immigrants has limited reach, then states and cities may play a large role in addressing the integration of immigrants in areas outside of access to public K–12 education.

There is much evidence—both historical and current—to suggest that *Plyler* has narrow application as constitutional doctrine. A telling confirmation of *Plyler*'s narrow doctrinal gauge is *Equal Access Education v. Merten*, which challenged a Virginia Attorney General's opinion expressing the view that unlawfully present individuals should be denied admission to public state colleges and universities.<sup>176</sup> The plaintiffs relied mainly on the federal preemption challenge that *Plyler* declined to ad-

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Republican majority's opposition to "paths to citizenship"); see also President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), at <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html> (on file with the *Columbia Law Review*) ("[I]llegal immigrants . . . should not be given an automatic path to citizenship."); Press Release, Sen. Barack Obama, Obama Statement on President Bush's Speech on Immigration Reform (May 15, 2006), at [http://obama.senate.gov/press/060515-obama\\_statement\\_23/](http://obama.senate.gov/press/060515-obama_statement_23/) (on file with the *Columbia Law Review*) (asserting that comprehensive immigration reform requires "a path to citizenship" for undocumented immigrants).

175. See Cristina M. Rodríguez, Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another, 2007 U. Chi. Legal F. 219, 222 (arguing guestworker programs fail to incorporate immigrants into American social and civic life).

176. 305 F. Supp. 2d 585, 591 (E.D. Va. 2004) (noting that "Virginia Attorney General's September 5, 2002, memorandum to all Virginia public universities and colleges" stated that "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at

dress, asserting the denial of due process in admissions and unconstitutional interference with foreign commerce.<sup>177</sup> Notably, they chose not to raise the equal protection challenge that was at the heart of *Plyler*,<sup>178</sup> which apparently loses all traction once children graduate from high school. By controlling access to colleges and universities through decisions on admission, in-state tuition, and financial aid, state and local governments have the constitutional power to limit the reach of *Plyler*, even if that means relegating young adults who are unlawfully present to economic disadvantage and social marginalization.<sup>179</sup>

When this happens, the clear message is that unauthorized migrants are not fully part of the community, even if their labor is vital to the economy. This reluctance to pursue the logical implications of *Plyler* lend support to the cynical view that the decision is just a “feel good” decision that thinly masks broader efforts to resist integration and exclude newcomers from other aspects of community life.<sup>180</sup> Similarly, some see local ordinances like Hazleton’s as expressions of hostility, their adoption announcing that Latino immigrants are not part of “our” community.<sup>181</sup> This sentiment reflects the fact that subfederal immigration authority—going back at least as far as efforts in California to exclude Chinese immigrants with state, local, and federal measures<sup>182</sup>—has historically been not just a story of direct or indirect enforcement of admission restrictions and expulsion rules, but also a deeper story of who belongs.<sup>183</sup> From this

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all” (citing Memorandum from the Commonwealth of Va. Attorney Gen. to Va. Pub. Univs. & Colls. (Sept. 5, 2002))); see also discussion *supra* Part II.C.

177. 305 F. Supp. 2d at 593–94. The district court rejected the foreign commerce and due process claims, and as Part II.C explained, the court allowed the claim to proceed subject to factfinding and later dismissed the preemption claim for lack of standing. *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 660–72 (E.D. Va. 2004).

178. See 305 F. Supp. 2d. at 598 (stating the case lacks an equal protection claim).

179. See Rodríguez, *Significance of the Local*, *supra* note 126, at 605–08 (highlighting “the inevitability of conflict between the federal government and states and localities on immigration-related matters,” particularly with regard to access to education). Where, however, states and localities adopt measures to facilitate access to education, students who are unlawfully present can acquire a sense of social acceptance in spite of their immigration law status. See Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 *Law & Soc. Inquiry* 709, 723–29 (2008) (arguing that California law granting in-state tuition status to undocumented students relieved stigma and provided a socially acceptable identity).

180. Rabin et al., *supra* note 20, at 50–56 (discussing educational restrictions in spite of *Plyler*).

181. See Olivas, *State and Local Ordinances*, *supra* note 15, at 55 (analogizing Hazleton ordinance to “our inglorious immigration history of racial exclusion”); discussion of anti-immigrant animus *supra* Part II.C.

182. See Motomura, *Americans in Waiting*, *supra* note 19, at 16–17, 23–24 (tracing early attempts to exclude Chinese immigrants following California gold rush).

183. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. Rev.* 493, 497–98 (2001) (citing current state discrimination and predicting future acts of anti-immigrant discrimination by states).

perspective, the message of exclusion that states and cities have sent in the form of anti-immigrant laws brings to mind the association of states' rights with slavery, Jim Crow, and later with resistance to the civil rights movement, carrying with it the inevitable link to racism.

The burden of this history notwithstanding, some modern episodes may signal countertrends suggesting that states and cities may foster or retard the integration of unauthorized migrants, but that neither tendency is preordained, or even more likely.<sup>184</sup> Outside of immigration law, some aspects of civil rights appear to be principally state-based, with same-sex marriage as a prominent example. Within immigration law, policies of sanctuary, noncooperation, or other forms of insulation from federal enforcement should be interpreted not just as skepticism or resistance to enforcement, but also as efforts to establish safe zones in which public and private initiatives can foster integration.<sup>185</sup> Conversely, resistance to sanctuary and other protective measures should be interpreted not just as enforcement measures, but also as efforts to resist the integration of noncitizens who lack lawful immigration status.

An essential role for states and cities in fostering or resisting the integration of unauthorized migrants—and thus to weigh in about any place for these noncitizens in the community—involves public education, for which state and local governments are primarily responsible. This role starts with basic access (or not) to elementary and secondary education, but also includes providing (or not providing) other government sponsored educational activity, such as English language instruction for children and adults, programs to help immigrants naturalize as U.S. citizens once they meet residency requirements, and most importantly, higher education.

Beyond education, states and cities can do much to foster or retard their vitality as crucibles of immigrant integration. On the one hand, the regulation of business in immigrant enclaves can help create vehicles for economic sustainability within the community as well as mobility into the larger economy. Identity documents are one important fulcrum for this form of subfederal authority.<sup>186</sup> Because the authority to issue docu-

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184. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 60–64 (observing that many states are more generous than Congress to lawful and unlawful immigrants).

185. See Noah Pickus & Peter Skerry, *Good Neighbors and Good Citizens: Beyond the Legal-Illegal Immigration Debate*, in *Debating Immigration* 95, 111–13 (Carol Swain ed., 2007) (describing how state and local programs can foster integration); Rodríguez, *Significance of the Local*, *supra* note 126, at 581 (“[T]he primary function state and local governments play is to facilitate the integration of immigrants into public life.”).

186. See Jane Caplan & John Torpey, *Introduction to Documenting Individual Identity: The Development of State Practices in the Modern World* 1, 5 (Jane Caplan & John Torpey eds., 2001) (“[I]ndividual identification . . . has been enabling as well as subordinating, and has created rights as well as police powers.”).

ments can amount to the power to create identity,<sup>187</sup> states and cities can use this power to promote integration. Documents, especially driver licenses, allow immigrants—even if they are here outside the law—to enter important spheres of the private sector. These identity documents are also access documents that provide immigrants the opportunity to navigate their lives with housing, a driver license, car insurance, and other features of modern American life. In contrast to the enforcement role of private actors discussed in Part II.E, private actors can also protect and help integrate unauthorized migrants. The banking industry, for example, largely welcomes unlawful immigrants as customers.<sup>188</sup>

The capacity for driver licenses to serve integration functions has been limited by the REAL ID Act of 2005, which imposed federal requirements that closely tie state driver license issuance to citizenship or lawful immigration status.<sup>189</sup> For a short period in 2007, New York took steps toward issuing a state driver license that did not depend on immigration status, but that proposal was soon abandoned.<sup>190</sup> Developments in identity documents for unauthorized immigrants have recently moved away from driver licenses to general identification cards for residents regardless of immigration status. One of the early proposals came from California's Little Hoover Commission, for a Golden State Residency Program.<sup>191</sup> In July 2007, New Haven, Connecticut began to issue resident ID cards for the stated purpose of enabling all residents, regardless of immigration status, to "become active participants in the community."<sup>192</sup> San Francisco adopted a plan to issue similar identification

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187. See Gérard Noiriel, *The French Melting Pot: Immigration, Citizenship, and National Identity* 45 (Geoffroy de Laforcade trans., 1996) ("[I]dentification documents, and laws are what, in the final analysis, determine the 'identity' of immigrants."); Torpey, *supra* note 63, at 10–17 (arguing states have strong interest in identifying both their subjects and foreigners); Dean Spade, *Documenting Gender*, 59 *Hastings L.J.* 731, 761 (2008) (discussing increasing social and economic significance of personal documentation); cf. Coutin, *supra* note 58, at 101 (observing that unauthorized migrants are not allowed to "complete" their journeys by acquiring U.S. identity documents").

188. See Azam Ahmed & Karoun Demirjian, *Credit Offered to Illegal Residents: Banks Target Workers Without Documents*, *Chi. Trib.*, Feb. 15, 2007, at 1 (describing banks' efforts to cultivate customers who are unauthorized migrants in the United States); E. Scott Reckard et al., *Banking on Illegal Immigrants: A Move to Issue Credit Cards to People Without Social Security Numbers Draws Anger and Praise*, *L.A. Times*, Feb. 14, 2007, at A1 (same).

189. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 311–12 (codified at 49 U.S.C.A. § 30301 (West 2008)); Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 1403–05.

190. Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 1404–05.

191. State of Cal., Little Hoover Comm'n, *We the People: Helping Newcomers Become Californians* (2002).

192. City of New Haven, *New Haven's Elm City Resident Cards—Fact Sheet*, available at [http://www.cityofnewhaven.com/pdf\\_whatsnew/municipalidfactsheet.pdf](http://www.cityofnewhaven.com/pdf_whatsnew/municipalidfactsheet.pdf) (last visited Oct. 22, 2008) (on file with the *Columbia Law Review*); Jeff Holtz, *This Summer's Surprise Hit: An Elm City ID*, *N.Y. Times*, Sept. 16, 2007, at 6CT (documenting need for

cards, also expressly to help integrate residents into the life of the city even if they lack lawful immigration status.<sup>193</sup>

In contrast, restrictions on eligibility for driver licenses and other identity documents limit lawful access not only to the streets and highways, but also to a full range of public and private activities that require identification documents. So viewed, subfederal restrictions on housing, employment, and driver licenses are not simply the intensification of federal immigration enforcement that results from indirect enforcement by states and localities. Penetration into basic aspects of daily life also broadens immigration law enforcement beyond its traditional core of detection, apprehension, and removal. When states and localities deny identity documents, they take a step toward denying identity itself—at least in practical terms. Unauthorized migrants then lack access to the autonomous spheres created by private actors in which they might otherwise be able to live. In short, these measures limit the number and size of the communities to which immigrants without lawful status can belong.

### C. *Citizens, Community, and Immigration Outside the Law*

The foregoing exploration of the key role of education in immigration policy—and in turn the larger question of whether communities will embrace or exclude unauthorized migrants—makes clear that the role of states and localities can only be understood together with the integration of immigrants. And in turn, the inquiry into community building must ask how both immigrants and citizens are treated. In this regard, as *Plyler* emphasized, a key aspect of immigrant integration is education. But the role of education goes beyond the education of lawful and unlawful immigrants. Just as important is the education of U.S. citizens, which shapes the society into which immigrants integrate. Much public debate about immigrants addresses their impact on America, especially economic impact. Much has been made of the need to address current revenue imbalances that arise because the federal government tends to receive the bulk of taxes paid by unauthorized migrants, while states and localities bear more of the costs. Given the attention paid by economists, policymakers, and ordinary people to these revenue imbalances and to the impact of immigration outside the law on specific groups of U.S. workers, it is strikingly underappreciated that any such impact reflects not only immigration policy, but also what the U.S. educational system has done (or not done) for U.S. citizens.

If one problem associated with immigration outside the law is that unauthorized workers displace citizens, the range of options must include

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identification cards and their popularity with city's immigrant community); Jennifer Medina, New Haven Approves Program to Issue Illegal Immigrants IDs, *N.Y. Times*, June 5, 2007, at B6 (announcing start of New Haven immigrant identification card program).

193. See Jesse McKinley, ID Cards for Residents Pass a Vote in California, *N.Y. Times*, Nov. 15, 2007, at A20 (summarizing debate around San Francisco's decision to create immigrant identification card program).

not only measures against unauthorized workers—regardless of whether such measures are more accurately viewed as enforcement or as resistance to integration—but also measures that improve the educational system for citizens. Immigration redistributes wealth and poverty in the basic and perhaps obvious sense that it enhances the economic well-being of some, while diminishing the well-being of others.<sup>194</sup> Against this background, one response to immigration outside the law is educational investment to ameliorate specific displacements, especially for lower income citizens, both preventatively and after displacements occur.<sup>195</sup>

Current immigration law answers this call in extremely limited ways. Employers who petition to bring in H-1B temporary workers must pay a fee of \$1,500 to file an initial petition or an extension of stay, or to hire an H-1B worker from another U.S. employer.<sup>196</sup> The funds are channeled to the National Science Foundation and the Department of Labor, primarily for job training programs for U.S. workers, college scholarships for low income students in engineering, math, computer science, and certain other science enrichment courses.<sup>197</sup>

This program has only limited capacity to transfer wealth created by immigration from employers who benefit from immigrant workers to U.S. citizens who may be displaced. Any features of the lawful immigration system that facilitate such transfers must be established by federal law. Moreover, the H-1B scheme assumes that migrants come to the United States within the lawful admission framework, and thus misses unauthorized migrants altogether. As a conceptual approach, however, the treatment of H-1B workers can be applied much more broadly. Assuming that education can play a crucial role in building communities that include or exclude noncitizens without lawful status, then any measures to assist the displaced will have broader effect if they are general investments in education rather than simple transfer payments generated by a federal immigration statute. In turn, states and localities are crucial to deciding whether or not to invest generally in education, for education on the ground is principally a subfederal responsibility.

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194. Nat'l Res. Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 135–65 (James P. Smith & Barry Edmonston eds., 1997) (outlining immigration's theoretical effects on labor markets); Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 61 *Population Bull.* 1, 20 (2006) (highlighting economic tradeoffs inherent in immigration policy).

195. Cf. Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 *SMU L. Rev.* 23, 25 (2008) (arguing that tax policies and transfer programs are more efficient than immigration restrictions as a way to protect least skilled native workers).

196. INA § 214(c)(9), 8 U.S.C. § 1184(c)(9) (2006). The fee is \$750 for employers with twenty-five or fewer full-time equivalent workers employed in the United States. See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 422–25 (detailing process of petitioning and qualifying for H-1B status).

197. See INA § 286(s). Colleges, universities, and nonprofit research institutions are exempt from the fee requirement.

The notion that responses to immigration outside the law should focus less on the unauthorized migrants and more on ameliorating any adverse effects on U.S. citizens raises a broader point that emerges when we consider the role of states and cities together with the integration of immigrants. The point is that perceptions of immigration outside the law vary a great deal, and it matters whether these perceptions are formed in communities of local, state, or national dimensions. Positions tend to harden when law and policy are discussed in the abstract. It can be easier to find common ground when focusing on individuals, families, and concrete situations, especially at the local level.

In this aspect of community building, cities and other local entities can play roles quite distinct from states. At the local level, hardship to neighbors and friends becomes very real. Hardships may fall on U.S. citizens if their wages are depressed or they lose their jobs as a consequence of immigration outside the law. Immigration laws that seem reasonable in the abstract may have devastating effects on family members who are U.S. citizens and lawful immigrants, or the unlawful resident next door. It was striking, yet not very surprising, when Representative Bill McCollum, a sponsor of the 1996 Immigration Act,<sup>198</sup> one of the most draconian enforcement measures ever adopted by Congress, soon thereafter introduced a private bill granting lawful status to a “deserving” illegal immigrant whose threatened removal from the United States was attributable to that very law.<sup>199</sup> Less personally but just as locally, the negative economic or other consequences of anti-immigrant ordinances may prompt reversal of such policies more easily when decisionmaking is local.<sup>200</sup>

Another key aspect of community building, also found at the intersection of the role of states and cities and the integration of immigrants, acknowledges a serious tension. Significant aspects of community building take place at a state and especially local level, and yet the question remains: Is integration of immigrants nonetheless integration largely within the framework of *national* citizenship? This tension has two facets. First, a rights sensibility that has emerged in the context of national citizenship informs how U.S. citizens perceive the effects of immigration outside the law on themselves and on their communities. As a prominent example, this sentiment is evident in some African American perceptions that full membership in America (through the rights of national citizen-

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198. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

199. See H.R. 321, 106th Cong. (1st Sess. 1999) (denying removal or deportation of Robert Anthony Broley); H.R. 4730, 105th Cong. (2d Sess. 1998) (same); Anthony Lewis, *The Quality of Mercy*, N.Y. Times, Feb. 27, 1999, at A15 (describing McCollum's efforts to deny removal or deportation of Robert Anthony Broley).

200. See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. Times, Sept. 26, 2007, at A1 (describing negative economic effects of town's laws against illegal immigrants).

ship) is being compromised by repeated instances of local integration of unauthorized migrants.<sup>201</sup>

One of the most publicized episodes of this type occurred in the aftermath of Hurricane Katrina in New Orleans in 2005,<sup>202</sup> where unauthorized migrant workers hired in rebuilding the city were perceived by some as displacing African American workers. This is not a new perception, of course, and indeed this issue extends broadly to encompass all underserved or disadvantaged communities in the United States. Some of these communities have been marginalized for generations as in the case of the terrible legacy of institutionalized discrimination beginning with slavery. Other groups—notably the core Lou Dobbs audience—have come to see themselves as wronged because of trends in the national and global economies that have reduced economic security and opportunities for the American working class. Assessing and addressing the concerns of these groups will require understanding them as an aspect of building communities in which the integration of immigrants is also a pivotal question.

Such integration will occur largely in state and local communities, and yet the question remains whether these communities are smaller scale versions of national citizenship. Alternatively, the notion that state and local communities are bulwarks against national citizenship should recall Michael Walzer's memorable defense of immigration regulation at national borders: A world without national walls may become a world of a "thousand petty fortresses."<sup>203</sup> If national citizenship matters less, then religion, race, class, and other groupings that are less cosmopolitan or democratic than national citizenship may matter even more than they already do. This concern is tied to the phenomenon of local integration because of the possibility that the apparent success of immigrant integration in some communities may be attributable to the replication of social structures—such as oppressive gender hierarchies—that are fundamen-

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201. See, e.g., Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *Fordham L. Rev.* 2493, 2513–14 (2007) (questioning whether "political participation [is] a zero sum game, so that the more active immigrants become, the less power African Americans have"); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. Rev.* 1161, 1173–85 (2008) (exploring conflict between African American and Latino low-wage workers); Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in *Debating Immigration* 175, 180–87 (Carol M. Swain ed., 2007) (describing adverse effects of Hispanic immigration on wages and working conditions of low-income blacks).

202. See generally Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 *Hous. L. Rev.* 11, 58–64 (2008) (describing aftermath of Hurricane Katrina wherein "New Orleans Mayor Ray Nagin expressed fear about the future prospects of his city: 'How do I ensure that New Orleans is not overrun by Mexican workers?'" and explaining that "[c]oming from a prominent African American political leader, this statement inflamed anti-immigrant sentiment in the black community").

203. Walzer, *supra* note 171, at 39 (citing Henry Sidgwick, *The Elements of Politics* 295–96 (1891)).

tally incompatible with the aspirations of national citizenship. If this concern is well-founded, then local integration should be informed by the rights and responsibilities of national belonging, or else already marginalized communities will be even further marginalized, and the integration of immigrants will be a hollow achievement.

In sum, these two *Plyler* themes—the role of states and cities and the integration of immigrants—combine to show that much integration of immigrants takes place locally, and that states and localities thus play a huge role, not just in addressing the question of enforcement authority, but also in determining whether and how to build communities touched by immigration outside the law. And going one step further, this combination of *Plyler* themes also reveals the tension between national citizenship and integration into state and local communities.

#### IV. BALANCING PAST, PRESENT, AND FUTURE

Part III addressed how the role of states and cities joins with the integration of immigrants to elucidate the more fundamental theme of community building. Part IV now explores how the integration of immigrants is also closely tied to the first *Plyler* theme—the meaning of unlawful presence. Together, these two themes join to raise the question of how time is perceived in the context of immigration outside the law. What matters most? That at present some noncitizens are in the United States without lawful immigration status, or that they—and their children and grandchildren—may live in the United States into the indefinite future, prompting us to ask how they will integrate into American society? Moreover, how is history, especially de facto U.S. policy toward immigration outside the law, relevant? In short, the integration of immigrants and the meaning of unlawful presence combine to present the question: How do we balance past, present, and future?

At one end of the spectrum is a view of time in immigration law that combines approaches to two *Plyler* themes. First, unlawfully present immigrants are invited into the United States by a past and present de facto immigration policy that reflects government tolerance, acquiescence, encouragement, or invitation. The result—occasional enforcement initiatives notwithstanding—is a sizeable stream of unauthorized migrants who form a flexible, disposable, and vulnerable workforce that over time has developed strong ties in the United States. Corollaries to this de facto immigration policy have been international economic development policies that produce immigrant flows to the United States. Second, future integration of unlawful migrants is essential. Combining these viewpoints, the history of de facto nonenforcement argues for generous treatment of immigrants who come outside the law, and unlawful presence seems like a status that is merely transitory, and thus relatively inconsequential.

Any such description of U.S. policy inevitably prompts objections, among them that no such de facto immigration policy has ever existed,

nor exists today. Equally contested is the relevance of any policy that may have existed. Even if *de facto* U.S. government policy once invited immigration outside the law, this history arguably generates no moral or legal obligations. The adjective “*de facto*” itself reminds us that this has never been official policy, at least not in the terms I use here to describe its practical effect. Moreover, the strong turn toward enforcement in the 1996 amendments to the INA<sup>204</sup> reflected a deliberate effort to change policy in ways that undercut any claims based on weaker, pre-1996 enforcement patterns. Thus emerges the counterargument that combines a very different approach to the meaning of unlawful presence and the integration of immigrants, suggesting that any noncitizen without lawful status is simply an illegal alien, that the past creates no obligation, and that future integration is illegitimate and unacceptable. This combination of perspectives on unlawful presence and integration strongly emphasizes present-day illegality.

There are at least two ways to assess any possible membership or equality claims that unauthorized migrants might assert based on past practices. One is what I call “immigration as contract,” which refers to a certain way of making immigration decisions.<sup>205</sup> The core idea is that coming to America reflects a set of expectations and understandings that newcomers have of their new country, and that their new country has of them. Of course, there is much room for disagreement about terms of the immigration contract. Some might argue that federal immigration statutes set out the terms. If so, unauthorized migrants have broken the contract and have no persuasive claims to equality or membership. Others would counter that the invitation historically extended by employers with U.S. government tolerance or acquiescence constitutes the true immigration contract. In this scenario, any intensification of immigration enforcement illegitimately upsets those expectations and promises.

A second way to assess equality or membership claims is what I call “immigration as affiliation.”<sup>206</sup> This point of view goes beyond the question whether unauthorized migrants have violated an immigration contract embodied in federal statutes. It instead argues that the law should recognize the ties unlawful migrants have acquired in the United States because these unauthorized migrants are productive members of the community who contribute to the economy through work and taxes, and who have U.S. citizen children. The counterargument is that these ties

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204. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

205. Though this is not a legally binding agreement following back-and-forth bargaining, this view of immigration adopts ideas of fairness and justice often associated with contracts. Motomura, *Americans in Waiting*, *supra* note 19, at 15–62 (discussing immigration as contract).

206. See *id.* at 80–114 (discussing emergence of “immigration as affiliation” as conception of lawful immigration).

have been acquired not only unlawfully but also illegitimately, and therefore cannot support any persuasive equality or membership claims.

These contrasting ways of balancing past, present, and future compete to support or reject equality and membership claims by immigrants who are in the United States unlawfully. In turn, they shape how immigration outside the law is discussed. This rhetorical duel frequently invokes the malleable phrase, "rule of law." All sides rely on rule of law rhetoric, but the specifics of their reliance reveal sharp differences in how they perceive immigration law enforcement in the first place. Such perceptions are fragile, in no small part because immigration and citizenship in the United States has historically been permeated by concepts of race that have deeply affected individuals and drawn the racial and ethnic map of the United States. This past has not been neutral. Asian exclusion and the treatment of Mexican immigrants as a disposable labor force come immediately to mind as aspects of the past that have profoundly affected the evolution of ethnic communities in the United States. Given this background, it is understandable for some observers to see justice in immigration through a historical lens that highlights future claims based on the past.

To soften the apparent intractability of this conflict, it is useful to examine aspects of immigration law in which the relevance of history has been contested but then normalized. Consider the law relating to refugees and asylum.<sup>207</sup> Here, a set of values, rooted in a historical view of responsibility and obligation, has mitigated the "illegal" label and protected a large category of individuals in spite of the potential rule of law arguments against their claims to protection. Specifically, U.S. immigration law has accepted that, in certain situations, international conventions that recognize humanitarian obligations override the fact that this is sometimes immigration outside the law.<sup>208</sup> This normalization of refugee and asylum protections recognizes historical experience. Much of the emergence of legal protections for refugees and asylees that emerged after World War II was a response to the consensus that many potential safe havens had failed miserably, inadequately protecting those who tried to

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207. I am grateful to Stephen Lee for suggesting that the treatment of refugees, asylees, and victims of trafficking and crimes is relevant here.

208. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (prohibiting participating states from returning people who were refugees prior to 1951 to a country where "life or freedom would be threatened on account of his race, religion, nationality," or membership in another social category) (adhered to by 143 states as of March 2006). This Convention was later applied to all refugees. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (expanding scope of equal status protection embodied in Convention Relating to the Status of Refugees to refugees covered by definition irrespective of date); see also David A. Martin, T. Alexander Aleinikoff, Hiroshi Motomura & Maryellen Fullerton, *Forced Migration: Law and Policy* 4 (2007) (characterizing refugee law as marking out privileges based on particular suffering or danger that "trump the normal law of migration control").

flee persecution, especially Jews fleeing Nazi-occupied Europe.<sup>209</sup> Today, this treatment of refugees and asylees has become natural enough to take for granted as consistent with the rule of law, even though their status as lawful migrants was once much more tenuous. We have internalized the notion that the arrival of refugees and asylees is distinct from other types of immigration outside the law because we believe these individuals come to the United States for reasons that justify protection in the public interest.

A similar perception of a group of migrants was vehemently contested but then resolved legislatively in the Nicaraguan Adjustment and Central American Relief Act (NACARA), which became law in 1997.<sup>210</sup> Part of NACARA allowed certain Guatemalans and Salvadorans to apply for discretionary relief resulting in lawful permanent resident status under a relatively generous scheme known as suspension of deportation that Congress had repealed in 1996.<sup>211</sup> NACARA treated these nationality groups favorably because Congress recognized that Guatemalan and Salvadoran asylum claimants had been given very limited opportunity to apply for asylum, and also recognized that these claimants had developed significant ties in the United States during a long period of nonenforcement. By opening the way to permanent residence, NACARA acknowledged the history of these immigrant groups in the United States without changing the basic structure of the laws that distinguish between lawful and unlawful migrants.<sup>212</sup> Similarly, much current debate about the way immigration law treats victims of domestic violence, trafficking, and other criminal activity amounts to a debate about whether to protect these migrants, even if they lack lawful presence, by imagining them in a category apart from immigration outside the law.<sup>213</sup>

All of this illustrates that “rule of law” rhetoric is malleable, depending on how the dimension of time is addressed. If past and present policies have created justifiable expectations of some version of equality or membership even if migrants have come outside the law, then it serves the rule of law to take those claims seriously. But if no such claims are

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209. Martin, Aleinikoff, Motomura & Fullerton, *Forced Migration*, *supra* note 208, at 2–4 (arguing Nazi regime’s horrors spurred development of refugee protections).

210. Pub. L. No. 105-100, §§ 201–204, 111 Stat. 2193–201 (1997); see also *supra* Part II.A.

211. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

212. See Coutin, *supra* note 58, at 63–66 (examining NACARA’s recognition of ambiguously positioned class members). I refrain from citing the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), because it is generally perceived as an amnesty for unlawful migrants, as opposed to my examples of migrants whose prior unlawful status is largely forgotten (asylees) or overlooked (NACARA).

213. These are petitioners under the Violence Against Women Act (VAWA) and T (trafficking) and U (victims) visas. See INA § 101(a)(51), 8 U.S.C. § 1101(a)(51) (2006) (defining VAWA petitioners); *id.* § 101(a)(15)(T)–(U) (defining T visa and U visa petitioners); Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 433–37 (discussing purposes and procedures of T and U visas).

persuasive, then it serves the rule of law to enforce immigration law without indulging in undue complexity. In short, “rule of law” rhetoric can start a productive discussion, but it is rarely a constructive endpoint. Part IV next explores two areas of controversy that further show how views of the meaning of unlawful presence combine with views of the integration of immigrants to yield different ways of balancing past, present, and future.

*A. The DREAM Act, and Other Forms of Legalization*

In debates about college and university education for students who are in the United States unlawfully, a focal point has been the Development, Relief, and Education for Alien Minors (DREAM) Act. The version of the DREAM Act that passed the Senate in May 2006 would have conferred lawful immigration status on students who (a) initially entered the United States before the age of sixteen; (b) were physically present in the United States for five years immediately preceding enactment; and (c) earned a high school diploma or the equivalent in the United States, or been admitted to a U.S. higher education institution. These students would be eligible for conditional permanent resident status, followed by lawful permanent residence.<sup>214</sup>

Opponents of the DREAM Act and other legalization programs often voice their objections in “rule of law” terms. They characterize any program that confers lawful status on unauthorized migrants as unacceptable amnesty that rewards lawbreakers by letting them “jump the line” over immigrants who “play by the rules” in coming to America.<sup>215</sup> From this vantage point emphasizing illegality in the present, the predicament of students without lawful immigration status becomes a straightforward matter of illegal aliens whose unlawful presence compels their removal. This emphasis on illegality today supports uncompromising enforcement as the most effective way of ensuring that no illegitimate claims to future integration can ripen. This view of unlawful presence, combined with skepticism about integrating illegal immigrants, thus emphasizes the present over the past and future, equating any form of legalization with “amnesty.”

The logical extension of combining this view of unlawful presence with resistance to future integration is prosecution and punishment of immigration law violations as crimes. Criminalization has been the trend since the 1990s, when Congress increased penalties for existing immigration-related crimes, such as smuggling and various types of document

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214. Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 1383 (summarizing proposed legislation and citing sources).

215. See Coutin, supra note 58, at 199 (“‘Following the rules’ was singled out as a moral virtue, as in the statement that the new [legalization] program ‘should not permit undocumented workers to gain an advantage over those who have followed the rules.’”).

fraud,<sup>216</sup> and added several new immigration-related crimes.<sup>217</sup> Starting around 2005, federal prosecutors have prosecuted immigration-related crimes more frequently, to the point that immigration-related prosecutions accounted in February 2008 for the majority of new federal criminal cases.<sup>218</sup> To be sure, many of the prosecutions are directed against noncitizens who are caught while trying to cross the border clandestinely, not immigrants who have been in the United States for a length of time without lawful status. A trend is emerging, however, to use criminal convictions as a mode of enforcement against all forms of immigration outside the law. For example, in connection with a workplace raid in May 2008 in Postville, Iowa, the government eschewed the usual reliance on removal proceedings in immigration court. Instead, it pressured unauthorized immigrants arrested in a workplace raid to plead guilty to immigration-related criminal charges and agree to removal as part of criminal sentencing.<sup>219</sup> Close to this association between immigration law and criminal law is the notion that immigration outside the law poses a threat to national security.

In contrast, DREAM Act supporters characterize these students' unlawful presence in the United States as, at worst, a zone of legal and moral ambiguity, and further argue that it is essential to integrate them into American society. From this combined perspective on the meaning

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216. See INA §§ 274(a), 274C(e)–(f) (criminalizing harboring or preparing false documents for illegal aliens); 18 U.S.C. § 1546(a) (2000) (criminalizing fraud of visas, permits, and other immigration status documentation).

217. Congress expanded criminal liability for reentry or attempted reentry without authorization after removal or after having departed while a removal order was in effect. See INA § 276, 8 U.S.C. § 1326. See generally Juliet Stumpf, *The Criminalization Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 379–92 (2006) (discussing closer links between criminal law and immigration law).

218. Spencer S. Hsu, *Immigration Prosecutions Hit New High*, Wash. Post, June 2, 2008, at A1. The number of convictions for immigration offenses climbed from 6,197 in FY 1995, to 14,277 in FY 2002, and then to 31,208 in FY 2004. In FY 2004, immigration-related crimes accounted for 33.9% of all federal criminal convictions. TRAC Immigration, DHS-Immigration Criminal Enforcement Trends, at <http://trac.syr.edu/tracins/highlights/v04/dhstrends.html> (last visited Oct. 9, 2008) (on file with the *Columbia Law Review*); TRAC Immigration, DHS-Immigration Ranks First in Terms of Share of All Federal Criminal Convictions, at <http://trac.syr.edu/tracins/highlights/v04/dhsshare.html> (last visited Oct. 9, 2008) (on file with the *Columbia Law Review*).

219. Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. Times, May 24, 2008, at A1; see TRAC Immigration, *Prosecutions for 2008: Referring Agency: Department of Homeland Security Immigration and Customs Enforcement*, at <http://trac.syr.edu/immigration/reports/192/> (last visited Oct. 4, 2008) (on file with the *Columbia Law Review*) (providing statistics on rise in prosecutions initiated by enforcement in the U.S. interior). In contrast, the federal government brought criminal charges against a very small number of unauthorized workers after a workplace raid in Laurel, Mississippi, several months after the Postville raid. See Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid*, Officials Say, N.Y. Times, Aug. 27, 2008, at A16 (reporting that according to immigration experts, “the relatively low number of criminal cases could represent a shift in government policy,” but that a government spokesperson rejected suggestion that policy had changed).

of unlawful presence and the integration of immigrants, legalization is a policy imperative—either because noncitizen students' ties should be recognized as a matter of immigration as affiliation, or because the de facto U.S. immigration policy of tolerating immigration outside the law (by their parents) reflects the true immigration contract. Moreover, it is wrong to treat immigration law violations as crimes, and it follows that the “rule of law” includes not only enforcement, but also discretionary relief as may be needed to achieve just results in individual cases.

Looking more broadly than the DREAM Act alone, the role of discretionary relief in immigration law—also a form of legalization, albeit ad hoc and individual—shows how contrasting views of the rule of law reflect contrasting views of the two *Plyler* themes of unlawful presence and integration.<sup>220</sup> In 1996, Congress reduced the opportunities for discretionary relief to individuals who would otherwise be unlawfully present.<sup>221</sup> Whether one believes this change is problematic depends on whether discretionary relief is perceived as extraordinary or normal. If the rule of law calls simply for enforcement because immigrants entered illegally, then limiting discretionary relief is appropriate, because it is extraordinary and should remain so. But if immigration law is not just a matter of enforcing the statute, these new limits on discretionary relief may be quite troubling, especially if long-term unlawful residents have a compelling claim to membership, including future integration.<sup>222</sup> These advocates would emphasize that discretion in immigration law, once exercised at the whim of a border inspector or other government official, has come to be governed by threshold eligibility, hardship requirements, and other standards that are typical of the rule of law.<sup>223</sup>

Beyond these differing invocations of the rule of law, rhetoric supporting the DREAM Act and other forms of legalization further subdivides into two broad categories, depending on how they see the connection between unlawful presence and integration, and on why they favor recognition of historical patterns and future integration over present ille-

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220. See generally Neuman, Discretionary Deportation, *supra* note 130, at 618–24 (explaining that uncompromising statutory rules can impose hardship that discretionary mechanisms can ameliorate).

221. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Aleinikoff, Martin, Motomura & Fullerton, Immigration and Citizenship, *supra* note 1, at 789–812 (summarizing discretionary relief through cancellation of removal, including stricter requirements imposed in 1996); Motomura, Americans in Waiting, *supra* note 19, at 54–57, 98–99 (noting that recently “waivers and cancellation of removal have become much harder to get”).

222. See Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary, 110th Cong. 42 (2007) (statement of Hiroshi Motomura, Kenan Distinguished Professor of Law, University of North Carolina-Chapel Hill) (discussing, in addition to discretion, reductions in judicial review and other shifts within federal decision making authority).

223. See INA § 240A, 8 U.S.C. § 1229b (2006) (enacting requirements for cancellation of removal).

gality. Some argue pragmatically that lawmakers should concede to enforcement realities and recognize that unlawfully present children will inevitably remain in the United States. Immigration outside the law may be susceptible to some regulation at the margins, but efforts to control its fundamental contours are doomed to failure. From this pragmatic perspective on the future, it does not matter if we think of the unlawfully present as bad people—as illegal aliens, as lawbreakers, and even as criminals. We still must accept and regulate unlawful migration, for example by putting less stock in enforcement and expanding the number of immigrants who are granted lawful status. And we should take seriously the need to integrate these immigrants.

In contrast, other DREAM Act supporters see the future differently. They make moral arguments that emphasize an asserted obligation to migrants who came to America as an intended consequence of past or present *de facto* U.S. immigration policy to tolerate and even encourage immigration outside the law to provide U.S. employers with a flexible, disposable labor force. These arguments for the DREAM Act and other forms of legalization emphasize in turn that integration is a compelling priority as a moral imperative.<sup>224</sup>

The *Plyler* majority's combined approach to unlawful presence and integration blended pragmatic and moral arguments. Reasoning pragmatically, it adopted the Attorney General's description of unauthorized migrants as "productive and law-abiding" individuals who had a "permanent attachment" to the United States, and who were "unlikely to be displaced from our territory."<sup>225</sup> But the core of *Plyler* was a moral argument: "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."<sup>226</sup> Though the majority emphasized the innocence of children brought here by their parents, its understanding of unlawful presence as the consequence of U.S. government policies sug-

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224. Of course, these categories are oversimplifications, and the labels that I employ may be perilous. One might label pragmatic arguments as "consequentialist," and moral arguments as "rights-based." The "rights-based" label may be especially misleading, however. I do not mean to suggest that moral rhetoric necessarily articulates a claim "as of right" to legalization or other benefits. What I call a moral argument is better understood as an argument based on policy, not on a claim of right.

225. *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982) (quoting Administration's Proposals on Immigration and Refugee Policy: J. Hearing before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th Cong. 9 (1981) (testimony of Hon. William French Smith, U.S. Attorney General)); cf. Linda S. Bosniak, Opposing Prop. 187: Undocumented Immigrants and the National Imagination, 28 Conn. L. Rev. 555, 581–90 (1996) (critiquing arguments that assess justice claims inside a "national imagination" rather than thinking in transnational or postnational terms). In contrast, all of the pragmatic and moral arguments that I identify fit within a "national imagination" in that they advance justice claims as a matter of national citizenship.

226. 457 U.S. at 220, 226; see also Bosniak, Membership, Equality, *supra* note 169, at 1121–23 (observing that it mattered a great deal to the *Plyler* Court that the children had not chosen to come to the United States).

gests that its moral argument also applies, if less powerfully, to adults who immigrate outside the law. This approach argues against barriers to the integration of the students who would benefit from the DREAM Act. More generally, it maintains that denying educational opportunity to anyone whose unlawful presence is inherently ambiguous and historically contingent is especially unjust. From this perspective, a shift to airtight enforcement, even if it were possible, would disserve justice.

### B. *Birthright Citizenship*

In the context of *jus soli* birthright citizenship, the meaning of unlawful presence and the integration of immigrants combine to produce a similar perception of time, and in turn a parallel set of arguments. Current law confers citizenship on any child (except children of diplomats) born on U.S. soil regardless of the parents' immigration status. This interpretation of the citizenship clause of the Fourteenth Amendment to the U.S. Constitution has stood for over a century.<sup>227</sup> Congress has considered, but never adopted, various versions of a constitutional amendment that would exclude children from *jus soli* citizenship if their parents are in the United States unlawfully.<sup>228</sup>

The arguments against *jus soli* citizenship parallel those against the DREAM Act and other forms of legalization. Those who argue from a standpoint that emphasizes illegality in the present would say that parents who are here illegally should not be allowed to impose their children unilaterally and permanently on American society in the future through

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227. See *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (affirming that Fourteenth Amendment confers citizenship by birth within territory of United States). See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, supra note 1, at 15–44 (describing longstanding principle of *jus soli*); Motomura, *Americans in Waiting*, supra note 19, at 72–73, 114 (same). Professors Peter Schuck and Rogers Smith have argued that the clause should be interpreted more restrictively to deny citizenship to children whose parents have not been admitted as permanent residents of the United States, but theirs is not the prevailing view. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 118 (1985) (“[C]itizenship at birth would not be guaranteed to the native-born children of those persons—illegal aliens and ‘nonimmigrant’ aliens—who have never received the nation’s consent to their permanent residence within it.”). For criticism of Schuck and Smith’s interpretation of the Fourteenth Amendment, see *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents*: J. Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 103–09 (1995) (statement of Gerald L. Neuman, Professor, Columbia University Law School) (describing Schuck and Smith’s revisionist theory of the citizenship clause as “poorly reasoned,” “historically inaccurate,” and “completely circular”). Professor Schuck later testified in Congress in opposition to legislation that would have limited *jus soli* citizenship to the children of citizens and lawful permanent residents. See *id.* at 97–103.

228. See, e.g., H.R.J. Res. 46, 109th Cong. (2005) (proposing constitutional amendment denying citizenship to individuals born in U.S. if neither parent is a U.S. citizen or owes permanent allegiance to the United States); H.R.J. Res. 42, 108th Cong. (2003) (same).

an automatic grant of citizenship.<sup>229</sup> This version of the rule of law centers on zero-tolerance enforcement and requires denying all benefits associated with unlawful presence, including citizenship, to the children of illegal aliens. As with arguments against legalization, arguments against jus soli citizenship emerge when this straightforward understanding of unlawful presence combines with skepticism of asserted obligations based on the past and with opposition to future integration of illegal immigrants.

Supporters of jus soli citizenship typically make both pragmatic and moral arguments by blending their understanding of unlawful presence with their support for immigrant integration. This blend gives rise to a way of thinking about the future through the medium of generations. A pragmatic argument might start by viewing children born to unlawfully present parents as likely to stay here into the indefinite future.<sup>230</sup> A moral argument might take a different view of unlawful presence that emphasizes a child's innocence, even if conceding her parents' culpability. Or a moral argument might adopt a more generous view of unlawful presence by relying on the ideas of contract and affiliation. For example, a moral argument may view immigration as a contract, reasoning that the long history of Mexican labor recruitment by U.S. employers with government acquiescence gives rise to legitimate expectations, even outside the law.<sup>231</sup> Or a moral argument may rely on immigration as affiliation, emphasizing ties developed and contributions made in this country by unauthorized migrants and their families, including children born here. In sum, both pragmatic and moral arguments can be deployed to emphasize the necessity of providing unauthorized migrants with a path to citizenship and other ways to avoid permanently relegating them to second class status.

## V. LOOKING AHEAD

This Essay began with the idea that the three themes that were central to the U.S. Supreme Court's decision in *Plyler* have remained at the heart of debates about immigration outside the law. For anyone who hopes a sound national immigration policy will emerge, it is essential to identify these themes as basic areas of concern. Next, wise policy requires not only addressing these areas individually, but seeing how they combine to raise more fundamental issues. This deeper understanding of the topic is the first step toward constructive disagreement.

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229. See, e.g., Schuck & Smith, *supra* note 227, at 94 (arguing in the context of interpreting Fourteenth Amendment that "[i]f mutual consent is the irreducible condition of membership in the American polity, it is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens").

230. See, e.g., David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 *Yale J. Int'l L.* 278, 282-84, 291-94 (1985) (reviewing Schuck & Smith, *supra* note 227) (noting complications associated with birthright citizenship and ascriptive citizenship rules).

231. See discussion *supra* Part II.A.

But what lies beyond constructive disagreement? Is there any hope of consensus? It might seem that these conflicts about immigration outside the law itself are intractable. Perhaps they are. But taking the three *Plyler* themes in pairs sheds light on the authority to enforce immigration law, on building of communities that include noncitizens and citizens, and on balancing the past, present, and future of immigration law. Put differently, each *Plyler* theme has two faces. The meaning of unlawful presence addresses enforcement authority as well as the balancing of past, present, and future. The role of states and cities also matters for enforcement authority, but it affects community building as well. And the integration of immigrants influences not only community building but also how we balance past, present, and future.

This Part V explains how any durable, politically viable efforts to address immigration outside the law must take seriously the lessons that emerge from these pairings of *Plyler* themes. Here I return to a thought at the core of Part II's discussion of unlawful presence—that it has been de facto policy to tolerate immigration outside the law. That discussion also noted some objections—that enforcement policy is much less tolerant today, that in any event the past does not bind the future, and that today's decisionmakers are free to change course. These notions of decisionmaking freedom must be correct as a pure statement of any government or society's authority. But it is also essential to acknowledge that the authority to make decisions does not necessarily include authority to erase history, expectations, or obligations by sheer fiat. At the very least, this difference between going forward and acknowledging the past affirms the need for a process of change that is both pragmatic and moral. Justice may require that expectations generated during an era of de facto tolerance of immigration outside the law should be protected through various forms of discretionary relief. This discretionary relief should last until fundamental change occurs—not just a unilateral declaration of a new day in enforcement—but a basic restructuring of responses in law and policy to migration patterns.

We come, then, to the hardest but most important question: What are the essential elements of this basic restructuring? This Essay's conceptual roadmap shows that the issues associated with immigration policy are both more global and more local than we might have thought. In particular, durable, politically viable responses to immigration outside the law will require sober reflection and wise decisions in three policy areas—international economic development, economic development inside the United States, and domestic educational policy. Though I leave fuller discussion of specific measures for another day, the pairings of *Plyler* themes analyzed in this Essay explain *why* these three areas are so important.

First, the many contingencies in the meaning of unlawful presence discussed in Parts II and IV depend ultimately on international economic development. The reason is that in the global economy, immigration is a

mediating factor in an age of great wealth and great poverty. Emigration from sending countries to the United States is an economic and political safety valve for those countries, especially where conditions impel flight. Emigration also generates substantial remittances back to sending countries, often comprising a large and essential part of their economies.<sup>232</sup> Often, the conditions that impel flight are the consequences of U.S. economic policies. Policymakers seem slow to acknowledge that flows of capital and goods—such as fostered by the North American Free Trade Agreement—create social networks that inevitably foster the flow of human beings as well.<sup>233</sup> To adapt what the Swiss writer Max Frisch wrote about European guestworkers, “we wanted products, but people came.”<sup>234</sup>

If we want to manage immigration outside the law, we first need to support robust economies in sending countries in order to give people a reason to stay and generate wealth at home. If, however, the economic conditions elsewhere make millions of their residents feel that they have no choice but to leave home to pursue what seem to be better lives—or basic survival—in the United States, one of the core elements of the current situation will remain. Demographic and economic pressure will keep the meaning of unlawful presence profoundly ambiguous and deeply contested. In turn, this complexity, when combined with the role of states and cities, produces much of the prevailing controversy on issues of enforcement authority. And when combined with the integration of immigrants, this same complexity yields debates on how to balance past, present, and future.

This focus on international economic development should remind us that immigration policy is a form of foreign policy, and that foreign policy is a way to make immigration policy. But these truisms raise further questions. One brings us back to the basic pursuit of justice in immigration. One of the conceits of the past generation of immigration policy has been the belief that justice in immigration is the product of even-handed application of a set of universal principles. Much of this approach is the legacy of the struggle to end the national origins system, which operated in some form between 1921 and 1965 to allocate lawful immigrant admissions through a scheme that strongly preferred immigrants from Europe, especially northern Europe.<sup>235</sup> This discriminatory

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232. See, e.g., Coutin, *supra* note 58, at 122–48 (discussing effect of remittances on Salvadorian economy); *id.* at 7 (citing figures); *id.* at 11 (citing sources).

233. See Douglas S. Massey, Jorge Durand & Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* 118–21 (2003) (discussing trend of declining wages and increased criminalization of undocumented workers).

234. Max Frisch actually wrote: “We wanted workers, but people came.” Max Frisch, *Überfremdung I, in Schweiz als Heimat?* 219 (1990) (“Man hat Arbeitskräfte gerufen, und es kommen Menschen.”).

235. See Motomura, *Americans in Waiting*, *supra* note 19, at 126–32 (describing national origins system).

system was dismantled in 1965 and replaced by the apparently equal treatment of immigrants regardless of their country of origin.<sup>236</sup> It is hardly clear, however, that justice in immigration is served by a numerical ceiling on most categories of immigrants from Mexico that is the same as for every other country in the world—regardless of population, proximity to the United States, or historical or economic relationships.

This dilemma of defining equality within the context of lawful admissions is difficult. It becomes even harder if we accept that the real problems lie not only in the admission scheme, but also in international economic development. Solutions in this arena may require acceptance of ad hoc arrangements, as well as decisionmaking by the political bodies that produce such arrangements rather than legal institutions that purport to apply universal principles. Any such trend may appear to jeopardize the hard-won equality of post-1965 immigration law to the extent that the 1965 amendments were a triumph for the general application of universal principles and for the related notion that immigration decisions should be based on law, not politics. However, ad hoc immigration arrangements with particular sending countries—especially those that generate large shares of immigration outside the law—that respond to specific historical and economic relationships are crucial if immigration law is to fit appropriately into the global economic context. In fact, numerous situation-specific arrangements are part of current immigration law. For example, the “E” nonimmigrant category provides generous admission terms for traders, investors, and their employees if the United States has a trade or investment treaty with their country of nationality.<sup>237</sup> Given their positive effects, it should be no surprise that ad hoc arrangements with specific countries, especially trade agreements, are emerging with greater frequency.<sup>238</sup>

Under current circumstances, the meaning of unlawful presence is ambiguous and contested for a second major reason: The current system of lawful admission to the United States is inadequate to meet the labor needs of the U.S. economy.<sup>239</sup> I have suggested that part of the way to

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236. See *id.* at 131–32.

237. See INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (2006) (distinguishing treaty investors and traders who come to United States from other “immigrants”).

238. See U.S.-Chile Free Trade Agreement, U.S.-Chile, ch. 14, § 3, June 6, 2003, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/asset\\_upload\\_file535\\_3989.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf) (on file with the *Columbia Law Review*); U.S.-Singapore Free Trade Agreement, U.S.-Sing., ch. 11, § 3, May 6, 2003, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf) (on file with the *Columbia Law Review*); North American Free Trade Agreement, U.S.-Can.-Mex., Annex 1603 § C, Dec. 17, 1992, 32 I.L.M. 605 (1993). See generally Aleinikoff, Martin, Motomura & Fullerton, *Immigration and Citizenship*, *supra* note 1, at 431–32 (discussing nonimmigrant categories based on trade and other international agreements).

239. To be sure, the idea of “needs” is itself complex. If wages rose sufficiently, the jobs would not go unfilled, but the question remains whether such wage levels would render U.S. employers uncompetitive in a global economy.

manage immigration outside the law is to ease emigration pressures in sending countries. The corollary is to modify demand for immigrant workers in the United States. Only if this also happens will the domestic pressures that now make the meaning of unlawful presence ambiguous and contested abate. A key focus, then, is economic development inside the United States.

One domestic initiative would be to increase the number of employment-based admissions with less required education and training, in order to meet the demand for workers in many jobs filled by migrants who come outside the law. In addition to increased permanent admissions, some labor needs will probably have to be met by workers whose admission is at least initially temporary. We should remember, however, any temporary worker program can be structured with a path to citizenship if an immigrant decides to stay in the United States permanently after weighing incentives to go home. We should also remember that structuring temporary or permanent admissions based on economic needs should not keep us from treating immigrant workers as people with families and aspirations outside the workplace. The admission of their immediate family members is crucial if we are serious about the integration of immigrants into U.S. society.<sup>240</sup>

Which domestic economic development measures will be most crucial may depend dynamically on international economic development patterns. If the economies of sending countries become truly robust, then emigration will diminish, and migration to the United States may become more circular and less permanent. Also possible is an increase in permanent return migration from the United States, as has occurred in the past fifteen years to South Korea, Ireland, and Poland.<sup>241</sup> If such trends emerge, then many of the jobs now performed by unauthorized migrants in the United States will go unfilled. This possibility suggests that as we invest in economic development in sending countries, we also need to anticipate the success of such efforts by aligning the U.S. economy with the labor force that we can expect to have, whether that realignment requires restructuring, mechanization, outsourcing, or some combination of these and other approaches.

When we combine analyses of integration of immigrants with both unlawful presence and the role of states and cities, a third crucial area of policy emerges. This is educational policy in the United States, which

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240. See Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 *Va. J. Soc. Pol'y & L.* 103, 114–18 (2006) (discussing relationship between family-based immigration and integration of immigrants).

241. See Pam Belluck, *Healthy Korean Economy Draws Immigrants Home*, N.Y. Times, Aug. 22, 1995, at 1 (describing reverse migration of immigrants from South Korea); Kevin Cullen, *Going Full Circle: Native Land's New Prosperity Has Many Reversing Their Exodus*, Boston Globe, Mar. 19, 2007, at A1 (describing reverse migration of Irish immigrants); Kirk Semple, *A Land of Opportunity Lures Poles Back Home*, N.Y. Times, Sept. 21, 2008, at A37 (describing reverse migration of Polish immigrants).

determines not only the integration of immigrants into our communities, but also the effects of immigration outside the law on U.S. citizens. As Part III.C explained, without a greater commitment to ameliorating cycles of poverty within the American poor, and to meeting the pervasive economic and educational challenges faced by the American middle class, immigration outside the law will remain an easy target for simple demagogues.

#### CONCLUSION

Immigration is one of the most important questions in American public policy, for it literally determines who “we” are. And within immigration, one of the most urgent issues is immigration outside the law. The dramatic increase over the past decade in the number of noncitizens who live and work in the United States without lawful status has led to broad chasms that separate opposing views and make the task of a national conversation especially daunting.

As this Essay explained at the outset, public debate has centered around three key themes that formed the core of the 1982 U.S. Supreme Court decision in *Plyler v. Doe*—the meaning of unlawful presence, the role of states and cities, and the integration of immigrants. But the state of this debate is disheartening, mainly because opposing sides talk past each other without listening. The only hope for moving beyond this impasse is developing a framework within which we can disagree constructively, even if that framework underscores that the key issues are more complex than they first appear. Any such framework for conversation requires identifying the basic points where we disagree—not just where we give different answers, but more importantly, where we ask different questions.

This Essay’s main argument is that the three *Plyler* themes are better understood as shedding light on three concepts that reveal fundamental differences in approaches and answers—enforcement authority, community building, and balancing past, present, and future. These three concepts sketch a roadmap that shows first where and why disagreements about immigration outside the law arise. The roadmap then shows how and why finding common ground will require engagement with larger forces that generate and shape immigration patterns. Durable, politically viable solutions lie in forthright engagement with challenges of international and domestic economic development, as well as domestic educational policy. Only by coming to this broader and deeper understanding of immigration outside the law can we ever hope to forge a national consensus.