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CHOOSING IMMIGRANTS, MAKING CITIZENS

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COMMENT

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INTRODUCTION

In immigration law as in other areas of legal scholarship, it is hard enough to find answers, but it is even harder and more important to pose the right questions and to understand the assumptions and frames of reference that define the field. For immigration law in particular, one of the basic choices is whether to adopt the traditional definition—as addressing whether noncitizens are allowed to enter and stay—or to embrace a broader range of questions about immigrants' rights, citizenship, and the integration of immigrants.

With the definition of the field up for grabs, the contributions of legal scholars are especially valuable if they not only search more deeply for answers to fundamental questions of law and policy, but also prompt us to consider why the questions matter in the first place. *The Second-Order Structure of Immigration Law*[1] by Professors Adam Cox and Eric Posner does both, the first quite explicitly but the second only obliquely. This Essay fills out the picture painted partially by *Second-Order Structure*, with a particular effort to identify

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1. Adam B. Cox & Eric Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007) [hereinafter *Second-Order Structure*].

its unstated assumptions, to examine those assumptions, and to explain why they make a difference.

Drawing on models of contracting and asymmetric information in the economics literature, and likening a country picking immigrants to an employer picking employees,[2] *Second-Order Structure* explains how questions of immigration law may concern "first-order" or "second-order" structure. First-order structure typically has three dimensions: the number of immigrants, the type of immigrants, and their terms of admission.[3] This poses the central second-order challenge: how to screen in only those applicants who satisfy the criteria derived from the first-order decisions.[4] For example, given a first-order preference for immigrants who will be law-abiding in the United States, how do we screen for this?[5] *Second-Order Structure* tells us that this requires a second-order decision: whether to screen immigrants on the basis of criteria known before arrival, or after they have lived in the host country for a period of time. A basic choice is thus posed between "ex ante" and "ex post" screening of immigrants.

Second-Order Structure explains that ex post screening has one big advantage: more information is available when immigrants are chosen.[6] But it issues a caution: not knowing if they will pass the host country's ex post screening, immigrants will hesitate to make "country-specific investments." Apparently agnostic on whether ex ante or ex post screening is inherently superior, *Second-Order Structure* observes: "The choice between the two systems turns in part on tradeoffs among these variables."[7]

To preview this Essay's main points, *Second-Order Structure* provides an illuminating structure for understanding immigration law choices, but its lessons apply more readily to some choices than others. Though it only obliquely addresses the limits of its own analysis, it happens to offer a rich opportunity—through an inquiry into those limits—to appreciate two ways in which immigration law necessarily implicates immigrants' rights, citizenship, and the integration of immigrants. First, immigration law affects a wide range of people from the undocumented to lawful nonimmigrants to permanent residents to naturalized citizens, who move over time from one status to another. From this first point follows a second: immigration law poses a basic choice between two frames of reference—one that focuses on the acquisition of lawful status, and the other on the acquisition of citizenship.

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2. *Id.* at 813 n.12.

3. *See id.* at 814-19.

4. Though *Second-Order Structure* asserts that the academic literature on immigration law and policy has largely neglected second-order questions of institutional design, *id.* at 847, most of the scholarship that has addressed these questions may not be immediately recognizable as such simply because it has not adopted this terminology.

5. *See id.* at 824-27.

6. *See id.* at 826-27.

7. *Id.* at 813.

Part I of this Essay explores how *Second-Order Structure* analyzes three core topics. These are: (A) deportation as the mechanism for ex post screening; (B) the concept of country-specific investments; and (C) underenforcement of immigration laws in the United States. These analyses uncover the full spectrum of status and time in immigration and citizenship, but they also show that *Second-Order Structure*, even when it seems to address the full spectrum, persuasively addresses only part of it. The analyses of deportation and country-specific investments in *Second-Order Structure* seem to address the choice between ex ante and ex post screening as a general matter. However, they apply much more convincingly to undocumented immigrants, and much less so to noncitizens who are lawfully in the United States. The analysis of the underenforcement of immigration laws is expressly limited to the undocumented in a way that confirms the unstated limits on the first two analyses. Part II of this Essay addresses more fully the spectrum of status and time and how this spectrum poses a basic choice between choosing immigrants and making citizens as alternative frames of reference. Part II explains how *Second-Order Structure* adopts choosing immigrants as its frame of reference, and how this frame limits the application of some of its central arguments.

I. A CLOSER LOOK AT SECOND-ORDER STRUCTURE

A. *Defining Ex Ante and Ex Post Screening*

Ex ante screening, *Second-Order Structure* tells us, is a decision "whether to accept a particular immigrant on the basis of *pre-entry information*, such as the immigrant's race or her educational achievement in her home country."[8] In U.S. immigration law, these decisions are reflected in the admission categories and inadmissibility grounds in the federal Immigration and Nationality Act (INA).[9]

A noncitizen seeking lawful admission to the United States generally must clear two hurdles. First, she must qualify under a nonimmigrant or immigrant category. A nonimmigrant is admitted for a limited duration and purpose, for example to study at a certain school[10] or to work in a certain job.[11] An immigrant may be admitted for an indefinite stay in a status known as "lawful permanent resident."[12] There are immigrant admission categories based on

8. *Id.* at 812.

9. Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version codified at 8 U.S.C. § 1101 et. seq. (2007)).

10. *See* Immigration and Nationality Act (INA) § 101(a)(15)(F), (M), 8 U.S.C. § 1101(a)(15)(F), (M) (2007).

11. *See* INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H).

12. *See* INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). On the evolution of the concept of permanent residence, see HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 6-8 (2006) [hereinafter AMERICANS IN WAITING].

family ties,[13] skills and employment,[14] protection as a refugee, asylee, or other forced migrant,[15] and a lottery.[16] A noncitizen who wants to become a U.S. citizen must generally become a permanent resident first. Then, after a waiting period—generally five years—and satisfying other requirements, she may become a citizen through naturalization.[17]

Second, however, a noncitizen who qualifies under an immigrant or nonimmigrant category may not be admitted if an inadmissibility ground applies to her. For example, marriage to a U.S. citizen initially qualifies a noncitizen for admission,[18] but she will be inadmissible if she has committed two crimes other than political offenses.[19] In that case, admission requires a discretionary waiver.[20] There are inadmissibility grounds based on national security,[21] lack of financial support,[22] and immigration law violations, to name just a few.[23] In short, lawful admission to the United States is controlled by positive and negative criteria that combine to define a system of ex ante screening.[24]

Second-Order Structure tells us that ex post screening works to "select[] immigrants on the basis of *post-entry information*, such as her avoidance of criminal activity or unemployment in the host country."[25] This definition seems intuitive, but *Second-Order Structure* applies it to U.S. immigration law in a curious and revealing way by focusing on deportation instead of acquisition of a lawful status such as permanent residence or citizenship.[26] Part of its deportation-focused discussion of ex post screening addresses removal procedures, which range from a summary inquiry by a single immigration officer at a port of entry to a full trial-type proceeding before an immigration judge followed by some administrative and judicial review.[27] The rest of the discussion of ex post screening in *Second-Order Structure* addresses the

13. *See* INA §§ 201(b)(2)(A)(i), 203(a), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).
14. *See* INA § 203(b), 8 U.S.C. § 1153(b).
15. *See* INA §§ 207-209, 8 U.S.C. §§ 1157-1159.
16. *See* INA § 203(c), 8 U.S.C. § 1153(c).
17. *See* INA § 316, 8 U.S.C. § 1427.
18. *See* INA §§ 201(b)(2)(A)(i), 204(a), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a).
19. *See* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).
20. *See* INA § 212(h), 8 U.S.C. § 1182(h).
21. *See* INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).
22. *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).
23. *See* INA § 212(a)(6), (7), (9), 8 U.S.C. § 1182(a)(6), (7), (9).
24. *See Second-Order Structure*, *supra* note 1, at 824-26.
25. *Id.* at 812.
26. The INA uses "removal" to refer to expulsion from U.S. territory, *see* INA § 241, 8 U.S.C. § 1231, but I follow *Second-Order Structure* in using the colloquial term "deportation."
27. *See* INA § 235(b), 8 U.S.C. § 1225(b) (expedited removal), INA § 240A, 8 U.S.C. § 1229b (removal proceedings). Both provisions are discussed in *Second-Order Structure*, *supra* note 1, at 820-21.

statutes defining deportable noncitizens.[28] These strong associations of ex ante screening with the border and ex post with deportation permeate the discussion. For example, "the ex ante system depends on the ability to control the border; the ex post system depends on the ability to detect noncitizens in the host country's territory."[29]

For undocumented immigrants in the United States, *Second-Order Structure* correctly assumes that because they foiled the ex ante screening system, deportation is the mechanism for ex post screening. Their unlawful presence alone suffices to deport them, even if some may be allowed to stay on a case-by-case, discretionary basis, or some future legalization program were to grant lawful status to many of them.

For lawfully present noncitizens, the situation is different. First consider lawful nonimmigrants. Though some may become deportable later, for example if they stay too long, it is equally pertinent to ask if they will become permanent residents through a process called adjustment of status. This is one of two procedural paths to permanent residence; the other is admission based on an immigrant visa issued in one of the immigrant admission categories. For example, an intending immigrant who qualifies for admission can apply for an immigrant visa at a U.S. consulate outside the United States. He can then come to a port of entry, show his visa, and be admitted as a permanent resident. But consider a noncitizen who has already been admitted as a temporary worker. If she meets the immigrant admission criteria, she can adjust to permanent resident status without leaving the United States.[30]

This distinction between lawfully and unlawfully present noncitizens prompts a broader observation about the analysis in *Second-Order Structure* and an inquiry into the assumptions and frames of reference that it implicitly adopts. It addresses ex ante and ex post screening of "immigrants," but this word has a variety of meanings along a spectrum that includes: (1) undocumented immigrants, (2) lawful nonimmigrants, (3) permanent residents, and (4) naturalized citizens. This spectrum is defined by elements of both status

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28. As a technical matter, inadmissibility grounds apply to noncitizens seeking admission, and deportability grounds apply to noncitizens who have been admitted. The removal of an undocumented immigrant may be based on an inadmissibility or deportability ground, depending on the facts. For a noncitizen who has crossed the border surreptitiously and thus was never admitted, the inadmissibility ground applies because she is present in the United States without admission or parole. *See* INA § 212(a)(6), 8 U.S.C. § 1182(a)(6). For a noncitizen who was admitted but no longer has a lawful status—perhaps by overstaying or otherwise violating admission conditions—the deportability grounds may apply for presence in violation of law, *see* INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), or violations of nonimmigrant status or conditions of admission, *see* INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C).

29. *Second-Order Structure*, *supra* note 1, at 813; *see also id.* at 812 ("the ex post approach necessarily leads to a system of deportation"); *id.* at 820; *id.* at 836-40 (discussing the gradual shift from ex ante to ex post screening by tracking the shift from exclusion to deportation).

30. *See* INA § 245, 8 U.S.C. § 1255.

and time, in that many noncitizens move from one status to another over the course of time.

I take *Second-Order Structure* at its word, that it addresses only the immigrant admission system in the United States and thus not admission of nonimmigrants.[31] Accordingly it observes that "a state might choose to use a temporary immigration system—such as a guest worker program—as a screening mechanism for potential permanent immigrants."[32] But if this is the topic, then it is curious to omit adjustment of status, which is a quintessential form of ex post screening in this setting.[33] After all, adjustment uses information acquired during a noncitizen's qualifying period of temporary residence to evaluate him for permanent residence.

Similarly, *Second-Order Structure* notes that U.S. immigration law has seen a "steady shift over time toward increased reliance on deportation and, consequently, on the ex post screening of immigrants."[34] But deportation is just a small part of the increased reliance on ex post screening. For the lawfully present, ex post screening is less about detecting and deporting, and more about conferring permanent residence. Much more telling is the percentage of permanent residents who arrived on immigrant visas, which reflects ex ante screening. This share declined from 66% in the two-year period 1998-1999 down to 38% in 2004.[35] The majority of permanent residents acquired that status through ex post screening in the form of adjustment of status.

The logical extension of this trend would be a system that conferred permanent resident status on noncitizens *only* by admitting them first as nonimmigrants, then using ex post screening through adjustment of status. This would resemble immigrant admissions in Germany, where noncitizens have traditionally been admitted for fixed admission periods rather than for the indefinite stay that is the hallmark of permanent residence in the United States. Noncitizens in Germany generally can acquire an indefinite residence permit like U.S. permanent residence only after they renew their residence permits for five years and satisfy other conditions.[36]

If we expand the inquiry into the screening of "immigrants" to include noncitizens who have become permanent residents, then ex post screening takes on yet another form. Permanent residents can become deportable for

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31. *See Second-Order Structure*, *supra* note 1, at 818.

32. *Id.*

33. Only in connection with immigration reform proposals does *Second-Order Structure* mention that guest workers would be allowed to acquire permanent resident status after working in the United States. *See id.* at 850.

34. *Id.* at 836.

35. *See* AMERICANS IN WAITING, *supra* note 12, at 141.

36. *See* Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) [Act to Control and Restrict Immigration and to Regulate the Residence and Integration of E.U. Citizens and Foreigners (Immigration Act)], §§ 7, 8, 9, 21, July 30, 2004, BGBl. I at 1950 (F.R.G.). *See generally* AMERICANS IN WAITING, *supra* note 12, at 140.

various reasons, of which criminal convictions are most significant numerically. But among the nearly twelve million permanent residents in the United States, only a tiny fraction became deportable.[37] For almost all permanent residents, ex post screening is a matter of naturalization. Naturalization, which *Second-Order Structure* does not discuss, shows how ex post screening means different things for different noncitizens at different times. Understanding ex post screening as a matter of deportation makes sense for undocumented immigrants, but not for lawful nonimmigrants looking ahead to adjustment of status, and even less for permanent residents looking ahead to naturalization.

B. *The Problem of Country-Specific Investments*

Now let me shift from the forms of ex post screening to its consequences. The analysis in *Second-Order Structure* rests on the premise that "immigration screening presents an information problem, and that the comparative effectiveness of ex ante and ex post screening turns in part on the solution to that problem."[38] The main advantage of ex post screening of immigrants, we are told, is that more information—both about the immigrant and about the country's needs—is available than in ex ante screening. "Indeed, because the ex post system can use information about pre-entry characteristics as well, it cannot be less accurate than the pure ex ante system."[39] This seems intuitive, but the nature of information in ex ante and ex post screening deserves a closer look.

The first question is whether deferring screening from ex ante to ex post affects how much immigrants as a group contribute. *Second-Order Structure* answers that the timing of screening can increase or decrease the value of immigration to the host country. Noncitizens who face delayed acceptance in the host country suffer a period of two-fold uncertainty. The delay might show that the immigrant is not what he seemed on arrival or that the country's needs have changed to make him less desirable.[40] As *Second-Order Structure* puts it, noncitizens who face ex post screening will hesitate to make "country-specific investments"[41] and thus decrease the immigrant pool's overall contribution. Conversely, ex ante screening "reduces the risk faced by potential immigrants

37. *See* Nancy F. Rytina, Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population and Population Eligible to Naturalize in 2004*, at 3 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/LPRest2004.pdf (reporting about 11.6 million permanent residents in November 2004).

38. *Second-Order Structure*, *supra* note 1, at 812-13.

39. *Id.* at 826.

40. *See id.*

41. *Id.* at 827-29.

that they will be deported, so that risk-averse noncitizens are more likely to enter and invest in the country than they are under the ex post system."[42]

Though this seems persuasive, the concept of country-specific investments is more complex than it may appear. Take a pair of examples featured in *Second-Order Structure*—learning English and learning Japanese.[43] Learning Japanese is a country-specific investment; its value diminishes significantly if the noncitizen leaves Japan. If Japan has ex post screening, a rational immigrant will hesitate to learn Japanese, since she may fail that screening and have to leave. If Japan has ex ante screening, she would be more likely to learn Japanese, all else being equal. Learning English is much less country-specific, so ex post screening in the United States should not deter learning English as strongly as it might deter learning Japanese in Japan. Immigrants in the United States have strong incentives to learn English even if they don't know if they can stay.

This concept of country-specific investments elucidates ex post screening, but it is essential to understand that ex post screening affects different types of individuals at different times. This part of *Second-Order Structure* overgeneralizes the effects of ex post screening on what immigrants think and do, which depends on much more than the portability of a skill. Whether the trade-offs associated with language acquisition favor ex post screening in the United States more than in Japan depends entirely on an immigrant's position on the spectrum of status and time.

The real effects of ex post screening are part of the complex process of immigrant integration. All else being equal, immigrants who face ex post screening will feel less attached to and accepted by the host country, and immigrants will feel more attached and accepted where ex ante screening is the norm. These effects have little to do with whether an investment is country-specific and are unlikely to diminish just because an immigrant successfully passes ex post screening and acquires permanent resident status or even citizenship. The probationary message that would be inherent in a decision by the United States to rely heavily on ex post screening is easily read as an enduring message of exclusion, especially in light of the long history of racial and ethnic exclusion in U.S. immigration law.[44]

Here I should explain that I use the term "screening" in the sense that *Second-Order Structure* seems to use it—to refer to a process in which decision-making control lies principally with the host country. If, in contrast, ex post screening were not screening in this sense at all, but rather a series of steps required of an immigrant but easily undertaken as a matter of her choice to acquire lawful status and later citizenship, then the exclusionary message that prompts my concern would significantly diminish or even disappear. But this

42. *Id.* at 813.

43. *See id.* at 834-35.

44. *See* AMERICANS IN WAITING, *supra* note 12, at 168-88.

approach would move the real screening to ex ante, not leave it to be applied ex post.

In contrast to the exclusionary message conveyed by heavy reliance on ex post screening, a decision to rely heavily on ex ante screening is an important positive influence as a matter of immigrant integration. This may seem counterintuitive in light of the observation in *Second-Order Structure* that racial and ethnic exclusion in earlier periods of U.S. immigration history may explain the greater use of ex ante screening in those periods. The reason, *Second-Order Structure* continues, is that ex ante screening is most effective when desirable immigrants are easily identified without more information through ex post screening. Race was a reliable proxy for an immigrant's desirability, either as a matter of outright exclusion of undesirable races, or by using race as a predictor of integration. "[A]s America became more racially and ethnically diverse, racial and ethnic homogeneity no longer served as a reliable proxy for assimilability,"[45] and "the cost advantages of the ex ante system became less significant."[46] Immigration law came to screen less ex ante and more ex post.[47]

This history might suggest that ex ante screening is no longer as effective as it once was. But it is precisely because immigrants to the United States have become a much more heterogeneous group today that it is important to give immigrants a stronger reason to integrate, or in the language of *Second-Order Structure*, to invest in their lives in the United States. Earlier periods of U.S. immigration history were marked by ex ante screening of white immigrants in an even more profound sense than lawful admission to the United States. They could acquire many of the benefits of citizenship by filing a declaration of intent to naturalize without waiting the five years generally required to acquire citizenship itself. While they had to take further steps to naturalize, this was their choice. U.S. immigration law did very little screening ex post as compared to ex ante.[48] Only by matching the welcome of immigrants communicated by ex ante screening during these earlier periods of U.S. immigration history can the immigrant selection system do everything it can to enhance immigrant integration.

Admittedly, the relationship that I describe between immigrant integration and the choice between ex ante and ex post screening varies greatly along the spectrum of status and time. For undocumented immigrants, the incentives for country-specific investments will operate largely as *Second-Order Structure* describes. Their stay in the host country is inherently precarious, and threat of deportation is strong and pervasive. With a focus on economic survival and less immediate concern about matters of deeper acceptance, the reluctant welcome

45. *Second-Order Structure*, *supra* note 1, at 839.
46. *Id.* at 840.
47. *See id.*
48. *See* AMERICANS IN WAITING, *supra* note 12, at 162-67.

signified by ex post screening will not significantly amplify the exclusionary message conveyed by the obvious fact that their very presence is illegal.

The exclusionary message inherent in ex post screening applies more to lawful nonimmigrants. And most importantly, the exclusionary message applies even more directly and profoundly to permanent residents, for whom naturalization is the next point of ex post screening. Putting them on probation, even if the chances of failure are remote, makes them less likely to integrate and perhaps even less likely to naturalize. In short, immigrant integration depends on a wider variety of factors than *Second-Order Structure* discusses. It is important not to read its reasoning to justify ex post screening in a broad range of settings. As potentially applied to lawfully present nonimmigrants through adjustment of status and to lawful permanent residents through naturalization, ex post screening deserves special caution.

C. *The Constitution, the Undocumented, and Ex Post Screening*

A third key feature of *Second-Order Structure* is its analysis of what it accurately calls a system of "deliberate underenforcement of immigration law plus periodic amnesties."[49] This system allows a half-million undocumented immigrants into the United States each year.[50] It is really a "quasi de jure" system, as *Second-Order Structure* explains by citing past and proposed amnesties that legalize the undocumented.[51] I would add that the quasi de jure label is even more apt if we consider the many ways that current law confers lawful status on the undocumented wholly apart from any amnesty.[52]

In addressing this third topic, *Second-Order Structure* is more explicit about limiting its analysis to unlawfully present noncitizens. The hypothesis in this part of *Second-Order Structure* is that U.S. immigration law favors ex post screening in the form of deliberate underenforcement because "the illegal system skirts constitutional restrictions that would reduce the advantages of a legal program."[53] The reasoning is that noncitizens who are unlawfully in the United States have fewer constitutional rights than noncitizens who have been lawfully admitted but only temporarily or conditionally.

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49. *Second-Order Structure*, *supra* note 1, at 813; *see also id.* at 845-47 (discussing deliberate underenforcement).

50. *See* Michael Hoefer et al., Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, at 1 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf ("During the 2000-2004 period, the unauthorized resident population grew at an annual average of 408,000.").

51. *Second-Order Structure*, *supra* note 1, at 847-48.

52. *See* David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, POLICY BRIEF (Migration Policy Inst., Washington, D.C.), June 2005, *available at* http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf.

53. *Second-Order Structure*, *supra* note 1, at 813-14; *see also id.* at 843-44.

In fact, constitutional considerations provide only a limited and partial explanation for underenforcement. The added constitutional protection that a noncitizen in the United States enjoys because she is here lawfully rather than unlawfully depends partly on the type of constitutional claim asserted. One possibility is what are typically called "substantive" constitutional challenges—for example, based on equal protection or the First Amendment—to the immigration law categories that define admission and removal. Under the plenary power doctrine, however, courts are very reluctant to hear constitutional challenges to such categories,[54] no matter whether noncitizens are in the United States unlawfully or as lawful guest workers.

Suppose noncitizens assert a procedural due process challenge instead. Ample precedent suggests that noncitizens on U.S. territory have procedural due process rights even if their presence is unlawful.[55] This suggests that the government loses little or nothing if undocumented immigrants come as lawful nonimmigrants instead. One might try to counter—as *Second-Order Structure* observes—that noncitizens, even on U.S. territory, can assert a procedural due process claim only if their presence is lawful.[56] But even if this is true, any greater procedural due process rights that a noncitizen gains from lawful nonimmigrant status would not matter without a substantive right to be protected by the constitutionally required procedure. The government could still accomplish removal with fuller procedures as long as the nonimmigrant overstays the period of admission or otherwise violates the conditions of admission.

Once we move on the spectrum of status and time beyond the unlawful/lawful line to the line between lawful nonimmigrants and permanent residents, then constitutional considerations may deter the government from enhancing the noncitizen's immigration law status by conferring permanent residence on a lawful nonimmigrant. But this, by hypothesis, does not explain a de facto (or quasi de jure) system of *unlawful* immigration.

In fact, deliberate underenforcement is more a product of political considerations than constitutional ones. Underenforcement of immigration law is the path of least political resistance. Facing irreconcilable tensions between politically visible responses and the underlying urgent need for immigrant labor in many sectors of the economy, decision-makers can defer tough choices and avoid political confrontation.[57]

Even if *Second-Order Structure* overstates the role of constitutional law, however, it is quite correct in observing that the "illegal immigration

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54. *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

55. *See* Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407 (2002) (discussing Zadvydas v. Davis, 533 U.S. 678 (2001)).

56. *Second-Order Structure*, *supra* note 1, at 823 n.64.

57. *See generally* AMERICANS IN WAITING, *supra* note 12, at 176-80.

system . . . can be seen as a de facto ex post screening system operated under the guise of an ex ante system."[58] Although I would have thought that the underenforcement of immigration law is pervasive and obvious and therefore not "obscured,"[59] the persistent invocation of illegality as a trump card in political debates and the popular media leads me to agree that the formal structure of law largely obscures the illegal immigration system in the public eye. In this zone of underenforced law, government officials make many discretionary immigration law decisions that add up to ex post screening. *Second-Order Structure* makes a real contribution by analyzing underenforcement in these terms, and by showing that ex post screening, as the corollary of underenforcement, is more understandable for undocumented immigrants than for lawful nonimmigrants or permanent residents.

II. FRAMES OF REFERENCE

What connects this Essay's discussions of these three features of *Second-Order Structure*—its focus on deportability as the mechanism for ex post screening, its concept of country-specific investments, and its analysis of underenforcement of immigration laws? The key common element is that all three discussions introduce the complexities of status and time into the analysis of the choice between ex ante and ex post screening of immigrants. A wide array of individuals who are "immigrants" in some sense cover a broad spectrum of status, from the undocumented to naturalized citizens. These immigrants can and often do move from one status to another with the passage of time. In turn, these complexities of status and time show that the frame of reference that we use to evaluate law and policy will matter a great deal.

The spectrum of status and time covers a range of immigration law decisions from who will be a lawful immigrant to who will become a citizen. The spectrum also covers noncitizens who are here both unlawfully and lawfully. Combining these ways of viewing the spectrum, two frames of reference emerge. The first would focus on the early stages of immigration and thus the transition from unlawful to lawful status. An alternative frame of reference would focus on the later stages of immigration—with adjustment of status as the key decision point—and then to the transition to citizenship through naturalization.

The three key features of *Second-Order Structure* discussed in Part I of this Essay show that its frame of reference tends decidedly toward choosing immigrants and their transition from unlawful to lawful status, and not toward the later stages of immigration and the making of citizens. Given this frame, it is perfectly logical to focus on deportation in defining ex post screening, omitting adjustment of status. Deportation addresses the choosing of

58. *Second-Order Structure*, *supra* note 1, at 845.

59. *Id.*

immigrants. Adjustment of status—though also part of the choosing of immigrants—looks forward to the making of citizens. Similarly, the analysis of country-specific investments in *Second-Order Structure* captures the trade-offs for ex post screening of undocumented immigrants, but omits the complex, potentially negative consequences of ex post screening of lawful nonimmigrants as they become permanent residents and then citizens. Thirdly, the analysis of deliberate underenforcement of immigration laws in *Second-Order Structure* focuses—much more explicitly than do its analyses of ex post screening or country-specific investments—on ex post screening of undocumented immigrants. All three applications of this orientation toward choosing immigrants are consistent with language in *Second-Order Structure* that stops short of concern for the transition to citizenship while articulating the goal to "draw an analogy between the immigration system and the screening process by which employers choose employees."[60]

Ultimately, the frame of reference question may not be susceptible to a convincing argument that either an immigrants frame or a citizens frame is inherently superior in the sense that one has universal application and should always displace the other. It is essential, however, to sound a cautionary note by identifying the significant limits on the choosing-immigrants frame of reference in *Second-Order Structure*. This caution is vital because its rhetoric is sweeping enough to suggest broad application to immigration law as a whole.

The lessons in *Second-Order Structure* about ex post screening apply cogently to undocumented immigrants, for whom the main question is whether they acquire lawful status. For them, the immigration frame of reference suggests quite sensibly that ex post screening is a matter of deportation, that the adoption of ex post screening should depend on trade-offs between more information and hesitation to make country-specific investments, and that ex post screening brings the further political advantages of a de facto illegal immigration system.

Thinking about immigration law and policy as a matter of choosing immigrants thus has an important sphere of application, but it is crucial to understand that this sphere is limited. The 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. For them, the question with the most consequences is whether they progress toward citizenship, so for them it is important to adopt a citizenship frame.

Modern European experience provides a cautionary tale about adopting an immigration rather than a citizenship frame when dealing with noncitizens who come lawfully and whose natural concern is the transition to permanent residence and in turn to citizenship. The industrialized European countries recruited foreign workers in the 1960s and 1970s as if they were employers picking employees. The incomplete integration of these immigrant

60. *Id.* at 856; *see also id.* at 833.

communities into their adopted countries has been a social problem of very troubling dimensions. As Swiss writer Max Frisch put it: "We asked for workers, but people came."[61] In fortunate contrast, the principal legislative proposals in the United States for the legalization of undocumented immigrants include a "path to citizenship."[62] This reflects an important understanding of the dangers of choosing immigrants without making citizens. Though it makes sense initially to approach undocumented immigration as a matter of choosing immigrants, it would be a mistake to adopt it as an overall frame of reference for immigration law.

CONCLUSION

Second-Order Structure calls welcome attention to the need to think systematically about different types of immigration law choices, and it offers an illuminating structure for understanding and making those choices. It also prompts further inquiry. Engagement with its assumptions and its limitations sheds light on the frames of reference that might inform and define immigration law. The main point of this Essay has been to place *Second-Order Structure* into this larger context, in order to show how its analysis applies differently to different types of immigrants on the spectrum of status and time from undocumented immigrants to naturalized citizens. Ultimately, as this Essay has explained, the law of immigration is part of the law of citizenship.

61. MAX FRISCH, Überfremdung I, *in* SCHWEIZ ALS HEIMAT? 219, 219 (Walter Obschlager ed., 1990) (translation by author). *See generally* CHRISTIAN JOPPKE, IMMIGRATION AND THE NATION-STATE: THE UNITED STATES, GERMANY, AND GREAT BRITAIN 62-99 (1999).

62. *See, e.g.*, Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., tit. IV, § 408(h) (passed by the Senate on May 25, 2006); Rachel L. Swarns, *Bipartisan Group Drafting Bill for a Simpler Path to Citizenship*, N.Y. TIMES, Dec. 26, 2006, at A1. *See generally* Daniel Swanwick, *A House-Senate Standoff over Immigration Reform*, 20 GEO. IMMIGR. L.J. 713 (2006).