The U.S. Immigration Experience: Entering the Third Phase

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Thomas Friedman in his new best selling book has suggested that "the world is flat." By this he means that globalization is both shrinking the world and flattening the playing field, with a "newfound power for individuals to collaborate and compete globally." Computer software and a global fiber optic network, he says, "[have] made us all next-door neighbors." For Friedman, we have become virtual next-door neighbors. I would suggest that modern trends in migration have made us all next-door neighbors in a very real physical sense as well. We live in neighborhoods, but those neighborhoods are increasingly places through which the world passes and many stop to settle.

For the United States this is an old story. Immigration is at the demographic core of the U.S. It is also part of the nation's self-definition. I have taught immigration law for many years in American law schools, and I begin the class each year by asking students to write their personal immigration histories. Every year I am fascinated by the results. Inevitably, some student reports ancestors who came to the United States hundreds of years ago; others are children of immigrants. Some came as refugees. Last year, a student stated that she was the child of undocumented immigrants. Many students report multiple nationalities and most are a mix of several ethnicities: Irish and Italian; Russian and Polish; Vietnamese and American. A few students are unable to trace their histories. Their ancestors have been in the U.S. for generations and they have lost the countries of origin other than some vague sense of "European."

In some ways, these stories represent the uniqueness of the United States— although it seems to me that increasingly students in schools in many nations would tell these kinds of stories. Most nations today experience migration in dramatic new ways. In our flattened world, people are on the move.

These developments have, necessarily, produced new forms of migration regulation. I want to spend a few minutes contrasting the old with the new, paying particular attention to the U.S. immigration story.

Let me start with the old world: what I will call the "classical age" born in the Peace of Westphalia and reaching its apex perhaps in the late 19th century. This was a world inhabited by states seen as sovereign within their borders, independent and equal. (Of course, this model of international relations applied only to so-called "civilized states"—and co-existed with a wide-ranging and frequently brutal colonialism.) In this world, citizens were subordinated to their states; they had no independent existence beyond their borders or in relation to other states. States entered into treaties with one another regulating migration flows and the treatment of their nationals in the territory of the other state. Borders defended territory; and documents were created to regulate border crossing. Immigrants were "guests," not members, of the societies in which they

relocated. Immigration policy was frequently crafted in ethnic terms, basing entry and membership decisions on race or ethnic background.

Immigration control in this world meant the fashioning of a border police, the establishment of passport and visa requirements, the imposition of numerical limits on migration or the closing of the border to defined categories of unacceptable migrants. The structure of citizenship remained mono-polar—the prevailing idea, necessary to the effective ordering of the international regime of states, was that everyone should have one and only one nationality. In the United States, this is the age of the laws and policies excluding Chinese and Japanese laborers, the imposition of national quotas, the opening of Ellis Island, and the development of rudimentary legal procedures for the removal of unauthorized migrants.

In the mid to late 20th century, the classical model began to give way. The idea of hermetically sealed states had proven chimerical. Millions of refugees had called for new responses, and the post-WWII commitments to human rights produced scrutiny of state policies that treated migrants less well than citizens. Migration policy became more functional, looking at immigrants as economic units rather than carriers of certain ethnicities, religions or cultures. In Europe, the creation of an economic union eventually produced free movement of labor for nationals of the member states. Migrants began to be recognized as having agency, not simply being "owned" by their states. Across all systems, asylum for persecuted persons became a commitment and then a problem, as migrants sought to use generous asylum procedures as a way to gain access to states that had begun to regulate labor migration. While some politicians continued to talk about "controlling migration" and the harm of "irregular migrants," it was widely understood that migration is a process that must be *managed*—for the benefit of both states and migrants.

A system dedicated to *management* rather than *control* requires new institutions and structures. Management means more than creating effective police; it means establishing effective *policy*. It means, rather than unilateral enforcement of the border, the fostering of bilateral and multilateral cooperation. In this newer world, migrants are not viewed simply as guests; rather they are understood as family members, needed workers and citizens-in-training. So capacity building means establishing structures for immigrant integration and the transition to citizenship.

In the United States, this shift in regulation strategy is reflected in the abandonment of the National Origin Quota system in 1965 and the institution of policies under which migration to the U.S. is based primarily on family ties and employment opportunities. The modern INS takes shape in the Department of Justice, and procedures are formalized by policymakers and the courts. Ratification of the Geneva Convention on the status of refugees in 1967, passage of the Refugee Act of 1980, and the professionalization of asylum adjudicators in the 1990s demonstrates the maturation of U.S. asylum procedures. The Bracero program of the 1950s and 1960s brings millions of temporary workers to the US—a flow that continues in undocumented form after the termination of the program. And citizenship law evolves to recognize certain forms of

dual nationality. To be sure, this formalization of legal flows and the rise of undocumented flows produces a backlash—with demands for greater border control, tough interior measures against asylum seekers and unauthorized workers, and denial of access of immigrants to the welfare state. But these calls for a return to the earlier paradigm are just an echo: both lawful and unlawful immigration reach unprecedented levels in the late 20th century.

In Europe and elsewhere, this period is the time of increased concern about irregular migration, the overburdening of the asylum process, and the multicultural implications of large migrant flows. Strategies of management are constructed—more border police, new visa restrictions, tighter asylum policies, reductions in welfare state protections—at the same time that legal procedures and supranational human rights norms are established that seek to protect immigrants and their families. My point here is not that our current age is pro-immigrant or anti-immigrant; it is rather that states view migration as a phenomenon to be *managed* and have constructed policies and institutions to further that management.

To note the management paradigm is not to say that it has been successfully implemented. Effective management requires a clarity of purpose and goals that has never been attained in the immigration policy world. It may also require a commitment to enforcement that is either too expensive or too intrusive into the lives of residents that we forgo the benefits because of the costs. In the United States, we have "managed" much of the migrant flow: rules on work visas are detailed and complicated, requiring the efforts of 3 (perhaps 4, depending on how you count) federal agencies; huge numbers of persons receive "green cards" each year and establish lawful permanent residency; the asylum system has been effectively reformed and the number of frivolous claims has dropped precipitously. But at the same time the flow of undocumented workers (predominantly Mexican) has continued unabated, and the federal government virtually stopped enforcing sanctions on employers who hire unauthorized workers in the late 1990s. One could call this, I suppose, management by intentional neglect—a state of affairs that benefits the workers, the employers and ultimately American consumers. Or perhaps it is the harbinger of another phase of migration toward which we are advancing.

These first two phases of immigration regulation are based on what might be termed a *linear* analysis: Migrants leave their countries of origin, seek entry to a new country, are inspected at the border (or avoid inspection by entering illegally), take up life and attain settled residence, sometimes attain citizenship and frequently have children who are citizens at birth. The linear model rests on a goal or assumption of *assimilation*—a result that occurs, if not with the first generation, then usually by the second or third.

And yet even as I describe this process, you are probably thinking that it doesn't quite define the world of migration that you know. In the complicated world of today, one that might appropriately be described as postmodern or postnational, things are rarely linear. We might better think of our 21st century world as a network, a set of interrelations, a web, where actions taken in one part of this interconnected system have

ripple effects elsewhere; where countries can no longer be described as sending or receiving countries but are simultaneously both; where circular flows of migrants are more typical than the old model of move, settle, and assimilate; where dual nationality is increasingly common; where families exist not just in one neighborhood but in several different countries around the web. In this model, states do not "control borders"; rather they govern parts of the web. And NGOs, both domestic and international, help migrants navigate the networks. As states become more multicultural and grant immigrants more rights, the line between citizen and immigrant becomes fuzzier.

There is a dark side as well. Networks of criminals, traffickers, smugglers and terrorists operate beyond states and therefore without respect to borders. So too diseases once seen as a local problem now have immediate global implications—much as a virus on one computer can infect computers around the world.

This networked world—Freidman's "flattened world"—exists both physically and virtually. Information (and misinformation) travels instantly through the system. Families maintain relations by cell phones and email as much as by cohabitation and travel. Technology aids both the unauthorized immigrants (as smugglers and traffickers communicate more easily with migrants) and states (whose police share information across borders and who develop cards with biometric identifiers).

From this perspective, states do not *manage* migration in the sense of saying which persons should be permitted to enter and to settle and which shall be sent home. States *facilitate* and *impede* migration, and sometimes they do both. States are a site upon which migration happens.

If the watchwords of the two earlier phases are *control* and *management*, the watchword in our newer world is *coordination*. The creation of cross-cutting connections and interrelationships loosens hierarchy. States become one of many actors constructing and moving within the network. Effective policy implementation thus requires coordination of efforts.

For U.S. policy, this new world presents a challenge. The United States has traditionally seen itself as a place of destination (even if large numbers of immigrants in fact returned to their countries of origin). Now it must understand its role in the network. Let me tell that story by focusing on elements necessary to an effective system of immigration regulation.

Those elements are fairly straightforward.

The first prerequisite is the development of clear and coherent policy objectives, and those objectives must be realistically based on a proper understanding of the phenomenon of migration. It is sometimes said that the policies of facilitation and enforcement are in conflict, but I think this is mistaken. To use a phrase that has been employed in the United States for some time, the goal is *a border that works.* This means a set of policies that admits lawful immigrants and deters the entry of unlawful migrants.

Of course, this presupposes that a state has developed a coherent account of which immigrants should be able to enter and reside and which should not. In this world, it would be unreasonable to have an objective of stopping every would-be unlawful entrant. Because of the high degree of cross-border flows and the crossing-cutting purposes that states seek through their immigration policies, states should set a realistic goal of the degree of border control that is tolerable and acceptable to its population.

An incoherent set of policy objectives has serious consequences for the rest of the immigration system. It sends mixed messages to migrants as well as state officials, producing suboptimal decisions by migrants and low morale among those charged with implementing policy. So a state cannot announce that it is restricting labor immigration but maintain an asylum process that permits workers to file frivolous claims that take years to adjudicate. Nor can a state welcome migrants as permanent residents but at the same time tolerate racial and ethnic discrimination against them or deny them access to the social safety net. These kinds of incoherencies will significantly undermine the effectiveness of any system of regulation.

Finally, given today's increasingly interconnected world, states will not achieve their objectives if they set their immigration policies unilaterally. A networked world, as I have said, requires cooperation and coordination among states, as well as an active role for civil society organizations and NGOs whose reach now is increasingly transnational.

In the United States, current legislative proposals are pushing towards greater policy coherence. Several significant pieces of legislation would establish a large-scale temporary worker program and a legalization program for undocumented workers already in the U.S. The proposals respond to the facts on the ground in an appropriate way, recognizing, in effect, the existence of a continental labor market.

Another example is the manner in which the U.S. asylum system was reformed in the mid-1990s. Before then, the U.S. witnessed a huge increase in asylum claims and a resulting large backlog. Applicants in the backlog were routinely given work authorization. The combination of these factors virtually guaranteed the filing of frivolous claims, which only further backlogged the system. The fix was to increase the number of adjudicators, deny work authorization for six months, and to ensure that cases were adjudicated in that time. Today, the number of claims is down, the backlog has been reduced, and the percentage of approvals has risen. I should note that these reforms were developed with detailed consultation with national and international NGOs.

A major challenge facing the U.S., however, remains the location of immigration functions. Following the events of September 11, 2001, the INS was disbanded and its functions were transferred to the new Department of Homeland Security. Buried in this new Department whose major duty is fighting terrorism, the development of immigration policy has suffered. Secretary Chertoff has announced plans to elevate policy making in the Department, but a better solution would be the establishment of a new Department of Immigration, Refugees, and Citizenship.

Effective immigration regulation requires a well-trained corps of immigration officers. Immigration authorities are more than police. They inevitably enforce a complicated law that can impose severe consequences on persons who generally have a poor understanding of the legal system in which they are located. In the U.S., the government has developed a trained corps of asylum officers, upgraded the training and status of immigration judges, and combined customs and immigration functions at the border—backed by significant new training. Border patrol officers remain overwhelmed, however. There are simply too few to effectively control a 2000 mile southern border, given the demand for entry from hundreds of thousands of Mexican workers and family members.

We live in a world with technology that few of us could have imagined a generation ago. So here is the third element of effective regulation: sophisticated use of technology to both facilitate entry and prevent unlawful entry and to screen entrants on security grounds. The United States has taken steps along these lines, sometimes to the irritation of other nations—for example, the requirement of machine readable passports. The effort to construct an automated entry/exit system remains rudimentary, as does the creation of immigration documents with biometric identifiers. But it is clearly the way of the future. There is simply no other way in which the twin goals of facilitation and control can be accomplished.

A fourth element is the establishment of norms of due process and the rule of law. The U.S. immigration system tells a mixed story here. The American legal system generally permits access to courts to challenge actions of governmental officials alleged to be outside the law and arbitrary. But these norms have not quite applied in full in the immigration context, where courts have largely deferred to the actions of the other branches of government. Congress adopted legislation in the 1990s restricting judicial review of the removal of criminal aliens; and the response to September 11th brought lengthy and unchecked detention of noncitizens suspected of links to terrorist groups. The hesitancy of courts to supervise immigration authorities under domestic law has led to increased attention to emerging international norm protecting international human rights. Here is another significant implication of our networked world—the recognition that migrants are not merely factors of production; they are people and they are entitled to the protection of their human rights in whatever state they find themselves.

Finally, it is worthwhile to take note of citizenship policy. A state's ability to come to grips with modern migration is in part a function of how it designates membership. In this respect, I believe, United States policy is exemplary. The United States has a broad policy of birthright citizenship, even for the children of undocumented migrants. Because of this, there are no "second generation" immigrants in the U.S. All children born in the country are entitled to all the rights enjoyed by all other citizens. This citizenship policy is a powerful tool for integration. It is not surprising that other states—most notably Germany—have in recent years moved toward broader birthright citizenship policies.

For each of these elements, it is important to think through how cooperation with other states might advance effective management. Clearly the actions of one state may have important implications for others: we have all seen how more or less generous asylum policies can dramatically influence flows of asylum seekers, how the requirement for visas and visa waiver policies can affect relations between states, how effective action against traffickers requires the coordinated efforts of states.

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I began by noting the change that migration is bringing to our neighborhoods. Some find that these changes disturbing, even frightening. But the American experience, it seems to me, clearly shows that immigration—even immigration on a large scale—can be a stimulus for development, for growth, for cultural enrichment and for progress. The major cities of the United States—New York, Chicago, Houston, Miami, Boston—have been made and remade by successive waves of immigrants. These transitions have not always been smooth, but they have in the end kept the nation vibrant.

Virtually all states are now connected in a world migration network. Effective maintenance of that network will require collaborative efforts among nations. And those efforts must begin with the idea that has been fundamental in the United States since its founding: that immigration is a natural and healthy world process, with positive results for states that manage it wisely.