The Issue of Mexican Immigration: Where Do We Go From Here?

Nicholas R. Montorio
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INTRODUCTION

This note will examine the issue of Mexican immigration into the U.S. from three different perspectives: historical, economical, and political. Analyzing this issue from these three perspectives will illustrate its multifaceted nature and each perspective is critical to understanding the delicacy of the Mexican immigration debate. Regardless of the standpoint from which one attacks this issue, the pivotal question remains: With a recent influx of Mexican immigrants into the United States, where do we go from here?

There are extremists on every side of this issue. Some believe the U.S. must literally close her borders, through the use of a wall to keep out Mexican immigrants who are damaging the country, while others advocate that such immigrants are an essential component of the country’s history and future. California provides a prime example of how both sides of the immigration coin

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1 Although each of the three analyses will explore how legal and illegal immigration affect the nation and specifically California, much of the discussion should be understood as one about Mexican immigration in a general sense. By the end of this note, it should be clear that with a mere tinkering of US Immigration Law (i.e., amnesty) an illegal immigrant today may very well be legal immigrant tomorrow. Therefore, the distinction between these two types of immigrants serves more as a reference point rather than a permanent mark of demarcation. To focus primarily on what is or is not legal immigration would detract from the larger issue of how Mexican immigration affects the U.S., regardless of what label given to the individuals involved.


exist simultaneously, particularly with regard to illegal immigration. As the U.S. considers the answer to that fundamental question, it is left with the unsettling feeling that both of these extremist positions have some merit, so any proposed resolutions appear untenable.

Each perspective presents unique dichotomies that cannot be answered without balancing complex nuances and various factors against each other; however, when it comes time for a final vote in Congress, the answer to the question above is reduced to its simplest form: one is either “pro”-immigration or “anti”-immigration. Historically, there is no doubt that immigrants have played a significant role in the development of the U.S., but does that mean that the country is required to alter its course to accommodate an endless stream of immigrants? Economically, California elicits many advantages from having a vast, cheap labor force of illegal immigrants, but when do the costs outweigh those benefits?\(^4\) Politically, Congress has periodically worked toward legislative reform to address specific immigration problems, but would even comprehensive legislation fix current immigration problems, and if so, for how long?\(^5\) Although few matters are easily resolved when it comes to the issue of immigration, it is clear that the stakes are high, and a miscalculation by Congress or the American people could lead to disaster.\(^6\)

Over the years, Congress has vacillated between a pro-immigration stance and an anti-immigration stance.\(^7\) The image of a swinging pendulum is apt: no matter how far the pendulum swings to one side based on changes in circumstances, it always comes back to the other side in time to further immigration goals.\(^8\) America has presented itself to foreigners as Emma

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\(^4\) In discussing the effect illegal Mexican immigration in California, the divide of opinions on this matter embodies the concept of how the immigration debate is shaped by extremists. For an “anti”-immigration opinion, See Richard Lamm, I Have A Plan to Destroy America (2005), available at http://www.snopes.com/politics/soapbox/lamm.asp (last modified June 16, 2005); (For a contrary “pro”-immigration understanding of this issue, see “DAY WITHOUT A MEXICAN,” (HBO April 2007).

\(^5\) See generally, Carrasco, supra note 3 (detailing how there are periodic shifts in the US Immigration law depending on the economic needs of the country).

\(^6\) In a post-9/11 world, border security and national unity are concerns which cannot be underestimated; both of which are intimately connected with immigration policy. For a perspective on how grave the future of the U.S. could be without comprehensive immigration reform, see Lamm, supra note 4.

\(^7\) See Carrasco, supra note 3, at 318.

\(^8\) See Thomas Alexander Aleinikoff, Immigration and Citizenship 146-166 (West Publishing 2003) (explaining that despite significant changes in immigration law, the two primary purposes behind immigration laws have remained constant: (1) protect the native worker from foreign competition, and (2) prevent drastic changes in society’s racial composition.).
Lazarus’s words proclaim: indiscriminately and with open arms to all.9 However, when the immigrants were colored or non-Protestant, or if the country was experiencing a labor surplus, America’s portrayal of itself as a welcoming host proved to be more fictional than factual.10 Throughout the history of the U.S., Congress has enacted various pieces of isolationist legislation by restricting immigration to certain ethnic groups,11 deporting immigrants who had legally established themselves in America,12 and by imprisoning Asian immigrants during the period of the Chinese Exclusion Laws.13

I. HISTORICAL PERSPECTIVE: A CHANGE FROM ASSIMILATION TO BALKANIZATION

A. The Modern Mexican: A Distinctive Immigration Experience

Proximity

The proximity between Mexico and the U.S. may provide one explanation for the difference between the modern Mexican immigrant’s experience and those of European and Asian immigrants.14 The geographical closeness between Mexico and the U.S is obvious, but worth mentioning, because of the effect that proximity has on tangential immigration issues, such as assimilation. As compared to their European and Asian counterparts, Mexican immigrants can venture to and from the U.S. every few months with

9 See Maurice Waters, Social Trust and Foreign Policy: Immigration and Law Enforcement Issues (1999) (the concluding words Emma Lazarus’ words, which are inscribed into the Statue of Liberty, as follows: “Give me your tired, your poor/ Your huddled masses yearning to breathe free,/The wretched refuse of your teeming shore./Send these, the homeless, tempest-tost to me,/ I lift my lamp beside the golden door.”), available at http://immigration.about.com/library/blStateGovOpFo.htm
11 See Waters, supra note 9 (explaining that although ultimately unsuccessful, there was a Popenoe eugenics movement in 1924 to limit certain races from immigrating to the US because they were deemed inferior in character and intellect.)
12 See Carrasco, supra note 3, at 317.
14 See SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 221-256 (Simon and Schuster Paperbacks 2004).
When an immigrant comes to the U.S. from a more distant country (i.e., the Philippines, Poland, Armenia), he or she is “barricaded in his new homeland by thousands of miles of ocean, with little hope of returning to the Old Country every few months, and thus [has] to deal with Americans.” Conversely Mexican immigrants can drive or even walk back to their native country, which removes a sense of finality from the decision to come to the U.S.

The geographical relationship between the U.S. and Mexico creates a unique entrance point for the modern Mexican immigrant, as compared to immigrants in the early 1900's. Whether Mexicans enter legally or illegally, there is no stop at Ellis Island or a view of the Statue of Liberty for them; instead, many enter illegally by foot or by car across various points of the desert land shared by the U.S. and Mexico. The U.S. is now “confronted by a massive influx of people from a poor, contiguous country with more than one third the population of the United States, who come across a two-thousand-mile border marked historically simply by a line in the ground and a shallow river.”

There is another important distinction between today’s Mexican immigrant and immigrants of earlier generations: the greeting. While Europeans, for example, were greeted by Emma Lazarus’s welcoming words in the early 1900's, Professor Victor Davis Hanson quips that the modern Mexican immigrant is welcomed into the country under some unspoken conditions:

Beware all you who enter. Here are the rules: You are welcome to work hard between twenty and forty. But then please retire at fifty and return home. Stay young, healthy, single, sterile and lawful - and we want you; get old or injured, marry, procreate or break the law – and we don’t.

15 Id.
16 Victor Davis Hanson, Mexifornia: A State of Becoming 21 (Encounter Books 2004).
17 Id. at 21-22 (explaining that this is a problem because the “umbilical cord” which attaches the Mexican native to Mexico is never cut.).
18 See Ann Novotny, Strangers at the Door: Ellis Island, Castle Garden, and the Great Migration to America 10-23 (Chatham Press 1971) (explaining the experience an average immigrant had in registering at Ellis Island after weeks on an immigrant ship).
20 Huntington, supra note 14, at 222
21 Id.
22 Hanson, supra note 16, at 55.
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As long as the Mexican immigrant’s presence appears to be a societal benefit, he or she will be welcomed; yet, once the economical and social costs are balanced against those benefits, suddenly the Mexican immigrant must be discarded.23

The proximity between the U.S. and Mexico only provides a partial explanation as to why Mexican immigrants pour into the U.S. by the hundreds of thousands each year.24 If it were the only reason, then logically there would also be hundreds of thousands of Canadians attempting to cross into the U.S. at its northern border. The fact that no such immigration issue exists with Canadian immigration indicates that it is not merely convenience and proximity that leads Mexicans to leave their native land for the U.S.; there is also a widespread desire for a better life.25

Mexico City

With the hope of a better life, or a chance to achieve the so-called “American Dream,” many Mexicans want to leave their native country.26 The impetus for many Mexicans to leave their native land for the U.S. has to do with economics. Mexico is one of the poorest countries in the world and it shares a border with one of the wealthiest.27 While the U.S. continues to remain a prosperous nation, Mexico’s economy continues to falter. The average wage in Mexico has not increased since 1993, and many Mexican citizens are underemployed or unemployed.28 The U.S. is the only First World country that shares a border with a Third World country, which stretches for two thousand miles.29 The combination of the economic opportunities presented by the U.S. with its close proximity is enough to lead hundreds of thousands of Mexicans to cross the border each year.30

For every indigent Mexican citizen who travels to the U.S. in search of a better life, a Mexican elite gains political strength from his or her departure.31

23 See Carrasco, supra note 3, at 313-14.
24 See 2001 INS Statistical Yearbook, Table 3 Immigrants Admitted from Top Twenty Countries of Birth Fiscal Years 1999-2001, 2001 INS YB. (illustrating that immigrants from Mexico led all other countries over the three year period with an average annual admittance of 175,972; India, second on the list India, averaged 47,524 over the same period).
25 See Hanson, supra note 16, at 26-31.
26 Id.
27 See Huntington, supra note 14, at 222-225.
28 See Buchanan, supra note 2.
29 See Huntington, supra note 14, at 222.
31 See Hanson, supra note 16, at 26-31; see also, ALEJANDRO PORTES, IMMIGRANT AMERICA: A PORTRAIT 7-23, 34-35, 48. (2d ed. 1996) (explaining that although the majority of those who leave
Instead of preventing the mass exodus of its citizenry, the Mexican government provides safety tips in a "how-to guide" for crossing the border illegally. This position by the Mexican federal government has been widely criticized because it ultimately leads to burdens the U.S. must bear: One critic points out that "Mexico's policy for a half-century has been the deliberate and illegal export of millions of its poorest citizens to the United States, which is expected to educate, employ, and protect them in ways not possible at home." The Mexican government is accused of encouraging its citizens to migrate north because the same citizens leaving the country are the same who would demand political reform; therefore, the status quo is more likely to remain in place. America represents more than the "American Dream" to Mexicans living in areas that lack regular electricity and running water; instead, America is their only hope of changing the living conditions for their families.

The opportunities presented by immigration to the U.S. are so alluring that many are willing to risk their lives in the process. In May 2003, 70 immigrants from Mexico, Central America, and the Dominican Republic packed themselves into a tractor trailer with the hopes of getting a ride to Houston, Texas. Nineteen of those passengers died from dehydration, overheating, and suffocation. The State prosecuted the driver, Tyrone Williams, for his role in the nation's deadliest human smuggling attempt. On
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January 18th 2007, Williams was found guilty and received a life sentence for each of the passengers who died in his tractor.40

The struggling economy is not the only motivation for native Mexicans to leave their country. They also live in a country where corruption and crime are a part of life.41 In 1996, Mexico’s lead drug enforcement officer, General Jesus Gutierrez Rebollo, was arrested for supporting drug traffickers.42 This occurred at the apex of the Clinton administration’s proclamations regarding the success of its efforts to curb Mexican corruption with regard to drug trafficking.43 A more recent example of corruption within Mexican law enforcement occurred in 2006 when the Mexican government began investigating the crime epidemic plaguing Tijuana. The investigation uncovered evidence that local police officers aided criminals with the transportation of drugs as well as with conducting other illegal activities.44 In Mexico, those responsible for deterring crime may very well be participating in it.45

Mexicans view the U.S. as a country that preserves a vibrant middle class, a democratic form of government, personal rights, and much more. In other words, “America as antithetical to their homeland, and thus their last and only hope.”46

40 Id.
41 See Dr. Ilya Adler, El Que No Tansa... (2001) (explaining that two different organizations have found high levels of corruption in Mexico. International transparency ranked Mexico 59th out of 90 countries it analyzed for corruption. The other organization, Price Water House Coopers, awarded scores to countries for how much corruption discovered where a score of zero represented the lowest level of corruption; this group determined Mexico to have a score of 48 out 150.), available at http://www.mexconnect.com/mex_travel/bzm/bzmaldler31.html.
43 Id.
44 See Fox News Special Report, (Fox Television Broadcast, Jan. 11 2007) (reporting that the Mexican Federal government ordered the police to turn in their weapons during the investigation due to uncovered incriminating evidence.).
45 For an reason as to why the Mexican government has not come under more pressure from its citizenry, see Hanson, supra note 34, (explaining that the only way corrupt Mexican government has avoided revolutions because their indigent travel to the U.S. instead of “marching en masse on Mexico City.”)
46 Hanson, supra note 16, at 79.
B. An Account of Mexican Immigration into the U.S.

During the early 1800's, the U.S. government was fascinated by the idea of expanding America's territory from "sea to shining sea." Under the policy of Manifest Destiny, and later the Monroe Doctrine, no obstacle proved too difficult in turning the idea of expansion into a reality. In 1848, Mexico ceded California to the US under the Treaty of Guadalupe-Hidalgo. As a result, millions of Native American Indians and thousands of Mexicans were suddenly foreigners in a land they previously considered home. Beyond a change in title, the Southwest did not change much in terms of its populous. Just one year after the Treaty, Anglo gold-miners invited local Mexican laborers now considered aliens under U.S. immigration law into their communities to meet their expanding need for workers during the California Gold Rush of 1849.

The Gold Rush of 1849 is the first of many instances in American history that demonstrates how the U.S. has treated Mexican immigrants based directly on its economic needs at the time. Law professor and author Gilbert Paul Carrasco pinpoints the source of U.S. immigration law to the American labor supply: during labor shortages, immigrant workers have been enthusiastically welcomed, but during labor surpluses, they have been subjected to "xenophobic bigotry" and forced out of the country. He explains: "Mexican laborers have . . . become the United States' disposable workforce, brought in when needed, only to fulfill their use and be unceremoniously discarded, a trend that has been recurring for over 150 years." During the Gold Rush, there was a labor shortage which created a need for foreign laborers to fill that void; however, when job opportunities diminished as a result of the Panic of 1873 and the depression of 1877, an extreme anti-alien fervor spread throughout the country. A return to the image of the swinging pendulum is appropriate: depending on America's economic needs at the time, the U.S. can either be a bright beacon of opportunity for foreigners, or it can play the role of a disgruntled, unappreciative neighbor.

47 See generally, Zinn, supra note 10, at Chapter 12 The Empire and the People; for a reproduction of Katherine Lee Bates' America The Beautiful, see http://www.llerrah.com/america.htm
48 Id.
49 See Carrasco, supra note 3, at 311.
50 See Huntington, supra note 14, at 229-230.
51 See Carrasco, supra note 3, at 311-12.
52 Id at 310.
53 Id. at 311.
54 See Aleinikoff, supra note 8, at 171.
55 See Nicole Gaouette, Border Barrier Approved, L.A. TIMES, Sept. 30, 2006, at A1 (Mexican
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The pendulum swung drastically toward opposition to immigration during the Great Depression in the 1930s. During that period, Americans were forced into taking the type of backbreaking, low-wage jobs that were previously held by immigrant workers. Once Americans began competing for those types of jobs, the presence of Mexican immigrant workers became superfluous and unwanted. Suddenly unemployed, the Mexican worker was forced to seek social welfare programs. The benefits society received from a vast cheap labor workforce of Mexicans during a period of prosperity became nonexistent due to the labor surplus created by the Depression. No longer able to serve as a benefit to the U.S., immigrant workers from Mexico and elsewhere were quickly cast aside as a societal problem to which deportation was the only appropriate remedy.

World War II produced a sharp decline in European immigration, which encouraged the U.S. to once again pursue Mexican laborers to alleviate the labor shortage. In 1942, the U.S. and Mexico signed a Mexican Laborer Program designed to allow Mexican citizens to work in the U.S. As a corollary to this Act, the two countries also agreed to protect the Mexican laborers against exploitation by U.S. employers. This aspect of the bill proved ineffective, as employers—primarily agricultural growers—routinely withheld large percentages from their laborers’ already reduced wages. Such exploitative measures are still common today. Many illegal immigrants work for slave wages, have dangerous working conditions, and are still at the mercy of the employer when it comes to “deductions” from a paycheck. Consider the options for the Mexican indigent: (1) working for slave wages in the U.S. or (2) remaining in utter poverty in a poor and corrupt Mexico. Hundreds of thousands choose the first as the lesser of two evils.

50 See Carrasco, supra note 3, at 313.
51 Id. (pointing out that the employers would often choose white laborers over immigrant workers).
52 Id.
53 Id. (U.S. legislation during this period resulted in the “repatriation” of some “400,000 Latinos without any formal deportation proceedings, including thousands of American citizens.”).
54 Id. at 314.
55 Id. (this agreement was also commonly known as the Bracero or “worker” Program.)
56 Id.
57 Id.
58 See Hanson, supra note 16, at 39 (explaining that exploitation still continues in the modern day as “the labor contractor can withhold [their] check without cause, or deduct 30 percent of it for Cokes, rides to work, and everything in between.”).
Pro-immigration legislation in the 1940s continued in the following
decade with the McCarran-Walter Immigration Act in 1952, which gave
“permanent” status to Mexican laborers who were already in the U.S.\(^5\)
Although the U.S. appeared to be entrenched in a “pro-immigration” position
after WWII, this period of pro-immigration legislation did not last long. By
1954, the last remnants quickly vanished under the leadership of Herbert
Brownell, Jr., the U.S. Attorney General. The pendulum took another drastic
swing in the anti-immigration direction when Brownell introduced “Operation
Wetback.”\(^6\) This program was a “two-fold plan that coordinated the border
patrol to prevent undocumented aliens from getting into the United States while
rounding up and deporting those who were already here.”\(^7\) If the government
had applied a similar policy to American citizens, it would have been met with
complaints about gross violations of the due process and equal protection rights
citizens are guaranteed by the U.S. constitution. However, the Supreme Court
has consistently ignored such violations when the federal government has acted
under immigration law.\(^8\)

C. “The Border Crossed Us”

Some modem Hispanic scholars believe that southwestern U.S.
rightfully belongs to Mexico. The history of the land does provide some merit
to this proposition: “Almost all of Texas, New Mexico, Arizona, California,
Nevada, and Utah [were] part of Mexico until Mexico lost them as a result of
the Texan War of Independence in 1835-1836 and the Mexican-American War
of 1846-1848... Mexicans do not forget these events.”\(^9\) Although the Treaty
of Guadalupe Hidalgo shaped the Mexico-U.S. border, some modem scholars
proclaim that the line of demarcation is arbitrary. Dr. Charles Truxillo, a
professor at New Mexico University, proposes that in the near future a new
nation will form at the border of the U.S. and Mexico called Republica del

\(^5\) See Carrasco, supra note 3, at 317 (for an understanding of how “permanent” status is a
misanommer because Congress can revoke that status at any time, see Fong Yue Ting v. U.S. 149 U.S.
698 (1883) and Wong Wing v. U.S. 163 U.S. 228 (1886)).

\(^6\) Id.

\(^7\) Id. (Carrasco explains that the program led to the deportation of 3.7 million Latinos with only
63,500 receiving any formal deportation proceedings).

\(^8\) There are several cases during the Chinese Exclusion period that establish this doctrine. The
seminal cases are Fong Yue Ting v. U.S. 149 U.S. 698 (1883) and Wong Wing v. U.S. 163 U.S. 228
(1886); for an attack on Congress incorrectly assuming the power to legislate immigration law, see
Progeny 100 HARV. L. REV 853, 862-63 (1987) (explaining that the assumed Congressional power
to control immigration is unenumerated, not assuredly within a sovereigns power, and should not be
considered an extra-constitutional power).

\(^9\) Huntington, supra note 16, at 229-30.
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Norte. This new nation would occupy most of the current southwest of the U.S. and some northern, industrial cities of Mexico, and would be a nation that is not quite Mexico and not quite America. Truxillo and others argue that "the border crossed us" and that the land is a Mexican's birthright. This position is not only held by scholars, but throughout Mexico as well. Fifty-eight percent of Mexican citizens believe that "the territory of the United States' southwest justly belongs to Mexico." Any number of modern Chicano scholars would argue that the southwest is indeed the rightful territory of the Mexican people which was wrongfully taken away by a manipulative and an overpowering U.S. government. Sociologists would explain that the root of the Chicano desire to form a Republica del Norte at the U.S.-Mexican border goes far beyond nostalgia. When a group of people have a common ancestry, origin, and culture, they are also linked to a specific territory, and the sense of solidarity can override other arbitrary distinctions as they work toward a common goal.

With the ever-growing Mexican population along the southern border, the concept of a Republica del Norte is not entirely impossible. The connection between Mexicans living in the U.S. and their native country is strong. Millions vote in Mexico's elections while living in the U.S. The border town of El Cenizo, Texas established Spanish as its official language. With many Mexicans venturing back and forth from one country to the other, the border is virtually nonexistent to some. Americans tend to assume that Mexican immigrants come to the U.S. with the intention of becoming Mexican-

71 Id.
72 See Hanson, supra note 16, at 32.
73 Id.
74 See DAVID LAVENDER, THE SOUTHWEST, The Anvil of American Indian Policy (University of New Mexico Press 1980) (depicting the story of how the 1848 Treaty was formed as one between an overcome and intimidated Mexican government and the more powerful U.S. government.) For a brief but critical look at Mexico's history, see Hanson, supra note 16, at 76-77 (explaining that Mexico's nostalgic look at history is laced with inaccuracies: "Terrorist organizations of the late nineteenth century are romanticized. The everyday killer Joaquin Murrieta becomes a modern-day Robin Hood... [And] commentators who have resurrected Tijerina for their pantheon of brown heroes point out that his broadsided were racist to the core and laced with anti-Semitism.").
75 See Nelson, supra note 70.
Americans; instead, many Mexican immigrants merely intend to become a Mexican in America.78

Unlike previous generations of immigrants who assimilated into U.S. culture out of necessity, Mexican immigrants receive steady waves of compatriots from Mexico to reaffirm their connection to their home country.79 Europeans entered and blended into the proverbial “melting pot” by fire; if they did not assimilate, they would be unemployed and unlikely to survive.80 Conversely, the modern Mexican immigrant can find employment without integrating into the U.S. culture at all.81 When this type of cultural seclusion exists, the image of a melting pot is replaced with the concept of a “salad bowl” with various ingredients touching but never becoming one.82 This is more likely to occur where there is a high concentration of immigrants in one area, such as in Los Angeles, where it has been estimated that the city will be 60% Hispanic by 2010.83

California is experiencing a “chain migration” where those immigrants who are established in the U.S. are assisting future generations of Mexicans to come into the U.S. When this occurs, “[m]igrants enable their friends and relatives back home to migrate by providing them with information about how to migrate, resources to facilitate movement, and assistance in finding jobs and housing.” 84 If this self perpetuating “migration chain” continues, many immigration critics worry the border will only be known to cartographers, and a de facto new nation will arise.85 Pat Buchanan, American politician who served as senior advisor to three American presidents, Nixon, Ford and Reagan, analogizes the southwest to Kosovo, and predicts that the southwest will eventually secede from the U.S.86 Others posit that the millions who have come to the U.S. from Mexico have caused a “blurring of the border between Mexico and America, introducing a very different culture, while also promoting the

78 See Hanson, supra note 16, at 86.
79 Id. at 21-25.
80 Id. at 23
81 See Huntington, supra note 14, at 248 (the large Cuban society in Miami is often used as a comparison city for Los Angeles).
82 See Lamm, supra note 4 (explaining this the transformation of the melting pot image to a salad bowl image is destructive to making a unified nation).
83 See Huntington, supra note 14, at 227.
84 Id. at 228 (explaining “If there is a single ‘law’ in migration, it is that a migration flow, once begun, induces its own flow.”).
86 Id.
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emergence, in some areas, of a blended society and culture, half-American and half-Mexican."

II. ECONOMICS OF ILLEGAL MEXICAN IMMIGRATION: CALIFORNIA AS A CASE STUDY

A. Sheer numbers and Mexifornia

California highlights both the economic advantages and pitfalls of Mexican immigration, both legal and illegal. Although most southwestern states have similar situations, the other states pale in comparison to what California is experiencing in terms of numbers. When computing the economic costs of illegal immigration for California, one only needs to look at figures and statistics (see Table 1) to understand the expenses borne by the state’s taxpayers (i.e. with respect to hospitals, schools, and the judicial system). On the other hand, many argue that despite those exorbitant costs, the U.S. would be unable to function if the millions of current illegal Mexican immigrants were not in the country.

Table 1

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87 Huntington, supra note 14, at 221. For more discussion on a possible Balkanization of the Southwest see also, Media matters for America http://mediamatters.org/items/200606060011.

88 For the sake of simplicity and for the purposes of this section, California will serve as an example of both the costs and benefits of any state that has millions of Mexican immigrants in the state.


90 See President Bush, 2006 State of the Union (Jan. 31 2006) ("We hear claims that immigrants are somehow bad for the economy, even though this economy could not function without them. All these are forms of economic retreat, and they lead in the same direction, toward a stagnant and second-rate economy.") available at http://www.ontheissues.org/Celeb/George_W__Bush_Immigration.htm

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California not only highlights some of the complexities on the issue of Mexican immigration, but the state also can serve as an example for the rest of the country in how it advances in the coming decades.\textsuperscript{91} Professor Victor Davis Hanson urges anyone who believes this is a problem exclusively affecting California to think again. Illegal aliens are concentrated in select areas of the country now (i.e. Los Angeles, Miami) but the future of immigration could be quite different.\textsuperscript{92}

If you want your work done cheaply by someone else, you will welcome illegal aliens as [California] did. And if you become puzzled later over how to deal with the consequent problems of assimilation, you will also look to California and follow what [California] has done, slowly walking the path that leads to Mexisota, Utxico, Mexizona or even Mexichusetts—a place that is not quite Mexico and not quite America either.\textsuperscript{93}

It is estimated that Hispanics will constitute 25\% of the U.S. population by 2040.\textsuperscript{94}

While an estimated 1.5 million Mexicans try to cross into the U.S. and are apprehended by Border Control every year, another 500,000 enter the U.S. undetected, and about one third of those immigrants go to California.\textsuperscript{95} The growing number of foreigners has not only placed an economic burden on the state, but has also had the unsettling effect of leading millions of native-born Americans to flee from California.\textsuperscript{96} Many claim that there is a Mexican immigration “problem,” but when a native U.S. citizen pays a Mexican gardener to mow his lawn for a lower price than an American gardener would charge, this transaction is socially acceptable—perhaps because it allows the American to save money. However, when the same U.S. citizen sees the same Mexican gardener waiting in line at the DMV, there is an immigration “problem.”\textsuperscript{97}

\textsuperscript{91} Hanson, supra note 16, at xii-xiii.
\textsuperscript{92} Id. at xiii.
\textsuperscript{93} Id.
\textsuperscript{94} Huntington, supra note 14, at 224.
\textsuperscript{95} See Buchanan, supra note 2.
\textsuperscript{96} Id.
\textsuperscript{97} See Hanson, supra note 16, at 61.
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B. Economic Principles

Two basic theories have been proposed to explain how the migrant worker affects the native worker. The two theories may not be mutually exclusive, depending on the surrounding circumstances, such as the degree to which there is a disparity in wealth among citizens in the same area. In California, for example, both theories are applicable.

The segmented labor market theory attempts to explain the effect that immigrant workers have on native workers as if the two groups exist independently of each other. Immigrant workers do not have substantial effect on native workers because the two work forces pursue entirely different forms of employment. Mexican immigrant workers, for example, take low-paying, backbreaking employment opportunities (i.e. janitor, landscaper, crop picker), and do not compete with native workers seeking blue- and white-collar employment. Moreover, immigrant workers who take those manual labor jobs are actually providing native U.S. workers with a greater opportunity to seek higher forms of employment. This theory would only apply if immigrant workers do not eventually climb the social ladder into high-paying jobs, and if the number of immigrant workers is lower than the number of jobs available to prevent them from creating labor surpluses or from turning to social welfare programs.

The one-to-one displacement theory suggests that every employed foreign worker is currently taking a job opportunity away from a native worker. Advocates of this approach argue that if the U.S. deported illegal immigrant workers, opening job opportunities for unemployed native workers, then unemployment in this country would be eliminated. In other words, every job vacancy left by a deported immigrant would automatically be filled by unemployed native workers. Economist Paul Samuelson offers another explanation:

By keeping labor supply down, immigration policy tends to keep wages high. Let us underline this basic principle: Limitation of the supply of any grade of labor relative to all other productive factors can be expected to raise its wage rate;

99 Id.
100 Id. at 67-69.
101 Id.
102 Id. at 67.
103 Id.
an increase in supply will, other things being equal, tend to depress wage rates.\textsuperscript{104}

This theory was realized, at least in part, during “Operation Wetback.” Thousands of immigrant laborers were deported, and the shortage in labor supply led to higher employment rates among natives and higher salaries.\textsuperscript{105}

When considering the costs and benefits of the presence of illegal Mexican immigrants in California, each of these theories, if implemented could support either a pro-immigration stance or an anti-immigration stance. However, a change in circumstances— in the form of an economic depression, for example— could make either theory appear meritless.

What benefits and costs would be involved if the U.S. were to severely restrict immigration? Would the benefits of immigration affect the entire country, or just particular segments of society? If the costs outweigh any potential benefits, are some American burdened more than others? Finally, where do we go from here?

C. Costs of Mexican Immigrants

President Bush explained the costs of illegal immigration in his May 15, 2006 Address to the Nation: “Illegal immigration puts pressure on public schools and hospitals, it strains state and local budgets, and it brings crime to our communities.”\textsuperscript{106} The costs borne by California can be divided into two categories: (1) the government spending that is required to provide access for immigrants to governmental resources like schools, hospitals, and other similarly government funded projects; and (2) the adverse effect of immigration on crime rates and law enforcement expenditures.

\textit{Governmental Resources: Education, and Health}

In the 1880s, the Supreme Court established that aliens would have as many rights as Congress permitted them to have, and that those rights would be


\textsuperscript{105} See Hanson, supra note 16, at 13.

\textsuperscript{106} President George W. Bush, \textit{President Bush Addresses the Nation on Immigration Reform}, available at http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html (May 2006). The rest of the quote is as follows: “These are real problems. Yet we must remember that the vast majority of illegal immigrants are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are a part of American life, but they are beyond the reach and protection of American law.” (Emphasis added).
revocable at any time. Until a few decades ago, Congress’ authority over immigration law went virtually unchecked. This judicial approach allowed statutes to infringe upon constitutional rights given to lawful permanent residents. However, Afroyim v. Rusk, 387 U.S. 253 (1967) brought Congress’ free rein over the matter to an end. In that case, the Court struck down a congressional statute that revoked the plaintiff’s U.S. citizenship for voting in a foreign election. This decision represented the beginning of a change in the Court’s deference to Congress with matters of immigration and naturalization. By the 1980s, it became clear that federal courts had abandoned the Chinese Exclusion cases, which allowed Congress to discriminate against the Chinese, after a string of decisions that gave aliens the government benefits such as education and healthcare.

Public education is a benefit that federal courts have allowed illegal aliens to enjoy. In the landmark case of Plyler v. Doe, 457 U.S. 202 (1982), children of illegal aliens were assured free public education under principles of Equal Protection and the 14th Amendment. The Court explained:

Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. No plausible distinction with respect to Fourteenth Amendment jurisdiction can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.

Although this opinion was criticized by later Supreme Courts and other federal courts, the case serves as a classic example of how policy has changed from the Chinese Exclusion period to present day. In the abstract, the Plyler
court’s assertion that everyone should be entitled to receive a public education, regardless of legal residence status, is admirable. However, in practice, there have been tremendous downsides to this approach, particularly in California. The Mexican population is so apparent in Los Angeles, that sociologists Katrina Burgess and Abraham Lowenthal declared “The schools of L.A. are becoming Mexican.” The city of Santa Ana, which is 40 miles south of Los Angeles, has a student population that is 92 percent Hispanic. Mexican immigrants in public schools are an extra expense for taxpayers—not just because of their presence, but also because they rarely graduate on schedule. Studies suggest that as many as 40 percent of “both Hispanic aliens and Hispanic citizens of immigration background do not graduate from [California’s] high schools within the normal four years, while over 90 percent of Mexicans of all statuses have no B.A. degree.” Only 59.6 percent of Hispanics had completed high school in 2000. While academic failures lead to more and more tax dollars being poured into schools, generalizations about “all immigrants” or “all schools” are always subject to exceptions.

Several other federal court decisions in the 1980s expanded the benefits an alien could receive. The Second Circuit allowed illegal aliens to receive supplemental security income in 1985—a case later used to expand their eligibility to other forms of welfare. In 1986, the Eastern District of New York held that illegal aliens are entitled to Medicaid. In 1987, the Fifth Circuit granted unemployment benefits to undocumented workers even though they were not permitted to work under the terms of the immigration law. With each decision, millions of tax dollars were spent to supplement those who

116 Id., at 227 (this quote is from Katrina Burgess and Abraham Lowenthal in their scholarly study of Mexico-California ties).
118 See Huntington, supra note 14, at 232-33.
119 Hanson, supra note 16, at 68.
120 See Huntington, supra note 14, at 233-34 (explaining that other academic woes for Mexican immigrants includes a drop out rate of 30 percent as compared to their white counter part whose dropout rate is only 7 percent).
121 See FAIR, supra note 89.
122 For an article on how many Mexican immigrants and their children have achieved academic success in Californian schools, see Richard Rothstein, True or False: Schools Fail Immigrants, available at http://www.epinet.org/content.cfm/webfeat_lessons20010704 (July 4, 2001).
123 See Berger v. Heckler, 771 F.2d 1556 (2nd Cir. 1985)
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had contributed a minimal amount of money to the tax system.\textsuperscript{126} The courts appeared to be going beyond Constitutional protections to reach their decisions, instead balancing the cost the state would bear as a result of expanding the rights afforded to liens against the benefits that segment of society could provide to the state.\textsuperscript{127}

\textit{Crime}

The streets of Los Angeles can be analogized to the lawless streets of Wild West frontier town.\textsuperscript{128} The same young men who work hard in the crops to help the country run are the same young men who participate in crime and violence.\textsuperscript{129} Mexican immigrants are surrounded by crime in their native country,\textsuperscript{130} and the situation does not change when they arrive in the U.S. Arriving into America may be the realization of a lifelong dream for some, but they have not reached a place free of crime.

An immigrant may arrive in the U.S. by crossing the border against U.S. immigration law, but he or she is ready to work hard for low wages to avoid being, so the law is not enforced. He or she will be paid in cash by an employer, and neither the employer nor the immigrant will pay taxes on the employment, breaking laws pertaining to taxation. The immigrant may live in an overcrowded dump run by his or her slumlord; this time, its property and health laws that are broken.\textsuperscript{131} Since he or she cannot open a bank account as an illegal alien, the immigrant walks the streets with hundreds of dollars in his or her pockets, and may be robbed by a gang of optimistic youths hoping for a big score.\textsuperscript{132}

In this context, it is unsurprising that "an entire species of predatory criminals exists in California that simply cruises cheap apartment buildings, corner liquor stores and rural markets, always on the prowl for industrious Mexican laborers."\textsuperscript{133} The individual is likely affected on a personal level by witnessing laws being broken on a daily basis. From the moment an illegal

\begin{footnotes}
\textsuperscript{126} See FAIR, supra note 89. Undoubtedly, money spent by aliens in the U.S. does often indirectly go toward taxes (i.e. when one pays rent, their landlord uses that money to pay property taxes).
\textsuperscript{127} The Courts may have been assuming the role of super-legislatuie in evaluating how society should address issues normally handled by the political process. By granting educational opportunity for illegal immigrants, for example, the Court assumed that would eventually benefit society in the long run when those children enter the work force.
\textsuperscript{128} See Hanson, supra note 14, at 17.
\textsuperscript{129} Id. at 39.
\textsuperscript{130} A reference back to Section I, supra at A: 2 “Mexico City.”
\textsuperscript{131} See Hanson, supra note 16, at 48-49.
\textsuperscript{132} Id. at 40, 49.
\textsuperscript{133} Id. at 40.
\end{footnotes}
immigrant enters the country from Mexico, he or she is surrounded by an entire universe accustomed to breaking U.S. laws.\textsuperscript{134}

The agricultural leeches are only the alpha, not the omega that surrounds the unskilled laborer. Beyond them is a virtual army of parasites. The coyote who smuggled him in... The forger who gives him the false identification... The landlord who rents him... The woman who provides him sex, the local market that cashes his check for a cut [and so on].\textsuperscript{135}

These types of crimes are witnessed every day by illegal immigrants. When anyone sees the laws go unenforced on a daily basis, a sense of complete lawlessness is created, leading to the perception that anything and everything will go unpunished.\textsuperscript{136} Author Deanna Spingola succinctly explains: “If an individual breaks the law, there should be consequences or others will follow the example of the unfettered lawbreaker.”\textsuperscript{137} The combination of the culture of crime surrounding Mexican immigration in Los Angeles and the accompanying sense that most crimes will go unpunished may explain why almost one-quarter of California’s inmate population are Mexican.\textsuperscript{138}

Although the types of crimes discussed above are abundant, those crimes do not often lead to the incarceration of Mexican immigrants. Drug crimes are much more common.\textsuperscript{139} Because the border between the U.S. and Mexico is easily crossed, illegal drugs also cross over; for example “[m]ore cocaine, heroin, methamphetamine, and marijuana flood across the Mexican border than from any other place[.]”\textsuperscript{140} John Walters, the Drug Czar of the Drug Enforcement Agency, claimed that prior to the implementation of the Methamphetamine Epidemic Act in 2006, illegal immigrants were the largest methamphetamine distributors in the country.\textsuperscript{141}

\textsuperscript{134} Id. at 48.
\textsuperscript{135} Id.
\textsuperscript{137} Id.
\textsuperscript{139} \textit{The Situation Room} (CNN television broadcast Jan. 18, 2007).
\textsuperscript{140} Id.
\textsuperscript{141} \textit{See Scarborough Country}, (MSNBC television broadcast Jan. 10, 2007).
To deal with the problem of drug trafficking by illegal aliens, Californians took matters into their own hands when a majority of California voters passed the controversial Proposition 187 in 1994.\textsuperscript{142} The Act "found and declared" that California had "suffered... economic hardship caused by the presence of illegal aliens in the state" and that the state had "suffered... personal injury and damage by the criminal conduct of illegal aliens in the state."\textsuperscript{143} The purpose of this Act was to facilitate state and federal governments in working together to "establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."\textsuperscript{144}

The costs of Mexican immigration in California are clear, with regard to education and crime. Schools are noticeably influenced by Spanish-speaking students, and crimes of all sorts are being committed by Mexican immigrants or on their behalf. However, it is important to weigh the costs borne by American taxpayers against the potential benefits provided by Mexican immigrants.

D. Benefits: Fact or Fiction?

\textit{A Day Without a Mexican}

Sergio Arau's 2004 film \textit{A Day Without A Mexican} suggests that California is utterly dependent on the Mexican immigrants who reside in the state.\textsuperscript{145} In the movie, the Mexican population in California mysteriously disappears from the state, depicting the desired effect of "Operation Wetback" and similar proposals to deport all illegal aliens.\textsuperscript{146} All of the jobs "Americans won't do" are often performed almost exclusively by Mexican immigrants.\textsuperscript{147} Jobs that many Americans refuse to do (i.e. pick vegetables), or those demanding "any physical labor that requires little skill or education but a great deal of physical strength and stamina and some courage . . . is now done by people born in Mexico."\textsuperscript{148} American youths are said to consider such service jobs demeaning.\textsuperscript{149}

\begin{footnotesize}142\end{footnotesize} \textit{Id.} Proposition 187 was later found unconstitutional by the 9\textsuperscript{th} Circuit.

\begin{footnotesize}143\end{footnotesize} League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1300; 131 F.3d 1297, 39 Fed. R. Serv. 3d 1336 (1997).

\begin{footnotesize}144\end{footnotesize} \textit{Id.} at 1300.

\begin{footnotesize}145\end{footnotesize} \textit{See DAY WITHOUT A MEXICAN,} (HBO April 2007).

\begin{footnotesize}146\end{footnotesize} The movie does not make a distinction between legal or illegal Mexican residents. Instead, all characters with Mexican ancestry "disappear."

\begin{footnotesize}147\end{footnotesize} \textit{See George W. Bush, supra,} note 90.

\begin{footnotesize}148\end{footnotesize} \textit{See Hanson, supra} note 16, at 35.

\begin{footnotesize}149\end{footnotesize} \textit{See Hanson, supra} note 34.
Arau’s film brings to life the claim that “immigrants are somehow bad for the economy, even though this economy could not function without them.”150 As the Mexicans disappear from California, the houses remain unclean, the crops unpicked, and every other service sector of the economy comes to a screeching halt.151 The void left by the unwillingness of Americans to assume those jobs is often filled by Mexican immigrants; for example, “California needs workers of a certain type—muscular, uneducated, and industrious—to cut our lawns, harvest our food, cook and serve meals, baby-sit kids, build homes, clean offices, and make beds in motels and nursing homes.”152 The working Mexican immigrant does appear to provide some benefits to the U.S. and to California. However, critics have challenged the claim that these benefits make up for the costs.153 In fact, the cost of the estimated 12 million undocumented illegal aliens living in the U.S. is estimated to be approximately $20 billion.154

Assessing the overall effect of Mexican immigrants in the U.S. is more complicated than adding up the benefits Mexican immigrants provide to the state and then simply subtracting the tax dollars allocated to the immigrants.155 The effect immigrants have on a particular area may be different for the affluent than for the lower class.156 In Southern California, a resident may have his gardening done cheaply by an illegal immigrant willing to do the work for less pay than a native U.S. worker, while a native construction worker cannot find work for the same reason.157

**IRCA and AgJOBS**

The benefit provided by the illegal Mexican immigrant to California is greater in the field of agriculture than in any other area. Hanson claims that a

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150 See President Bush, supra note 90.
151 See Arua, supra, note 145; see also, Hanson, supra, note 16, at 37 (“Ban our yearly contingent of tough, lean Mexican Immigrants completely from California tomorrow, and I think within a year or two the state would be almost paralyzed—much of its food decaying, its hotels dirty, its dishes unwashed, its lawns and shrubs weedy and unkempt.”).
152 See Hanson, supra note 16, at 158.
154 Id.
155 See Center for Immigration Studies, supra note 104.
156 See Peter Elstrom, Fresh Ideas for the Immigration Debate, available at http://www.businessweek.com/bwdaily/dnflash/content/feb2007/db20070226_045720.htm (Feb. 27, 2007)
157 Id.
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prime example of the “type” of job Americans refuse to do is picking crops.\textsuperscript{158} The reason might be that “[f]armwork is among the most dangerous professions in the U.S., and many farmworkers suffer job related injuries or from the effects of poisonous pesticides.”\textsuperscript{159} As a result, this void is filled by undocumented workers.\textsuperscript{160} These workers lack any bargaining power and are often exploited with unfair wages and dangerous working conditions.\textsuperscript{161}

Congress attempted to address this issue in 2005 with the Agricultural Jobs, Opportunity, Benefits, and Security Act (“AgJOBS”).\textsuperscript{162} The bill modifies the H-2A visa application by streamlining the process and by providing various worker protections.\textsuperscript{163} The most significant improvements for laborers under AgJOBS are as follows: (1) free housing is provided to nonlocal employees by employer; and (2) wages will be paid that match the highest of either federal minimum income, state minimum income, or the prevailing wage for that job.\textsuperscript{164} In addition, the bill gives the guest worker the power to enforce these rights in federal court.\textsuperscript{165}

The working conditions of laborers will improve under this and similar laws when enforced, but the agricultural employers may receive the greatest benefit. With recent raids on employers suspected of hiring illegal aliens,\textsuperscript{166} this legislation allows agricultural employers to avoid the dilemma of breaking the law or letting their crops spoil.\textsuperscript{167} Understanding AgJOBS as an effort by Congress to advance and protect the needs of agricultural farmers is par for the legislative course. In the 1950s, laws were enacted to forbid the harboring or

\textsuperscript{158} See Hanson, supra note 16, at 38-39
\textsuperscript{159} See National Council of La Raza, available at http://www.nclrl.org/content/publications/download/2609
\textsuperscript{160} Id. (“The majority of migrant and seasonal farmworkers in the U.S. are currently undocumented, and 70% of U.S. farmworkers are Latino.”)
\textsuperscript{161} Id.
\textsuperscript{162} The discussion of AgJOBS is limited to how “illegal” immigrants will be authorized to pick crops in the U.S. and how that will benefit California. There is a second component of this bill which would allow illegal workers to earn a path toward citizenship. However, this aspect of immigration reform was not included in the 2006 immigration reforms that were enacted into law. This issue of earned citizenship is addressed in Section III, B:3 “The debate over ‘Amnesty’”
\textsuperscript{163} See NCLR, supra note 159.
\textsuperscript{164} Id.
\textsuperscript{165} Id. (recall the line of cases after Plyler, supra Section II:3, that expanded alien rights. This bill is a continuation in that expansive direction).
\textsuperscript{166} E.g., Robert Longley, Immigration Raid Vacates Texas Town, available at http://usgovinfo.about.com/b/a/217518.htm (Feb, 14, 2007)
\textsuperscript{167} See Gaouette, supra note 55 (quoting California Senator Dianne Feinstein who explained that efforts to curb illegal border crossing resulted in an entire agricultural season being lost because not enough workers were available to pick the crops.).
transporting of illegal immigrants, but those laws without any teeth, as the law did not forbid actually employing illegal workers. In 1972 and 1973, the House of Representatives passed employer sanctions on hiring illegal workers in successive years, only to have the sanctions rejected by the Senate.

In 1986, less than thirty years after "Operation Wetback," Congress authorized the Mazzolli-Simpson Immigration Reform and Control Act ("IRCA") as part of a campaign called "Operation Jobs" to fill the labor shortage. Like AgJOBS, IRCA also contained provisions that would extend earned citizenship to illegal aliens who met certain qualifications.

Even though many immigrants were given U.S. citizenship under IRCA, a long-awaited dream come true for most, the true winners under this 1986 Act may have been the agricultural farmers. The Act appeared to establish firm guidelines for employers to follow when employing foreign laborers, but there were several concessions made in the employers' favor, including "the right to 'replenish' the supply of agricultural workers;[a] two year moratorium on enforcement of employer sanctions in agriculture;[a] and a further curb on INS operations against field workers."

Over twenty years ago, author David E. Simcox made a prescient observation: the agricultural growers' constant demand for cheap laborers would continually impact how Congress addressed immigration reform. Simcox wrote:

[on] one side is a congeries of determined special interests [of agricultural growers] that, though representing a minority, press effectively for more immigration. On the other side is a sizable but unfocused majority of the electorate that favors restricting immigration and harnesses it more rationally to agreed national needs. This deep division will continue to roil policymaking.

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168 See Simcox, supra note 98, at 4-6
169 Id. at 6 (particularly important legislative reforms and their specific details and effects are addressed more fully in Section III, infra.).
170 Id. at 4 (Important to note, IRCA was enacted under great political pressure in the November before a mid-term election. As early as 1981 there was a strong public outcry for immigration reform when the country's unemployment level approach 10% and William French Smith, US Attorney General, admitted that the country "[had] lost control of [its] borders.").
171 Id. at 4-12.
172 Id. at 11.
173 Simcox, supra note 98, at 59
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Although theirs is a minority voice, farmers have significant pull in the political process in a state like California, which produces nearly half of the country's fruits, vegetables, and nuts.\(^{174}\)

III. A LEGISLATIVE PERSPECTIVE: THE SECURE FENCE ACT OF 2006 AND OTHER MODERN IMMIGRATION REFORM

A. Politics As Usual

Few issues in current U.S. politics are as likely to incite emotional reactions as the topic of immigration. Extremists line up on each side, generally along political lines, and offer their opinions about the appropriate Congressional response to the recent influx of immigrants from Mexico.\(^{175}\) The clashing viewpoints which form the landscape of the immigration debate are firmly entrenched, which makes the pursuit of a popular consensus through a moderate alternative nearly impossible.\(^{176}\)

Politicians often handle the immigration issue in a superficial manner in order to garner votes. Democrats, who largely resist the imposition of draconian measures to stem the rising tide of immigration, face criticism for their perceived weakness with regard to national security at the borders—which has become a hot-button issue for U.S. voters in a post-9/11 world.\(^{177}\) Conversely, Republicans, who are generally in favor of such measures, face criticism for politicizing the issue in a ploy to win votes from their conservative base, instead of acting in the nation's best interests.\(^{178}\) When it comes to issues such as immigration about which voters are deeply divided, competing politicians often polarize themselves by exaggerating the shortcomings of the

174 See Gaouette, supra note 55.
175 See Immigration Agenda: Republicans vs. Democrats, available at http://immigration.about.com/od/associaleconomicissues/a/GOPvLiberalView.htm (explaining that from a philosophical standpoint, republicans generally advocate for measures that would close US borders, while Democrats advocate for open immigration policies.) (last accessed Nov. 5, 2006).
opposing position. As a result, they continue to move further away from possible solutions.\textsuperscript{179} The intense emotions evoked by the issue of immigration may be the source of this superficial treatment in the U.S., which has been termed “a nation of immigrants[.]”\textsuperscript{180} Many Americans become nostalgic about how their ancestors were intimately involved in the construction of this country’s infrastructure during its developmental years.\textsuperscript{181} Millions of those immigrants in the early 1900s were greeted on Ellis Island by the kind words of Emma Lazarus which begged for Europe’s poor “huddled masses.”\textsuperscript{182} Many current immigrants, most notably those from Mexico, are seeking the same supportive welcome to America as they pursue their “American Dream.”

B. Recently Enacted Legislation

\textit{Security Fence Act of 2006}

Since 9/11, national security has become a governmental priority. There is a general consensus among the nation’s representatives that the country’s borders must be patrolled closely, but finding an appropriate means for doing so has proven to be a difficult task. On September 29, 2006, after months of debate, the Senate approved the construction of a 700-mile fence along the southern border of the U.S., under the Secure Fence Act of 2006 (the “Secure Fence Act”).\textsuperscript{183} The Secure Fence Act specifies that the fence will be built in choice locations between the US and Mexico, including Tecate and Calexico, California, as well as several border towns throughout New Mexico,
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Arizona, and Texas. In 2007, the Department will use "state-of-the-art" security systems to better detect illegal crossing and always with an eye to prevent potential terrorist attacks, in accordance with the provisions of the Secure Fence Act.

The proposed use of a fence as a solution for illegal immigration was hotly contested during the summer of 2006. One outspoken proponent of the Secure Fence Act was Republican Senator Jeff Sessions from Alabama; Democratic Senate Edward Kennedy from Massachusetts argued vehemently against it. Senator Sessions continually stressed that the Secure Fence Act would be "absolutely effective" in deterring illegal immigration and avoiding its detrimental side effects. He cited the 56% decrease in crime San Diego experienced after building a fence around certain parts of its border with Mexico. Senator Kennedy was quick to discard any statements in support of the Secure Fence Act as "a crass political effort by those more interested in saving their [Senate] seats than securing the border." He suggested that the real issue was the system that permitted people to overstay their visas. Democratic Senator Harry Reid from Nevada explained that no barrier could solve the current immigration reform issues: "You build a fence 10 feet high, 20 feet high, 100 feet high, it won’t solve our problems." The use of a fence was also criticized by Republican Senator Arlen Spector from Pennsylvania, who rejected the concept due to its failure to address other aspects areas that need immigration reform.

During the debate over the Secure Fence Act, critics pointed out that Republicans seemed to be exploiting this issue to gain some political advantage among their base. After the Act became law, critics attacked it from a different angle, by speculating about its practical effect. Some argued that by blocking known trails across the border, the fence would not deter immigrants from trekking across the desert as much as it would force them to take more

185 Id.
187 Id. at A16.
188 Id.
189 Id. (Kennedy pointed out that approximately 40% of illegal immigrants in the US entered legally but have overstayed their visa.)
190 See Gaouette, supra note 178.
191 Id. (Specter is quoted as saying "I don’t see how we can deal with immigration on a piecemeal basis." In context, he was expressing the need for comprehensive immigration reform that dealt with various aspects of illegal immigration. In other words, building a fence to thwart individuals from illegally crossing the border is only a "piece" of the puzzle needed for a solution.).
dangerous routes. Others expressed concern that the ecosystem would be adversely affected by the construction of a fence that stretched hundreds of miles. Senator Biden, Democrat from Delaware, argued that the provisions of the Secure Fence Act conditioned the construction of the proposed fence on so many factors that it could never be completed, and that the proposal was simply a “sham” by Congress in an effort to deceive the American people. In addition, it appears to some to be a foregone conclusion that the fence between the border will never be built. This further supports earlier contentions that this Act served a Republican political needs to appear tough on national security, rather than as an effective solution to a practical concern.

**Department of Homeland Security and Border Patrol**

After the creation of the Department of Homeland Security (DHS) by the Homeland Security Act of 2002, the bureaucratic organizations responsible for enforcing immigration policy were reorganized. On March 1, 2003, the Natural Immigration Service was moved into the DHS, and renamed Citizenship and Immigration Services (CIS). CIS handles U.S. immigration services and benefits: citizenship and visa applications, asylum, and refugee services. The Border Patrol is the responsibility of a different bureaucratic department known as the Department of U.S. Immigration and Customs Enforcement.

In September of 2006, the House and Senate agreed to provide DHS with a budget of $34.8 billion, with $21.3 billion earmarked for border security and immigration enforcement. Of that allotment, $1.2 billion is for border security and will be used in an effort referred to as Hold The Line “to hire “1,500 new Border patrol agents, increasing the force to 14,800, and add 6,700 detention beds.” The increased number of agents will ensure greater coverage along the 2,000-mile southern border, but the beds also provide a

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192 See Gaouette, supra note 186.
193 Id.
195 See Gaouette, supra note 55 (quoting Frank Sharry, executive director of National Immigration Forum, “I’m going to go out on a limb and say we’ll never see a 700-mile wall along the southern border”; “This is about incumbent protection, not border protection.”).
198 Id.
199 See Eric Lipton, Lawmakers Agree to Spend $1 Billion on Tightening Border, N.Y. TIMES, Sept. 26, 2006 at A21.
200 Id.
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place to keep individuals who are apprehended.\textsuperscript{201} The Border Patrol’s former “catch and release” cycle did not prevent those who attempted to cross the border from trying again, and the process was heavily criticized.\textsuperscript{202} Bush outlined the problem:

For many years, the government did not have enough space in our detention facilities to hold [apprehended border crossers] while the legal process unfolded. So most were released back into our society and asked to return for a court date. When the date arrived, the vast majority did not show up. This practice, called “catch and release,” is unacceptable, and we will end it.\textsuperscript{203}

It is interesting to note that although Mexican immigrants come to the U.S. in the largest numbers, this aspect of immigration reform does not affect them as much as it affects immigrants from other countries.\textsuperscript{204}

In an active effort to better protect the borders, Congress has enacted another piece of legislation which requires all air travelers—even American citizens—to present a passport at the border.\textsuperscript{205} The primary problem presented by the Act was its effect on U.S. citizens and Canadians who were currently abroad without their passports.\textsuperscript{206} The law provides for exceptions, however; officers are empowered to make discretionary judgments regarding the admittance of individuals into the U.S. without a passport. In early 2008, the Act, which currently only applies to air travelers, will also apply to land and sea travelers.\textsuperscript{207}

\textsuperscript{201} Without a place to keep the attempted illegal crossers, agents are forced to release those apprehended. Thus, the heavily criticized policy of “catch and release” took form.

\textsuperscript{202} For a critical look at the flaws in previous immigration policy handled apprehended illegal border crossings, see Spencer S. Hsu, Backlogs at the Borders, Cracks in the System, WASH. POST, May 14, 2006 at A1 available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/13/AR2006051301173.html?nav=rss_world/centralamerica

\textsuperscript{203} See Bush, supra note 106.

\textsuperscript{204} Id. (explaining that because the U.S is able to return those apprehended with relative ease, “catch and release” was used for natives of more distant countries.)

\textsuperscript{205} See Beverley Lumpkin, New Rules Requiring Passports for Americans, http://travel.msn.com/Guidelines/article.aspx?cp-documentid=380528&page=2; (explaining that these new rules “were mandated by Congress in 2004 following the terrorist attacks of Sept. 11, 2001, and were recommended by the 9/11 Commission.”); see also, The State Department’s website at http://travel.state.gov/travel/cbpmc/cbpmc_2223.html

\textsuperscript{206} Id.

\textsuperscript{207} Id.
The discretion afforded to Border Patrol agents in enforcing the passport requirement appears to be a necessary delegation of enforcement responsibility, in the interest of promoting efficiency. If U.S. citizens were able to prove their identity and legal citizenship without a passport, then a time-consuming judicial hearing could be avoided. However, the discretionary powers of Border Patrol agents and other law enforcement officers in other circumstances may come dangerously close to violating traditional notions of due process. Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the discretion of Border Patrol agents charged with determining whether an individual is an illegal alien is virtually unchecked. Prior to the IIRIRA, the law provided that an individual suspected of illegally crossing the border could have the benefit of judicial intervention prior to his or her deportation. After the IIRIRA, however, an officer is empowered to exercise his or her discretion in enforcing immigration laws. Critics are fearful of allocating this responsibility to Border Patrol agents merely to improve efficiency, because “to allow officers of such low grade, who are not lawyers, to have such a sweeping authority regarding the admission or removal of aliens appears to . . . greatly diminish the notion of due process.”

The Debate over “Amnesty”

The most controversial aspect of recent legislative reform has involved the question of how to deal with the estimated millions of undocumented immigrants currently residing in the U.S. Some advocate the deportation of everyone living in the U.S. who entered the country illegally. This approach is analogous to “Operation Wetback” from 1954, but this time politicians have characterized it as an “enforcement only approach.” This stance is grounded in the belief that amnesty is the equivalent of rewarding criminal behavior and would even encourage more immigrants to cross the border illegally.

Others are in favor of giving amnesty to every undocumented alien currently living in the U.S. The illegal alien’s method of entry into the country would be forgiven, and he or she would be given a legal status. Benefits of this strategy could be as follows: an increased number of taxpayers reduced social

208 See Waters, supra note 9.
209 Id.
210 Id.
211 Id.
212 See Gaouette, supra note 186.
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costs related to illegal immigration, and the advancement of greater diversity.\textsuperscript{214} Amnesty would allow illegal immigrants to come out from their “underworld,” join the American culture, and benefit from social programs which could help reduce crime rates.\textsuperscript{215} The closest this country has come to embracing this position was the Mazzoli-Simpson Act IRCA of 1986, which provided amnesty for illegal aliens who met certain qualifications, such as residing in the U.S. for 5 years.\textsuperscript{216}

By spring of 2007, Senators John McCain, republican from Arizona, and Ted Kennedy are expected to propose legislation resembling that of AgJOBS and Mazzoli-Simpson.\textsuperscript{217} Illegal immigrants currently residing in the U.S. could become eligible to obtain legal status through a temporary worker program.\textsuperscript{218} This view was endorsed in the 2004 presidential election race by Senator John Kerry, Democrat from Massachusetts:

[W]e need an earned-legalization program for people who have been here for a long time, stayed out of trouble, got a job, paid their taxes, and their kids are American. We got to start moving them toward full citizenship, out of the shadows.\textsuperscript{219}

Kerry’s stance is similar to the McCain-Kennedy proposal. No matter what conditions might be imposed on the grant of citizenship status, conservatives are steadfastly opposed to providing any kind of benefits to undocumented workers.\textsuperscript{220} Republican Senator Bill Frist from Tennessee explains his opposition as follows: “[G]ranting amnesty now will only encourage future and further disrespect for the law.”\textsuperscript{221}

Supporters of the anticipated McCain-Kennedy proposal and President Bush’s stance on immigration reform are quick to declare that they are not in favor of amnesty; even though the distinction appears to be strictly semantic. On the campaign trail in 2003, Bush unequivocally opposed amnesty: “I don’t believe we ought to have amnesty. I don’t think we ought to reward illegal

\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{217} See Elstrom, supra note 156.
\textsuperscript{218} Id.
\textsuperscript{220} See Frist Fires Opening Shot on Immigration, supra note 36.
\textsuperscript{221} Id.
behavior . . . If they want to become . . . citizen[s], they can stand in line." In his recent Address to the Nation of Immigration Reform, Bush reiterated his belief that amnesty was an unfair practice. Nevertheless, his proposal for permitting some of the 12 million illegal aliens currently in the U.S. to become citizens parallels the concept of amnesty.

Under Bush's approach, there are two types of illegal aliens: those who may be eligible for earned citizenship, and those who are ineligible. The problem with this approach, beyond determining what qualifications should exist and how they are to be met, is that the most important question remains unresolved: what happens to the illegal immigrants who are ineligible for earned citizenship? No real effort to deport all illegal aliens is likely to be made; therefore, the distinction between those who are entitled to a change of status and those who are not entitled appears to be a mere change in form without much substance. Under immigration rights' cases in the 1980s, Illegal aliens are already privy to many public benefits; the rest of the illegal immigrants in this country would remain in the same position after the enactment of the immigration reform as the position they were in prior to its enactment. The immigration debate will continue to progress on a piecemeal basis until legislation can deal with all of the illegal immigrants, and not just those who would qualify for amnesty.

**CONCLUSION: WHERE DO WE GO FROM HERE?**

Over the past few decades, Congress has swayed from one extreme to the other in its immigration policy. The effects of any legislation proposed to restructure immigration law are unlikely to last for any significant period of time. If history continues to repeat itself, then even if an impenetrable wall were built around the entire U.S. border, only a decade or two would pass before the wall was torn down. Legislation will have to be constantly modified to fit the needs of an ever-evolving world. Congress must be aware that the immigration policies that once helped the U.S. strive may eventually damage its growth. The same can be said for policies currently considered to be detrimental to the U.S. may promote economic growth in the future.

There are two possible answers to the initial question, "where do we go from here?" First, it is important to remain flexible as a nation with regard to

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222 See Bush-Kerry, supra note 219.
223 See Bush, supra note 106, ("We must face the reality that millions of illegal immigrants are here already. They should not be given an automatic path to citizenship. This is amnesty, and I oppose it. Amnesty would be unfair to those who are here lawfully, and it would invite further waves of illegal immigration.)
224 Id.
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society's needs and demands. Second, with regard to how we get to our eventual destination, it will be important to recognize that although intense emotions surround the immigration debate, public sentiment must not be permitted to outweigh the country's needs.

The future may be bright or bleak, depending on one's perspective, but here is one way to consider the issue of Mexican immigration into the U.S.:

Our new immigrants are just what they've always been—people willing to risk everything for the dream of freedom. And America remains what she has always been: the great hope on the horizon, an open door to the future, a blessed and Promised Land. We honor the heritage of all who come here, no matter where they come from, because we trust in our country's genius for making us all Americans—one nation under God.225

225 See Bush, supra note 106.