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Ryan D. Frei

*University of Richmond School of Law*

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# REFORMING U.S. IMMIGRATION POLICY IN AN ERA OF LATIN AMERICAN IMMIGRATION: THE LOGIC INHERENT IN ACCOMMODATING THE INEVITABLE \*

## I. INTRODUCTION

For over one hundred years, the Statue of Liberty has served as one of the United States's primary representative symbols, embodying the welcoming spirit of equal opportunity on which the country was founded.<sup>1</sup> The United States is, undeniably, an eclectic "nation of immigrants."<sup>2</sup> Nevertheless, despite the common immigrant background virtually all Americans share,<sup>3</sup> the admissibility of immigrants has long been a thorny issue in American society.<sup>4</sup> Somewhat ironically, during the very years in which the Statue of Liberty was erected to symbolize the nation as being open to the "huddled masses yearning to be free,"<sup>5</sup> immigrants

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1. See Rex D. Khan, Note, *The Variable Up-Front Per Capita Visa Tax: A Contractual Approach to Immigration Law*, 13 GEO. IMMIGR. L.J. 409, 410 (1999) ("When we think about the U.S. immigration policy, we normally think of a generous open-door policy.").

2. See, e.g., OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 3 (Joshua Cohen & Joel Rogers eds., 1999); Khan, *supra* note 1, at 410; John S. Richbourg, *Liberty and Security: The Yin and Yang of Immigration Law*, 33 U. MEM. L. REV. 475, 477 (2003) (noting that even Native Americans can at least be considered descendants of immigrants, referring to Siberian immigrants who came to North America 18,000 years ago over a land bridge temporarily formed after the last ice age).

3. This assertion should be taken to include Americans who were themselves immigrants and Americans whose ancestors were immigrants. Admittedly, some immigrants came to this country against their will, as in the case of slaves involuntarily "imported" from Africa, but most came by choice. FISS, *supra* note 2, at 3.

4. See *infra* Part II.B.1 (discussing the origins of anti-immigrant sentiment in the United States).

5. Emma Lazarus, *The New Colossus* (1883) (unpublished manuscript, on file with the American Jewish Historical Society, Waltham, Massachusetts). Ms. Lazarus's famous sonnet, from which these words were taken, is inscribed at the base of the Statue of Liberty and has long been associated with immigration policy in the United States. See Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 669 n.1 (1995). But see Hon. John F. Gossart, Jr., *Lady Liberty Blows Out Her Torch: New Immigration Law is Unfor-*

“were engendering fear and dislike” among many segments of the American population, inducing the federal government to begin passing restrictive immigration legislation in the late 1800s.<sup>6</sup>

Since then, immigration policy in the United States has varied according to economic needs, ethnic and religious biases, national security concerns, foreign policy objectives, and general public opinion and feelings toward “outsiders.”<sup>7</sup> Contributing to the capricious nature of immigration policy is the way in which immigration law is set.<sup>8</sup> The United States Constitution expressly enumerates several powers Congress can use to establish and regulate immigration laws.<sup>9</sup> Additionally, Congress has long been recognized, under the plenary power doctrine, as implicitly having “virtually unfettered discretion to [admit or] exclude immigrants” in any manner it deems appropriate at a given time.<sup>10</sup> Beginning in the years after World War II, the executive branch

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*giving and Far More Restrictive*, 27 U. BALT. L.F. 25, 25 (1997) (“Yet these words inscribed on Lady Liberty are no longer particularly true today and clearly have not been the rallying call in the last decade.”).

6. See U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY, at xxxi–xxxii (Michael LeMay & Elliott Robert Barkan eds., 1999) [hereinafter U.S. IMMIGRATION AND NATURALIZATION].

7. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1–2 (1984).

8. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.5.4, at 746 (2d ed. 2002) (“The [Supreme] Court’s repeated insistence that Congress has plenary power to act against aliens in any way it wants must be seen as an invitation to Congress to act capriciously . . .”) (quoting Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 338 (1997)).

9. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 10–13 (3d ed. 2002); see, e.g., U.S. CONST. art. I, § 8, cl. 3 (providing that Congress may “regulate Commerce with foreign Nations”); *id.* art. I, § 8, cl. 4 (authorizing Congress “[t]o establish a uniform Rule of Naturalization”); *id.* art. I, § 8, cl. 11 (granting Congress the power “[t]o declare War,” which suggests that Congress can regulate alien enemies when the United States is at war); *id.* art. I, § 9, cl. 1 (stating, “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight,” which implies that Congress may prohibit migration and importation after 1808).

10. Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 197 (2003); see, e.g., CHEMERINSKY, *supra* note 8, § 9.5.4, at 745–46; Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 384 (2004) (explaining that, under one common conception, “Congress’s power over immigration is simply unlimited by any constitutional constraints”). For a glimpse into how the Supreme Court has historically interpreted Congress’s plenary power to regulate immigration to be virtually absolute, see *infra* note 66 and accompanying text. *But see* *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (pointing out that Congress’s plenary power does have certain constitutional limitations); Cox, *supra*, at 386 (arguing that modern courts put much less emphasis on the “absolute” nature of Congress’s plenary power to control immigration).

began to take a more active role in crafting immigration policy, sharing with Congress the plenary power to set immigration policies with almost complete immunity from judicial review.<sup>11</sup>

The practical result of immigration law-making procedure has been an enormous amount of legislation—rivaled in volume and complexity only by the United States Tax Code<sup>12</sup>—that is modified by each Congress and every president to adapt and respond to evolving social and economic trends.<sup>13</sup> Over the past four decades, one trend in particular has put a stranglehold on United States immigration policy: the emergence of the Latin American immigrant.<sup>14</sup>

Despite the precise statutory and regulatory framework of immigration law,<sup>15</sup> an alarmingly increasing rate of illegal immigration from Latin America—predominantly from Mexico—has renewed a push in the United States for major immigration reform over the past few years.<sup>16</sup> The issue has become one of the most hotly debated and polarizing political topics in recent years,<sup>17</sup> with immigration opponents frequently citing the \$24 billion-burden illegal aliens place on the United States economy annu-

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11. See U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxv; see also *Hirsiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (recognizing the presidential plenary power by explaining that policies toward aliens or relating to foreign affairs “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”).

12. E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798–1965, at xiii (1981).

13. See *id.* at 3 (“Our national immigration policy as formulated in law is thus the product of long growth and development over a period of more than a century and a half, in an ongoing process that may be expected to continue.”).

14. See STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, BACKGROUNDER: ECONOMY SLOWED, BUT IMMIGRATION DIDN’T—THE FOREIGN-BORN POPULATION, 2000–2004, at 13–14 (Nov. 2004), at <http://www.cis.org/articles/2004/back1204.pdf> (last visited Apr. 2, 2005) [hereinafter CIS BACKGROUNDER] (noting that Mexico has been the top immigrant-sending country consistently since 1980, with Mexicans comprising sixteen percent of the foreign-born in the United States in 1980, twenty-two percent in 1990, twenty-eight percent in 2000, and thirty-one percent in 2004). The term “Latin America” refers to all Central and South American countries, as well as any Spanish-speaking countries located near the contiguous United States. In the context of this paper, “Latin American” will usually refer to Mexicans specifically.

15. LEGOMSKY, *supra* note 9, at 9 (“In minute detail, [the current Immigration and Nationality Act] specifies which noncitizens may enter the United States and which of those already here may stay.”).

16. See *infra* notes 133–46 and accompanying text.

17. See Edwidge Danticat, *Foreword* to FISS, *supra* note 2, at ix (“In recent years, immigration has become one of the most heavily debated issues in the United States.”).

ally,<sup>18</sup> and proponents pointing to the vast economic benefits immigrants provide.<sup>19</sup> Within the United States, the rapidly expanding minority base of Latin American voters has forced both Democrats and Republicans to weigh immigration reform more seriously.<sup>20</sup> External factors have also played a significant role in spawning reform initiatives, with one of the most influential factors being the repeated lobbying efforts by Mexican government officials, whose economy's third largest revenue source in 2003 was money their citizens working in the United States sent back home.<sup>21</sup>

Not surprisingly, at the onset of the 2004 presidential campaign season, President Bush introduced a major new immigration reform initiative.<sup>22</sup> Having worked tirelessly throughout much of his first term to keep the door to the United States closed to terrorists,<sup>23</sup> President Bush, somewhat paradoxically, announced in January 2004 a proposal that would keep the door open for millions of currently undocumented Latin American immigrants. In the months following the election, President Bush has made clear that his guest-worker proposal was not simply election-time rhetoric by continuing to lobby Congress to approve a system that would dramatically change the face of United States immigration law and policy toward Latin Americans.<sup>24</sup>

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18. David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages Be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, 28 BROOK. J. INT'L L. 179, 184 (2002).

19. See, e.g., AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AILA BACKGROUNDER: MYTHS AND FACTS IN THE IMMIGRATION DEBATE 3 (Aug. 2003), at <http://aila.org/fileViewer.aspx?docID=10960> (last visited Apr. 2, 2005) [hereinafter AILA BACKGROUNDER] ("[Immigrants] may add as much as \$10 billion to the [U.S.] economy each year.").

20. See, e.g., John Moreno Gonzales, *The Hispanic Vote; Candidates Yet to Excite Electorate*, NEWSDAY, Sept. 6, 2004, at A04 (citing, among other examples, an unprecedented number of Republican- and Democrat-produced Spanish-language television spots as evidence of both political parties' attention to the "crucial Hispanic swing vote"); *infra* Part III.A.

21. Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 53; see *infra* Part III.D.1.

22. See Ricardo Alonso-Zaldivar, *Dueling Immigration Ideas Frame a Key Election Issue; Democrats Counter Bush's Guest-Worker Concept with a Move Toward Citizenship*, L.A. TIMES, May 1, 2004, at A1.

23. Although terrorism and immigration legislation overlap considerably, this Comment will focus primarily on legislation and policy related to Latin American immigration and employment. For a brief discussion of the Bush Administration's antiterrorism legislation, see *infra* notes 146–50 and accompanying text.

24. See *infra* notes 205–06 and accompanying text.

This Comment analyzes the recent push for immigration reform, examining the many controversies, factors, and interests involved in the modern immigration debate. Part II, in an effort to frame the topic within a broader context, details the four major historical periods of immigration law and policy in the United States, paying particularly close attention to significant legislative acts, public sentiment, and domestic economics. Part III discusses the emergence of Latin American immigration as an incredibly divisive societal issue that strongly influenced both pre- and post-election politics in 2004 and promises to be a major theme of the 109th Session of Congress. Part IV considers the apparent inevitability of increased Latin American immigration, points out the impracticality of the Bush Administration's guest-worker plan, and proposes several reality-based options for immigration reform. Finally, Part V offers a brief conclusion advocating the acceptance and accommodation of Latin American immigration.

## II. HISTORY OF IMMIGRATION LAW IN THE UNITED STATES

The history of immigration law in the United States can be categorized into four distinct periods by examining trends in legislative action, apparent societal concerns and attitudes, and demographic shifts.<sup>25</sup> The evolving nature of immigration law and policy has reflected changes in "more fundamental social and ideological structures"<sup>26</sup> that have taken place over the past two centuries, as the United States's international identity has shifted from that of a fledgling country to a global economic powerhouse. Although this Part offers a general history of immigration policy in the United States, special emphasis is placed on the gradual introduction of Latin American workers to the United States's economy and how their arrival triggered a phenomenon that has shaped modern immigration debate.

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25. See generally U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 1-311. While this Comment attempts to highlight the most significant political, social, and legal developments affecting immigration policy, the discussion contained herein is by no means a comprehensive analysis of all important immigration factors and laws. For an excellent and thorough discussion of immigration issues and developments over the past two centuries, see generally HUTCHINSON, *supra* note 12.

26. Schuck, *supra* note 7, at 2.

A. *The Era of Wide-Open Doors: The Colonial Period Through the Late 1800s*

Shortly after its birth as a nation, the United States recognized immigration as imperative for the growth and prosperity of the country.<sup>27</sup> Immigration was viewed early on as a vital means of “populating a vast unsettled continent and exploiting its untapped wealth.”<sup>28</sup> Indeed, many of the country’s earliest and most influential political leaders stressed the importance of embracing and encouraging immigration as a way to ensure industrial development and to reinforce the United States’s image as a gateway to newfound liberties, rights, and privileges.<sup>29</sup> It was common for both government officials and private employers to encourage immigration to the point of actively recruiting potential immigrants by offering enticing incentives, and sometimes by advertising.<sup>30</sup>

The practical result of governmental and industrial enthusiasm for immigration in this first historical period was a country with

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27. See, e.g., U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxix–xxx (explaining the need for immigrants to help build cities, clear the frontier land for farms, strengthen the nation’s ability to ward off Indian attacks, and avoid coming under the control of European colonial powers).

28. Chuck, *supra* note 7, at 2; see also U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxix–xxx; Hon. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 205 (2004) (“America was so huge, underdeveloped, and sparsely populated that the nation welcomed immigrants who could help unfold the country’s rapidly expanding territory.”).

29. See, e.g., KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820–1924, at 1 (1984) (referring to Alexander Hamilton’s 1791 Report on Manufacturing that warned Congress of the need for immigrants to compensate for the “scarcity of hands” and the “dearness of labor”); Letter from General George Washington to Volunteer Association of the Kingdom of Ireland Lately Arrived in the City of New York (Dec. 2, 1783), in U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 10 (“The bosom of America is open to receive . . . the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.”).

30. See CALAVITA, *supra* note 29, at 1. One such incentive was found in a federal act granting expedited naturalization rights to alien-soldiers who had been honorably discharged from the “armies of the United States” upon their petition showing at least one year’s residence within the United States prior to filing the petition. Act of July 17, 1862, ch. 200, § 21, 12 Stat. 597 (revised and codified as The Alien Soldiers Naturalization Act, Rev. Stat. § 2166 (1878)). Advertising and inducements to potential immigrants also commonly took place abroad, as all American consuls in Northern Europe actively encouraged emigration to the United States, and American employers often placed advertisements in foreign newspapers. CALAVITA, *supra* note 29, at 41, 45.

virtually no federal regulation of immigration until the late nineteenth century.<sup>31</sup> Some scholars have gone as far as to label the United States from the late eighteenth until the late nineteenth century as an “open border country with no immigration laws.”<sup>32</sup> To be completely accurate, although there was little federal immigration regulation until the late nineteenth century,<sup>33</sup> many states passed immigration legislation in primarily five major categories:

[1] regulation of the migration of convicts; [2] regulation of persons likely to become or actually becoming a public charge; [3] prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; [4] regionally varying policies relating to slavery, including the prohibition of the slave trade; and [5] bans on the migration of free blacks, including the seamen's acts.<sup>34</sup>

Some of these state statutes, however, were declared unconstitutional by the Supreme Court of the United States for invading the federal government's power to regulate foreign commerce.<sup>35</sup>

All factors considered, the United States pursued a relatively barrier-free immigration policy grounded in “laissez-fair values of unimpeded resource flow and exchange” from the colonial period until the late nineteenth century.<sup>36</sup> Even when the wave of Catholic immigrants in the 1830s and 1840s “set off a dramatic anti-

31. See, e.g., Brickner & Hanson, *supra* note 28, at 205; Schuck, *supra* note 7, at 2, 5; Turoff, *supra* note 18, at 181.

32. Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 862 (1998); see also Schuck, *supra* note 7, at 2 (stating that the United States, during this period, had “a policy of essentially open borders”). But see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–20 (1996) (dismissing the “open border” argument as a “myth” permeating legal discussions of immigration regulation).

33. One of the few sets of federal legislative actions that restricted immigration in this first historical period does warrant consideration. The Alien and Sedition Acts of 1798 “gave the President the power to expel suspect foreigners by executive decree,” but were only in force for two years. See Turoff, *supra* note 18, at 181 n.22.

34. NEUMAN, *supra* note 32, at 41–42.

35. LEGOMSKY, *supra* note 9, at 125. See generally CHEMERINSKY, *supra* note 8, § 5.2.3, at 291–97 (discussing the topic of federal preemption of state immigration laws and citing several cases that affirmed the federal government's power to invalidate state laws having direct or indirect effects on foreign policy or immigration).

36. Schuck, *supra* note 7, at 7; see also U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxix–xxx (“The sentiment prevailing among most U.S. citizens at the time was that the nation was a brave and bold experiment in freedom which they felt should be shared by any and all who desired to be free, regardless of their former nationality.”).



foreign reaction" among many Americans, the dire need for immigrant labor prevailed in determining immigration law and policy.<sup>37</sup> This need intensified during and immediately after the Civil War, as war-time manufacturing and post-war transcontinental railroad construction increased the demand for labor.<sup>38</sup> It was not until the economic depression of the 1870s that antiimmigration sentiment began to influence legislation.<sup>39</sup>

## B. *Exclusionary Impulses Take Root: The Late 1800s Through 1920*

### 1. Increasing Resentment Toward Immigrants

Between roughly the last quarter of the nineteenth century and 1920, over "23.5 million immigrants flooded into the United States, predominantly from South, Central, and Eastern Europe and from Asia"<sup>40</sup>—a significant change from the traditional Northern and Western European nationalities of America's early immigrants.<sup>41</sup> These "new" immigrants' characteristics—coloring, physique, cultures, religions, and languages—differed greatly from the mold to which most Americans had grown accustomed.<sup>42</sup> Many Americans were skeptical of the new immigrants' abilities to properly assimilate into American society.<sup>43</sup> Furthermore, claims that the new immigrants "were racially inferior and more likely to become criminals or diseased" were given merit in scientific and sociological books and articles.<sup>44</sup> As a result of these common fears and complaints, a sense of xenophobia began to build in American cities.<sup>45</sup>

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37. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxx–xxxi.

38. *Id.* at xxxi.

39. *See id.*

40. *Id.*

41. *See* Schuck, *supra* note 7, at 5 (describing the "dramatic" ethnic and cultural changes in the immigrant population between the 1870s and World War I, and outlining the geographic contrast between the "old" and "new" immigrants).

42. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxi–xxxii.

43. *Id.* at xxxii.

44. *Id.*; *see also* HUTCHINSON, *supra* note 12, at 83 (discussing the undesirability of new immigrants and the "suspicion that other nations were dumping their least-wanted citizens in the United States").

45. *See* JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for*

By 1880, "more than 70% of the populations in each of America's largest cities were immigrants or children of immigrants," and, "foreign-born [workers] increasingly made up the bulk of the industrial labor force."<sup>46</sup> Spurred by governmental and industrial encouragement of immigration during the greater part of the nineteenth century, as well as the "temporary stimulus of war-time manpower shortages,"<sup>47</sup> the influx of new immigrants produced a surplus of cheap, albeit unskilled, labor that created a new problem: job displacement.<sup>48</sup> As industrial mechanization improved in the United States, employers started "displac[ing] unionized labor with the thousands of unskilled, nonunionized immigrants that entered the country each month."<sup>49</sup> Widespread fear among Americans that their jobs were being threatened by immigrants became a grievance frequently voiced in union newspapers<sup>50</sup> that would also prove to be a theme strongly echoed in the future.<sup>51</sup>

## 2. Restrictive Immigration Legislation Begins

Toward the end of the nineteenth century, an increase in hostility and resentment toward new immigrants, based largely on xenophobic attitudes and employment concerns, served as a catalyst for the enactment of new restrictive federal immigration laws. The first official federal legislative act restricting immigration during this second historical period was passed in 1875.<sup>52</sup> The Immigration Act of 1875 was designed primarily to prohibit the immigration and importation of Chinese prostitutes and European criminals—two classes of individuals causing increas-

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*the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 176 n.361 (1994) (arguing that a sense of nativism among "WASP Americans" made them "virulently xenophobic"); Schuck, *supra* note 7, at 3 (listing "nativist xenophobia" as one of the exclusionary impulses leading to the enactment of restrictive federal immigration legislation).

46. CALAVITA, *supra* note 29, at 41.

47. HUTCHINSON, *supra* note 12, at 83.

48. See CALAVITA, *supra* note 29, at 39–40.

49. *Id.* Union representatives considered "labor-saving machines" to actually be "wage-saving and labor-displacing machines." *Id.* at 40 (emphasis added).

50. See *id.* at 50.

51. See *infra* notes 164–67 and accompanying text.

52. Immigration Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477, 477–78 (repealed 1974).

ing concern and moral indignation among many Americans.<sup>53</sup> Despite its relatively narrow scope, the Immigration Act of 1875 "began an extension of federal authority" and a pattern of exclusion that would "develop into a major instrument of [federal] immigration policy."<sup>54</sup>

In 1882, President Chester A. Arthur approved two major restrictive immigration bills: the Chinese Exclusion Act of 1882<sup>55</sup> and the Immigration Act of August 3, 1882.<sup>56</sup> The Chinese Exclusion Act was enacted in response to mounting paranoia and anger over an enormous increase in the number of Chinese immigrants, particularly in California.<sup>57</sup> Many of the Chinese immigrants were contract workers drawn to the West Coast for temporary work as gold miners or railroad builders.<sup>58</sup> These so-called "sojourners," with no intent to permanently reside in the United States, often had little incentive to learn English or conform to American customs—a source of annoyance to American workers.<sup>59</sup> Moreover, Chinese immigrants were typically frugal and unaccompanied by families, so they were content working for lower wages than most American workers were willing to accept.<sup>60</sup> Perturbed by the foreign-born competition undercutting their own wages, American workers experienced "deep and bitter" irritation, which resulted in public conflicts and persistent petitioning for restrictive legislation.<sup>61</sup>

Congressional proponents of the Chinese Exclusion Act made clear that, in passing the legislation, labor concerns were taken

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53. HUTCHINSON, *supra* note 12, at 66; see U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxi.

54. HUTCHINSON, *supra* note 12, at 66; see also Schuck, *supra* note 7, at 2–3 (detailing the development of "exclusionary impulses" during the 1880s).

55. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

56. Immigration Act of August 3, 1882, ch. 376, 22 Stat. 214 (repealed 1974).

57. See Brickner & Hanson, *supra* note 28, at 219 (noting that, because of differences in "religion, language, and physical appearance," prejudice against Chinese workers intensified, resulting in the break-out of "violent anti-Chinese riots on the West Coast").

58. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 594 (1889).

59. See U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxii; see also *Chinese Exclusion Case*, 130 U.S. at 595 ("[Chinese immigrants] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.").

60. *Chinese Exclusion Case*, 130 U.S. at 595.

61. *Id.*

into account but were not “paramount.”<sup>62</sup> Instead, in the legislators’ view, what made Chinese immigration most undesirable was the social, moral, political, and religious inability of the Chinese people to assimilate into American society.<sup>63</sup> Some remarks made during floor debates prior to the Act’s enactment advocated what, under contemporary societal norms, would be considered disturbing racial and religious ideals for the United States’s expanding population base.<sup>64</sup> Once enacted, the Act’s main effects barred the entry of Chinese immigrants for a period of ten years and authorized “the deportation of ‘any Chinese person found unlawfully within the United States.’”<sup>65</sup> In an early affirmation of Congress’s broad discretion and authority to admit or exclude immigrants as it saw fit within the bounds of the Constitution, the Supreme Court upheld the constitutionality of the Act in *Wong Wing v. United States*.<sup>66</sup>

Enacted less than three months after the Chinese Exclusion Act, the Immigration Act of 1882 (the “1882 Act”) expanded the excludable classes of immigrants from the two categories desig-

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62. Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 29 (1998).

63. *Id.* at 30.

64. See, e.g., *id.* (citing 13 CONG. REC. 2035 (1882) (statement of Rep. Berry) (predicting that “the light of Christianity [would] be obscured in the gloom of heathen darkness” if Chinese immigrants were ever granted citizenship)); *id.* at 31 (citing 13 CONG. REC. 1645 (1882) (statement of Sen. Teller) (“[T]he Caucasian race has a right, considering its superiority of intellectual force and mental vigor, to look down upon every other branch of the human family . . . . We are the superior race today. We are superior to the Chinese . . . .”)). See generally *id.* at 28–36 (highlighting the blatantly racist and ethnocentric attitudes of many congressmen supporting the Chinese Exclusion Act and analogizing the prejudices against the Chinese to the prejudices against African-Americans).

65. See HUTCHINSON, *supra* note 12, at 82.

66. 163 U.S. 228, 235 (1896). The Court stated that Congress should be unlimited in its power “to protect . . . the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.” *Id.* at 237. The Court’s holding in *Wong Wing* reinforced the stance it had adopted seven years prior in the *Chinese Exclusion Case*, 130 U.S. at 609; see also *supra* notes 58–61 and accompanying text (explaining American feelings toward Chinese immigrants in the late 1800s). In the *Chinese Exclusion Case*, the Court held:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

130 U.S. at 609.

nated in the Immigration Act of 1875.<sup>67</sup> The 1882 Act added the additional excludable classes of "lunatics, idiots, convicts, and those liable to become public charges."<sup>68</sup> The 1882 Act also authorized medical examinations in an effort to bar individuals suffering from "loathsome or contagious diseases"<sup>69</sup> from entering, and it imposed a fifty-cent tax on every passenger on a vessel arriving from a foreign port.<sup>70</sup> Despite its broader reaching restrictions, however, the 1882 Act was not completely blind to the rights and liberties of potential immigrants, as it distinguished between crimes of moral turpitude and crimes of a political nature, with individuals convicted of the latter type still being admissible.<sup>71</sup>

By passing two major acts in 1882, Congress revealed its willingness to embrace a federal regulatory system that would impose and tailor immigration restrictions as necessary.<sup>72</sup> Viewing their concerns as being fairly well received in Congress, nativist groups and labor unions lobbied for further restrictive legislation, particularly in the form of literacy and English language tests as necessary hurdles for immigrants to overcome to gain citizenship.<sup>73</sup> Although a literacy bill was passed by both houses of Congress in 1895 and similar bills were "almost continuously before Congress," they were repeatedly defeated by presidential veto.<sup>74</sup> The push for restriction continued into the twentieth century, with Congress frequently passing bills aimed at restricting immigration, many of which were enacted.<sup>75</sup> The head tax, for example, was increased to one dollar in 1894, only to be doubled to two dol-

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67. HUTCHINSON, *supra* note 12, at 80. The two classes originally designated under the 1875 Act were convicts and individuals immigrating to the United States for "lewd or immoral" purposes, the latter designation referring to Chinese prostitutes. *Id.*

68. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxii.

69. *Id.* at xxxii.

70. *Id.* at 55.

71. *See id.*

72. *See* HUTCHINSON, *supra* note 12, at 85. It should be noted that Congress revised the Chinese Exclusion Act several times such that, by 1900, Chinese laborers and their spouses were almost completely prohibited from immigrating to the United States. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxii.

73. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiii.

74. HUTCHINSON, *supra* note 12, at 157; *see also* U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiii.

75. *See* HUTCHINSON, *supra* note 12, at 157 ("[D]uring [this second historical period] the call for restriction became more and more explicit. Petitions to Congress called for it, and the term ['restriction'] came to be used more frequently by supporters of various measures in Congress.").

lars in 1903, and then doubled again to four dollars in 1907.<sup>76</sup> While a literacy requirement was not yet imposed, the 1906 enactment of a law requiring that immigrants be able to speak English in order to be considered for citizenship did help to appease some restriction proponents.<sup>77</sup>

In 1907, Congress commissioned what became known as the Dillingham Commission, named after its chairman, Senator William Dillingham, to study the subject of immigration.<sup>78</sup> In 1911, the Dillingham Commission issued a forty-two volume report espousing many of the Darwinism-based racist and ethnocentric arguments made in support of the Chinese Exclusion Act.<sup>79</sup> Not surprisingly, among the proposals was a literacy requirement for immigrants that was finally adopted over President Woodrow Wilson's veto in the Immigration Act of 1917 (the "1917 Act").<sup>80</sup> One other very important provision of the 1917 Act established an "Asiatic Barred Zone, which virtually excluded all Asian immigration."<sup>81</sup>

With Asian immigration effectively banned and European immigration severely curtailed by World War I, the United States turned to Mexico as a "back-door" source for temporary war-time labor<sup>82</sup>—a highly significant decision for both the purposes of this Comment and for the future of immigration policy in the United States.<sup>83</sup> Driven by a need to supply increased manpower for American industries and agricultural employers in the Southwest after the United States entered World War I in 1917, Secretary of Labor William Wilson exempted Mexican workers from the recently increased head tax and the literacy requirement that had only been in force for a few months.<sup>84</sup> Mexicans were allowed to enter the United States as guest workers on a temporary basis, six months at a time, which fulfilled the United States's dual

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76. *Id.*

77. See U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiii.

78. Act of Feb. 20, 1907, ch. 1134, § 39, 34 Stat. 898, 909.

79. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 47.

80. *Id.* at 48; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–78. The 1917 Act also doubled the head tax to eight dollars and added alcoholics, vagrants, and psychopaths to the list of excluded classes. *Id.*

81. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 48.

82. CALAVITA, *supra* note 29, at 134–35 (explaining that American industries recruited Mexicans "in unprecedented numbers" as temporary workers during World War I).

83. See *infra* Part III.

84. CALAVITA, *supra* note 29, at 135.

goals of meeting American industries' war-time needs while keeping the Mexicans "socially and politically marginal."<sup>85</sup>

Despite having benefited greatly from foreign-born laborers—mostly Mexicans—during World War I, the United States experienced widely felt and incredibly strong nationalistic, antiforeign sentiments by the end of the war in 1919.<sup>86</sup> With xenophobia at an all-time "high pitch," the stage was set for the third phase of immigration law and policy to begin in the United States.<sup>87</sup>

### C. *The Era of Extreme Restriction: 1920 Through 1965*

In the years immediately following World War I, several factors contributed to the renewal of calls for more restrictive legislation. As immigration numbers began to rise toward pre-war levels, many Americans feared that citizens from war-devastated countries would soon inundate the United States.<sup>88</sup> The isolationist mood of the post-war period and an economic depression influenced legislators' desires to curb immigration.<sup>89</sup> Additionally, increased paranoia and skepticism of "un-American" political views, as evidenced by the Red Scare and the Palmer Raids of 1919–1920,<sup>90</sup> impacted legislative initiatives to supplement the traditionally qualitative restrictions on immigration with *quantitative* restrictions.<sup>91</sup>

Legislation in 1921 introduced, for the first time ever, quantitative restrictions on immigration in the form of strict national-origin-based quota limitations.<sup>92</sup> The Quota Act of 1921, with certain exceptions, temporarily allocated quotas to each nationality "totaling 3% of the foreign born persons of that nationality resid-

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85. *Id.* at 137.

86. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 75 (2003).

87. *See id.*

88. LEGOMSKY, *supra* note 9, at 126.

89. *Id.*

90. During the Red Scare in the winter of 1919–1920, authorities executed raids (known as the Palmer Raids) aimed at suspected Eastern European revolutionaries and communists. Brickner & Hanson, *supra* note 28, at 223–24. These raids resulted in the arrests of "10,000 alleged anarchists" and the ultimate deportation of 500 of them. Ngai, *supra* note 86, at 74.

91. *See Ngai, supra* note 86 at 74.

92. Quota Act of 1921, ch. 8, § 2(a)–(b), 42 Stat. 5; *see* LEGOMSKY, *supra* note 9, at 126.

ing in the United States in 1910.”<sup>93</sup> A permanent and more restrictive quota policy was put in place in 1924, which essentially fixed the quota for a particular nationality proportionate to the number of persons of that nationality living in the United States in 1920.<sup>94</sup> Not included in the quota policy were immigrants from Western Hemisphere countries, whose entry was not numerically limited.<sup>95</sup> Nevertheless, between 1920 and 1965, the quota laws, coupled with the immigration-reducing effects of the Great Depression, had a profound impact on immigration numbers.<sup>96</sup> During that forty-five-year period, the total number of immigrants entering the country was limited to fewer than six million—an astounding drop when compared to the 23.5 million immigrants who entered during the forty-year period between 1880 and 1920.<sup>97</sup> The quota restrictions remained, for the most part, unchanged for approximately thirty years.<sup>98</sup>

The harsh immigration restrictions were slightly modified in the 1940s, however, due to a number of factors arising out of the United States’s participation in World War II.<sup>99</sup> Since China had been a war-time ally, Congress repealed the long-standing ban on Chinese immigration as a matter of foreign policy.<sup>100</sup> Also, similar to the practice in place during World War I, the concept of employing temporary Mexican “guest workers” was introduced yet again to fill war-time needs.<sup>101</sup> Spurred by the “flight [of American agricultural laborers] to higher-paying industrial jobs generated by the war,” the Bracero Program was instituted in 1942 at the request of Southwestern agribusiness leaders.<sup>102</sup> Under the agree-

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93. LEGOMSKY, *supra* note 9, at 126. The Quota Act of 1921 effectively allowed for the admission of 350,000 quota immigrants annually. *Id.*

94. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153; *see also* LEGOMSKY, *supra* note 9, at 126. The admission of quota immigrants was limited to approximately 150,000 per year. *Id.*

95. LEGOMSKY, *supra* note 9, at 126.

96. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiv.

97. *Id.*

98. *See* LEGOMSKY, *supra* note 9, at 126–27.

99. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiv.

100. Act of December 17, 1943, ch. 344, 57 Stat. 600; *see* U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiv.

101. *See, e.g.,* U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxiv–v; Lorenzo A. Alvarado, Comment, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 57–58 (2001); Nicole Jacoby, Note, *America’s De Facto Guest Workers: Lessons from Germany’s Gastarbeiter for U.S. Immigration Reform*, 27 FORDHAM INT’L L.J. 1569, 1573–74, 1574 n.18 (2004).

102. Alvarado, *supra* note 101, at 57.



ment between the United States and Mexico, Mexican guest workers ("Braceros") would be recruited only to areas with certified labor shortages, and their employment would be governed by written labor contracts with specified terms of duration.<sup>103</sup> After their contracts expired, Braceros were obligated to immediately return to Mexico.<sup>104</sup> Although implemented to compensate for war-time labor shortages, the Bracero Program was extended for over two decades, and Braceros' employment contracts were frequently renewed.<sup>105</sup>

Along with the practice of importing Mexican Braceros, however, came the trend of deporting other classes of immigrants or at least temporarily removing suspect classes.<sup>106</sup> Post-war fear of Communism intensified in the United States and, reminiscent of the Palmer Raids earlier in the century, the federal government took actions to protect the American public from what was considered a threatening foreign voice of political dissent.<sup>107</sup> The Internal Security Act of 1950 made past or present membership in, or affiliation with, the Communist Party a ground for exclusion or deportation.<sup>108</sup>

Further expanding the grounds for deportation and, perhaps, the most significant legislative development of the era was the enactment of the Immigration and Nationality Act of 1952 (the "INA"),<sup>109</sup> "an unprecedented recodification and revision of existing immigration law" that still constitutes the backbone for immigration law in the United States.<sup>110</sup> The INA broadened the cri-

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103. *Id.* at 59–60.

104. *Id.* at 60.

105. *Id.* at 59. For a thorough discussion of the Bracero Program and the controversies surrounding it, see generally *id.* at 57–73.

106. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of the "evacuation" of Japanese-Americans to concentration camps out of concern for national security and fear of disloyalty). See generally CHEMERINSKY, *supra* note 8, § 9.3.3.1, at 670–72 (providing background and criticism of the *Korematsu* case); R. Spencer Macdonald, Comment, *Rational Profiling in America's Airports*, 17 BYU J. PUB. L. 113, 122–24 (2002) (outlining the many criticisms of Japanese internment during World War II).

107. See LEGOMSKY, *supra* note 9, at 127; see also HUTCHINSON, *supra* note 12, at 256 ("[W]ars, like depressions, always have strong effects on attitudes toward immigration and the alien.").

108. Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006.

109. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

110. Kati L. Griffith, Comment, *Perfecting Public Immigration Legislation: Private*

teria for exclusion and deportation, with most of the new grounds relating to national security or political expression.<sup>111</sup> Another major aspect of the INA was the addition of a “preferences” system for certain skilled laborers and for relatives of U.S. citizens and lawful permanent resident aliens,<sup>112</sup> thereby establishing the basis for the most common modern forms of lawful immigration.

In 1953, a special commission was formed to closely study immigration law and policy.<sup>113</sup> The commission ultimately recommended a less restrictive, more liberal approach to immigration, and several private bills were enacted in the 1950s in an effort to clarify and loosen certain aspects of existing law.<sup>114</sup> Finally, in 1965, Congress enacted the Immigration and Nationality Act of 1965,<sup>115</sup> which officially ended the strict national-origins quota system and marked the beginning of the fourth and current phase of immigration law and policy in the United States.<sup>116</sup>

#### D. *The Era of Latin American Immigration: 1965 Through the Present*

##### 1. 1965–2000

When considering the current era of immigration law and policy, many scholars have been unable to assign a particular adjective or phrase that accurately characterizes the period. One common observation is that immigration legislation over the past forty years has been facially neutral, lacking the overt tones of restriction that dominated the first seventy-five years of federal

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*Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 280 (2004); see LEGOMSKY, *supra* note 9, at 127.

111. See LEGOMSKY, *supra* note 9, at 399; Griffith, *supra* note 110, at 280. INA § 212(a)(27) “covered noncitizens believed to be entering the United States to engage in activities ‘prejudicial to the public interest.’” Section 212(a)(28) pertained to noncitizens who had ever advocated communism, anarchy, or the propriety of overthrowing government. Section 212(a)(29) addressed noncitizens likely to engage in espionage, sabotage, or subversion. LEGOMSKY, *supra* note 9, at 399.

112. Immigration and Nationality Act of 1952, ch. 477, §§ 203(a)(1)–(3), 66 Stat. 163.

113. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxvi.

114. See Griffith, *supra* note 110, at 282.

115. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (2000)).

116. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxvi.

immigration lawmaking in the United States.<sup>117</sup> The most resounding observation, however, is the emergence of illegal immigration from Latin America as the chief consideration consuming the executive and legislative immigration agendas.<sup>118</sup> Preoccupation over the influx of illegal, undocumented Latin American workers—mostly Mexican—during the current era has resulted in a considerable amount of legislation, but very little success.<sup>119</sup>

After a relatively prosperous preceding decade, the 1970s weighed the United States's economy down with significant "stagflation"—a combination of both high inflation and high unemployment.<sup>120</sup> Also, as a result of the Bracero Program ending in 1964, the United States experienced a major increase in the number of illegal Mexican immigrants crossing the border.<sup>121</sup> These two combined factors put pressure on Congress to again enact restrictive legislation.<sup>122</sup> In response, Congress formed the Select Commission on Immigration and Refugee Policy in 1978 to closely consider the problem of illegal immigration.<sup>123</sup> One of the Commission's main recommendations—to impose sanctions on employers who knowingly hired illegal aliens—was incorporated into the primary piece of immigration legislation arising out of the 1980s.<sup>124</sup>

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117. See, e.g., FISS, *supra* note 2, at 3 ("[S]ince the 1960s our immigration laws have been purged of an overt racial and ethnic bias."); U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at xxxvi (arguing that the current era of immigration law and policy has "reject[ed] the open racism of the quota system"); Brickner & Hanson, *supra* note 28, at 228–29 ("[The] treaties and statutes [of the current era] have removed explicit discrimination from American immigration law; they are facially neutral.").

118. See Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 933, 949 (2004) (commenting on the "marked focus both in the political arena and in general public discourse on the problems caused by illegal immigration from Central and South America, and in particular from Mexico").

119. See, e.g., *id.* at 958 ("By all accounts, contemporary United States immigration policy has been ineffective in significantly reducing the flow of illegal migration from Mexico."); JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601, 617 (2002) (arguing that a lack of presidential leadership on immigration reform over the past couple of decades has resulted in a failure to deter and prevent illegal entry into the United States).

120. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 252.

121. *Id.*

122. See *id.*

123. Turoff, *supra* note 18, at 183.

124. U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 252–53.

The Immigration Reform and Control Act of 1986 ("IRCA")<sup>125</sup> attempted to curb illegal immigration in two main ways: (1) by imposing sanctions on employers of undocumented workers, and (2) by granting amnesty to special agricultural workers who could prove they had been performing agricultural work in the United States for at least ninety days between May 1985 and May 1986 without proper documentation.<sup>126</sup> Despite the "sweeping changes"<sup>127</sup> it introduced to immigration law, IRCA had a relatively minor impact that did little to ameliorate the growing problem of illegal immigration.<sup>128</sup>

Congress tried again in 1990 to combat the mounting illegal entry statistics through the enactment of the Immigration Act of 1990 (the "1990 Act"),<sup>129</sup> which many commentators described as being "unquestionably . . . the most important immigration statute in many years."<sup>130</sup> Oddly, the 1990 Act had only two provisions relating specifically to *illegal* immigration, one of them being designed to make it easier to deport criminal aliens, and the other being an effort to fortify the U.S.-Mexico border by increasing the size of the Border Patrol.<sup>131</sup> The main effect of the 1990 Act was to make more visas available, which dramatically increased the rate of legal immigration by thirty-five percent but did virtually nothing to lower the levels of *illegal* immigration.<sup>132</sup>

Shortly after the 1990 Act's ineffectiveness became apparent, "public frustration with the mass immigration problem began to boil over."<sup>133</sup> Public opinion, particularly in states strongly im-

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125. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

126. See LoBreglio, *supra* note 118, at 949; Maggio, *supra* note 32, at 864-65. The amnesty program led to the legalization of nearly three million workers who had previously been undocumented. Jacoby, *supra* note 101, at 1623.

127. LEGOMSKY, *supra* note 9, at 131.

128. See U.S. IMMIGRATION AND NATURALIZATION, *supra* note 6, at 253 ("IRCA had but a very temporary impact on the flow of immigrants . . ."); LoBreglio, *supra* note 118, at 949-50 (explaining that illegal immigration continued to rise throughout the late 1980s and early 1990s, while "the rate of unemployment for domestic agricultural workers remained high").

129. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.).

130. *E.g.*, LEGOMSKY, *supra* note 9, at 131.

131. See Spotts, *supra* note 119, at 612.

132. *Id.*; see LoBreglio, *supra* note 118, at 951.

133. Spotts, *supra* note 119, at 613; see also, *e.g.*, Jacoby, *supra* note 101, at 1623 ("By the early 1990s, the tide had turned and public sentiment concerning immigrants grew

pacted by illegal immigration, clearly indicated a desire for more restrictions.<sup>134</sup> In 1993 and 1994, President Clinton approved and launched several initiatives to strengthen the Border Patrol, none of which was particularly effective.<sup>135</sup> The centerpiece of President Clinton's immigration efforts proved to be the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), passed in 1996.<sup>136</sup> The IIRIRA provided several mechanisms designed to thwart the entry of illegal immigrants, such as the hiring of one thousand new Border Patrol agents annually, the imposition of stricter penalties on smugglers of aliens, and the reinforcement and construction of fencing on the border with Mexico.<sup>137</sup> Consistent with the fate of other initiatives designed to combat illegal immigration, however, the IIRIRA did little to reverse the unprecedented increases in illegal immigration.<sup>138</sup> By the end of President Clinton's second term, the illegal immigration problem seemed to be growing exponentially with approximately six million illegal immigrants living in the United States as of July 2000.<sup>139</sup>

## 2. The Bush Administration

Just months into his first term, President Bush quickly made immigration reform a priority, stressing his desire for a "revamped" guest-worker program.<sup>140</sup> Working closely together,

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increasingly negative.").

134. *E.g.*, Jacoby, *supra* note 101, at 1625 ("Anti-immigrant sentiments were strongest in the key immigrant-receiving states of California, Texas, and Florida."); Spotts, *supra* note 119, at 613 (discussing grassroots immigration reform movements in California, Florida, New York, Texas, and Illinois with particular focus on California's highly influential "Proposition 187"). For details on Proposition 187, see *infra* notes 169-70 and accompanying text.

135. See Spotts, *supra* note 119, at 614-15 & n.116. (noting that, despite increases in personnel and improvements in equipment and technology, over 400,000 immigrants were still able to cross the U.S.-Mexico border illegally in 1996).

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

137. LoBreglio, *supra* note 118, at 952; Spotts, *supra* note 119, at 615.

138. See LoBreglio, *supra* note 118, at 952 ("[T]he IIRIRA, like so many other reforms before it, failed to produce a dramatic downturn in illegal immigration."); Spotts, *supra* note 119, at 617 (noting that "there had been little improvement made" during Clinton's presidency when considering that the number of illegal aliens entering the United States had increased at a rate of about 300,000 per year).

139. Spotts, *supra* note 119, at 617.

140. Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage*

President Bush and Mexican President Vicente Fox formed a bi-national policy group consisting of the attorneys general and the secretaries of state and labor from both countries.<sup>141</sup> The group established several general principles that would serve the interests of both the United States and Mexico but did not agree upon a specific legislative plan to put into action.<sup>142</sup> In early September 2001, less than a week before the horrific terrorist attacks, a U.S.-Mexican immigration reform plan seemed to be building momentum in light of President Fox's first State Visit to the White House.<sup>143</sup> After extensive talks, President Bush and President Fox endorsed a joint statement released on September 6, 2001, which provided, in relevant part:

[President Bush and President Fox] stressed their commitment . . . to reach mutually satisfactory results on border safety, a temporary worker program and the status of undocumented Mexicans in the United States. They requested that the working group provide them proposals with respect to these issues *as soon as possible*. The Presidents recognized that . . . it is critical to address the issue *in a timely manner* and with appropriate thoroughness and depth.<sup>144</sup>

The two Presidents' emphasis that time was of the essence in pursuing immigration reform suggested that the United States and Mexico were on the brink of a historic bilateral immigration agreement.<sup>145</sup> That prospect was at least temporarily shattered, however, as the devastating terrorist attacks immediately shifted the United States government's attention from immigration reform to more urgent national security matters.<sup>146</sup>

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*Comes Home*, 52 DEPAUL L. REV. 849, 866–67 (2003); see also Jacoby, *supra* note 101, at 1635; LoBreglio, *supra* note 118, at 941.

141. Jacoby, *supra* note 101, at 1635.

142. *Id.* at 1635 n.357 (explaining that the principles agreed upon were that a reformed immigration policy should “match willing workers with willing employees, serve the social and economic needs of both countries, . . . respect the human dignity of all immigrants regardless of their legal status in the United States[,]” and ensure that immigration would occur through safe and legal channels).

143. See *id.* at 1635.

144. Joint Statement Between the United States of America and the United Mexican States, White House Press Release, Sept. 6, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010906-8.html> (last visited Apr. 2, 2005) (emphasis added).

145. Johnson, *supra* note 140, at 867 (“Although difficult issues remained to be solved, compromise appeared possible.”).

146. See *id.* at 867 (“After September 11, discussions virtually stopped in their tracks. A U.S./Mexico migration agreement restructuring migration between the United States and Mexico was apparently another casualty of the catastrophic events of that day.”); LoBreglio, *supra* note 118, at 942 (“Immediately after the terrorist attacks, however, the

In the two years following the terrorist attacks, President Fox attempted to reinitiate reform talks several times to no avail.<sup>147</sup> The executive and legislative branches of the United States government were understandably preoccupied with the global war on terror.<sup>148</sup> Although Congress passed several significant pieces of legislation affecting immigration during those two years, the changes were terrorism-themed, and not the employment-themed adjustments that seemed likely to come to fruition in the first week of September 2001.<sup>149</sup> In January 2004, however, immigration reform aimed at Latin America was once again put at the forefront of American politics and public debate.<sup>150</sup>

### III. THE CURRENT STATE OF AFFAIRS: PRE- AND POST-ELECTION IMMIGRATION DEBATE

Over the past few years, the impact of Latin American immigration on the United States population has been astounding. The immigrant population—legal and illegal—in the United States reached a record of more than thirty-four million in March

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talks ended, and the focus shifted from relaxing border controls to heightening them.”); see also Jacoby, *supra* note 101, at 1642–45 (observing that September 11 marked the beginning of a more than two-year hiatus for the Bush Administration’s immigration reform agenda).

147. Jacoby, *supra* note 101, at 1643.

148. *Id.* Several major pieces of legislation, including the expansive USA Patriot Act, were passed shortly after the tragedy of September 11, 2001. A detailed analysis of terrorism and national security initiatives affecting immigration, however, would be outside the scope of this paper. For thorough discussions of post-9/11 terrorism legislation affecting immigration, see generally Johnson, *supra* note 140 (focusing on the concrete effects of September 11 on United States immigration law) and Ruchir Patel, *Immigration Legislation Pursuant to Threats to U.S. National Security*, 32 DENV. J. INT’L L. & POL’Y 83 (2003).

149. See Johnson, *supra* note 140, at 855–60 (discussing the USA Patriot Act, increased visa monitoring, and stricter immigration enforcement—all of which affect Latin American immigrants and their employment prospects—that resulted after the terrorist attacks); see also LoBreglio, *supra* note 118, at 942 (“[I]t is inevitable that [Mexicans] will be the group most affected by [post-9/11 legislation], regardless of whether the proposals are aimed specifically at the Mexican community.”).

150. See President George W. Bush, Remarks on New Temporary Worker Program Proposal Presented in the East Room of the White House (Jan. 7, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html>) (last visited Apr. 2, 2005) [hereinafter Bush Remarks] (discussing the temporary worker program in the contexts of national security, economic benefit, and immigration reform); see also Sara R. Bollerup, Comment, *America’s Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 38 NEW ENG. L. REV. 1009, 1045–46 (2004) (discussing the recent political emphasis on immigration reform).

2004, an increase of well over four million since 2000.<sup>151</sup> Nearly one-third of all immigrants living in the United States are Mexican, and in 2004 alone, Mexico sent over five times more immigrants than any other single country.<sup>152</sup> Finally, an estimated three million illegal aliens entered the United States in 2004—three times the number of immigrants entering legally—and the vast majority of those immigrants came from Mexico.<sup>153</sup> With Latin Americans dramatically changing the demographic landscape of many key electoral states, their importance as an attention-meriting constituency was quite clear throughout the 2004 presidential campaign.<sup>154</sup> President Bush's announcement in early 2004 that his Administration was revisiting and tweaking its guest-worker proposal from 2001<sup>155</sup> helped to set the tone of the Bush and Kerry campaigns and also to frame the most important issues, controversies, and factors involved in the current immigration reform debate.<sup>156</sup>

### *A. Recognizing a Crucial Constituency*

The population of Latin Americans in the United States has reached thirty-five million, earning them the distinction of representing a "minority majority" as the nation's largest minority group.<sup>157</sup> During the 2004 presidential campaign season, both President Bush and Senator Kerry recognized the importance of appealing to Latin American voters by proposing immigration re-

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151. CIS BACKGROUNDER, *supra* note 14, at 1.

152. *Id.* at 1, 13. China sent the second-highest number of immigrants, but its total was still less than sixteen percent of Mexico's contribution. *Id.* at 13.

153. Barlett & Steele, *supra* note 21, at 52 (noting also that the number of illegal aliens entering the United States in 2004 would be "enough to fill 22,000 Boeing 737-700 airliners").

154. See, e.g., Alonso-Zaldivar, *supra* note 22, at A1 (stating that Democrats and Republicans are "courting immigrant constituencies" in swing states like Florida and New Mexico); Ann M. Simmons, *Immigration Is Topic A for Foreign-Born Voters*, L.A. TIMES, Feb. 26, 2004, at A22 (explaining that Latin Americans represent thirty-two percent of California's population and, as such, "immigration is a pertinent issue, both practically and symbolically").

155. See Bush Remarks, *supra* note 150 ("Today, I ask the Congress to join me in passing new immigration laws that . . . meet America's economic needs, and live up to our highest ideals").

156. See Alonso-Zaldivar, *supra* note 22, at A1 (arguing that the competing proposals of the Democrats and the Republicans during the presidential campaigns helped "to define the battle lines").

157. See Moreno Gonzales, *supra* note 20, at A04.



form, since the crucial Hispanic swing vote brings a strong interest in immigration issues.<sup>158</sup> Although Latin Americans have traditionally voted for Democratic candidates, President Bush's political team has, since the 2000 campaign, made Latin American voters a top priority.<sup>159</sup> Evidence of the President's success was an enormous increase in the Republican share of the Latin American vote in the 2000 election when compared to how Senator Dole fared in 1996—thirty-five percent compared to twenty-one percent.<sup>160</sup> By early May 2004, it became apparent that President Bush had benefited from a "head start" in announcing his immigration reform plan in January, while Democrats did not present their proposal until late spring.<sup>161</sup>

### B. *The Two Sides of the Controversy*

While the Latin American voting base was certainly an important target for both candidates, strong immigration views are common among the rest of the American population as well.<sup>162</sup> On a very basic level, two opposing "sides" of the public sentiment spectrum can be discerned: the "anti-immigration" restrictionist view, and the "pro-immigration" inclusiveness view.<sup>163</sup> Granted, this categorization is over simplified, but the following discussion lists several popularly held concerns on both sides of the immigration debate.

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158. *Id.*

159. Ron Hutcheson & Dave Montgomery, *Bush's Guest Worker Proposal: Firestorm Engulfs Plan to Give Illegal Immigrants Legal Status: Foreigners Could Gain Entry to U.S. by Holding Job*, DETROIT FREE PRESS, Jan. 8, 2004, available at [http://www.freep.com/news/nw/immig\\_20040108.htm](http://www.freep.com/news/nw/immig_20040108.htm) (last visited Mar. 25, 2005).

160. Moreno Gonzales, *supra* note 20, at A04.

161. Alonzo-Zaldivar, *supra* note 22, at A1 (suggesting that the Democrats' immigration bill was "an effort to recapture a traditionally Democratic issue from President Bush, who got out in front" by proposing his guest worker initiative several months earlier).

162. See, e.g., Jacoby, *supra* note 101, at 1641 (noting the negative impact the September 11, 2001 attacks had on public opinion regarding immigrants, particularly after the economy soured and unemployment rates began to soar).

163. See Richbourg, *supra* note 2, at 477–78 (labeling optimistic, pro-immigration individuals as the "Yin," and pessimistic, anti-immigration individuals as the "Yang").

## 1. The Anti-Immigration View

One of the most common anti-immigration complaints is the claim that foreign-born immigrants, especially those entering the United States *illegally*, are taking American jobs and displacing American workers.<sup>164</sup> One study performed in the early 1990s predicted that the cost of job displacement by illegal aliens would reach approximately \$171.5 billion between 1993 and 2002.<sup>165</sup> A more recent study found that, between 2000 and mid-2003, employment of native-born Americans and established, legal immigrants fell by at least 900,000, while new illegal immigrants “substantially increased their access to jobs in the U.S.”<sup>166</sup> Immigration opponents also point to the statistic that between forty and fifty percent of wage loss among low-skilled American workers is likely caused by illegal immigration.<sup>167</sup>

Another major complaint is that illegal immigration results in a massive drain on the United States economy and taxpayer funds, most notably in states with high immigrant populations, like California, Texas, Florida, and Arizona.<sup>168</sup> One of the best articulations of this concern took the form of the grassroots-sponsored “Proposition 187” in California, a 1994 ballot initiative that was proposed by Californians frustrated with illegal aliens benefiting from public assistance funds.<sup>169</sup> Passing with overwhelming support, Proposition 187 eliminated many state-provided benefits for illegal immigrants, such as welfare, non-emergency healthcare, and the right to public elementary and high school education.<sup>170</sup> Despite any ameliorative effects of Proposition 187, the complaints in California continue: a 2004 study reported that California taxpayers are spending \$7.7 billion

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164. AILA BACKGROUNDER, *supra* note 19, at 1; Turoff, *supra* note 18, at 183–84; Andrew M. Sum & Paul E. Harrington, *Rise of the Off-the-Books Workforce*, L.A. TIMES, Feb. 22, 2004, at M1 (“There has been substantial displacement of native-born workers by new immigrants, especially in entry-level jobs.”).

165. Turoff, *supra* note 18, 184 n.40.

166. Sum & Harrington, *supra* note 164, at M1 (observing that many native-born teenagers and adults without college degrees are being displaced by new, illegal immigrants).

167. See Cliff Stearns, Editorial, *Don't Decriminalize Illegal Immigration*, ORLANDO SENTINEL, Jan. 28, 2004, at A13.

168. AILA BACKGROUNDER, *supra* note 19, at 2; Turoff, *supra* note 18, at 183 (stating that “[t]his concern was plausible given evidence showing that illegal aliens ha[ve] exacted a high economic toll within the U.S.”).

169. Jacoby, *supra* note 101, at 1625.

170. *Id.*

annually on public education benefits for illegal aliens and \$1.4 billion annually on costs associated with the incarceration of illegal aliens.<sup>171</sup>

Finally, American residents of border towns through which thousands of illegal aliens pass daily experience the most direct adverse impacts of illegal immigration and are generally the most outspoken critics.<sup>172</sup> For example, in Bisbee, Arizona, located five miles from the U.S.-Mexico border, residents complain about being overwhelmed by the constant flow of illegal immigrants through their town—approximately three hundred each night.<sup>173</sup> Complaints from Bisbee residents typically relate to crime,<sup>174</sup> nuisance,<sup>175</sup> and the reckless behavior of many illegal immigrants.<sup>176</sup> Also, similar to the concerns often voiced in California, the influx of illegal immigrants in Bisbee has strained the tiny town's economy, unfairly forcing the local government to provide emergency healthcare to illegal immigrants free-of-charge.<sup>177</sup> The types of anti-immigration sentiments felt in Bisbee are also common in other border towns.<sup>178</sup>

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171. FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO CALIFORNIANS 1 (Nov. 2004), at <http://www.fairus.org/Files/OpenFile.cfm?id=2571> (last visited Apr. 2, 2005).

172. See Barlett & Steele, *supra* note 21, at 51–57.

173. *Id.* at 51, 54.

174. *Id.* at 53–56 (explaining that some illegal immigrants have poisoned the residents' dogs to prevent them from barking and will often steal vehicles, which resulted in Arizona being the number one state in cars stolen per capita each year).

175. *Id.* at 53–54 (noting that illegal immigrants are very noisy at night and that they will "turn the land into a vast latrine, leaving behind revolting mounds of personal refuse" and garbage).

176. *Id.* at 54 (describing how illegal immigrants cut through fences, which causes hundreds of cattle to stray from farms).

177. *Id.* at 55 (observing how Congress requires a fourteen-bed local hospital to provide emergency care to illegal immigrants—often suffering from dehydration or injuries received during high-speed chases with police—without reimbursing the \$450,000 annual expense).

178. See, e.g., *A Citizens' Revolt*, BALT. SUN, Nov. 12, 2004, at 18A ("Weary Arizonans, especially ranchers, who have had their properties overrun by illegal border crossers, have been complaining for years."); Gil Klein, *Dying to Cross: A Special Report from the Mexican Border—Illegal Immigrants Who Circumvent Tough Barriers Often Pay with Their Lives*, RICH. TIMES DISPATCH, Nov. 30, 2003, at A1 (listing the complaints of residents in several Texas, California, and Arizona towns).

## 2. The Pro-Immigration View

Most proponents view modern immigration as a necessary and appropriate affirmation of the ideals on which the United States was founded—inclusiveness, opportunities for self-made success in the form of the “American Dream,” and the notion that diversity is the greatest asset to this nation’s unique identity in the world.<sup>179</sup> They argue that immigrants come to the United States with a desire to assimilate, learn English, and most importantly, improve the lives of their families.<sup>180</sup> A desire to freeload off of public assistance funding is not a common motivation.<sup>181</sup> Fundamentally, in response to anti-immigration sentiment, proponents highlight the irony of attempting to close the United States’s borders to immigration when one in five residents of this country is an immigrant or has at least one immigrant parent.<sup>182</sup>

Immigration proponents attack the job displacement statistics, contrarily arguing that immigrants actually help create new jobs.<sup>183</sup> As the logic goes and economists have argued, immigrants expand the demand for goods and services by becoming consumers themselves.<sup>184</sup> Also, immigrants frequently “fill vital niches in the low and high skilled ends of the labor market, thus creating subsidiary job opportunities for Americans.”<sup>185</sup> Rebutting the job displacement statistics, immigration proponents stress the unreliable nature of the statistical methods used by immigration opponents, and they refer to different studies that suggest job creation by illegal immigrants.<sup>186</sup>

Responding to arguments that illegal immigration drains the domestic economy, immigration proponents argue that immi-

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179. See Richbourg, *supra* note 2, at 477–78 (opining that immigration proponents “operate out of a perspective of plenty . . . [and] contend that there is more than enough to go around”).

180. AILA BACKGROUNDER, *supra* note 19, at 4.

181. *Id.*

182. See Cragg Hines, Editorial, *Some Mean to Give Thanks for Drawbridge They’d Raise; Cragg Hines Believes that Fear—Far More than Facts—Is Driving a Resurgence of the Vindictive Anti-Immigration Movement*, HOUS. CHRON., Nov. 24, 2004, at B9 (“Some of the biggest advocates of pulling up the drawbridge come from groups that have crossed it most recently.”).

183. AILA BACKGROUNDER, *supra* note 19, at 1.

184. *Id.*

185. *Id.*

186. See Turoff, *supra* note 18, at 184 n.41.

grants—both legal and illegal—are significant sources of tax revenue.<sup>187</sup> Apart from individuals being paid “under the table” and those who are exempt due to their level of earnings, “all individuals who work in the United States are required to pay federal income taxes.”<sup>188</sup> Economists found that immigrant households paid an estimated \$133 billion in direct federal, state, and local taxes in 1997, and in New York, for example, the taxes paid by immigrants were roughly proportional to their size in that state’s population.<sup>189</sup> Overall, immigration proponents claim that most Americans benefit from a healthier economy because of the strengthened labor force and lower prices resulting from immigration.<sup>190</sup>

### C. *Differing Approaches to Reform: The Bush and Kerry Campaign Stances*

#### 1. President Bush’s Temporary Guest-Worker Proposal

President Bush described his reform plan as being designed to “reflect[] the American Dream” while also “serv[ing] the economic needs of our country” and “help[ing] [to] return order and fairness to our immigration system.”<sup>191</sup> In essence, President Bush’s plan would offer temporary legal status to millions of undocumented workers currently employed in the United States and also to workers who are not currently in the United States but have job offers waiting for them.<sup>192</sup> The guest-worker status would last for three years with an option for renewal, though only for a finite period of time.<sup>193</sup> This proposal would not offer amnesty to currently undocumented workers, nor would it place temporary workers on any better path to citizenship than they would have if they were not in the guest-worker program.<sup>194</sup> President Bush

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187. AILA BACKGROUNDER, *supra* note 19, at 2.

188. *Id.*

189. *Id.* at 2–3.

190. *Id.* at 3.

191. Bush Remarks, *supra* note 150 (describing the main components of President Bush’s proposed program).

192. *Id.*

193. *Id.* (“The legal status granted by this program will last three years and will be renewable—but it will have an end.”).

194. *See id.*; *see also* Jacoby, *supra* note 101, at 1646 (“Under the Bush plan, temporary

emphasized the expectation that guest workers would return permanently to their native countries after the expiration of their temporary status.<sup>195</sup>

## 2. The Democrats' Approach: A "Path to Citizenship"

The Democrats' modified guest-worker plan, endorsed by Senator Kerry while campaigning and continuing to be advocated in the 109th Congress, "would offer green cards and permanent resident status to all immigrants who have been in the United States at least five years, can prove they have worked for at least 24 months and have passed background and medical checks."<sup>196</sup> The proposal would also promote family reunification by loosening the quotas currently preventing many immigrants from bringing their relatives to the United States.<sup>197</sup> Although this program would make it more difficult to "import" guest workers by limiting their future entry to 350,000 annually, it would also "open the path to citizenship for illegal immigrants already in the country."<sup>198</sup> Differing sharply from President Bush's plan, the Democrats' proposal would facilitate "earned legalization"—a form of amnesty for illegal immigrants with proven and stable track records of employment, health, and law-abiding behavior.<sup>199</sup>

### D. *Post-Election: President Bush's Guest-Worker Push Continues*

Improving upon the gains Republicans made in the 2000 election, President Bush received a notable forty-four percent of the Latin American vote in the November 2004 election—nine percent more than in 2000.<sup>200</sup> President Bush's re-election and in-

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workers will have to apply for green cards and citizenship under existing laws, with no advantage over other applicants.").

195. Bush Remarks, *supra* note 150. ("This program expects temporary workers to return permanently to their home countries after their period of work in the United States has expired.").

196. Alonso-Zaldivar, *supra* note 22, at A1.

197. *Id.*

198. *Id.*

199. *See id.*

200. Paul S. Egan, *Post-Election Analysis: What's in the Cards for Immigration Reform?*, Federation for American Immigration Reform, at <http://www.fairus.org/Legislation/Legislation.cfm?ID=2563&c=66> (last visited Apr. 2, 2005) [hereinafter *Post-Election Analysis*].

creased share of the Latin American vote should not, however, be automatically interpreted to indicate that a majority of Americans preferred his immigration reform proposal to the one Senator Kerry endorsed and Democrats are still promoting.<sup>201</sup> Although immigration reform was a significant issue, exit polling, though flawed, revealed that the chief concerns of the voting public were, in descending order, moral and cultural values, the economy, the war on terrorism, the war in Iraq, and health and education.<sup>202</sup> Moreover, Americans might not have been willing to base their vote on immigration grounds due to skepticism of President Bush's commitment to immigration reform in light of the initial vagueness of his proposal<sup>203</sup> and his Administration's unwillingness to support other proposed immigration bills.<sup>204</sup> Nevertheless, regardless of the actual impact the immigration reform issue had on voters, the Bush Administration's actions immediately following the President's re-election dispelled much of the speculation that his proposal had been rhetoric-filled campaign fuel.<sup>205</sup> Since the election, President Bush has persisted in actively promoting his guest-worker proposal, all but guarantee-

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201. See *id.* ("The most immediate danger facing the immigration reform movement is the politically mistaken view that the president's reelection [sic] is a mandate for open borders, guest worker programs, . . . continued failure to enforce laws against illegal immigration or continued mass legal immigration.").

202. *Id.* While immigration is intertwined with each of these issues, it is simply not possible to determine with certainty the extent to which immigration reform influenced voters' election preferences. See *id.* (arguing that the Latin American votes could be interpreted to mean that fifty-six percent of Latin American voters cast their ballots *against Bush*, preferring Kerry's amnesty/family reunification proposal, or that forty-four percent of Latin Americans cast their ballots *against Kerry*, fearing that his limitations on the number of guest-worker entries could "jeopardize their own economic security"); see also Jacoby, *supra* note 101, at 1639 (explaining that immigrant advocacy groups were fairly mixed in their views on immigration reforms, but most Mexican workers prefer a plan that could ultimately lead to citizenship).

203. See Alonso-Zaldivar, *supra* note 22, at A1 ("The Democratic proposal contains more detail than Bush's principles for immigration reform."); Bush Remarks, *supra* note 150 (outlining proposed principles for reform with few concrete details).

204. See Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y 735, 737 (2004) (listing several sources of "doubt[] that the President [was] serious about immigration reform").

205. *Post-Election Analysis*, *supra* note 200 ("Already, less than a week after the election, the president's men are again pressing for an amnesty/guestworker program."); See also e.g., Medige, *supra* note 204, at 735 (noting that some commentators had speculated that President Bush's proposal was an "election-year ploy") (quoting Hutcheson & Montgomery, *supra* note 159); John Conyers, Jr. & Sheila Jackson Lee, "Harvest of Shame" Again?, LEGAL TIMES, Feb. 2, 2004, at 54 (expressing skepticism over the Bush Administration's "election-year conversion to immigration reform").

ing a prolonged immigration reform debate continuing well into the 109th session of Congress and possibly beyond.<sup>206</sup>

# 1. The Mexican Government: An Ardent Supporter of Immigration Reform

President Fox and the Mexican government have enthusiastically backed President Bush's guest-worker proposal, and their motivation is clear: Mexico has an enormous stake in the outcome of the American immigration debate.<sup>207</sup> The Mexican economy receives more money from its citizens working in the United States who send their earnings back home than it does from the entire Mexican tourism industry.<sup>208</sup> Money sent home from Mexican immigrants in the United States ranks second only to petroleum exports for Mexico's foreign revenue.<sup>209</sup> With Mexican unemployment rates soaring, President Fox has "lauded as heroes" both legal and illegal immigrants working in the United States, because he views their efforts as tremendously beneficial to Mexico.<sup>210</sup> With a United States-Mexican immigration agreement as his "top foreign policy priority," President Fox views the Bush Administration's guest-worker program as a way to meet his objectives, and he considers the re-election of President Bush as an indicator that the President's proposal will be approved.<sup>211</sup>

In addition to wanting to bolster Mexico's economy, President Fox also has a considerable personal stake in the outcome of the immigration reform debate.<sup>212</sup> In light of the rising fatality statistics of Mexicans attempting to cross into the United States ille-

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206. See *Post-Election Analysis*, *supra* note 200 (offering a post-election prediction that "[c]ongressional leaders will be pressed hard by the White House in the months ahead" to adopt the President's proposal).

207. See Barlett & Steele, *supra* note 21, at 53 (noting that money sent back to Mexico from Mexicans working in the United States provided the Mexican economy with \$13 billion in revenue in 2003).

208. See Pat Doyle, *Cash Flow to Mexico Is a Focus for Fox; Money from Immigrants Can Be Lifeline for Families*, STAR TRIB. (Minneapolis), June 18, 2004, at 1A.

209. *Id.*; see Barlett & Steele, *supra* note 21, at 53.

210. See Doyle, *supra*, note 208, at 1A; see also *infra* Part IV.A.2 (discussing economic disparities between Latin American countries and the United States).

211. Glenn Kessler & Kevin Sullivan, *Powell Cautious About Immigration Changes; Bush Will Give Plan 'High Priority,' Mexicans Told*, WASH. POST, Nov. 10, 2004, at A16.

212. See *supra* note 208 and accompanying text; see also Hugh Dellios, *Mexico Pushes U.S. on Immigration; Fox Seeks Reforms that Bush Touted*, CHI. TRIB., Nov. 9, 2004, at C3.



gally,<sup>213</sup> Mexican opposition leaders and church officials have been pressuring President Fox to ensure that immigration becomes safer and easier.<sup>214</sup> With the 2006 Mexican presidential election not too far off, President Fox feels a sense of urgency to accomplish immigration reform by late 2005 in order to successfully seek re-election.<sup>215</sup> Evidence of President Fox's diligence is his recent support for the issuance of Mexican consular identity cards to illegal aliens living in the United States.<sup>216</sup> The consular cards have been approved by many state and local governments, enabling illegal aliens to open savings or checking accounts, obtain driver's licenses, and perform other tasks that would normally require official United States identification documents, such as a valid Social Security card.<sup>217</sup>

Just one week after President Bush's re-election, Secretary of State Colin Powell and Homeland Security Secretary Tom Ridge met with President Fox in Mexico at the United States-Mexico Binational Commission meeting.<sup>218</sup> Secretary of State Powell emphasized that President Bush would be placing a "high priority" on promoting his plan to Congress, but he cautiously added that he did not want to "overpromise" success.<sup>219</sup> Shortly thereafter, President Bush spoke with the Mexican President at the Asia-Pacific Economic Cooperation Leaders Summit in Chile.<sup>220</sup> After explaining to President Fox that he had "campaign[ed] on [the immigration reform] issue," President Bush reiterated his desire to develop "reasonable immigration policies" that would ensure a secure border and "respect and dignity" for Mexican immigrants,

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213. See Hugh Dellios, *Immigration Change a Priority, Powell Tells Mexico*, CHI. TRIB., Nov. 10, 2004, at C6 ("In recent years, an average of at least one Mexican per day has died along the countries 2,000-mile frontier. Most have drowned in the Rio Grande or perished in the heat of Arizona's desert.").

214. Dellios, *supra* note 212, at C3.

215. See *id.*

216. See Doyle, *supra* note 208, at 1A (detailing President Fox's June 2004 visit with Minneapolis-St. Paul banking leaders to discuss ways to transfer money to Mexico more efficiently and to lobby them to accept the consular identification cards at their banks).

217. Jacoby, *supra* note 101, at 1644-45 & n.408.

218. Kessler & Sullivan, *supra* note 211, at A16.

219. *Id.* (stating that "Secretary of State Colin L. Powell gave Mexican officials a 'sober report' . . . on the prospects of winning congressional approval" to enact President Bush's proposal in its current form).

220. Press Release, The White House. Office of the Press Secretary, Remarks by President Bush and President Vicente Fox of Mexico After Bilateral Meeting (Nov. 21, 2004), at <http://www.state.gov/p/wha/rls/38605.htm> (last visited Apr. 2, 2005) [hereinafter Bush-Fox Press Release].

though he did not specify how he would present the reform to a Congress that resisted his proposal throughout 2004.<sup>221</sup>

## 2. The Formidable Congressional Hurdle

### a. *Democrats' View: A Wolf in Sheep's Clothing*

At face value, President Bush's newfound zeal for immigration reform might seem rather odd, since immigration has traditionally been an issue pushed mainly by Democrats.<sup>222</sup> Vehemently opposing President Bush's proposal, however, Democrats are quick to point out the underlying purpose and likely consequences of the Bush Administration's plan.<sup>223</sup> Democrats stress the "notorious" history of guest-worker programs in the United States with particular emphasis on the Bracero Program of the mid-twentieth century.<sup>224</sup> They consider the Bracero Program as having exposed thousands of Mexican workers to abusive and exploitative employment, essentially allowing immigrants to be used, abused, and then deported.<sup>225</sup> The Bush proposal, they argue, would similarly "relegate millions of foreigners to permanent underclass status" by tying their legal status to a specific employer, thereby giving employers an incentive to exploit and immigrants a disincentive to complain.<sup>226</sup> Moreover, Democrats have questioned the practicality of a program expecting millions of currently undocumented immigrants to come forward and declare themselves illegal knowing they face deportation as soon as their temporary vi-

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221. *Id.*

222. See Alonso-Zaldivar, *supra* note 22, at A1 ("The Democrats have been working on immigration for quite a while, and they cannot afford to have the president one-up them on it.") (quoting Demetrios Papademetriou, President of the Migration Policy Institute)).

223. Conyers & Jackson Lee, *supra* note 205, at 54 (referring to President Bush's plan as "a wolf in sheep's clothing offered by a party that has consistently opposed immigrants' rights"); see also Jacoby, *supra* note 101, at 1575 n.25 (citing several articles criticizing President Bush's plan).

224. Conyers & Jackson Lee, *supra* note 205, at 54; see also Medige, *supra* note 204, at 735 (describing the likely result of implementing the President's plan as being "a new era of indentured servants") (quoting Farmworker Justice Fund, Inc., *The President's Temporary Foreign Worker Proposal Is Ill-Conceived*, at [http://www.fwjjustice.org/bush\\_policy.htm](http://www.fwjjustice.org/bush_policy.htm) (last visited Apr. 2, 2005)). See generally Alvarado, *supra* note 101 (arguing for the rejection of a guest-worker program by explaining the injustice and exploitation inherent in the Bracero Program).

225. See Conyers & Jackson Lee, *supra* note 205, at 54.

226. See *id.*

sas have expired.<sup>227</sup> Representative Sheila Jackson Lee, the ranking member of the House Judiciary Subcommittee on Immigration, Border Security and Claims, has made the Democrats' position quite clear: "The guest-worker program proposed by President Vincente Fox and this administration *will not work*."<sup>228</sup>

b. *Republicans' Skepticism: Rewarding Illegality with Amnesty?*

Opposition to President Bush's proposal has not been limited to Democrats. In fact, "Republican lawmakers have been among the biggest skeptics of Bush's plan."<sup>229</sup> The main concern voiced by conservatives has been over what Republicans perceive as an amnesty component to the President's plan, effectively rewarding illegal aliens for their unlawful presence in the United States.<sup>230</sup> Given that President Bush's proposal "received a lukewarm reception on Capitol Hill"<sup>231</sup> in 2004 and continues to be opposed in early 2005 by many Democrats and Republicans, the President's plan, and immigration reform overall, "face[] a difficult road through Congress."<sup>232</sup>

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227. *See id.*

228. 150 CONG. REC. H9860 (daily ed. Nov. 17, 2004) (statement of Rep. Jackson Lee) (emphasis added). "You will not get 8 million illegal immigrants in this country to accept [this proposal's] philosophy. Nor will [we have] a secure America, because we are not focusing on securing our borders. We are focusing on what I think is misdirected in a temporary guest worker program." *Id.* Representative Jackson Lee has further opined: "Despite an egregious history of failed temporary foreign worker programs in the United States that have hurt immigrant and domestic workers alike, the President proposes a . . . vastly enlarged temporary worker program that will do nothing to strengthen protections for wages, benefits and other rights of immigrant and domestic workers." 150 CONG. REC. H422 (daily ed. Feb. 10, 2004) (statement of Rep. Jackson Lee).

229. Kessler & Sullivan, *supra* note 211, at A16; *see also* Jacoby, *supra* note 101, at 1647 (stating that the President's proposal "has met notable opposition on both ends of the political spectrum"); Wayne Washington, *Bush Upsets Part of Conservative Base*, BOSTON GLOBE, Jan. 9, 2004, at A1 ("The immigration proposal is the latest in a series of Bush policies that have angered parts of the president's conservative political base.").

230. *See* Jacoby, *supra* note 101, at 1647; David D. Kirkpatrick, *House Passes Tightening of Laws on Immigration*, N.Y. TIMES, Feb. 11, 2005, at A13 (quoting Republican Senator Trent Lott as stating that "[t]he president's guest worker program is not going anywhere, period. . . . [and] [h]e needs to go ahead and accept it. We are not going to do anything that looks like, smells like or in anyway resembles amnesty, period."); *see also* Frank del Olmo, *Immigration Reforms Border on a Good Proposal*, L.A. TIMES, Jan. 11, 2004, at M5 ("Some of Bush's [Republican] critics are using the word 'amnesty' to refer to any step, however modest, that gives illegal immigrants some legal status . . .").

231. Kessler & Sullivan, *supra* note 211, at A16.

232. Dellios, *supra* note 213, at C6; *see also* del Olmo, *supra* note 230, at M5 (predicting a long delay for immigration reform in Congress given the "complex and contentious" na-

#### IV. PRACTICAL CONSIDERATIONS AND REALITY-BASED OPTIONS FOR IMMIGRATION REFORM

##### A. *The Inevitability of Latin American Immigration*

As the current debate on immigration reform churns in the 109th Congress, it is important to note that no federal lawmaker proposes a ban on Latin American immigration. Completely closing America's doors to immigrants would be a grossly unnatural, anachronistic, and impractical policy that would flatly contradict this nation's founding principles.<sup>233</sup> Aside from certain restrictive, but justifiable,<sup>234</sup> policies related to modern terrorism concerns, the United States seems to have evolved out of the restrictionist mentality that began to take legislative form in the 1880s and continued through the McCarthyism phase of the mid-twentieth century.<sup>235</sup> Any discussions concerning immigration reform must operate on one common premise: As the world continues to evolve into the twenty-first century, Latin American immigration into the United States is simply inevitable.<sup>236</sup> Taking into account several considerations makes the inevitability of Latin American immigration unequivocally apparent.

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ture of the debates so far). It should be noted, however, that while President Bush's main immigration reform bill has yet to receive congressional approval in the 109th Congress, some congressional immigration initiatives have been passed by the House and/or the Senate. For example, the REAL ID Act of 2005, H.R. 418, 109th Cong. (2005) was approved by the House on February 10, 2005. 151 CONG. REC. H566 (2005). Section 202 of the Act prevents states from issuing standard drivers' licenses to illegal immigrants).

233. See Schuck, *supra* note 7, at 4 (arguing that restrictive nationalism in immigration policy is inconsistent with contemporary public law values and ever-popular "communitarian" values).

234. But see Don Phillips, *Airlines' Representative Deplores Security 'Mess,'* INT'L HERALD TRIB., Dec. 10, 2004, at 2 (articulating the arguments of some international businessmen and government officials that unreasonable and improperly administered airport security policies must be changed, especially in light of the recent detention of singer Yusuf Islam (formerly "Cat Stevens")).

235. See Schuck, *supra* note 7, at 3-5.

236. See Andrew Scott Kosegi, Note: *The H-2A Program: How the Weight of Agricultural Employer Subsidies Is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 299 (2001) ("[I]llegal immigration to the United States seems to be inevitable . . .").

## 1. Historical Identity as a Nation of Immigrants

The United States has long been recognized worldwide as a diverse nation of immigrants.<sup>237</sup> Many scholars feel that significantly restricting immigration from Latin America would be wholly incompatible with the United States's image of having open arms to foreigners in search of better lives.<sup>238</sup> Of particular importance is the long history of Mexican guest-worker programs, which first took form in this country around the time of World War I and were again introduced during World War II.<sup>239</sup> While intended to function as a war-time solution for a labor shortage, the Bracero Program lasted more than twenty years.<sup>240</sup> Having started families here, however, many Mexican Braceros remained in the United States after the program ended, which planted the seeds for what would become the United States's largest minority group at the beginning of the twenty-first century.<sup>241</sup> Latin American immigration continues to build and reunite families, adding to an expansive social network of immigrant families that has moved far beyond just the border states.<sup>242</sup> Attempting to significantly reduce the flow of Latin American immigrants into the United States would be unfaithful to this nation's historical identity, and it would also prove impossible when one considers how intensely motivated some Latin Americans are to reunite with family members living in the United States.<sup>243</sup>

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237. E.g., Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 986 (2002) (stating the view of some commentators of the inevitability of "pro-immigrant . . . policies . . . in a nation of immigrants that is committed to human rights and, in particular, to political and religious freedom").

238. See Erin Kragh, Book Note, *Forging a Common Culture: Integrating California's Illegal Immigrant Population*, 24 B.C. THIRD WORLD L.J. 373, 381 (2004) (reviewing VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003)) ("[A policy restricting Latin American immigration would] be difficult to implement because of its incompatibility with America's historical identity as a nation of immigrants.").

239. See *supra* notes 82–86, 101–03 and accompanying text.

240. See Alvarado, *supra* note 101, at 59.

241. See *id.* at 56.

242. See CIS BACKGROUNDER, *supra* note 14, at 1 (stating that Georgia, North Carolina, New Jersey, Maryland, and Pennsylvania—all nonborder states—experienced very large increases in their immigrant populations since 2000); see also Spotts, *supra* note 119, at 617 (explaining that "the strong ties between Mexican citizens and family members in the United States . . . create social networks that 'pull' migrants from Mexico").

243. See, e.g., Mary Jordan, *A Harsh Price to Pay in Pursuit of a Dream; For Central American Women, Sexual Coercion Is Hazard on Route to U.S.*, WASH. POST, Dec. 6, 2004,

## 2. Poverty, Lack of Opportunity, and Encouragement of Illegal Immigration on the Other Side of the Border

Economic disparities between Latin American countries and the United States create strong reasons for immigrants to embark on dangerous journeys into the United States.<sup>244</sup> “[P]oor living conditions, high levels of unemployment, poverty, political unrest, overcrowding, and government oppression” plague many Latin American countries and are “push” factors that fuel both legal and illegal immigration into the United States.<sup>245</sup> Of particular significance is the way in which many Latin American political leaders either passively condone or actively encourage their citizens to illegally migrate into the United States.<sup>246</sup> President Fox of Mexico, for example, has denied the illegality of his citizens’ migration into the United States, emphatically pointing out that immigrants are beneficial to the American economy, want to work productively, and are only searching for better opportunities.<sup>247</sup> In early January 2005, supported by President Fox, Mexico’s Foreign Relations Department boldly published nearly two million pocket-size books titled the “Guide for the Mexican Immigrant.”<sup>248</sup> The book, replete with color illustrations and detailed instructions, has been distributed free of charge and provides Mexican citizens with survival tips should they choose to cross into the United States illegally.<sup>249</sup>

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at A01 (describing a Honduran woman’s dangerous journey in Central America in an effort to reunite with her brother in Miami, Florida); *Nation/World: Guatemala: Several Are Arrested in Child Smuggling Case*, ST. LOUIS POST-DISPATCH, Apr. 7, 2002, at A7 (describing a situation where Latin American parents paid over \$5,000 to smuggle each of their children into the United States).

244. See Spotts, *supra* note 119, at 617.

245. *Id.* at 602.

246. See Turoff, *supra* note 18, at 203–10 (describing the Mexican government’s approval and encouragement of migration into the United States, which they refuse to acknowledge as “illegal”).

247. *Id.* at 204–05 (“They are not illegals. They are not illegals. They are people that come there [to the U.S.] to work, to look for a better opportunity in life . . .” (quoting President Fox from a March 2002 television interview)).

248. Oscar Avila, *Illegal-Immigration Tips from Mexico Stir Rancor*, CHI. TRIB., Jan. 9, 2005, at C1.

249. *Id.* The book, for example, informs immigrants of the risks involved with water crossings and recommends following “light poles, railroad tracks, or dirt roads” should one become lost in the desert. *Id.* For illegal immigrants already in the United States, the book suggests “avoid[ing] noisy parties,” because the police could be called and would likely arrest undocumented Mexicans in attendance. *Id.*

The perception in many Latin American countries of the ability of illegal aliens to readily find "better jobs, education, political stability, and improved health and welfare benefits" in the United States motivates millions of Latin Americans annually to try to illegally enter the United States.<sup>250</sup> Newspapers in the United States are filled with tear-jerking articles detailing the risks, hardships, and sacrifices involved in many Latin American immigrants' attempts at traveling into the United States.<sup>251</sup> If Latin Americans are willing to turn over their life's savings and risk death for a chance to live in the United States, common sense dictates that Latin American immigration, even if restricted, is sure to persist "as long as economic conditions in nearby countries continue to languish."<sup>252</sup>

### 3. Reaping the Benefits of Immigrant Labor

Critics of immigration frequently overlook the fact that the costs of many goods and services are much lower for American consumers as a direct result of lower-wage immigrant labor.<sup>253</sup> Also, critics often harp on job displacement, failing to acknowledge one important fact: The reason employers hire illegal immigrants is because many Americans are no longer willing to perform the type of work for which most illegal immigrants are employed.<sup>254</sup> In response to this observation, some economists ar-

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250. See Spotts, *supra* note 119, at 602.

251. See, e.g., Ángel González, *Truckers May Face Federal Charges; 30 Illegal Immigrants Found in Trailer Now at Euless Detention Center*, DALLAS MORNING NEWS, July 20, 2004, at 10B (describing how thirty illegal Latin American immigrants were arrested after being found, severely overheated, in the back of a smuggler's trailer in Texas, having paid to be smuggled into the United States); Jordan, *supra* note 243, at A01 (telling the story of Ileana, a twenty-year-old Honduran woman who handed over her family's life savings to a smuggler only to be apprehended in Mexico and forced into a life of prostitution).

252. See Kosegi, *supra* note 236, at 299; see also Bollerup, *supra* note 150, at 1044 (opining that no number of Border Patrol officials would be sufficient to stop the steady flow "of illegal workers who are seeking a better life").

253. Guillermo I. Martinez, *A Feel-Good Substitute*, SUN-SENTINEL (Fort Lauderdale), at 19A; see also Barlett & Steele, *supra* note 21, at 57 ("[M]any citizens quietly benefit from the flood of illegals because the supply of cheap labor helps keep down the cost of many goods and services, from chicken parts to lawn care.").

254. See Regina Germain, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: The Time for Immigration Reform Is Now*, 32 DENV. J. INT'L L. & POL'Y 747, 748 (2004) ("Our nation would grind to a halt without immigrants willing to . . . [perform agricultural work][,] the least desirable jobs in our society."); Jacoby, *supra* note 101, at 1614-16 ("Because U.S. workers are increasingly unable or unwilling to fill the growing number of low-skilled positions, U.S. companies rely on immigrant labor to accept

gue that American workers *would* be willing to accept immigrant-filled jobs if they were paid higher wages.<sup>255</sup> That rebuttal, however, ignores the likelihood that, rather than give the jobs to Americans at a higher wage rate, many American companies would outsource the work to another country.<sup>256</sup>

#### 4. Immigration Analogized to Outsourcing

Another consideration suggesting the future survival and increase in Latin American immigration is drawn from analogizing immigration to outsourcing. Like immigration, outsourcing involves the controversial practice of American employers offering jobs to foreigners, though, with outsourcing, the foreigners typically perform the work in their native countries.<sup>257</sup> Despite the controversy, however, members of the Bush Administration have defended the practice of outsourcing as “a natural effect of the global economic system” that benefits the United States.<sup>258</sup> Similarly, one could argue that, as Latin American immigration continues to swell in the United States, embracing this trend would “increase national and global economic welfare because of more efficient use of the untapped source of relatively low-wage labor.”<sup>259</sup> It is, therefore, reasonable to view immigration as mutually beneficial—an inevitable byproduct of the desire for economic efficiency in the United States that also benefits foreign workers looking for a quality of life superior to what they had in their native country.<sup>260</sup> As such, immigration reform efforts should be aimed at accommodating and integrating foreign workers into the

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these jobs.”); Martinez, *supra* note 253, at 19A (“American workers no longer like to work at back-breaking farm jobs . . .”).

255. Jacoby, *supra* note 101, at 1614.

256. *Id.* at 1614–15.

257. See Jyoti Thottam et al., *Is Your Job Going Abroad?*, TIME, March 1, 2004, at 27.

258. Steven R. Weisman, *Powell Reassures India on Technology Jobs but Presses for Opening of Markets*, N.Y. TIMES, Mar. 17, 2004, at A6 (quoting Secretary of State Colin L. Powell).

259. Johnson, *supra* note 10, at 235. See generally *id.* at 235–36 (analogizing immigration to the proliferation of international trade and arguing for the benefits of a liberalized immigration policy).

260. See *id.* at 233–34 (describing the “concrete benefits” of immigrant labor for the United States economy, as well as the higher standard of living sought by foreign-born immigrants when coming to the United States).



United States economy, rather than trying to preclude the phenomenon or allow it only on a temporary basis.<sup>261</sup>

## B. *Realistic Options for Immigration Reform*

### 1. Mexico: Confronting the Issue at its Core

Reforming the laws of the United States is necessary to develop a more sound United States-Mexican immigration policy, but Mexico is in equal need of reform if the illegal immigration issue is going to be properly addressed.<sup>262</sup> In 2003, the Mexican unemployment rate rose faster than it had in the previous ten years.<sup>263</sup> Mexicans who are unemployed have to make due with wages "kept low by the Mexican government to attract foreign businesses looking to decrease their operating costs."<sup>264</sup> Making matters worse, in November 2004, the Mexican inflation rate accelerated at its fastest pace in nearly three years.<sup>265</sup> It is no wonder that more illegal Mexican immigrants are crossing into the United States than ever before.<sup>266</sup> One Mexican woman summarized the situation well: "If our own government can't support us, how can we expect our neighbor to support us? *The problem starts in Mexico.*"<sup>267</sup>

President Fox recently emphasized his commitment to create jobs in Mexico to help address the illegal immigration problem from Mexico's side of the border,<sup>268</sup> but one has to question the sincerity of his commitment to solving a "problem" that he has publicly deemed to *not* be a problem.<sup>269</sup> Mexican leaders must

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261. See *id.* at 258.

262. See Stearns, *supra* note 167, at A13.

263. *Latin America: Mexico Jobless Rate Has Biggest Rise in Almost Decade*, Bloomberg.com (Jan. 21, 2004), at [http://www.bloomberg.com/apps/news?pid=10000086&sid=aFyPw.JnOUng&refer=latin\\_america](http://www.bloomberg.com/apps/news?pid=10000086&sid=aFyPw.JnOUng&refer=latin_america) (last visited Apr. 2, 2005).

264. Jenna L. Acuff, Note, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L L.J. 387, 405 (2004).

265. See *Interest Rates Up; Stocks Set Record*, HOUS. CHRON., Dec. 11, 2004 at B4.

266. See Germain, *supra* note 254, at 749.

267. LoBreglio, *supra* note 118, at 960 (quoting from a telephone interview with "Marta C") (emphasis added).

268. See Bush-Fox Press Release, *supra* note 220 (describing President Fox's comments at the Asia-Pacific Economic Cooperation Leaders Summit in November 2004).

269. See *supra* note 247 and accompanying text (quoting President Fox in a March 2002 television interview during which he seemed indignant at the notion that Mexicans

take economic reform seriously, and the United States should actively assist the Mexican government in promoting economic growth. Logically, reducing the incentive for Mexicans to leave their country will assuage some of the concerns over illegal immigration in the United States.

In the meantime, the Mexican government can and must improve its efforts to crack down on human smuggling through Mexico and into the United States. After the IIRIRA was enacted in 1996, the United States Border Patrol's funding was significantly increased, which enabled them to improve their enforcement efforts.<sup>270</sup> One of the main consequences for Mexican immigrants was an increased reliance on expensive smugglers to take them into the United States.<sup>271</sup> Some commentators argue that the increased smuggling costs have resulted in considerably larger numbers of illegal aliens remaining in the United States for longer periods of time out of fear that they would not be able to afford re-entry if they were to leave.<sup>272</sup> Although Mexican authorities have been intercepting smugglers and detaining a record number of migrants—often more than one thousand per day—more work remains to be done.<sup>273</sup>

## 2. The United States: A More Sensible Approach to the Border

The United States has a vital interest in maintaining its national security, and heightened concerns over terrorism in recent years are certainly justified. Since the September 11, 2001, attacks, however, it has become increasingly apparent that the Bush Administration views immigration through a "[national] security lens."<sup>274</sup> In a November 2004 meeting with President Fox, President Bush discussed immigration concerns within the larger context of national security, emphasizing, in particular, border

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working in the United States could be considered "illegal").

270. Jacoby, *supra* note 101, at 1610.

271. *Id.*; see also *id.* at 1610 n.206 (citing numerous authorities indicating notable increases in the percentage of Mexicans using human smugglers throughout the 1990s).

272. See *id.* at 1610–11.

273. Jordan, *supra* note 243, at A01.

274. Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 852 (2002). For example, what had been Immigration and Naturalization Services within the Department of Justice became the Bureau of Citizenship and Immigration Service, part of the Department of Homeland Security. See LoBreglio, *supra* note 118, at 940–41 (discussing several post-9/11 changes in immigration policy and enforcement).

security.<sup>275</sup> Having mentioned border security as the first basic principle guiding his guest-worker program, President Bush appears to view increased border enforcement as one of the most effective ways to handle the United States's growing illegal immigrant problem.<sup>276</sup>

Although secure borders are of supreme importance in protecting the United States from terrorism, some argue that the United States-Mexico border "poses little threat in terms of terrorism."<sup>277</sup> Furthermore, despite the Border Patrol's increased enforcement powers, more illegal immigrants are entering the United States now than ever before, and many of them are choosing to enter the country through dangerous and highly remote areas.<sup>278</sup> When viewed in this light, the increased funding and renewed emphasis on fortifying the United States-Mexico border seems slightly misguided.<sup>279</sup> After one considers that "the majority of people who enter the United States illegally do so by overstaying legally obtained . . . visas," it would appear wise to divert some of the increased funding for the Border Patrol to "more urgent" and necessary immigration matters, such as visa enforcement efforts.<sup>280</sup> Protecting national security and promoting reasonable immigration policies do not have to be mutually exclusive.

### 3. The Need for an Immigration Reform Plan Grounded in Reality

President Bush's guest-worker plan will not be approved in its current form. Democrats in Congress have sharply criticized the

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275. Bush-Fox Press Release, *supra* note 220.

276. See Bush Remarks, *supra* note 150 (explaining that the Bush Administration has "significantly expanded the Border Patrol," adding more than one-thousand new agents and increasing funding by forty percent since 2002).

277. Jacoby, *supra* note 101, at 1661; see also Meissner, *supra* note 274, at 858 (expressing the need for "far more focus" on the U.S.-Canada border than the U.S.-Mexico border in the war on terrorism).

278. See Germain, *supra* note 254, at 749 (noting that approximately two thousand illegal migrants have died trying to cross over the U.S.-Mexico border since 1998); Jacoby, *supra* note 101, at 1610.

279. See Jacoby, *supra* note 101, at 1661.

280. See *id.*; see also Spotts, *supra* note 119, at 617-18 (arguing that increasing the funding and manpower of the Border Patrol will not deter potential migrants from illegally entering, but reducing the economic disparities between the United States and Mexico would work).

proposal;<sup>281</sup> many Republicans in Congress are “vehemently oppose[d]” to the idea,<sup>282</sup> members of the Bush Administration acknowledge that changes need to be made,<sup>283</sup> and Mexicans remain skeptical over its prospects for enactment.<sup>284</sup>

Having been thrust into the public eye and heavily debated in Congress throughout 2004, however, the political climate is right for a major immigration reform plan of some type to be seriously considered and ultimately enacted.<sup>285</sup>

The Bush Administration has correctly recognized the need to deal with illegal immigrants once they are already in the United States, unlike so many other recent tunnel-vision initiatives designed solely to keep illegal immigrants out.<sup>286</sup> Unfortunately, the cornerstone of the President’s guest-worker program—the temporary three-year status to be conferred on immigrants—is fundamentally flawed. It is simply unreasonable to expect illegal Latin American immigrants, already living comfortably in the United States, to voluntarily participate in this program and effectively set their own course for being deported after the expiration of their newly acquired “temporary status.”<sup>287</sup> An option for a finite renewal does little to make this proposal easier to swallow, since the temporary status would still come to an end.

The limited three-year duration is equally troubling as applied to Latin Americans who are not currently in the United States. Paradoxically, President Bush believes that his proposal “reflects the American Dream” by inviting guest workers into this country for a limited duration, after which time they will be legally re-

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281. See *supra* Part III.D.2.a.

282. *Immigration Effort Is Resurrected*, DENVER POST, Nov. 24, 2004, at B-06.

283. See Dellios, *supra* note 213, at C6 (quoting Secretary of State Powell as saying the Bush Administration would be working with Congress “to get this [guest worker program] right”) (alteration in original).

284. See Kessler & Sullivan, *supra* note 211, at A16 (noting that many Mexicans “remain skeptical that the United States is serious about immigration reform” and quoting a former Mexican ambassador to the United States as stating, “I don’t think [Bush’s guest-worker plan] [is] something that people will swallow in the United States”).

285. See LoBreglio, *supra* note 118, at 933 (“Today, there is a marked focus both in the political arena and in general public discourse on the problems caused by illegal immigration from [Latin America].”).

286. See *id.* at 942.

287. See 150 CONG. REC. H9860 (daily ed. Nov. 17, 2004) (statement of Rep. Jackson Lee) (“We can no longer have a temporary guest program . . . that allows people to come in for 3 years and then suggest to them that they must then leave the country in order to . . . remain in a position to possibly have another job again.”).

quired to return to their native countries.<sup>288</sup> The President's plan does not embody or reflect the American Dream for guest workers. At most, it reflects a *fleeting taste* of the American Dream—temporary exposure to the wonderful rights and privileges Americans enjoy followed by a mandate to surrender their newfound quality of life and return to the economic disasters from which they fled. That is not fair, nor is it a realistic incentive.

Another impracticality of the President's plan is the requirement that temporary work visas be tied to single employers. If guest workers feel as though switching jobs is not an option, they will come to view their employment as binding and will be more reluctant to report exploitation or abuses for fear of losing their status.<sup>289</sup> Also, immigrants are frequently employed as day laborers, construction workers, nannies, gardeners, and domestic workers—positions that would be difficult to secure in advance when not yet in the United States. As such, the President's requirement that would-be immigrants have employment already lined up before being admitted would have little success in practice. An immigration plan allowing workers more flexibility in both arranging and, if necessary, changing employment options without the fear of deportation would help to combat the abuse of immigrant workers so common in the past.<sup>290</sup>

With respect to American employers, the federal government must improve their efforts to enforce immigration laws and impose penalties on employers who choose not to comply.<sup>291</sup> One of the primary motivating factors for illegal immigration is the common perception in Latin American countries that illegal immigrants will easily be able to find jobs with employers who blatantly ignore documentation requirements for their workers.<sup>292</sup> The government's nonenforcement of employer sanctions "has been the equivalent of hanging out a HELP WANTED sign for il-

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288. Bush Remarks, *supra* note 150.

289. See Jacoby, *supra* note 101, at 1647; Conyers & Jackson Lee, *supra* note 205, at 54 ("Under Bush's program, immigrants' right to stay in the United States would again be entirely contingent on getting and keeping a job with a U.S. employer. What is the guarantee that the abuses and exploitation of the past will not be repeated?").

290. See Medige, *supra* note 204, at 741.

291. See Bollerup, *supra* note 150, at 1042-44.

292. See Barlett & Steele, *supra* note 21, at 58 (describing a major incentive for illegal immigration to be the message they perceive from American employers: "If you can run that border, we have a job for you").

legals.”<sup>293</sup> Communicating more clearly to employers about the complex process of legal work authorization and the likely repercussions of noncompliance is an essential element of a successful immigration reform plan.<sup>294</sup> If hiring violations do occur, employers must face stiff penalties that would “outweigh the benefit for employers to hire cheap labor.”<sup>295</sup>

Fundamentally, Latin American immigrants uproot themselves and their families from their native countries in an effort to secure a healthier, more stable way of life. Any successful immigration reform plan must, therefore, respect and facilitate immigrants’ social and economic stability. The current version of the Bush Administration’s guest-worker program is nothing more than a virtually guaranteed dead-end for immigrant workers. President Bush has expressed his desire to increase the number of green cards that could lead to citizenship, but he has failed to provide any specifics.<sup>296</sup> Casting doubt on the viability of the President’s goal is the substantial backlog of more than six million immigrants waiting for their visa applications to be processed.<sup>297</sup> A successful immigration reform initiative would specifically identify and provide for additional resources to assist the Department of Homeland Security in screening and processing more applications.<sup>298</sup> A “path to citizenship” does not have to be quick and direct, but it must, nevertheless, exist as an incentive for both legal and illegal immigrants to participate in a guest-worker program.

## V. CONCLUSION

There is no perfect solution to the immigration controversy. As long as any American citizen remains unemployed while an immigrant—legal or illegal—has a job, anti-immigration sentiments will permeate in some segments of the American population. In-

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293. *Id.*

294. *See* LoBreglio, *supra* note 118, at 962.

295. *See* Bollerup, *supra* note 150, at 1044 (arguing that an increase in penalties should “target employers who knowingly hire illegal workers” and also those who aid in the creation and use of fraudulent documents).

296. Jacoby, *supra* note 101, at 1646–47.

297. Conyers & Jackson Lee, *supra* note 205, at 54.

298. *Id.*

creased immigration must, however, be accepted as inevitable and necessary in the United States. Immigrants founded the United States; they were vital contributors to the industrial and manufacturing bases upon which this country rose to international economic dominance; they have helped to mold the uniquely diverse "American" identity; they are currently entering this country at an unprecedented rate; and, as they build expansive social networks across the country, immigrants will continue to make the trek into the United States to reunite with their families and find higher-paying jobs. There is considerable logic inherent in accommodating the inevitable.<sup>299</sup>

The current era in immigration has been marked by an influx of Latin American immigrants. Rather than view them as pariahs who compete with and displace American workers, one should take to heart the United States-government-certified statistic that, between 2000 and 2010, more than thirty-three million new job openings will be created in the United States that will require little or moderate training.<sup>300</sup> These will be the types of jobs viewed by Latin American immigrants as opportunities for a better life, but considered by most Americans to be wholly undesirable. Immigration reform in the United States should aim to embrace willing and motivated immigrants, benefit from their labor, and ultimately reward them with a realistic chance at citizenship—not a one-way ticket back to their native countries. As the sonnet goes, "[g]ive me your tired, your poor, your huddled masses yearning to breathe free"<sup>301</sup>—ignoring this theme would be a slap in the face to Lady Liberty and the ultimate paradox given the indispensable role of immigration throughout our nation's history.

*Ryan D. Frei*

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299. See Johnson, *supra* note 10, at 258 ("The sensible approach is to adopt laws and policies that facilitate [changes brought on by increased immigration], rather than to seek to prevent the inevitable.").

300. AILA BACKGROUNDER, *supra* note 19, at 2 (citing a study undertaken by the United States Department of Labor Bureau of Labor Statistics).

301. Lazarus, *supra* note 5.