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Immigration Reform from the Outside In.

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ARTICLE

IMMIGRATION REFORM FROM THE OUTSIDE IN

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RYAN PROFESSOR OF LAW

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I. INTRODUCTION

The vast majority of Americans are likely dissatisfied with the current state of immigration law. With some exceptions throughout our history, there has been significant and even violent opposition to the nation's immigration scheme.¹ This dissatisfaction, and the resulting cry for immigration reform seems to intensify during times of perceived or actual increases in immigration, perceived or actual economic downturn, or during times when politicians find it advantageous to raise the hue and cry of immigration reform as a means of attracting votes.² The convergence of all three of these elements at the present time results in the cyclical and predictable cries to address the nation's immigration problems.

No one would seriously challenge the notion that the nation's immigration laws can and should be improved. As in other areas which invoke strong political, racial, economic and religious concerns, the positions that attract the most attention tend to be those that are the most extreme.³ The coverage given to armed civilians seeking to seal the borders to illegal immigrants,⁴ and the coverage afforded to an angry crowd waving the flag of Mexico demanding an essentially open border,⁵ is always going to exceed the coverage afforded to thoughtful presentations seeking to bal-

1. See generally BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS, ch. 1 (1994).

2. *Id.*

3. See ACLU OF PENNSYLVANIA, ANTIDEFAMATION LEAGUE RELEASES REPORT ON EXTREME RHETORIC IMMIGRATION DEBATE, available at http://ad1.org/civil_rights/anti_immigrant/print_version.pdf.

4. Leslie Bernstein, *Border-Watch Squabble; Civilian Patrols Mushrooming Along With the Infighting*, SAN DIEGO UNION-TRIB., July 6, 2005, at A1 ("Three months after hundreds of people descended on southern Arizona to stage civilian border patrols as part of the Minuteman Project, the anti-illegal-immigration movement has snowballed, with offshoot groups forming along the southern border and in other states."); Tyche Hendricks, *On the Border*, S.F. CHRON., Dec. 5, 2005, at A1 (reporting on civilian boarder patrols in San Diego County and the affect such patrols have on political debates); Susan Carroll, *Backlash from Rallies Across U.S. Bolsters Minutemen, Leader Says*, ARIZ. REPUBLIC, Apr. 1, 2006, at 1A ("The massive pro-immigrant marches and rallies sweeping across the country have fueled a growing countermovement and piqued interest in upcoming civilian border patrol missions, leaders in the anti-illegal immigration movement say.").

5. Clarence Page, Op-Ed., *The Foreign Flag Rule*, BALT. SUN, Apr. 14, 2006, at 11A.

Little symbols mean a lot when you're trying to make a point about big, complicated issues. In the rallies that have swept through more than 100 cities since late March to protest proposed toughened immigration reforms, that most significant little symbol has been the Mexican flag. Televised images of marchers waving Mexican flags in some of the early protests sparked a backlash, particularly among conservative politicians, talk-radio hosts and other such advocates who want to hold back the flood of illegal immigrants into the United States. The flag-wavers and protest organizers insist that the critics are taking the gesture the wrong way. Spontaneous displays of pride in their heritage should not be misconstrued as a lack of patriotism for their adopted country, they say. *Id.*

ance the competing concerns in order to strengthen our republic and maintain this nation as a beacon of liberty. However, loud and dramatic proposals often set the tone for change.

This article will briefly examine some of the very dramatic and clearly extreme positions in American immigration history. It will also look at the extreme calls for reform at both ends of today's political spectrum. Subsequently, this article will examine why implementation of either of the current extremes would be disastrous. Afterwards, having framed these "outside" examples, this article will move inward to see if there is a middle ground that might serve as a starting point for the implementation of some thoughtfully-conceived series of measures to address our current immigration situation. This article will conclude with a series of suggestions for bringing about this change.

II. HISTORICAL EXTREMES

The rhetoric associated with the contemporary immigration debate is often harsh. Yet it pales by comparison with the extreme discussions in earlier periods of our history. A brief examination of this history will help us put the current debate and proposals into perspective.

The original European settlers of the colonies were immigrants.⁶ By 1639, several colonies, including Massachusetts, Virginia, and Pennsylvania, recognized an "immigration problem" resulting from the En-

Hiram Soto, *Mexican Flag Kindles Passions Pro and Con*, SAN DIEGO UNION-TRIB., Apr. 8, 2006, at B1.

The sight of marchers in recent protests carrying Mexican flags inflamed passions on all sides of the immigration debate. The controversy will likely fly again tomorrow, as community, religious and union groups plan to rally thousands of marchers in downtown San Diego to support legalization of undocumented immigrants. Latino leaders are aware that such displays not only offend some people, but can be counterproductive in efforts to influence legislation and improve the image of immigrants. Some of them, in fact, have requested that people planning to participate in tomorrow's march leave their Mexican flags home. *Id.*

Yvonne Wingett & Daniel Gonzalez, *Mexican Flags Draw Dissent*, ARIZ. REPUBLIC, Apr. 5, 2006, at 1A.

Even march organizers acknowledge that displaying the Mexican flag offended many. Organizers of work stoppages, rallies and marches planned for Monday are urging people to carry U.S. flags as they protest Congress' proposed crackdown on illegal immigrants. Still, some immigrant supporters believe images of the Mexican flag at the demonstrations have been misunderstood. Waving the flag is a symbol of cultural pride, they say, not political allegiance. "It's representing our culture, our heritage, where we are from," said Maria Barrera . . . who rallied with classmates in Phoenix after school. *Id.*

6. Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 4-8 (1987), in BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* 9 (1994).

lish government's policy of deporting felons and vagrants to the colonies.⁷ As a result, several colonies enacted legislation precluding criminals and paupers from entering, or requiring their departure.⁸ By the early 1700s, other colonies enacted prohibitions against the entry of Catholics.⁹ Later, Virginia excluded Quakers.¹⁰ In 1727, Pennsylvania required immigrants to take a loyalty oath.¹¹

As time progressed, however, the colonies realized that they needed additional labor in order to clear the lands, settle the wilderness, and protect themselves against Native American tribes and foreign powers, particularly the French.¹² At the same time, the British Crown was determined to restrict immigration to the colonies.¹³ By the time of the Declaration of Independence was signed, colonists felt so oppressed by the limitation upon immigration that they cited these restrictions as one of the justifications for armed revolution in the Declaration of Independence.¹⁴ Specifically, the drafters of the Declaration of Independence objected that the king of England had "endeavored to prevent the population of these States; for that purpose of obstructing the Laws, for Naturalization of Foreigners; refusing to pass others to encourage their immigrations hither, and raising the conditions of new Appropriation of Lands."¹⁵ It is hard to imagine a more extreme immigration position than armed revolution and the express willingness to die, if necessary, in the struggle that would ensue.

7. *Id.*

8. *Id.*

The earliest colonial "immigration problems" resulted from the English practice of exporting vagrants, beggars, and felons to the New World. Legislation and orders barring the admission or requiring the departure of paupers and criminals appeared as early as 1639; Massachusetts, Virginia, and Pennsylvania were the first colonies to enact such measures. Similar legislation appeared in other colonies throughout the colonial period and well into the post-revolutionary era. *Id.*

9. *Id.*

10. *Id.* ("Virginia imposed a fine on anyone bringing a Quaker to the colony and expelled Quakers already present.")

11. Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 4-8 (1987), in BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 9 (1994) ("A 1727 Pennsylvania act, for instance, required immigrants 'to take an oath of allegiance to the king and fidelity to the proprietors and the provincial constitution.'").

12. BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 11 (1994); *see generally* French & Indian War, <http://frenchandindianwar250.org> (last visited Feb. 18, 2008).

13. BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 11 (1994); *see generally* French & Indian War, <http://frenchandindianwar250.org> (last visited Feb. 18, 2008).

14. BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 11 (1994); *see generally* French & Indian War, <http://frenchandindianwar250.org> (last visited Feb. 18, 2008).

15. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

For the next fifty years, America generally pursued an open immigration policy.¹⁶ The words of Emma Lazarus, inscribed on the Statue of Liberty, were literally true: “Give me your tired, your poor, Your huddled masses yearning to breathe free[.]”¹⁷ In general, Americans perceived this “nation to be a refuge for freedom-seeking peoples.”¹⁸ However, the arrivals of millions of new immigrants, most of them speaking languages other than English and adhering to different religious viewpoints, created new concerns. Catholic immigrants found themselves in a country consisting mostly of Protestants who were overtly hostile to Catholicism.¹⁹ Societies seeking to preserve the nation’s ethnic purity were organized. For example, “[t]he Secret Catholic Order of the Star Spangled Banner and the Know Nothing Party grew out of concern . . . that ‘the floodgates of intemperance, populism and crime are thrown open by immigrants and if nothing be done to close them they will carry us back to all of the drunkenness and evil of former times.’”²⁰

Violent nativism resulted in “anti-Catholic rioting in New York, Philadelphia and Boston.”²¹ However, as the Irish and Catholic immigrants assimilated in American life, new immigrants from Eastern Europe became the targets of anti-immigration rhetoric. Edward Ross, a prominent historian, characterized the new arrivals as “beaten men from beaten races representing the worst failures in the struggle for existence.”²²

By the late 1800s, anti-Chinese feelings surfaced as a result of resentment against the Chinese laborers who worked the mines, laid railroad tracks, and occupied positions in which American citizens were apparently unwilling to work.²³ Fears were expressed that the country faced a

16. *Id.*

17. EMMA LAZARUS, *THE NEW COLOSSUS* (1883), available at <http://www.libertystatepark.com/emme.htm>.

18. BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* 12 (1994).

19. *Id.* at 10; see generally French & Indian War, <http://frenchandindianwar250.org> (last visited Feb. 18, 2008).

20. BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 14 (1990) (citing AM. PROTESTANT MAGAZINE, Feb. 1849).

21. *Id.*

22. *Id.* at 15.

23. *Ping v. United States*, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act of 1882).

The competition steadily increased as the laborers came in crowds on each steamer that arrived from China, or Hong Kong, an adjacent English port. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. *Id.*

“yellow scourge.”²⁴ In reaction, Congress enacted the Chinese Exclusion Act in 1882,²⁵ and its constitutionality was upheld by the Supreme Court of the United States in 1889.²⁶ The Court noted: “If therefore, the government of the United States, through its legislative department considers the presence of foreigners of a different race in this country, who will not assimilate with us to be dangerous to its peace and security, their exclusion is not to be stayed.”²⁷

In 1924, after nativist concerns about the influx of “so-inferior peoples,” Congress passed the National Origins Act,²⁸ developing quotas based on the contribution of each nationality to the existing United States population.²⁹ The theory was that by freezing the percentage of the percentage of those “inferior” peoples, the United States would ultimately be able to prevent from being culturally and ethnically overwhelmed by the immigrants from less-desirable regions of Eastern Europe.

As immigration from Mexico increased in the 1920s and 1930s,³⁰ nativists became obsessed with what they termed “breeding habits” and “excessive fecundity” of Mexicans.³¹ C. M. Goethe, writing in *World's Work* magazine³² noted that the average American family has three children, while Mexican laborers average between nine and ten children.³³ He asserted that in three generations, the offspring of Mexicans would outnumber

24. BILL PIATT, LANGUAGE ON THE JOB: BALANCING BUSINESS NEEDS AND EMPLOYEE RIGHTS 5 (1993).

25. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882).

26. *Ping v. United States*, 130 U.S. 581 (1889).

27. *Id.* at 606 (opining that at times of peace and war, the government possesses the power to determine what power it shall exercise for the protection and security of the country).

28. National Origins Act 1924, ch. 190, 43 Stat. 153 (1924).

29. See generally BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS, ch. 1 (1994) (summarizing the reasons behind the National Origins Act and providing insight into the discriminatory climate in early twentieth century America).

30. MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940, at 18 (1976) (noting that during the first decade of the twentieth century, Latinos made up less than one percent of legal immigrants, and that by the Act's passage in 1924, that figure grew to more than twelve percent).

31. MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940, at 151-56 (1976), in BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 19 (1994) (summarizing the reasons behind the National Origins Act and providing insight into the discriminatory climate in early twentieth century America).

32. *Id.*

33. See generally MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940 (1976).

ber Americans 27 to 1, producing a race of “hybrids or *Amerinds*.”³⁴ Samuel J. Holmes borrowed the race suicide theme originally developed by nativists supposing eastern European immigration to declare that a policy of unrestricted immigration, “means that to a greater or lesser extent we are going to be replaced by the Mexican.”³⁵ Harry Laughlin worried that the immigration from Mexico was so large, “as to almost reverse the essential consequences of the Mexican War.”³⁶ Roy Garis, a Vanderbilt economics professor asserted, “[w]e cannot postpone the erection of an adequate barrier any longer . . . for it is an invasion, even more serious than if it were military.”³⁷

Nativists also anxiously contemplated the possibility of miscegenation. Members of Congress John C. Box and Thomas A. Jenkins argued that “because Mexicans themselves were the product of intermarriage among [W]hites, Indians, and [B]lacks . . . they harbored a casual attitude toward interracial unions.”³⁸ To the congressmen, “such a situation will make the blood of all three races flow back and forth between them in the distressing process of mongrelization.”³⁹ Harry Laughlin warned that, “if the time ever comes when men with a small fraction of colored blood can

34. MARK REISLER, *BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940*, at 151–56 (1976), in BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* 19 (1994).

In an article in *World's Work* magazine, C.M. Goethe, a virulent California nativist, urged Americans to ponder the kind of future their great-grandchildren would face in a country over-run with Mexicans. “The average American family,” he declared, “has three children.” “Mexican laborers average between nine and ten children to the family. At the three-child rate a couple would have twenty-seven great-grandchildren. At the nine-child rate 729 would be produced. Twenty-seven American children and 729 hybrids or *Amerinds*!” *Id.*

35. *Id.* (“Borrowing the race suicide theme originally developed by nativists opposing European immigration, Samuel J. Holmes warned that the pressure of Mexican population would become so intense that Americans would cease reproducing A policy of unrestricted immigration, Holmes insisted, ‘means that to a greater or less extent we are going to be replaced by the Mexican.’”).

36. MARK REISLER, *BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940*, at 151–56 (1976), in BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* 20 (1994) (discussing the effects of outflow of immigration from Mexico to the United States).

37. *Id.* (arguing that a barrier must be erected between Mexico and the United States in order to end illegal immigration).

38. *Id.* (contending that Mexicans have an informal position on interracial unions because of their own interracial backgrounds).

39. *Id.* (suggesting that because of the casual attitude harbored by Mexicans concerning intermarriage between the races, the United States will undergo the process of mongrelization).

readily find mates among white women, the gates would be thrown open to a final radical race mixture of the whole population.”⁴⁰

Subsequent immigration legislation throughout the twentieth century to some extent reflected these anxieties. Concerns related to maintaining an adequate workforce and perhaps a cheap labor force conflicted with nativist, racial and religious concerns as this country hammered out the polyglot of immigration legislation which governs us today.⁴¹ National origins quotas were changed to create immigration preference based on the goals of family unification and work skills rather than national origin.⁴²

Still, a very complicated scheme persists which has the effect of limiting immigration from countries with a large percentage of immigrants already in the United States. Indeed, a “lottery” system seeking to allow additional immigrants from northern European countries was enacted with the backing of U.S. Sen. Edward Kennedy and others who were concerned that the immigration system was limiting the influx of northern Europeans.⁴³

In 1986, Congress enacted the Immigration Reform and Control Act imposing sanctions for the first time upon employers who hire undocumented workers and providing a limited amnesty program for people who have successfully and illegally run the gauntlet and established themselves in American society.⁴⁴ Additional amendments followed, and security concerns became a focus once again following the events of September 11, 2001.⁴⁵ The result reflects the extremes of willingness to die for open borders, coupled with the nativist desire to seal those same borders.

40. *Id.* (contending that Mexicans have an informal position on interracial unions because of their own interracial backgrounds).

41. See BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIAL* 5 (1994).

42. *Id.*

43. Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigration and Diversity: Cead Mile Failte (A Thousand Times Welcome)?*, 6 *GEO. IMMIGR. L.J.* 745, 768–70 (1992).

44. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.); see also BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIAL*, 396–413 (1994) (describing three key provisions of the IRCA: employer sanctions, unfair immigration-related employment practices, and legalization or “amnesty” provisions).

45. Susan E. Rice, *U.S. National Security Policy Post 9/11: Perils and Prospects*, 28 *FLETCHER F. OF WORLD AFF.* 133, 134 (2004) (critiquing America’s national security policy after the terrorist attacks on September 11, 2001).

III. CONTEMPORARY EXTREME POSITIONS

Echoes of extreme positions throughout our immigration history reverberate today. This section examines what appears to be the extreme rhetoric in the current immigration debate. These positions really cannot be characterized as “conservative versus liberal.” Immigration politics makes strange political bedfellows that defy these over-simplistic labels.

By way of example, a national debate ensued in the 1980s whether to impose sanctions against employers who hire workers who lacked work authorization.⁴⁶ Traditional civil rights groups lined up in favor of imposing such sanctions and the resulting decline in job opportunities for undocumented workers. These organizations included the United Farm Workers Union and the National Association for the Advancement of Colored People, both of which would traditionally be viewed as “liberal” organizations.⁴⁷ Opposition to the implementation to the employers’ sanctions came from agricultural growers, and leaders of industry;⁴⁸ these groups and individuals would traditionally be considered “conservative.” Employer sanctions were implemented, but political and economic influence, particularly by the agricultural growers in California, lead to the creation of broad amnesty provisions for agricultural workers.⁴⁹

U.S. Sen. Edward Kennedy, a liberal, and U.S. Sen. Alan Simpson, a conservative, co-sponsored legislation to allow more immigration from northern Europe, particularly from Ireland.⁵⁰ Sen. Kennedy was concerned that the nation’s immigration scheme was resulting in “a pattern of reverse discrimination[.]”⁵¹ The legislation passed, with many categorizing it as a “white man’s lottery.”⁵²

46. See BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIAL* 5 (1994).

47. See *id.* (“These competing concerns are reflected in current immigration laws . . . with employers often caught in the middle.”).

48. See generally *id.* (describing agricultural growers fears regarding employer sanctions).

49. See generally Julie A. Degen, *The Legislative Aftershocks of Kelo: State Legislative Response to the New Use of Eminent Domain*, 12 *DRAKE J. AGRIC. L.* 325, 351 (2007) (evaluating rural states as having more conservative ideologies and thus more likely to pass conventional statutes).

50. See BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* 127 (1994).

51. Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigration and Diversity: Cead Mile Failte (A Thousand Times Welcome)?*, 6 *GEO. IMMIGR. L.J.* 745, 756 n.103 (1992) (discussing U.S. Sen. Ted Kennedy’s views regarding the effects of the 1965 Amendments to the Immigration and Naturalization Act).

52. *Id.* at 766 n.184 (illustrating the opposition’s heated views towards the legislation by providing an example of the words used by the opposition when referring to the legislation).

The current debate finds liberals advocating restrictions upon immigration⁵³ and conservatives proposing “pathways to legalization” for undocumented workers in this country.⁵⁴ There are many other examples. Rather than trying to analyze positions as conservative or liberal, it makes more sense to view the extremes from a “closed border” versus an “open border” approach. With the risk of over generalizing, this article will now turn to staking out these positions, identify the underlying assumptions, and attempt to predict why the implementation of either extreme would be disastrous.

A. *Closed Border Approach*

Many anti-immigration voices are demanding a closure of the United States’s borders to all illegal immigration, and in some instances, are seeking a shut down of all but a trickle of legal immigration.⁵⁵ In addition, there are some who worry that too many immigrants pose a threat to our national identity and our cultural values.⁵⁶ Others express anxiety that immigrants are displacing American workers, particularly those citizens that are at the lower end of the socio-economic scale.⁵⁷ A repeated concern is that the cost of social services and education for immigrants are creating an impossible strain on our economic infrastructure.⁵⁸ The solution would be, from this perspective, to deport the twelve million in-

53. Dan Haley, *A Shift in the Debate over Illegals*, DENVER POST, Nov. 21, 2005, at B7 (referring to Denver Democrats who are advocating for a policy that controls illegal immigration).

54. Editorial, *The Republican: John McCain*, BRADENTON HERALD, Jan. 13, 2008, at 8 (referencing U.S. Sen. John McCain’s favorable position in comprehensive immigration reform and his sponsorship of the 2007 bill that would have boosted border security and provided a way for millions of undocumented workers to earn legal status).

55. Andres Oppenheimer, *The Oppenheimer Report: Five Myths of Anti-Immigration Talk*, MIAMI HERALD, Jan. 13, 2008, at A6 (“On top of that, most anti-immigration groups want to reduce legal immigration.”).

56. See PublicEye.org, *Immigration and Racial Ethnic and Cultural Diversity*, <http://www.publiceye.org/ark/immigrants/culturalDiv.html> (last visited Feb. 19, 2008).

57. See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar*, 67 OHIO ST. L.J. 961, 962–63 (2006) (discussing why so called brown-collar workers are desired in jobs that encourage subservience); see also Rachel Bloomekatz, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963–81 (2006) (discussing why it is actually the employers creating the problem because they prefer workers they can take advantage of). “Within the context of low-wage employment, employers are generally looking for workers who are most susceptible to exploitation.” *Id.* at 1970.

58. STAN GREENBERG & JAMES CARVILLE, *DEMOCRACY CORPS ON WINNING THE IMMIGRATION ISSUE: A REPORT ON NEW NATIONAL SURVEY ON IMMIGRATION 1, 3* (2007), http://www.scoop.co.nz/media/pdfs/0712/Democracy_Corps_December_18_2007_Immigration_Memo.pdf (“The public’s leading concern about illegal immigration is that the immigrants get access to non-essential governmental benefits at a time when government

dividuals in this country illegally, seal the borders to any further illegal immigration, deny health care and educational benefits to those here without authorization, impose additional sanctions upon employers who hire individuals without work authorization, and implement a number of national and local schemes to discourage additional immigration including restrictions on landlords and hotel operators who rent to unauthorized guests. Finally, official English language statutes would be imposed to help maintain national identity.⁵⁹ Some would even go so far as to deny citizenship to those born in the United States.⁶⁰

Implementation of this extreme view would have devastating impact on this nation. It would probably be physically impossible to detain and deport all of the twelve million individuals in this country illegally.⁶¹ We do not have sufficient law enforcement resources or detention facilities to physically round up and detain them. We do not have the judicial infrastructure necessary to process the proceedings and appeals which would be necessary if we wish to maintain our system of due process.⁶² There are attempts currently being implemented to seal at least portions of the border with Mexico by the creation of a wall.⁶³ Again, it is not apparent that we would have the resources to physically seal the southern border and even if we did so, we would leave exposed the northern border of the United States to illegal immigration.

Denying medical benefits to undocumented individuals can be counter-productive. Transmittable diseases that take hold in the immigrant community could spread quickly throughout the general American

spending is squeezed and taxes are a burden.”). “With the problem out of control, voters believe immigrants are taking more from the country than they give.” *Id.*

59. See BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 15 (1990); see also Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 898, 906 (1986) (discussing whether there is a “right to language” in the United States).

60. See Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36, 40–41, 46 (1988) (evaluating the treatment of children born in the United States whose parents are undocumented).

61. Darryl Fears, *\$41 Billion Cost Projected to Remove Illegal Entrants*, WASH. POST, July 26, 2005 at 11A, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25AR2005072501605.html> (reporting that one estimate places the cost of such an endeavor at \$41 billion).

62. See generally *Immigration Crisis Test Federal Courts on Southwest Border*, (Admin. office of the U.S. Courts, Washington D.C.). June 2006, available at <http://www.uscourts.gov/ttb/06-06/border/index.html>.

63. Kevin Johnson, *Fence Plan Alarms Landowners*, USA TODAY, Nov. 28, 2006, at 1A (“the federal government’s most provocative effort to stop people from entering this country illegally: a plan to build 700 miles of fence along the 2,100-mile Southwest border”).

population. Bacteria and viruses do not distinguish between undocumented and documented individuals.

Depriving immigrant children of an education creates the dangers of the underclass which the Supreme Court of the United States viewed with significant concern in *Plyler v. Doe*.⁶⁴

Employer sanctions enacted with the Immigration and Reform and Control Act of 1986 did not stop illegal immigration. Making it illegal to rent to persons without documentation might only create a black market for such housing and would criminalize otherwise law-abiding citizens who rent to the undocumented.

While every person would acknowledge that to be successful in this country you must be able to speak English, there is a difference between recognizing this reality and imposing this by government fiat.⁶⁵

Attempting to deprive children born in this country of their citizenship would require that Congress repeal the Fourteenth Amendment to the Constitution of the United States.⁶⁶ Punishing undocumented children for the immigration sins of their parents in order to prevent illegal immigration raises, in addition to legal concerns, profound moral implications.⁶⁷ In addition, the cumulative effect of the imposition of all of these steps would likely have a severe negative impact upon our economy, and would damage our standing in the community of nations.

B. *Open Border Plus Amnesty*

This position assumes that we cannot stop illegal immigration anyway and we cannot deport the twelve million or so who are already in our

64. See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that under the Equal Protection Clause of the Fourteenth Amendment and due to the importance of education, Texas may not deny illegal immigrant children the same public education granted to citizens and legal immigrant children without furthering a substantial state interest).

65. BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 15 (1990) (“Scholars began to conclude that supposed biological and cultural inferiorities, including linguistic differences, would preclude representatives of various nationalities or religious groups from ever being able to become what was called 100 percent Americans.”); see generally Bill Piatt, *Toward Domestic Recognition of a Human Right to Language* 23 *HOUS. L. REV.* 885 (1986) (discussing the relationship between the practical necessity of knowing English as a resident of the United States and the impact of requiring this knowledge by governmental mandate).

66. See Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 *NOTRE DAME L. REV.* 35 (1988).

67. See *Ezekiel* 18:20 (“The son shall not bear the iniquity of the father.”); see also Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents* 63 *NOTRE DAME L. REV.* 35, 36, 40–41, 46 (1988) (analyzing the legal ramifications of having undocumented parents on children born in the United States).

presence.⁶⁸ It also assumes that Americans will take low-paying jobs that immigrants traditionally and/or currently fill. This view assumes that undocumented workers make economic contributions to our society through taxes they pay and because they require housing, food and services just like any person in this country with documentation requires. It also assumes that humans have a right to move to improve their lot in life.

The main difficulty with this position is that if it were ever implemented, we could expect a huge influx of immigrants. The economy could not guarantee employment to all who would come, just as it cannot now guarantee employment to those that are already here. The burden on health care and educational institutions would be unbearable.⁶⁹ As individuals poured across the borders and were unable to find work, there would be a natural human inclination towards theft and crime in order to provide for hungry family members. The experiment could not be undone; if we cannot now deport twelve million, we certainly would not be able to deport the many more millions who would enter. Even granting amnesty to those who are already here illegally creates very difficult problems. Presumably, many of those twelve million are working in lower socio-economic jobs. Their sudden legalization would mean an inclination on their part to move up the economic ladder, thereby creating a vacuum at the lower end of the economy which would draw in many more illegal workers.⁷⁰ Even granting amnesty in 1986 did not slow the increase of undocumented workers.⁷¹ Indeed, it appears to have had the opposite effect.⁷²

68. See RAJEEV GOYLE & DAVID A. JAEGER, *DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1* (2005), http://www.americanprogress.org/kf/deporting_the_undocumented_pdf; see also Ralph Blumenthal, *In Texas, Weighing Life with a Fence*, N.Y. TIMES, Jan. 13, 2008, at A12 (examining the feasibility of curbing illegal border crossing through the use of a border fence).

69. See STEVEN A. CAMAROTA, *IMMIGRATION IS HURTING THE U.S. WORKER: LOW PAID AMERICAN WORKERS HAVE BORNE THE HEAVIEST IMPACT OF IMMIGRATION* (2007), <http://www.cis.org/articles/2007/sacoped071107.html> (Nine percent of native-born Americans between the ages of eighteen and sixty-four were high school dropouts in 2006, while thirty-four percent of immigrants in the same age bracket quit school before earning a high school diploma). “The rate was 60 percent for illegal immigrants.” *Id.*

70. See Rectea, *Amnesty and Continued Low-Skill Immigration Will Substantially Raise Welfare Costs and Poverty*. Backgrounder, May 12, 2006, <http://www.heritage.org/Research/Immigration/bg1936.cfm>.

71. Center for Immigration Studies, *New INS Report: 1986 Amnesty Increased Illegal Immigration*, available at <http://cis.org/articles/2000/ins1986ammesty.html>.

72. *Id.*

IV. MOVING INWARD

A majority of American citizens are not satisfied with the current state of immigration laws.⁷³ The extreme approaches will not work. Constructing a realistic alternative will require the involvement of people from many different backgrounds and all ranges of the political spectrum. It would require a comprehensive analysis of the legal, economic, political, social, religious and racial issues, rather than the ad hoc responses to the perceived hot-button issues at whatever time policy is being debated. A more comprehensive view which would allow us to find more politically-acceptable middle ground from the extremes would require a thoughtful examination of a number of issues. These issues and the outlines of a resolution follow.

A. *Why do People Want to come to the United States?*

More people enter this country illegally and legally than any other nation in the world.⁷⁴ Political freedom and economic opportunities have drawn people to this nation from the inception of our republic.⁷⁵ What do these newcomers need, and what do we as a nation have a right to expect? It is likely that many, if not most, of the new arrivals seek the more immediate benefit of economic prosperity in the United States. The nation, that is the majority of individuals living and working in the United States, has the legitimate right to maintain the sovereignty of this country in order to provide the same blessings of economic prosperity and liberty for their families and for future generations.⁷⁶

B. *What Impact do New Arrivals Have on the Economy?*

So far, economists have disagreed on this very important issue. We need to be able to determine the costs and benefits of immigration. It makes no sense to drastically curtail immigration if the nation is experiencing economic benefits from it anymore than it makes sense to open the borders wider if that would cause an economic downturn.

73. See Pew Hispanic Center, *The State of America Public Opinion on Immigration in Spring 2006: A Review of Major Surveys*, <http://pewhispanic.org/files/factsheets/18.pdf> (last visited Feb. 19, 2008).

74. Haya El Nasser, *A Nation of 300 Million*, USA TODAY, July 5, 2006, at 1A (“Immigration, longevity, a relatively high birth rate and economic stability all have propelled the phenomenal growth. The nation has added 100 million people since 1967 to become the world’s third-most populous country after China and India. It’s growing faster than any other industrialized nation.”).

75. See BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIAL* 26 (1994).

76. See *id.* at ch. 2.

C. *What Would be the Costs and Benefits of Attempting to Remove Those Who are Here Illegally?*

Do we have the resources to identify, detain and remove all those who are here illegally? If not, how would we prioritize enforcement? Should we consider some form of amnesty for these individuals? In this regard, what were the successes and failures of the amnesty provisions enacted in 1986? Would granting amnesty create a vacuum encouraging others to enter illegally? There are many individuals outside of the United States who have applied for an entry visa and who have spent years and even decades awaiting the availability of a visa under our incredibly complex quota system.⁷⁷ Is it fair to those who have followed the law to allow those who have broken the law to receive amnesty? If we consider amnesty for those who enter unlawfully, should we consider some form of amnesty for those who have patiently waited in line all these years?

D. *How do We Prioritize Immigration Enforcement Efforts?*

Assuming that we cannot physically stop every person who wishes to enter this country illegally from doing so, how do we set priorities for prevention of entry, and for deportation? What role should physical barriers and technology play in this process?

E. *What Role Should the Federal, State and Local Governments Play?*

Traditionally, immigration enforcement has been left to the federal government.⁷⁸ It has become obvious to the governors of the border states and many localities that these immigration enforcement efforts are failing.⁷⁹ In fact, several border states have recently enacted their own enforcement schemes.⁸⁰ For example, Arizona recently enacted a scheme for employers' sanctions.⁸¹ On the other hand, some state and local gov-

77. *See id.*

78. *See id.* at 29–39 (1994); *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitutions*, 83 AM. J. INT'L L. 862, 862–63 (1989) (commenting that change should be welcomed regarding immigration enforcement).

79. WorkPermit.com, U.S. State Governors Want Immigration Changes, http://www.workpermit.com/news/2006_02_27/us/governors_want_immigration_changes.htm (last visited Feb. 19, 2008).

80. Texas Governor, Rick Perry - Press Release, Perry Authorizes More Border Security Finding, Virtual Border Watch Program, <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2006-06-01.1612> (last visited Feb. 19, 2008); Emily Bazar, *Strict Immigration Law Rattles Okla. Businesses; Undocumented Workers Have Left by the Thousands, Creating Hole in Economy*, USA TODAY, Jan. 10, 2008, at 1A.

81. Lindsay M. Butler, *Businesses Feel the Pinch of Sanctions Law: Stores that Cater to Hispanics Closing Down in Mesa*, EAST VALLEY TRIB., Dec. 29, 2007, at B1.

ernments have declared themselves to be amnesty or sanctuary zones for illegal entrants.⁸²

F. *To What Extent Should We Rely Upon Private Immigration Enforcement?*

The federal government has imposed upon the private sector a large portion of the burden of immigration enforcement through the creation of employer sanctions.⁸³ Employers currently are prohibited from hiring undocumented workers.⁸⁴ Moreover, they must maintain records to prove they are not hiring undocumented workers.⁸⁵ An employer who hires someone with documentation but fails to maintain records at the employer's place of business is subject to penalties.⁸⁶ The private sector is not compensated for this.⁸⁷ To what extent do we want to increase the sanctions thereby breaking the magnet of employment drawing people to our country illegally without providing compensation to these private enforcers? What do we do about private volunteers who seek to enforce the nation's immigration policies? Do we want to encourage them in their efforts or does this lead to at least the perception of vigilante justice when armed, private individuals and groups patrol the borders?

G. *How Much are We Willing to Impose Sanctions Upon Citizens in the Name of Immigration Control?*

To what extent would illegal immigration be curbed if we deny citizenship to children born in the United States to undocumented parents? To

82. See Michael D. Shear & Dan Balz, *Romney, Giuliani Escalate Their Immigration Fight*, WASH. POST, Aug. 17, 2007, at A02 (citing the criticism aimed at cities with alleged sanctuary polices that protect undocumented residents).

83. See BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 396 (1994) (noting the introduction of "employer sanctions" as an attempt by Congress to penalize employers that hire unauthorized workers).

84. Immigration Reform and Control Act of 1986 § 274A, 8 U.S.C. §1324a (2008) (defining, via statute, the illegality of United States employers who attempt to hire "an alien knowing the alien is an unauthorized alien . . . with respect to such employment").

85. *Id.* §1324a(b) (2008) (laying out the steps of the employment verification system, such as attesting that the employer has reviewed the documentation to determine the employee is not an illegal immigrant, the proper documents for determination and that the employer must attest that the future employee is a citizen or an immigrant who may be hired and must retain said attestation).

86. *Id.* §1324a(f)(1) (2008) ("Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.").

87. Immigration Return and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (providing no provision for reimbursement compensation to employees for their efforts).

what extent do we discourage illegal immigration by enacting English-only rules which affect citizens and non-citizens alike? Will denying educational and health care benefits to illegal entrants curb immigration or will it create more difficulty for citizens and non citizens alike?

H. *What Impact Does Immigration Have on Race Relations in the United States?*

Will English-only rules discourage illegal immigration and help to maintain cultural identity? Is the nation or areas of the nation at risk of losing identity by the influx of immigrants? Does the presence of Latino immigrants exacerbate tensions between the African-American and Latino communities?⁸⁸ To what extent should race and national origin play a role in immigration policy?

V. HOPE FOR RESOLUTION

It is obvious that attempting to answer these questions will be extremely difficult. We have not been able to successfully address them thus far in the nation's history. That is not to say that the inquiry should not begin. Beginning this process will enable us to start moving inward from the extremes to a more just and politically immigration policy. With principled political leadership much could be accomplished. After all, the heated rhetoric at both ends of the spectrum has been toned down from historical models. Even those who currently adhere to the closed-border approach would likely agree that our immigration policy should allow for the entry of some aliens with exceptional ability.⁸⁹ They would probably allow those fleeing persecution to continue to enter this country, particularly those fleeing regimes hostile to the United States. Most of the open-border advocates would nonetheless agree that it makes no sense to allow those into this country who would destroy it.⁹⁰ Ultimately, it might be possible, depending upon the result of the studies to the issues raised in the previous section, to come to some more general agreements. The results of those inquiries and the resulting policy might be that immigrants will want to enter the United States because they seek to better their own lot and that of their families. Their motives are likely, in most cases,

88. See generally BILL PIATT, *BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION* 160 (1997) (noting that the two groups are sometimes each others' oppressors).

89. Carla Marinucci, "Close the Borders", *Schwarzenegger Says*, S.F. CHRON., Apr. 20, 2005, at B1.

90. See Jackson Yam, *U.C. Davis Law Professor Calls for Open Border with Mexico*, Jan. 29, 2008, media.www.californiaaggie.com/media/storage/paper981/news/2008/01/29/CampusNews/Uc.Davis.Law.Professor.Calls.For.Open.Border.With.Mexico-3173453.shtml.

mixed. They need immediate sustenance and yet they look to provide a better future for their children. This future involves the hope of improved economic circumstances, and the “pursuit of happiness” that is the common goal of people who are already in the United States. We need the skills and labor of some immigrants, and we want to attract the best and brightest to our shores.

However, we have a right as a nation to admit those who are interested not only in their own economic well-being, but in the political well-being and the sovereignty of this nation. We have the right as a nation to limit entry in terms of absolute numbers and in terms of qualifications of the immigrants. We might choose to continue to allow those with particular work skills to enter our country as well as those who are fleeing persecution. We would also want to allow some immediate family members to accompany those workers.⁹¹ The presence of family members will assist the immigrant in the process of survival and assimilation into the new country, benefiting both the immigrant and the nation.⁹² It would likely be cost prohibitive to remove all of those who are now here illegally.⁹³

Yet granting a blanket amnesty would likely create a vacuum, drawing others here illegally. It would not be fair to those who have patiently waited, following the legally-ordained process of immigration to the United States, to put those who have “jumped the line” ahead of them. We might strike a balance by creating some opportunities for those who are here illegally to apply for legal entrance. They might have to “stand in line” with the others. They might even have to leave this country for some period of time. For those who are here illegally who do not qualify or who fail to apply for some form of legalization, we might just choose to look the other way. Unless they create negative attention by committing crimes or doing other things that are harmful, we might choose not to spend the resources necessary to uproot them. They would not qualify for the benefits that those who are here lawfully have achieved. At the same time, we would need to provide a safety net for the children of these individuals.

Immigration enforcement efforts should be prioritized with the notion of defense of the nation as the highest priority. Those who pose the greatest threats should be at the top of the enforcement efforts, especially terrorists, and criminals.

91. See *Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977) (noting that family unification has been an important goal of immigration policy in the United States).

92. See BILL PIATT, *IMMIGRATION LAW: CASES AND MATERIALS* (1994).

93. Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

Federal, state, and local governments have got to work together to implement effective immigration controls. State and local police officers need to receive training in immigration law and enforcement.

Private enforcement of the nation's immigration laws through employer sanction should be continued with compensation to business owners for the costs associated with this endeavor. Courts should continue to prevent the implementation of private, state and local action which runs contrary to national immigration law and policy. We should not tolerate a plethora of immigration standards on a local basis any more than we would tolerate the minting of currency on a local or private level.

While not all western democracies recognize the concept of citizenship by birth, we do. It is enshrined in the Fourteenth Amendment to the Constitution of the United States.⁹⁴ Any attempt to change this would require the effective repeal of the Fourteenth Amendment.⁹⁵ Legally and morally, that does not appear to be the right thing to do, just as punishing undocumented children for the sins of their parents should not be condoned.

VI. CONCLUSION

There is no easy approach to immigration reform, yet, it is critical that we attempt it. By following the approaches suggested in this article, a realistic possibility that we would be able to arrive at a better formulation, weighing the economic, sociological, political religions and racial implications of our determinations might be created. In the process, we would quite frankly have to take into account lofty ideals (i.e., human rights, sovereignty) and baser human motivations (i.e., greed, racism). Assuming that no individual, political party or interest group has a monopoly on virtue or vice, seeking common ground from the extremes might increase the likelihood of the formulation of an equitable approach to immigration reform.

94. See U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*

95. Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).