Can't Live with 'Em, Can't Deport 'Em: Why Immigration Reform Efforts Have Failed

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I. Introduction

The United States has a passionate love/hate relationship with undocumented immigrants. The refrain “We are a nation of immigrants” competes with the exhortation “We are being invaded.” Many Americans fault undocumented immigrants for breaking U.S. laws, not waiting their turn in line for lawful immigration and diluting already scarce public resources. Other Americans applaud the strong work ethic that many undocumented immigrants exhibit and the economic strength they bring to the country. In the post-September 11 years, the debate has reached a boiling point.

The conflicting emotions of the immigration debate aside, the United States’ need for immigration is indisputable. First, the U.S. workforce is aging and becoming increasingly skilled. Fewer native born Americans fill jobs in agriculture, manufacturing, service occupations (jobs such as healthcare support, food preparation and cleaning/...
maintenance), and construction. Experts predict that as the U.S. population continues to age and advance, more workers will be needed in service industries such as elder and child care.

In addition to aging and becoming increasingly skilled, the U.S. workforce is experiencing a growth slowdown. A 2004 report conducted by the Rand Corporation’s Labor and Population Program per the request of the Department of Labor provides the following statistics:

The annual growth rate of the nation’s workforce is expected to slow to a nearly static 0.4 percent by 2010. That’s a sharp decline from the 1.1 percent annual increases seen in the 1990s and the 2.6 percent annual increases experienced during the 1970s. The slowing workforce growth rate is caused primarily by a 25 percent decline in the birthrate that followed the end of the baby boom in the mid 1960s, coupled with a trend toward earlier retirement by men. The influx of immigrant workers and women into the workforce has counteracted these forces so that the workforce has continued to expand, albeit at a slower rate.

As the United States has grown increasingly dependent on immigrant labor, its laws have not kept up with the demand. Restrictive labor quotas ensure that U.S. businesses do not have the workers they need. Restrictive family quotas separate wives from husbands and parents from children for years. As a result, the United States has become home to as estimated ten million to thirteen million undocumented immigrants.

Comprehensive immigration reform would update the woefully inadequate immigration laws so that they respond to the economic and social realities on both sides of the border. Necessary workers would have a lawful means of seeking the employment that they need. U.S. businesses would have a lawful means of employing the labor that they need. With the undocumented population eligible to regularize their status, identity theft would decrease, tax revenue would increase, and national security would be stronger.

Despite the benefits that could accrue from comprehensive immigration reform, legislative efforts at comprehensive immigration reform fail year after year. Such efforts seem to fall into a pattern: immigration reform gains momentum in Congress and in the press; a bipartisan coalition of senators introduces a comprehensive immigration reform package; a media frenzy ensues; the immigration re-

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5. Id. at Tbl. 4 (reporting that 22.5% of the foreign-born population as opposed to 15.4% of the native-born population works in service occupations). [BLS report]
6. Id. at Tbl. 4 (reporting that 11.8% of the foreign-born population as opposed to 5.6% of the native-born population works in construction). [BLS report]
7. See 21st Century at Work, supra note 1, at 201-203.
form bill is referred to the Judiciary Committee: the bill dies, killed by amendments or a failure to garner enough support to proceed. In the meantime, the United States is left with a broken immigration system that jeopardizes border security, creates an underclass of exploitable workers, proliferates the smuggling and trafficking of humans, and impedes family unity.

This article seeks to explain why Congress has failed to pass comprehensive immigration reform legislation. Part II describes the current avenues available to foreign nationals who seek to immigrate to the United States for business or family reasons. Part III enumerates the various immigration reform bills that, despite the promise they showed, failed to become law. Part IV seeks to explain how the positive/negative duality of undocumented immigration, the public perception of undocumented immigrants, and business interests all contribute to the highly politicized nature of the immigration debate. Finally, this article concludes that the legislature and the courts have a responsibility to educate the U.S. public, depoliticize the debate, and create an environment in which proposed comprehensive immigration reform legislation can survive to become law.

II. Current Immigration System

The U.S. immigration system permits temporary and permanent immigration to the United States through a dual visa system. Non-immigrant visas are available for individuals who wish to visit or temporarily live in the United States; immigrant visas, popularly known as “green cards” are available for those seeking to immigrate permanently to the United States. Contrary to popular belief, the U.S. immigration system affords limited opportunities for permanent legal immigration, as well as for temporary work visas. Moreover, very few individuals qualify for immediate immigration benefits, even if they do have a means of legal immigration available to them; most immigration benefits require applicants to endure lengthy waits, often outside the United States. Generally, most individuals seeking permanent lawful immigration to the United States require the sponsorship of an immediate family member (spouse, parent, child or sibling) or a business; temporary work visas are virtually unavailable outside the skilled labor industry.

A. Family-Based Immigration

U.S. citizens and lawful permanent residents are entitled to sponsor certain relatives for permanent immigration to the United States. The process requires the sponsoring relative to submit a petition to Citizenship and Immigration Services. Citizenship and Immigration Services will approve petitions that establish the immigration status of the sponsoring relatives and their relationship to the sponsored individuals.
proved petitions may eventually lead to a relative living abroad immigrating to the United States through a procedure known as “consular processing”, or a relative already living in the United States applying for permanent residence through a process called “adjustment of status.” Only the spouses and minor children of U.S. citizens, however, may be immediately eligible to apply for lawful permanent residence once their petitions are approved. As discussed below, statutory numerical limitations and bars to admissibility delay or prevent the lawful immigration of many sponsored relatives.

1. Family Members of U.S. Citizens

U.S. law permits citizens of the United States to sponsor their spouses, children and siblings for lawful permanent residence. Only U.S. citizens’ spouses and children under the age of twenty-one, who have lawfully entered the United States, are eligible to apply to adjust their status to lawful permanent residency. Spouses or children who entered the United States illegally are only eligible for consular processing. Once they depart the United States to complete the process, however, they trigger a ten-year period of inadmissibility, during which they are prohibited from returning to the United States. The sponsoring U.S. citizen may request a waiver of the bar, but such waivers are only granted in cases where the bar creates a situation of extreme hardship to the U.S. citizen spouse or U.S. citizen child.

In addition to the admissibility bars, statutory numerical limitations delay the lawful immigration or adjustment of status of many close relatives of U.S. citizens. U.S. law currently permits 23,400 U.S. citizens’ unmarried children over the age of twenty-one, 23,400 married

13. See 8 C.F.R § 204.2(a)(3) (2007) (directing that approved family petitions be forwarded to the Department of State’s Processing Center). See also, 22 C.F.R. § 42.61-68 (2007) (delineating visa application procedures for individuals intending to immigrate through consular processing).


19. See 8 C.F.R. § 204.2(a)(3) (2007) (permitting Citizenship and Immigration Services to retain only those approved petitions made on behalf of aliens eligible to adjust status, and requiring that all other approved petitions be forwarded to the Department of State for consular processing). See also 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2000) (barring aliens who have accumulated more than 180 days of unlawful presence from re-entering the United States for a period of three years). See also 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2000) (barring aliens who have accumulated one year or more of unlawful presence from re-entering the United States for a period of ten years).


children of U.S. citizens, and 65,000 siblings of adult U.S. citizens to immigrate or adjust status. To date, this quota has resulted in a delay of approximately six years for adult children, seven and a half years for adult and married children, and ten and a half years for siblings.

The nationality of sponsored relatives may create additional delays. Citizens of Mexico, India, the Philippines, and China are subject to stricter quotas than citizens of other countries due to the high rate of immigration from those countries. The highest rate of immigration is from Mexico and the Philippines, resulting in delays for Mexican and Filipina/o family members that exceed the average delay by anywhere from three to twelve years.

2. Family members of Lawful Permanent Residents

Lawful permanent residents are more limited than U.S. citizens both in terms of whom they may sponsor and statutory quotas. Permanent residents may only sponsor their spouses, children under the age of twenty-one, and unmarried adult children. There is no immediate preference category for spouses and minor children: U.S. law permits only 114,200 spouses and unmarried children of lawful permanent residents to immigrate or adjust status annually, resulting in a delay of five years for spouses minor children, and nine years for unmarried adult children. The same nationality-based restrictions on citizens from Mexico, India, the Philippines, and China that apply to family members of U.S. citizens also apply to family members of lawful permanent residents.

25. See id. (reporting that immigrant visas are currently unavailable for married children of U.S. citizens whose petitions were filed after March 1, 2000).
26. See id. (reporting that immigrant visas are currently unavailable for siblings of U.S. citizens whose petitions were filed after May 22, 1997).
27. See 8 U.S.C. § 1151(a)(2) (2006) (stipulating that "the total number of immigrant visas made available to natives of any single foreign state...in any fiscal year may not exceed 27 percent...of the total number of such visas made available...in that fiscal year.").
31. See Visa Bulletin, supra note 24 (reporting that immigrant visas are currently unavailable for spouses and minor children of lawful permanent residents whose petitions were filed after December 15, 2002).
32. See id. (reporting that immigrant visas are currently unavailable for unmarried adult children of lawful permanent residents whose petitions were filed after September 15, 1998).
3. Violence Against Women Act Self-Petitions

Spouses, children, and step-children of abusive U.S. citizens and lawful permanent residents may apply to adjust their status through a self-petitioning process authorized by the Violence Against Women Act (VAWA).34 The VAWA self-petition allows an abused spouse, child or step-child of a U.S. citizen or permanent resident to bypass the traditional petitioning process that, prior to the enactment of VAWA, required the abusive spouse/parent to sponsor the abused family member.35 Under the VAWA self-petitioning process, the abused family member files a petition for special immigrant status with proof of the physical and/or extreme cruelty inflicted by the U.S. citizen or permanent resident.36 Upon approval of the self-petition, family members of U.S. citizens are immediately eligible to apply to adjust their status to permanent residency.37 Family members of permanent residents are subject to the same statutory quotas discussed above, but are permitted to remain in the United States in a status known as “de-
ferred action” until they are eligible to apply for permanent residency.38

4. Adoption

Obtaining legal status in the United States through adoption is subject to strict limitations. If the adoption takes place in the United States (as opposed to overseas), only children under the age of fourteen who have lived with the adoptive parent for two consecutive years prior to the adoption are eligible to obtain lawful status.39 Adopted children of U.S. citizens automatically acquire citizenship if the following requirements are met: (1) they are under 18; (2) at least one parent is a native-born or naturalized U.S. citizen; (3) they have entered the U.S. as lawful permanent residents and are residing with the U.S. citizen parent(s); and (4) the adoption is final.40 Adopted children are not eligible to sponsor their biological parents or siblings.41

B. Employment-based Immigration

Employment-based immigration is based on a process called “labor certifica-
tion.” The Immigration and Nationality Act prohibits the admission of “[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor.”42 This prohibition is overcome only when the Attorney General and the Department of Labor certify that (1) “there are not sufficient workers who are able, willing, qualified. . . and available at the time of application for a visa and admission to the United States”43 and (2) that the employment of such alien will not adversely affect the wages and working conditions of workers in the United States.44

1. Permanent

The United States allows approximately 140,000 workers per year to immigrate permanently.45 The Immigration and Nationality Act allocates the visas according to a priority system: 28.6 percent for priority workers,46 28.6 percent for professionals holding advanced degrees or demonstrating exceptional abil-

46. 8 U.S.C. § 1153(b)(1) (2006). Priority workers include aliens with “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation”; outstanding professors and researchers; and certain multinational executives and managers. 8 U.S.C. § 1153(b)(1)(A).
ity,\textsuperscript{47} 28.6 percent for other skilled workers and professionals,\textsuperscript{48} 7.1 percent for certain religious workers and foreign employees of the U.S. government and international organizations,\textsuperscript{49} and 7.1 percent for entrepreneurs with significant capital whose investment will create employment opportunities for U.S. workers.\textsuperscript{50}

2. Temporary

There are several nonimmigrant visas available for individuals seeking to work in the United States. Most pertain only to "skilled" workers — employees with at least bachelor’s degrees or their equivalents and "theoretical and practical application of a body of highly specialized knowledge,"\textsuperscript{51} key positions within a company,\textsuperscript{52} or national or international fame.\textsuperscript{53}

Only the visas known as H-2 visas are reserved for "unskilled" workers.\textsuperscript{54}

The H-2 visa program is divided into two categories: H-2A visas for agricultural workers\textsuperscript{55} and H-2B visas for workers providing other types of unskilled labor.\textsuperscript{56} Both categories have significant limitations that preclude them from being a viable means of lawful immigration to the United States.

The H-2A program requires employers to engage in a two-phase petitioning process. First, employers must apply to the Department of Labor for a certification that there are not sufficient U.S. workers to perform the needed agricultural labor\textsuperscript{57} and that employing the foreign national will not "adversely affect the wages and working conditions" of U.S. workers who are similarly employed.\textsuperscript{58} Petitioning employers must assure the Department of labor that, if the employment is not covered by state workers' compensation law, they will provide insurance equal to that provided under state workers' compensation law for com-

\textsuperscript{47} 8 U.S.C. § 1153(b)(2).
\textsuperscript{48} 8 U.S.C. § 1153(b)(3). This provision specifically excludes unskilled and seasonal labor. See 8 U.S.C. § 1153(b)(3)(A)(i) (defining skilled workers as "[q]ualified immigrants who are capable . . . of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature . . . .") .
\textsuperscript{50} 8 U.S.C. §§ 1153(b)(5). Immigrants under this section are required to invest $1,000,000, or, if investing in a rural or low-employment area, $500,000. 8 U.S.C. § 1153(b)(5)(C).
\textsuperscript{52} See 8 U.S.C. § 1101(a)(15)(L) (authorizing nonimmigrant status for intracompany transferees). See also 8 U.S.C. § 1184(c)(2)(B) (defining "specialized knowledge" of intracompany transferees to include "special knowledge of the company product and its application in international markets" or "an advanced level of knowledge of processes and procedures of the company").
\textsuperscript{53} See 8 U.S.C. § 1101(a)(15)(O) (authorizing nonimmigrant status for aliens who have "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim . . . ."). Nonimmigrant visas are also available for skilled workers such as fashion models of "distinguished merit and ability"; nurses; doctors; and religious workers.
\textsuperscript{57} 20 C.F.R. § 655.90(b)(1)(A) (2006).
\textsuperscript{58} 20 C.F.R. § 655.90(b)(1)(B).
parable employment. Petitioning employers must also demonstrate that they have “made positive recruitment efforts within a multi-state region” and that there are not a significant number of U.S. workers available to perform the labor. Only if and when the Department of Labor grants a certification may an employer petition Citizenship and Immigration Services for H-2A visas. In 2006, Citizenship and Immigration Services issued 46,432 H-2A visas.

The H-2B program operates according to similar requirements. In order to receive a certification from the Department of Labor, an “employer must submit a job order with the Employment Service System which circulates for ten days; advertise the openings in a newspaper for three consecutive days; and contact unions and other recruitment sources.” In order to receive the visas from Citizenship and Immigration Services, employers must demonstrate that, absent extraordinary circumstances, the services or labor will not exceed one year. Employers must also demonstrate that the need for the temporary labor “shall be a one-time occurrence, a seasonal need, a peakload [sic] need, or an intermittent need.” The Immigration and Nationality Act caps the availability of H-2B visas at 66,000 per year.

C. Incompatibility of Current Demographics with Current Immigration Laws

The existence of the various opportunities for legal immigration discussed above begs the question: why does the United States have thirteen million undocumented immigrants living within its borders? The answer lies to a large degree in unreasonable quotas and lack of avenues for legal unskilled immigrant labor. Undocumented immigrants comprise an estimated twenty-six percent of immigrant labor and are filling an estimated six million jobs in the United States, many of which are in the agriculture and service sectors no longer being

59. 20 C.F.R. § 655.90(b)(3).
60. 20 C.F.R. § 655.90(b)(4).
65. Id.
filled by native-born workers.\textsuperscript{67} Considering that the only visa system in place to fill unskilled labor needs is available to fewer than 200,000 workers, it is clear that current immigration laws are not aligned with current workforce demographics. Compounding the problem is the fact that when an individual does find a way to immigrate legally, quotas prevent even traditional nuclear families from being together.

III. Immigration Reform Bills

Lawmakers are fully aware that the current immigration system is inadequate and ineffective. However, even with Republicans controlling the executive and legislative branches of government, and a President with close ties to the Mexican President Vicente Fox, no immigration reform has occurred. When the Democrats took control of Congress, yet another push for immigration reform gained momentum and raised the hopes of millions of immigrants and concerned Americans. Nevertheless, each of the bills discussed below failed.

A. Immigration Reform Act of 2004

Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) introduced the Immigration Reform Act of 2004,\textsuperscript{68} one of the earliest post-September 11 comprehensive immigration reform bills. The stated purpose of the Immigration Reform Act was “[t]o strengthen national security and United States borders, reunify families, provide willing workers, and establish earned adjustment under the immigration laws of the United States.”\textsuperscript{69} The main components of the Hagel-Daschle bill were the “reclassification of spouses and minor children of legal permanent residents as immediate relatives,”\textsuperscript{70} an enhanced temporary worker program,\textsuperscript{71} and an earned legalization plan for undocumented immigrants.\textsuperscript{72} The bill designated thirty percent of the petitioning fees to the Department of Homeland Security for “implementation of border security measures.”\textsuperscript{73} The Hagel-Daschle bill was referred to the Senate Committee on the Judiciary, where no further action was taken.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. tit. I.
\item \textsuperscript{71} Id. tit. II.
\item \textsuperscript{72} Id. tit. III.
\item \textsuperscript{73} Id. § 216.
\item \textsuperscript{74} See Library of Congress THOMAS Guide, http://www.thomas.gov/cgi-bin/bdquery/z?d108:SN02010:@@@X (reporting that the last action taken on S. 2010 was on January 21, 2004, when it was “[r]ead twice and referred to the Committee on the Judiciary”) (last visited Feb. 19, 2008).
\end{itemize}
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B. Secure America and Orderly Immigration Act of 2005

Senators McCain (R-AZ), Kennedy (D-MA), Brownback (R-KS), Lieberman (D-CT), Graham (R-SC) and Salazar (D-CO) introduced the Secure America and Orderly Immigration Act of 2005. This bill noted the many problems resulting from illegal immigration, including the proliferation of international human trafficking, the burden on states' and municipalities' social services, and the creation of an underclass of workers vulnerable to exploitation and abuse. The McCain-Kennedy bill went further than the Hagel-Daschle bill described supra in section 0 in enhancing border security. The bill also eased quotas for spouses and minor children of lawful permanent residents, created a market-based temporary worker visa with the possibility of lawful permanent residency for qualified workers, and encouraged the U.S. government to work with Mexico to alleviate conditions that compel migration. Like the Hagel-Daschle bill, the McCain-Kennedy bill died in the Senate Committee on the Judiciary.

C. The Comprehensive Immigration Reform Act of 2006

Senator Arlen Specter (R-PA), joined by Senators Brownback, Hagel, Martinez (R-FL), Graham, Kennedy and McCain, introduced the Comprehensive Immigration Reform Act of 2006. The result of intense bipartisan negotiations, the Specter bill would have provided for enhanced border security and increased resources for border security, mandated an electronic system for employment verification, established an earned legalization program for workers and others with significant continuous physical presence in the United States, and taken

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76. S. 1033 § 2(7).
77. Id. § 2(8).
78. Id. § 2(9).
79. The bill mandated the U.S. government to cooperate with and provide aid to Mexico and other countries relevant to U.S. southern border concerns. Id. § 131. It also appropriated funds for state and local law enforcement to incarcerate illegal aliens. Id. § 201.
80. Id. § 603.
81. Id. § 306.
82. Id. § 502.
83. See Library of Congress THOMAS Guide, http://www.thomas.gov/cgi-bin/bdquery/z?d109:SN01033:@@@X (reporting that the last action taken on S. 1033 was on May 12, 2005, when it was “[r]ead twice and referred to the Committee on the Judiciary") (last visited Feb. 19, 2008).
86. S. 2611 tit. I.
87. Id. § 301.
88. Id. § 601.
measures to eliminate the family immigration backlog.\textsuperscript{89} Unlike its predecessors, the Specter bill passed the Senate and inspired much optimism that immigration reform would come to pass.\textsuperscript{90}

Opponents in the House, however, had their own idea of immigration reform, and it did not include regularization for undocumented immigrants. In December of 2005, the House had passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.\textsuperscript{91} In addition to implementing an employment verification system similar to the one proposed in the Senate bill,\textsuperscript{92} this bill would have expanded the categories of deportable crimes known as “aggravated felonies,”\textsuperscript{93} increased criminal and administrative penalties for immigration violations,\textsuperscript{94} expanded mandatory detention of undocumented immigrants,\textsuperscript{95} and further restricted judicial review of immigration court decisions.\textsuperscript{96} Although this bill also failed,\textsuperscript{97} the enforcement-focused mentality that drove it precluded the garnering of sufficient support for the hybrid reform represented by the Senate bill.

\textbf{D. Attempts at Immigration Reform in 2007}

The most recent efforts to achieve comprehensive immigration reform, like their predecessors over the last several years, have been unsuccessful. 2007 has seen the introduction of a number of immigration reform bills, including the Democrat-sponsored Comprehensive Immigration Reform Acts,\textsuperscript{98} the Republican-sponsored Immigration Enforcement and Border Security Act,\textsuperscript{99} and the bipartisan Kennedy-Specter comprehensive immigration reform bill.\textsuperscript{100} The number of bills and proposed amendments to the bills reflects the fractured, divisive state that

\textsuperscript{89} Id. §§ 501, 503.
\textsuperscript{93} Id. § 201.
\textsuperscript{94} Id. tit. II.
\textsuperscript{95} Id. § 401.
\textsuperscript{96} Id. tit. VIII.
\textsuperscript{98} See Comprehensive Immigration Reform Act of 2007, S. 9, 110th Cong. (2007), (co-sponsored by Democratic Senators Leahy, Cantwell, Schumer, Stabenow and Boxer), and Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007), (sponsored by Democratic Senators Reid, Kennedy, Menendez, Leahy and Salazar).
\textsuperscript{100} Unaccompanied Alien Child Protection Act of 2007, S. 1639, 110th Cong. tit. VIII (2007).
the immigration debate has reached, and does not bode well for future attempts to achieve comprehensive immigration reform.

IV. Reasons for Failure: The Many Levels of the Immigration Debate

Why can U.S. lawmakers not agree on a matter of such urgent concern? That question has proven to be as complex as the immigration debate itself. In general, however, it appears that the political nature of immigration combined with the complexity of the issue have produced the perfect conditions for stalemate.

A. Illegal Immigration Carries Both Positive and Negative Consequences

Immigration law affects the country on a national, state, and local level. The regulation of immigration, however, has been held to be the exclusive domain of Congress as part of its plenary powers to regulate commerce with foreign nations and to establish "a uniform rule of naturalization." ¹⁰¹ States and municipalities, though considered ineligible to regulate immigration, are nevertheless affected by Congress’s immigration decisions – particularly in the case of illegal immigration.

Illegal immigration, like legal immigration, affects the United States in both positive and negative ways. On the one hand, undocumented immigrants provide significant economic benefits. As discussed supra in Part 0, undocumented immigrants often fill jobs in areas with labor shortages. They use the money they earn to buy goods and services in the United States and to send home to family members, thereby contributing to the U.S. economy as well as helping to stabilize the economies of countries neighboring the United States. As Professor Francine Lipman points out, although undocumented immigrants are ineligible for virtually all federal (and often state and local) benefits with the exception of emergency medical care and public education through high school, they contribute “billions of dollars in sales, excise, property, income, and payroll taxes, including Social Security, Medicare and unemployment taxes, to federal, state and local coffers.” ¹⁰²

Illegal immigration also produces negative results. States and municipalities with large populations of undocumented immigrants report overcrowding in schools and hospitals. Serious national security concerns arise when thousands of people are crossing the U.S. border clandestinely. Low-wage workers who are U.S. citizens and documented immigrants find their wages depressed and/or job availability scarce.

¹⁰¹ U.S. Const. art. I, § 8. See Fong Yue Ting v. United States, 149 U.S. 698, 713-714 (1893) (holding that the power to expel and exclude aliens resides with Congress).

B. Public Perceptions of Illegal Immigration

The complexity of the immigration problem is compounded by how U.S. society perceives the effects of illegal immigration. The negative effects of immigration are often far more visible and recognizable than the positive effects. The affordability of goods and services coming from labor markets filled predominantly with undocumented immigrants – produce, restaurants, hotels, construction, landscaping – is not usually credited to illegal immigration. The burdens placed on schools, hospitals, and law enforcement, however, are uniformly blamed on illegal immigration. Thus, middle-class parents who buy fresh produce for their family every day, take the family out to eat once a week, and go on vacation once a year will likely not credit their ability to do so affordably to undocumented immigrants. They have not seen the workers in the field, the cooks in the back of the restaurant, or the maids who have made up their room while the family was relaxing by the pool. The same parents, upon having to deal with an overcrowded school, a lengthy wait at the emergency room, or a delayed response to a 911 call, can look around and see just what is causing the problem: the immigrant children at school, the immigrant families in the hospital waiting room, and the immigrant neighborhoods surrounding their own neighborhood.

C. Business Interests

In addition to one-dimensional perceptions and irreconcilable economic realities, business interests heavily influence the political debate. From a purely profit-based standpoint, there is no confusion where illegal immigration is concerned: an exploitable worker is a cheap worker, and the most exploitable workers are undocumented workers. Not only do undocumented workers often work for less pay than documented and native-born U.S. workers, but they are also far less likely to sue employers for workplace violations or to assert other employment rights.

The Supreme Court validated the exploitation of workers in Hoffman Plastic Compounds v. National Labor Relations Board. Hoffman Plastics hired Jose Castro, an undocumented worker from Mexico who used a U.S. citizen’s birth certificate in order to gain employment. Hoffman Plastics fired Castro after he participated in a union-organizing campaign at its plant. The National Labor Relations Board found that the firing violated the National Labor Relations Act and ordered Hoffman Plastics to cease and desist its unfair labor practices, post notices of employees’ rights under the


National Labor Relations Act, and to pay back wages in the amount of $66,951, representing wages for the three and a half years that had elapsed since the time of the unlawful firing. The Supreme Court reversed the back pay award:

Allowing the National Labor Relations Board to award backpay [sic] to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [the Immigration Reform and Control Act of 1986]. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.\footnote{Id. at 138. But see Balbuena v. IDR Realty L.L.C., 6 N.Y.3d 338, 363 (holding that “in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment . . . [the Immigration Reform and Control Act] does not bar maintenance of a claim for lost wages by an undocumented alien.”).}

Hoffman Plastics sent a clear message to businesses: illegal treatment of undocumented workers will go virtually unpunished in the United States. It also sent a broader message about U.S. immigration laws: even though the laws claim to punish employers who hire undocumented immigrants as well as punish the undocumented employees for working illegally in the United States, enforcement will fall primarily upon the latter. Now that these messages are firmly entrenched and widely known, businesses have less interest than ever in an immigration system that eliminates the underclass of exploitable workers.

V. What Needs to Happen for Immigration Reform to Occur

A. Public Education and Lawmaker Responsibility

It is understandable that individuals and families who experience the negative effects of illegal immigration and lack the information necessary to recognize the positive effects of illegal immigration would seek one-dimensional solutions focused on violators of immigration law. It is predictable, though nevertheless reprehensible, that businesses should seek to maximize their profits by hiring cheaper labor, especially given that they face little if any punishment for doing so in violation of U.S. immigration law. It is not understandable – in fact, it is irresponsible and unconscionable – that lawmakers, who have the resources and information to understand the various facets of illegal immigration, pander to the emotional, knee-jerk reactions of their less informed constituents, and to the profit-maximizing interests of their business constituents.

Lawmakers, especially U.S. senators and house representatives, have a responsibility to their constituents and to their country to find a workable solution to the immigration crisis. The stream of illegal border crossers – a phenomenon directly related to the lack of avenues for lawful immigration – threatens national security. Backlog-causing numerical limitations threaten family unity. The lack
of a viable immigration plan for unskilled employees threatens the competitiveness of businesses who wish to follow the law by hiring only documented immigrants. Only by educating their constituents about the multiple layers of the immigration situation, rather than condoning and engaging in the hysterics that currently characterize the immigration debate, can lawmakers resolve these issues and strengthen their communities and the United States as a whole.

B. Responsible Court Decisions

Like lawmakers, the courts also have a responsibility to ensure that reason and fairness, rather than rhetoric and inequity, guide the resolution of the immigration situation. Decisions like Hoffman Plastics are just as irresponsible and reprehensible as Congress’s lack of leadership on the immigration issue. They enable and validate the perpetuation of an exploitable subclass of workers. They punish undocumented workers – for whom the punishment carries disproportionately harsh consequences – in favor of employers who routinely employ undocumented workers. They also perpetuate the misconception that undocumented workers have solely created and are solely responsible for the current immigration situation. Reversing Hoffman Plastics would inject a sense of fairness and equanimity that is currently absent from the immigration debate.

VI. Conclusion

It is clear that the United States has outgrown its immigration laws. The ag-