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## Possible Reforms of the U.S. Immigration Laws

*Kevin R. Johnson\**

### INTRODUCTION

In 1952, Congress passed the comprehensive federal immigration statute, the Immigration and Nationality Act (INA).<sup>1</sup> The law has been amended almost annually since its original enactment, sometimes in minor ways and other times with major overhauls.

The last decade has seen a series of calls for immigration reform in the United States. Many reform bills have been debated in Congress and among the public at large.<sup>2</sup> To this point, efforts to pass significant—referred to by many observers as “comprehensive”—immigration reform have failed.<sup>3</sup>

The politics of immigration are complex, with public debate of the issue often heated. Positions on immigration are not neatly divided along Republican and Democratic party lines. For example, labor unions, generally considered to be liberal politically, at times have supported immigration restrictions in hopes of protecting domestic workers, while *The Wall Street Journal*, known for its conservatism, has championed easy admission of labor.

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<sup>1</sup> Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of Titles 8, 18, and 22 U.S.C.).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> For different perspectives on comprehensive immigration reform, see Steven W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107 (2010); Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267 (2006); Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007); see also John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 YALE L.J. ONLINE 325 (2011) (explaining the failure of Congress to enact comprehensive immigration reform during the Bush and Obama administrations).

One complicating factor for immigration reform is that the events of September 11, 2001 have influenced the immigration debate. Even after more than a decade, any reform proposal that does not focus on border enforcement and enhanced removal efforts continues to risk claims that it poses undue risks to the national security and public safety.<sup>4</sup>

Part I of this Article first outlines the impacts of the contemporary operation of the U.S. immigration laws and some of the problems with the current immigration system. Part II describes various reform proposals floated in Congress in the last few years. Part III generally outlines some more far-reaching possibilities for immigration reform.

### I. THE IMMIGRATION STATUS QUO

To appropriately evaluate potential immigration reforms, one must consider the operation of modern U.S. immigration law and policy and its impacts.

#### A. Undocumented Immigration

As President George W. Bush observed in calling for immigration reform in 2006, “*illegal immigrants live in the shadows of our society. . . . [T]he vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are part of American life, but they are beyond the reach and protection of American law.*”<sup>5</sup>

Somewhere in the neighborhood of 12 million undocumented immigrants currently live in the United States.<sup>6</sup> Rather than

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<sup>4</sup> See BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 140–63 (2006); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); see also Jonathan Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 46 REV. JUR. U.I.P.R. 787 (2012) (discussing the relationship between immigration policy and national security after September 11, 2001); Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383 (2007) (analyzing how immigration law can serve national security ends); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173 (2004) (evaluating how post-September 11 terrorism concerns reshaped U.S. immigration law and policy).

<sup>5</sup> George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 928, 928–29 (2010) (emphasis added).

<sup>6</sup> JEFFREY S. PASSEL, D'VERA COHN & ANA GONZALEZ-BARRERA, PEW RESEARCH CTR., POPULATION DECLINE OF UNAUTHORIZED IMMIGRANTS STALLS, MAY HAVE REVERSED 6 (2013), available at <http://www.pewhispanic.org/files/2013/09/Unauthorized-Sept-2013-FINAL.pdf>, estimates that, as of March 2012, 11.7 million unauthorized immigrants lived in the United States. The U.S. government, whose estimates historically have been somewhat lower than those of non-governmental groups, estimated that, in 2011, 11.5 million undocumented immigrants lived in the United States compared to

engaging in futile efforts to close the border, the United States would benefit if its immigration laws better addressed the modern political, economic, and social realities currently fueling undocumented immigration and attracting the millions of people who live and work in communities across the country in contravention of the U.S. immigration laws.

Generations of migrants from Mexico have made their way to the United States.<sup>7</sup> In modern times, migrants literally risk life and limb to come to this land of freedom and opportunity. Absent dramatic economic, political, and social changes, immigrants will continue to come lawfully and unlawfully to the United States in pursuit of employment and to reunite with family members.

The limited legal avenues under U.S. law for labor migration encourage migration in violation of the law by noncitizens who seek to work in the country. Many unskilled and medium-skilled workers have no line to wait in to lawfully immigrate to the United States.

Laws and policies promoting more liberal admissions would decrease the incentives for undocumented immigration. However, such policy proposals are often characterized as sacrificing national security by allowing too many immigrants into the United States. In response, commentators claim that flexible immigration admission systems would in fact better ensure national security.<sup>8</sup> A scheme that better matches the demand for immigration—while minimizing the incentive for undocumented immigration and thus limiting the creation and maintenance of a population of millions of undocumented immigrants—arguably would better ensure public safety.<sup>9</sup> To begin with, an immigration system that maximizes the likelihood that the U.S. government has the basic identifying information, such as name

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11.6 million in 2010. See MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf).

<sup>7</sup> See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 641–72 (1981); JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601 (2002); see also Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012) (analyzing how the operation of the U.S. immigration laws has facilitated the creation of the undocumented immigrant population in the United States).

<sup>8</sup> See, e.g., Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 207–16 (2006); Jan Ting, *Immigration Law Reform After 9/11: What Has Been and What Still Needs to Be Done*, 17 TEMP. INT'L & COMP. L.J. 503, 512–15 (2003).

<sup>9</sup> See Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 930–72.

and address, of as many immigrants in the United States as possible would improve criminal and immigration law enforcement and allow the nation to better protect national security.

Recent years have seen increasingly aggressive efforts in the United States to close the southern border with Mexico. However, *increased* border enforcement efforts, to the surprise of many, have been accompanied by an *increase* in the overall size of the undocumented population. One study concluded that “[t]here is *no* evidence that the border enforcement build-up . . . has substantially reduced unauthorized border crossings,” and that “[d]espite large increases in spending and Border Patrol resources . . . the number of unauthorized immigrants . . . increased to levels higher than those” before 1986.<sup>10</sup> The bottom line is that the undocumented population in the United States has doubled since the mid-1990s.<sup>11</sup>

The fact that so many undocumented immigrants live in the United States confirms what most Americans know—that the immigration laws are routinely violated and, as currently configured, are effectively unenforceable. The magnet of jobs unquestionably attracts many undocumented immigrants to the United States. Undocumented workers understand that if they are able to make the often-arduous journey to the United States, they can obtain work and that the job will pay more than most of them would have been able to earn in their native countries. Employers willingly hire undocumented workers. Day laborer pickup points in many American cities demonstrate both that undocumented immigrants can obtain work and employers are willing to hire them.<sup>12</sup>

Employer sanctions, which bar the employment of undocumented immigrants, added to the immigration laws in 1986 have failed to put an end to the employment of undocumented immigrants.<sup>13</sup> Computer systems designed to

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10 BELINDA I. REYES ET AL., *HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION*, at viii, xii (2002) (emphasis added).

11 See PASSEL, COHN & GONZALEZ-BARRERA, *supra* note 6, at 6.

12 For studies of day laborers, see ABEL VALENZUELA, JR. ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (2006); ABEL VALENZUELA, JR. & EDWIN MELÉNDEZ, *DAY LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY* (2003); see also Justin McDevitt, *Compromise Is Complicity: Why There Is No Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 A.B.A. J. LAB. & EMP. L. 101 (2010) (advocating increased protection of the rights of day laborers in the United States); Kim McLane Wardlaw, *The Latino Immigration Experience*, 31 CHICANO-LATINO L. REV. 13, 30–35 (2012) (discussing the impacts of state and local regulation of day laborers on Mexican immigrants).

13 For critical analysis of the failure of employer sanctions to deter the employment of undocumented immigrants, see Cecelia M. Espenosa, *The Illusory Provisions of*

allow employers to easily verify work authorization, such as E-Verify, continue to have high error rates.<sup>14</sup>

To this point, the addition of incremental enforcement measures has had a limited impact on undocumented immigration from Mexico.<sup>15</sup> The U.S. government simply has been unable to keep migrants—who are so determined that they are willing to risk their lives—from unlawfully entering, and remaining in, the country.<sup>16</sup> It makes little sense from an immigration or security standpoint to simply continue to throw resources at fortifying the borders, increasing border enforcement, and engaging in the futile attempt to keep all undocumented immigrants out of the country.

The U.S. government has engaged in limited efforts to remove noncitizens who lawfully entered the country on temporary visas, such as students and tourists, but overstayed their terms. Visa overstays likely constitute somewhere between twenty-five and forty percent of the undocumented population.<sup>17</sup> Increased monitoring of nonimmigrant visa holders after September 11 does not appear to have had much of an impact on reducing visa overstays. Raids and increased interior enforcement pursued by the Bush administration also have not reduced the undocumented population in the United States.<sup>18</sup>

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*Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

<sup>14</sup> See WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION 114 (2009), available at [http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf); Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475, 482–83; see also T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1313, 1314 (2008) (acknowledging that the United States is years away from creating a computerized system that can reliably identify undocumented workers: “There is no clear way to fix employer sanctions anytime soon. The widely discussed ‘smart cards’ or ‘swipe cards’ will be years in the making. Meanwhile, massive work will need to be done on government databases to clean up misspelled, duplicate, and false names.”) (footnote omitted).

<sup>15</sup> See Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. CHI. LEGAL F. 131.

<sup>16</sup> See generally PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE (Peter J. Katzenstein ed., 2000) (analyzing the difficulties of border enforcement in reducing undocumented immigration while offering concrete benefits to politicians in pursuing border enforcement strategies).

<sup>17</sup> See JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 16 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

<sup>18</sup> See Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092–96 (2008) (discussing raids of meatpacking plants); Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 655 (2008) (mentioning raids); Anil Kalhan, *The Fourth Amendment and Privacy Implications*

Resistance to interior enforcement from employers, as well as immigrant rights advocates, makes such enforcement politically challenging.<sup>19</sup> However, increased border enforcement without any effort to tighten the availability of jobs to undocumented immigrants will ultimately do little to change the status quo. The availability of jobs unquestionably will continue to fuel migration to this country.

The current American immigration laws in many respects resemble the failed Prohibition-era anti-alcohol laws.<sup>20</sup> In both instances, enforcement of the law failed dramatically and, to make matters worse, resulted in widespread negative collateral consequences, including widespread violation of the law, increased criminal activity, and diminished public perception of the legitimacy of the law.

### B. Labor Exploitation

The operation of the immigration laws has negative labor market consequences. Indeed, the large undocumented population harkens back to the days following the abolition of slavery in the United States, with a racial caste of workers relegated to a secondary labor market. As Professor Leticia Saucedo has written, the nation has seen the emergence of a “brown collar” workplace, with many Mexican migrants working in low-wage jobs.<sup>21</sup> The new “Jim Crow” sees undocumented immigrants working for low wages in poor conditions—and virtually unprotected by law—in one labor market and all others in a superior, more law-abiding labor market.<sup>22</sup>

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*of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008) (analyzing legal impacts of raids and other forms of interior immigration enforcement); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862–88 (2008) (same); see also David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008) (identifying negative impacts of immigration raids on families).

<sup>19</sup> See Lori Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 359–61 (2001); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 516–21 (2004).

<sup>20</sup> See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 245–52 (2003).

<sup>21</sup> See Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); see also Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L.J. 547 (2013) (analyzing narratives of race and masculinity used to justify the exploitation of Mexican immigrant workers).

<sup>22</sup> See Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163 (2010).

Other adverse consequences also are associated with the current immigration laws and their enforcement. Reports of involuntary servitude of immigrants in the modern United States have increased in recent years.<sup>23</sup> More commonly, exploited in the workplace,<sup>24</sup> undocumented workers have legal rights that go unenforced.<sup>25</sup> Because many are people of color, the nation's labor market has a distinctively racial caste quality to it. This labor market operates outside of the confines of law, with undocumented workers enjoying few legal protections and often working for low wages in poor conditions. More realistic immigration law and policy that allows labor migration could help eliminate this secondary labor market and halt the exploitation of undocumented workers (by making them less vulnerable because of their unauthorized immigration status).

### C. Human Trafficking and Death on the Border

Demand for evasion of the law by millions of undocumented immigrants has contributed to the emergence of highly organized human trafficking networks.<sup>26</sup> In no small part due to tighter

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<sup>23</sup> See HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 1 (2005); Free the Slaves, Washington, D.C. & The Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47 (2005); Ellen L. Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403 (2006).

<sup>24</sup> See Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993–1994); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1.

<sup>25</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented immigrant lacked full legal rights under federal labor law and was not entitled to reinstatement and back pay despite being unlawfully terminated for union-organizing activities). For critiques of the *Hoffman Plastic* decision, see, for example, Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301 (2005); *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2224–47 (2005); James Lin, Note, *A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion*, 36 FORDHAM INT'L L.J. 706 (2013).

<sup>26</sup> See Morgan Brown, *Targeting Demand: A New Approach to Curbing Human Trafficking in the United States*, 11 RICH. J. GLOBAL L. & BUS. 357 (2012); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).



immigration enforcement, the trafficking of human beings today is a booming industry, with the problem extending across the entire United States. Deaths regularly occur as migrants attempt the dangerous crossing of the U.S./Mexico border.<sup>27</sup>

Besides risking life and limb, some immigrants are forced to work to pay off smuggling debts, with thousands of immigrant women forced into the sex industry and other exploitative work arrangements.<sup>28</sup> The trafficking of human beings—with its devastating impacts—flows directly from heightened immigration enforcement. Recognizing the problem, Congress has passed laws in response to human trafficking but has failed to more fundamentally reform the laws that in effect encourage the unlawful labor practice.<sup>29</sup>

#### D. A Disrespected Immigration Bureaucracy

The American immigration bureaucracy frequently is accused of being unfair and biased. Many commentators and jurists currently express a lack of respect and confidence in the agencies that enforce the immigration laws.

The Immigration and Naturalization Service (INS), which until the spring of 2003 possessed primary responsibility for enforcing the immigration laws, had long been criticized as

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<sup>27</sup> For a sampling of extensive literature analyzing the deadly impacts of increased border enforcement measures, see TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICAN BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* (Victor J. Guerra et al. eds., 1996); KARL ESCHBACH, JACQUELINE HAGAN & NESTOR RODRIGUEZ, *CAUSES AND TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985-1998* (2001); JOSEPH NEVINS, *OPERATION GATEKEEPER* (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 *POPULATION & DEV. REV.* 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 *INT'L MIGRATION REV.* 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 *U.C. DAVIS J. INT'L L. & POLY* 121, 123 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 *UCLA L. REV.* 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 *SAN DIEGO INT'L L.J.* 1 (2001). Much popular literature focuses on the travails of immigrants seeking to unlawfully enter the United States from Mexico. See, e.g., SONIA NAZARIO, *ENRIQUE'S JOURNEY* (2013); LUIS ALBERTO URREA, *THE DEVIL'S HIGHWAY: A TRUE STORY* (2004).

<sup>28</sup> See Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 *MICH. J. GENDER & L.* 87 (2005); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 *WM. & MARY J. WOMEN & L.* 317 (2005); Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 *LOY. U. CHI. INT'L L. REV.* 193 (2005); see also *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, ACLU (May 31, 2007), <https://www.aclu.org/womens-rights/human-trafficking-modern-enslavement-immigrant-women-united-states>.

<sup>29</sup> See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101-7110 (2012)); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

excessively focused on enforcement and being inefficient, arbitrary, and incompetent.<sup>30</sup> The new Department of Homeland Security (DHS) appears as enforcement-oriented as the old INS. This is not altogether surprising because the agency, as its name connotes, was created with the primary purpose of better protecting “homeland security,” not serving the needs of immigrants. Nor has the dismantling of the INS seen any dramatic improvement in the efficiency of immigration operations.<sup>31</sup> Unless the DHS is reformed so that it better balances its enforcement and service functions, pouring increasing resources into the agency is unlikely to improve matters. For example, additional increases to funding to increase the number of Border Patrol officers without significantly providing sufficient training for them is likely to make matters worse, not better.<sup>32</sup>

In addition, the decisions of the immigration courts and Board of Immigration Appeals (BIA) have been the subject of sustained criticism.<sup>33</sup> The Board has long been challenged for, among other things, a lack of independence and neutrality. Other criticisms run the gamut from poor quality rulings (most charitably attributed to a high volume of matters to review), to

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<sup>30</sup> See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1948–50 (2000); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1698–700 (1997).

<sup>31</sup> For criticism of the Department of Homeland Security’s handling of immigration matters, see M. Isabel Medina, *Immigrants and the Government’s War on Terrorism*, 6 NEW CENTENNIAL REV. 225, 230–32 (2006); Thomas W. Donovan, *The American Immigration System: A Structural Change with a Different Emphasis*, 17 INT’L J. REFUGEE L. 574 (2005); Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN’S J. LEGAL COMMENT. 51, 52 (2004); Noël L. Griswold, Note, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 227–28 (2005); Jeffrey Manns, Legislation Comment, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145 (2002).

<sup>32</sup> See Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 32 DENV. J. INT’L L. & POL’Y 83, 97 (2003) (criticizing USA PATRIOT Act for increasing the number of Border Patrol agents but failing to ensure better training); Gabriela A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729, 1757–58 (2004) (stating that 1996 immigration reforms failed to ensure adequate training in light of “the Border Patrol’s checkered history of abuse in the Southwest”). See generally ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (analyzing how law, including immigration law, has been employed to subordinate persons of Mexican ancestry in the United States).

<sup>33</sup> See, e.g., *Sukwanputra v. Gonzales*, 434 F.3d 627, 637–38 (3d Cir. 2006); *Wang v. Attorney Gen.*, 423 F.3d 260 (3d Cir. 2005); *Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005); Pamela A. MacLean, *Immigration Judges Come Under Fire*, NAT’L L.J., Jan. 30, 2006, at 1; see also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (proposing the abolition of the Board of Immigration Appeals and appellate review by the court of appeals and replacing such review with appeals to a new Article III Court of Immigration Appeals).

bias against noncitizens, to simple incompetence. Such criticism increased after the BIA changed its procedures in 2002 to expedite its rulings in an attempt to reduce a large backlog of appeals.<sup>34</sup>

Respected court of appeals judge Richard Posner, a conservative appointed to the federal bench by Republican President Ronald Reagan, is a vocal critic of the decisions of the BIA.<sup>35</sup> As Judge Posner succinctly stated in one immigration appeal, “[a]t the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court.”<sup>36</sup> In another opinion, he stated, “We understand the Board’s staggering workload. But the Department of Justice cannot be permitted to defeat judicial review by refusing to staff the Immigration Court and the Board of Immigration Appeals with enough judicial officers to provide reasoned decisions.”<sup>37</sup> Judge Posner in still another opinion emphasized that

[d]eference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.<sup>38</sup>

The immigration courts also have been the subject of public criticism. In late 2005, *The New York Times* ran a front page story about how immigration judges, at times in mean-spirited and disrespectful ways, callously treated noncitizens and disposed of their cases.<sup>39</sup> In response, then-Attorney General

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<sup>34</sup> See Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POLY 1 (2012) (discussing the surge of appeals in the federal courts following the BIA’s streamlining measures); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541 (2011) (analyzing contemporary immigration adjudication problems, including the dilution of judicial review resulting from streamlining measures); Scott Rempell, *The Board of Immigration Appeals’ Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283 (2011) (studying the impacts of the reforms on the Board’s standard of review).

<sup>35</sup> See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005); *Iao v. Gonzales*, 400 F.3d 530, 534–35 (7th Cir. 2005). For analysis of Judge Posner’s immigration jurisprudence, see Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–87 (2007).

<sup>36</sup> *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005).

<sup>37</sup> *Mekhael v. Mukasey*, 509 F.3d 326, 328 (7th Cir. 2007).

<sup>38</sup> *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

<sup>39</sup> See Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

Alberto Gonzales formally instructed the immigration judges to improve their conduct.<sup>40</sup> The Bush administration also was found to have employed political litmus tests in the selection of immigration court judges.<sup>41</sup>

Along these lines, an empirical study of asylum decision-making published in 2009 has shown widely disparate results in the asylum decisions of immigration judges.<sup>42</sup> The evidence suggests a chronic problem in the quality and consistency of the immigration court and BIA decisions, thereby placing their legitimacy in serious question.

Concerns with immigration adjudication persist. In 2013, the president of the National Association of Immigration Judges offered one possible solution:

Immigration courts must be restructured as real courts under Article I of the Constitution, similar to Tax and Bankruptcy Courts, so we can maintain administrative independence and ensure total transparency in our proceedings. This would free them from any control or influence by the Attorney General or Department of Homeland Security. While seemingly technical, this change is essential to achieve the most fundamental expectation we American's [sic] hold about judges: that they are independent and protected from undue influence by any party to their proceedings. It is a reform which is much needed and long overdue.<sup>43</sup>

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<sup>40</sup> For discussion of the Attorney General's memorandum, see *Cham v. Attorney Gen.*, 445 F.3d 683, 686–89 (3d Cir. 2006).

<sup>41</sup> The Office of the Inspector General concluded that, during the Bush administration, ties to the Republican Party, among other political considerations, were taken into consideration in the selection of immigration judges. See OFFICE OF PROF'L RESP. & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69 (2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>.

<sup>42</sup> See JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009). For commentary on the study, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413 (2007); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007); see also Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53 (2013) (analyzing the impact of trauma suffered by immigrants on immigration adjudicators); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (examining narratives of "good" and "bad" immigrants that affect the exercise of discretion by immigration courts); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011) (analyzing implicit bias that influences the decisions of immigration judges).

<sup>43</sup> Dana Leigh Marks, *Let Immigration Judges Be Judges*, HILL (May 09, 2013, 8:03 PM), <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>.

### E. The Need for More Reasonable Immigration Laws

A system that authorizes easier migration of labor to the United States would likely decrease the incentive for circumventing the immigration laws. More liberal admissions grounds that allow workers and migrants who lack family members in the United States to lawfully enter into this nation would be a good first step.

To this end, narrower inadmissibility grounds in the U.S. immigration laws would be more realistic than the current blanket exclusions that, for example, bar the immigration of poor and working people from the developing world.<sup>44</sup> With relaxation of the inadmissibility grounds, the nation could devote scarce enforcement resources to efforts to bar the entry into the United States of criminals, terrorists, and other serious dangers to society. As seen in other areas of law enforcement, more focused immigration law enforcement has a greater likelihood of rooting out public safety risks than scattershot efforts that infringe on the civil rights of large numbers of people.<sup>45</sup>

Moreover, more carefully crafted immigration enforcement is less likely to frighten immigrant communities—the very communities whose assistance is essential if the United States truly seeks to successfully combat global terrorism and crime generally. Unfortunately, the “war on terror” following September 11, 2001 has almost undoubtedly chilled Arabs and Muslims living in the United States from cooperating with the government in counter-terrorism efforts.<sup>46</sup>

A system in which undocumented migration is reduced would allow for improved tracking of all noncitizens entering and living in the United States. It is difficult to see how the existence of millions of undocumented immigrants living off the grid could

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<sup>44</sup> See, e.g., Immigration & Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2012) (providing that “[a]ny alien . . . likely at any time to become a public charge is inadmissible”). See generally KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 91–108 (2004) (analyzing history of excluding poor and working noncitizens from the United States). Statistics for fiscal year 2013 show that the public charge exclusion was a substantive ground frequently relied upon in the denial of immigrant visas by the State Department. See OFFICE OF VISA SERVS., U.S. DEPT OF STATE, REPORT OF THE VISA OFFICE 2013, at tbl.xx (2013), available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf>.

<sup>45</sup> See Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 912–15 (2002) (reviewing experience of U.S. Customs Service and its adoption of a policy limiting searches, resulting in fewer searches and increased rate of searches finding contraband).

<sup>46</sup> See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–55 (2002).

in any way be in the national interest. Nor is there sufficient evidence that the U.S. government as a practical matter could end undocumented immigration under the current laws and remove all undocumented immigrants from the country.

Consider the available evidence. Despite record levels of removals in the years since September 11, 2001,<sup>47</sup> officials at the highest levels of the U.S. government recognize that removal of all undocumented immigrants from the country is simply not possible. In 2006, President George W. Bush himself acknowledged that “[m]assive deportation of the people here is unrealistic. It’s just not going to work.”<sup>48</sup> President Obama has made similar statements.<sup>49</sup> A 2005 study estimated that it would cost \$41 billion a year for five years to fund a serious effort to remove all undocumented immigrants from the country.<sup>50</sup>

At the same time, more liberal admissions of immigrants to the United States arguably would benefit the national economy. The Economic Reports of the President in both the Bush (Republican) and Obama (Democratic) administrations have extolled the benefits of immigrants to the U.S. economy.<sup>51</sup> The Obama administration has argued that immigration reform would bring substantial economic benefits.<sup>52</sup>

Some contend that incremental reform will not work and that bolder initiatives are necessary to cure the ills of modern U.S. immigration law. In that vein, the possibility of much more

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<sup>47</sup> See JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf). For statistics on the number of unauthorized immigrants removed from the United States since 2001, see OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 103 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf).

<sup>48</sup> Elisabeth Bumiller, *In Immigration Remarks, Bush Hints He Favors Senate Plan*, N.Y. TIMES, Apr. 25, 2006, at A22 (emphasis added) (quoting President Bush).

<sup>49</sup> See *Obama Addresses the National Council of La Raza*, WASH. POST (July 15, 2008, 10:49 AM), [http://www.washingtonpost.com/wp-dyn/content/article/2008/07/15/AR2008071501138\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/07/15/AR2008071501138_pf.html) (advocating a path to legalization for undocumented immigrants: “we cannot and should not deport 12 million people”).

<sup>50</sup> See RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1–2 (2005).

<sup>51</sup> See COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 154–56 (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/erp2013/full\\_2013\\_economic\\_report\\_of\\_the\\_president.pdf](http://www.whitehouse.gov/sites/default/files/docs/erp2013/full_2013_economic_report_of_the_president.pdf); COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 93 (2005), available at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=ERP>.

<sup>52</sup> See EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC BENEFITS OF FIXING OUR BROKEN IMMIGRATION SYSTEM (2013), available at <http://www.whitehouse.gov/sites/default/files/docs/report.pdf>.

open borders has been advocated.<sup>53</sup> In an era of an increasingly integrated world economy, the United States arguably requires a system of immigration admissions that better comports with social, political, and economic factors contributing to immigration than the current system.<sup>54</sup> At a most fundamental level, the nation needs immigration laws that avoid the creation and re-creation of an undocumented immigrant population numbering in the millions.

## II. CONGRESSIONAL PROPOSALS FOR IMMIGRATION REFORM

For roughly a decade, the nation has engaged in a fractious national debate over reform of the immigration laws, with a special focus on undocumented immigration from Mexico. The proposals frequently call for legalization of undocumented immigrants, “guest” (or temporary) worker programs,<sup>55</sup> and a myriad of enforcement measures. The granting of “amnesty” to undocumented immigrants in some of the proposals became a charged political accusation and contributed to political opposition to any reform proposal including a path to legalization for undocumented immigrants.<sup>56</sup>

In December 2005, the House of Representatives passed what was known as the Sensenbrenner bill,<sup>57</sup> named after its sponsor, Representative James Sensenbrenner. The tough nature of the bill sparked protests of thousands of immigrants and their

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<sup>53</sup> See, e.g., KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007); JASON L. RILEY, *LET THEM IN: THE CASE FOR OPEN BORDERS* (2008); SATVINDER SINGH JUSS, *INTERNATIONAL MIGRATION AND GLOBAL JUSTICE* (2006); TERESA HAYTER, *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS* (2d ed. 2004).

<sup>54</sup> See Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 *STAN. L. & POL'Y REV.* 445, 445 (2005) (“U.S. immigration policy is based on denial. Most lawmakers in the United States have largely embraced the process of economic ‘globalization,’ yet stubbornly refuse to acknowledge that increased migration, especially from developing nations to developed nations, is an integral and inevitable part of this process.”).

<sup>55</sup> For critical analysis of guest worker programs, see Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 *U. CHI. LEG. F.* 219; Karla M. Campbell, *Guest Worker Programs and the Convergence of U.S. Immigration and Development Policies: A Two-Factor Economic Model*, 21 *GEO. IMMIGR. L.J.* 663 (2007). Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 *N.C. J. INT'L L. & COM. REG.* 465 (2002), provides a partial defense to guest worker programs.

<sup>56</sup> See Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 *AKRON L. REV.* 291 (2008). For a defense of amnesty, see Bill Ong Hing, *The Case for Amnesty*, 3 *STAN. J. C.R. & C.L.* 233 (2007).

<sup>57</sup> Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). The Sensenbrenner bill, among other things, would have made the mere status of being an undocumented immigrant a felony subject to imprisonment and would have imposed criminal sanctions on persons who provided humanitarian assistance to undocumented immigrants. See *id.* §§ 203, 205.

supporters across the United States.<sup>58</sup> Shortly thereafter, the Senate passed a more moderate reform proposal, which included legalization and guest worker programs in addition to more moderate enforcement measures than in the Sensenbrenner bill.<sup>59</sup> Ultimately, the controversy ended in 2006 with Congress failing to enact immigration reform. It instead agreed only to authorize extension of a fence along the United States' southern border with Mexico.<sup>60</sup> Congress did so even though there is no evidence that this, or any other border enforcement measure alone, will decrease the flow of undocumented immigrants to the United States.<sup>61</sup>

In the 2008 election campaign, President Obama expressed support for immigration reform, with a majority of Latina/o voters supporting him.<sup>62</sup> His administration renewed calls for comprehensive immigration reform.<sup>63</sup> In 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744),<sup>64</sup> which was co-sponsored by a bipartisan group of Senators. The bill generally has four basic objectives:

- (1) creating a path to citizenship for the approximately 11 million undocumented aliens currently living in the United States; (2)

<sup>58</sup> For analysis of the spring 2006 immigrant rights marches, see Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

<sup>59</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

<sup>60</sup> See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638. For analysis of the political symbolism of the U.S./Mexico border fence, see Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147 (2012).

<sup>61</sup> See JOHNSON, *supra* note 53, at 114–15.

<sup>62</sup> See MARK HUGO LOPEZ, PEW HISPANIC CTR., *THE HISPANIC VOTE IN THE 2008 ELECTION*, at i–ii (2008), available at [www.pewhispanic.org/files/reports/98.pdf](http://www.pewhispanic.org/files/reports/98.pdf) (stating that Latina/os voted for the Democratic presidential ticket by a 2:1 margin over the Republican candidates for President and Vice President).

<sup>63</sup> See THE WHITE HOUSE, *BUILDING A 21ST CENTURY IMMIGRATION SYSTEM* (2011), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/immigration\\_blue\\_print.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blue_print.pdf).

<sup>64</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744pap/pdf/BILLS-113s744pap.pdf>. The Senate passed the bill by a margin of 68 to 32. See *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, U.S. SENATE (June 27, 2013, 4:11 PM), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00168](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168). For analysis of S. 744's provisions, see NAT'L IMMIGRATION LAW CTR., *SUMMARY & ANALYSIS: BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT OF 2013* (2013), available at [www.nilc.org/document.html?id=895](http://www.nilc.org/document.html?id=895); CONG. BUDGET OFFICE, *THE ECONOMIC IMPACT OF S. 744, THE BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT* (2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf>; Claire Bergeron, *Current Developments, Bipartisan "Gang of Eight" Bill Would Dramatically Alter US Immigration Law*, 27 GEO. IMMIGR. L.J. 431 (2013).



reforming America's immigration system to better recognize characteristics that will help build the economy; (3) implementing an effective employment verification system; and (4) establishing an improved process for admitting future workers.<sup>65</sup>

Despite bipartisan support, as well as a push from the White House, as this Article goes to press, the House of Representatives has not voted on the Senate bill or any alternative comprehensive immigration reform proposal.<sup>66</sup>

#### A. The DREAM Act

Congress has considered many versions of a bill narrower in scope than the various comprehensive immigration reform proposals that would expressly permit states to allow undocumented students to pay in-state fees to attend public colleges and universities and to regularize their immigration status.<sup>67</sup> Members of Congress almost annually sponsor legislation known as the Development, Relief and Education for Alien Minors (DREAM) Act.<sup>68</sup>

Versions of the DREAM Act would have defined residency requirements for in-state tuition without regard to immigration

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<sup>65</sup> Brandon E. Davis, *The Border Security, Economic Opportunity, and Immigration Modernization Act: An Overview of the Changes Employers May Expect Following Comprehensive Immigration Reform*, FED. LAW., Jan./Feb. 2014, at 24, 26.

<sup>66</sup> See Wesley Lowery, *House Democrats Need 27 Signatures to Force Vote on Comprehensive Immigration Reform Bill*, WASH. POST (Apr. 15, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/15/house-democrats-need-27-signatures-to-force-vote-on-comprehensive-immigration-reform-bill/>; David Nakamura, *U.S. Chamber of Commerce Pushes House GOP on Immigration Reform*, WASH. POST (Feb. 25, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/25/u-s-chamber-of-commerce-pushes-house-gop-on-immigration-reform/>.

<sup>67</sup> See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 452–57 (2004); Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admissions and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257, 266–74 (2005).

<sup>68</sup> See Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1280–82 (2008). For arguments favoring enactment of the DREAM Act, see Berta Hernández-Truyol & Justin Luna, *Children and Immigration: International, Local, and Social Responsibilities*, 15 B.U. PUB. INT. L.J. 297, 314–16 (2006); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L & COM. REG. 393 (2002); Susana Garcia, Comment, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 247 (2006); Youngro Lee, Note, *To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB. POLY 231 (2006); Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to This Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 HOUS. L. REV. 847 (2006); see also María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1400–04 (2005) (summarizing status of undocumented student access to higher education).

status, provided a path to legalization for eligible undocumented students, and made undocumented students eligible for federal financial aid (which they currently are not). Immigration restrictionists harshly criticize the many iterations of the DREAM Act, contending, among other things, that they reward unlawful conduct and amount to an “amnesty” for undocumented immigrants.<sup>69</sup>

In 2007, the DREAM Act was part of a comprehensive Senate immigration bill that Congress ultimately failed to enact.<sup>70</sup> A subsequent version of the Act, which would have permitted a path to legalization for undocumented high school graduates who attend college or serve in the military, failed in the U.S. Senate.<sup>71</sup> To date, Congress has not passed any version of the DREAM Act.

Although lacking authority to provide a path to legalization for undocumented immigrant students, some states, including California, have expanded access for undocumented students to public colleges and universities.<sup>72</sup> In contrast, Arizona voters passed an initiative that barred public universities from providing undocumented students with any “public benefits,” including in-state fees, state financial aid, or enrollment in adult education classes.<sup>73</sup>

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<sup>69</sup> See Julia Preston, *In Increments, Senate Revisits Immigration Bill*, N.Y. TIMES, Aug. 3, 2007, at A1 (noting opposition to the DREAM Act in the House of Representatives and quoting Representative Brian P. Bilbray, who referred to the bill as “the Nightmare Act”). Compare Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473 (2007) (criticizing strongly state and federal DREAM Acts), with Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008) (advocating passage of these laws).

<sup>70</sup> See Preston, *supra* note 69.

<sup>71</sup> See Karin Brulliard, *Bill Aimed at Immigrant Children Fails*, WASH. POST, Oct. 25, 2007, at A12.

<sup>72</sup> See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011) (rejecting a challenge to a California law that allows certain graduates of California high schools, including undocumented immigrants, to pay the same fees as state residents to attend the University of California, state universities, and community colleges). For analysis of the *Martinez* decision, see Kyle William Colvin, Note, *In-State Tuition and Illegal Immigrants: An Analysis of Martinez v. Regents of the University of California*, 2010 BYU EDUC. & L.J. 391; Beverly N. Rich, Note, *Tracking AB 540’s Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of Martinez v. Regents of the University of California*, 19 S. CAL. REV. L. & SOC. JUST. 297 (2010).

<sup>73</sup> See *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005); *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216 (Ariz. Ct. App. 2007). Arizona Governor Jan Brewer later issued an order that prohibited public colleges and universities from allowing undocumented students granted relief by the U.S. government under the Deferred Action for Childhood Arrivals (DACA) program from eligibility for in-state university fees, or any public benefits. Ariz. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237 (Sept. 7, 2012), available at <http://www.azsos.gov/aar/2012/36/governor.pdf>. Although the executive order does not specifically refer to in-state tuition eligibility, Governor Brewer stated that

## B. Prosecutorial Discretion and Deferred Action for Childhood Arrivals

With Congress failing to pass immigration reform, the Obama administration took a number of steps to fine-tune its immigration enforcement efforts. While focusing its efforts on immigrants with brushes with the criminal law, it administratively employed its discretionary authority to make certain removal cases a low priority.

One important area of deferred action involved a category of noncitizens who would have benefitted from passage of the DREAM Act. In June 2012, the U.S. Department of Homeland Security announced the Deferred Action for Childhood Arrivals program (DACA), an exercise of prosecutorial discretion that provides temporary relief from removal on a case-by-case basis to those who entered the United States as children.<sup>74</sup> To be eligible for relief, a noncitizen must have entered the United States before the age of sixteen; continuously resided in the United States since June 15, 2007; been physically present in the United States and not over the age of thirty when DACA was announced; have not been convicted of a felony, a significant misdemeanor, or multiple misdemeanors; not pose a threat to national security or public safety; and be currently in school, graduated from high school, obtained a General Educational Development (GED) certification, or be an honorably discharged veteran of the U.S. Coast Guard or Armed Forces.<sup>75</sup> DACA recognizes its

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in-state tuition for DACA recipients would be unlawful under the order. See Daniel González, *Young Migrants May Get Arizona College Tuition Break*, ARIZ. REPUBLIC (Sept. 12, 2012), <http://www.azcentral.com/news/articles/20120912young-migrants-may-get-arizona-college-tuition-break.html> (“The executive order did not address tuition specifically, but Brewer said afterward that allowing illegal immigrants to pay in-state tuition even if they receive deferred action and work permits would violate state law.”).

<sup>74</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter DHS Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. For criticism of the DACA program, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85, 856 (2013) (arguing that by authorizing the DACA program, President Obama breached his responsibility to faithfully enforce the immigration laws). *But see* Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 62–68 (2013) (defending program as consistent with the executive exercise of prosecutorial discretion by the Executive Branch in immigration matters), available at <http://www.texasrev.com/wp-content/uploads/Wadhia.pdf>.

<sup>75</sup> DHS Memorandum, *supra* note 74, at 1.

beneficiaries to be “low priority cases” for removal from the United States.<sup>76</sup>

By the end of the first quarter of fiscal year 2014, U.S. Citizenship and Immigration Services reported that it had received a total of 638,054 DACA applications, approved 521,815, and denied 15,968.<sup>77</sup> In 2014, DHS announced a renewal program for DACA recipients.<sup>78</sup>

DACA recipients are able to obtain employment authorization, a Social Security number, and, in many states, a driver’s license.<sup>79</sup> However, the relatively high \$465 filing fee and the requirement of documentation of continuous presence in the United States since 2007 can serve as impediments to successful applications,<sup>80</sup> which may help explain why many eligible noncitizens have not applied for DACA relief.

Thus far, DACA has helped more than a half million immigrants “who were brought to this country as children and know only this country as home.”<sup>81</sup> As one commentator has noted, however, “it is not a permanent solution and does not grant [recipients] any long-term immigration status stability.”<sup>82</sup>

### III. ALTERNATIVE VISIONS

Future possibilities for immigration reform run the gamut. Reform could represent incremental changes to the current immigration laws, with “comprehensive” immigration reform similar to S. 744 a possibility.<sup>83</sup> As one commentator observed,

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<sup>76</sup> See *id.*

<sup>77</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012–2014 FIRST QUARTER (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>.

<sup>78</sup> See *Secretary Johnson Announces Process for DACA Renewal*, U.S. CITIZENSHIP & IMMIGR. SERVICES (June 5, 2014), <http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal>.

<sup>79</sup> See *Frequently Asked Questions: The Obama Administration’s Deferred Action for Childhood Arrivals (DACA)*, NAT’L IMMIGR. L. CENTER (June 13, 2014), <http://www.nilc.org/FAQdeferredactionyouth.html>.

<sup>80</sup> AUDREY SINGER & NICOLE PRCHAL SVAJLENKA, METRO. POLICY PROGRAM AT BROOKINGS, IMMIGRATION FACTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 2 (2013), available at [http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca\\_singer\\_svajlenka\\_final.pdf](http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final.pdf).

<sup>81</sup> DHS Memorandum, *supra* note 74.

<sup>82</sup> Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 91 (2013).

<sup>83</sup> See, e.g., Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Doris Meissner, *Keynote Address*, 16 TEMP. POL. & CIV. RTS. L. REV. 309 (2007); Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 537–38 (2007).

A thoughtful and responsible reform package must accomplish a few things. First, it must address the dilemma of the existing undocumented immigrant population in our country. Second, it must regulate future flows of immigrants consistent with our labor market needs and economic interests in an increasingly inter-dependent world. Third, it must advance the protection of both U.S. and foreign workers. Finally, it must reflect the deeply engrained American value of fairness.<sup>84</sup>

The author of this Article has argued that economic, moral, and policy arguments militate in favor of more liberal admissions of immigrants to the United States than that provided by current law.<sup>85</sup> A related possibility is the greater economic integration, including the integration of labor markets, of the United States, Canada, and Mexico modeled after the relatively successful European Union.

#### A. A North American Union? Increased Economic Integration of Canada, Mexico, and the United States

At the tail end of the twentieth century, regional common markets gained popularity. Many nations perceived the economic benefits of more integrated economies. At the same time, there was reluctance to move from a restricted to a more open scheme immediately. In several important instances, including the European Union, labor migration between the member nations evolved out of increased trade of goods and services.

The U.S. government at some point may consider regularizing the flow of labor from Mexico into the United States.<sup>86</sup> The North American Free Trade Agreement (NAFTA) might be expanded to permit labor migration that mirrors the free trade of goods and services among the member nations. A North American Union modeled on the European Union could

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<sup>84</sup> Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT'L L.J. 115, 116 (2008); see Johnson, *supra* note 83.

<sup>85</sup> See JOHNSON, *supra* note 53.

<sup>86</sup> Considerable attention has been paid to the growing economic integration of North America. See, e.g., THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA (Peter Hakim & Robert E. Litan eds., 2002); ERIC HELLEINER, TOWARDS NORTH AMERICAN MONETARY UNION? THE POLITICS AND HISTORY OF CANADA'S EXCHANGE RATE REGIME (2006); Emily Gilbert, *Money, Citizenship, Territoriality and the Proposals for North American Monetary Union*, 26 POL. GEOGRAPHY 141 (2007); Emily Gilbert, *The Inevitability of Integration? Neoliberal Discourse and the Proposals for a New North American Economic Space After September 11*, 95 ANNALS ASS'N AM. GEOGRAPHERS 202 (2005); Axel Huelsemeyer, *Toward Deeper North American Integration: A Customs Union?*, CANADIAN-AM. PUB. POL'Y, Oct. 2004, at 2. Of course, opposition to any such union is strong. See, e.g., JEROME R. CORSI, THE LATE GREAT USA: THE COMING MERGER WITH MEXICO AND CANADA (2007); COLIN D. STANDISH & RUSSELL R. STANDISH, THE EUROPEAN UNION, THE NORTH AMERICAN UNION, THE PAPACY, & GLOBALISM (2007).

permit labor migration among Canada, Mexico, and the United States.<sup>87</sup>

Some preliminary steps might be necessary before the implementation of a North American regional migration arrangement. Noting that the European Union invested billions of dollars in the infrastructure of new member nations, one observer argues that the United States must consider an economic adjustment strategy for Mexico to decrease migration pressures and allow for the possibility of more manageable free labor movement into the United States.<sup>88</sup>

### B. Integration of Immigrants into Civil Society

Discussion of immigration reform often neglects the consideration of strategies that might improve the integration of legal, as well as undocumented, immigrants into U.S. society.<sup>89</sup> Facilitating naturalization of immigrants is one way to provide for the legal integration of immigrants. The U.S. government, however, has been somewhat inconsistent with respect to promoting naturalization as well as other programs, such as ensuring access to federal public benefits programs, which might facilitate immigrant integration.<sup>90</sup>

Although often focusing on strategies to facilitate immigration enforcement, state and local governments can play an important role in the integration of immigrants into civil

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<sup>87</sup> See T. Alexander Aleinikoff, *Legal Immigration Reform: Toward Rationality and Equity*, in BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 5, 5–6 (Richard D. Lamm & Alan Simpson eds., 2001); Noemi Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15 ARIZ. J. INT'L & COMP. L. 365 (1998); Emily Gibbs, Comment, *Free Movement of Labor in North America: Using the European Union as a Model for the Creation of North American Citizenship*, 45 U.S.F. L. REV. 265, 286–88 (2010); see also Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007) (noting that the United States and Mexico have been acting in increasingly transnational ways with respect to migration); Katie E. Chachere, Comment, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659 (2008) (contending that United States must work with other nations on immigration). See generally BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010) (analyzing immigration in North America after NAFTA); L. RONALD SCHEMAN, *GREATER AMERICA: A NEW PARTNERSHIP FOR THE AMERICAS IN THE TWENTY-FIRST CENTURY* (2003) (advocating generally greater cooperation between nations in the Americas); THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA, *supra* note 86 (analyzing integration of North America).

<sup>88</sup> See Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J.L. & PUB. POL'Y 341 (2007).

<sup>89</sup> See, e.g., SECURING THE FUTURE: U.S. IMMIGRANT INTEGRATION POLICY: A READER (Michael Fix ed., 2007).

<sup>90</sup> See Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: The Mixed Messages of Federal Policies*, 16 TEMP. POL. & CIV. RTS. L. REV. 367, 381–84 (2007).

society.<sup>91</sup> Issuing driver's licenses to undocumented immigrants or recipients of deferred action, which has proven to be hotly contested in the states,<sup>92</sup> is one strategy that would facilitate noncitizen integration. A number of states have passed laws allowing undocumented high school graduates to pay in-state fees at public universities.<sup>93</sup> Providing additional English-as-a-second-language classes, which are chronically over-enrolled,<sup>94</sup> and bilingual education<sup>95</sup> also would facilitate English language acquisition by immigrants and thus immigrant integration.

### CONCLUSION

Congress will pass immigration reform. The only questions are when and what form it will take. The answer to both questions is far from clear at this time. This Article outlines some of the possible reforms that Congress might consider in the future.

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<sup>91</sup> See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–609 (2008).

<sup>92</sup> See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798–807 (2002); María Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004); Joelle P. Hong, *Current Developments, Illinois Joins Three States in Granting Driving Privileges to Undocumented Immigrants*, 26 GEO. IMMIGR. L.J. 713 (2012); Kari E. D'Ottavio, *Comment, Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931 (2013); Steven J. Escobar, *Note, Allowing Undocumented Immigrants to Obtain Driver's Licenses in New Mexico: Revising, Not Abandoning, the System*, 43 WASH. U. J.L. & POLY 285 (2013).

<sup>93</sup> See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011) (upholding California law permitting California high school graduates including undocumented immigrants to pay in-state fees at public universities); see Rodríguez, *supra* note 91, at 605–09; Olivas, *supra* note 67.

<sup>94</sup> See James Thomas Tucker, *The ESL Logjam: Waiting Times for ESL Classes and the Impact on English Learners*, 96 NAT'L CIVIC REV., Spring 2007, at 30. Increasingly, the private sector has promoted immigrant assimilation with employers through, among other policies, promoting English language acquisition. See Pamela Constable & N.C. Aizenman, *Companies Take Lead in Assimilation Efforts*, WASH. POST, Aug. 9, 2008, at B1.

<sup>95</sup> See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing elimination of bilingual education in California).