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WHY CALIFORNIA'S PROPOSITION 187 IS A DECISION FOR THE U.S. SUPREME COURT

I. INTRODUCTION

Crossing the U.S. border without documentation transforms a law abiding Mexican citizen into a criminal who is instantly a fugitive from the U.S. justice system. The incentives include work, higher wages, and possibly a ticket into an abundant entitlement system. The economic advantages to border jumping remain strong, as U.S. employers have come to depend on low cost labor. Proposition 187 provides a convincing disincentive in a system that has historically rewarded those who flagrantly violate the immigration laws.

In November, 1994, after years of unsuccessful attempts to curb the immigration problem, California voters overwhelmingly approved Proposition 187, a bill that denies undocumented immigrants most state and local government provided social services such as health care and education.¹ California's overwhelming endorsement of Proposition 187

1. Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 HARV. L. REV. 1643, 1643 (1995).

occurred after "thirty years of high-handed federal jurisprudence" that forced the burden of illegal immigration costs onto the states and away from the government.² If the legal fight reaches the U.S. Supreme Court and is upheld as constitutional, the rippling effect may cause all states that harbor undocumented immigrants to follow suit.

Because immigrants provide a wealth of labor intensive individuals willing to fill low-wage jobs, and due to Mexico's stagnant economy, completely terminating the flow of immigration is not only undesirable, but also infeasible. "Thus, we must view immigration, in the phrasing of one expert, as a phenomenon to be managed, not a problem to be solved."³

As this comment will explore, the bills that currently led to the overwhelming approval of Proposition 187 have already passed through Congress with little or no success. For the purpose of understanding the ramifications of Proposition 187 and its approach to curb illegal immigration, it is necessary to first discuss both the unresolved historical attempts and the current Congressional immigration reform proposals. Prior to the sponsoring of Proposition 187, no other immigration reform proposal created the kind of unequivocal controversy that will ultimately rise to a climax before the U.S. Supreme Court. Finally, if Proposition 187 passes, it will affect not only the economic and social relations the United States maintains with Mexico, but it will also impact the North American Free Trade Agreement (NAFTA). Ultimately, the Supreme Court will have to decide.

II. FAILED CONGRESSIONAL PROPOSALS LEADING UP TO PROPOSITION 187

Immigration law has long been the subject of rhetorically heated but fruitless debates. Prior to Proposition 187, no single bill dealt solely with immigration reform on such a controversial level. As this comment will illustrate, the issues surrounding Proposition 187 and immigration reform have remained unresolved since the late 18th Century.

History will show that the prior immigration reform bills produced great disparities between the actual legislative "intent" and the final "effects."⁴ Although the United States and Mexico have grappled with

2. Dan Stein, *Is California's Proposition 187 Constitutional? Yes: The Supreme Court Must Re-evaluate Existing Law*, 81 A.B.A. J. 42, 42 (1995).

3. Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3 (1994) (quoting Martha Angle, *Immigration's Bridges Have Ups and Downs*, 51 CONG. Q. WKLY. REP. 710 (1993)) (discussing statements of Jeremy M. Tinker, Staff Director, Senate Judiciary Subcommittee on Immigration and Refugee issues).

4. Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 IND. J. GLOBAL LEGAL STUD. 143, 143 (1994). Kitty Calavita is a professor at the Universi-

the idea of curbing immigration reform, their good intentions have customarily proved futile.⁵

Illustrations of the aforementioned disparity between the immigration policy intentions and the undesired effects are abundant. In the late 18th century, the United States voluntarily opened its market to all immigrants.⁶ Congress placed few, if any, territorial or social restrictions on them.⁷ However, subsequent to a downslide in the U.S. economy in 1885 and the beginning of an anti-immigration sentiment, Congress passed the Alien Contract Labor Law, a law intended to revitalize U.S. labor against the European immigrant workers.⁸ The law prohibited immigrants with prior agreements with their employers from entering the United States.⁹ The result was that the Labor Law inhibited "fewer than one-half of one percent" of the European immigration during the fifteen years of its establishment.¹⁰ On the contrary, immigration drastically increased.¹¹ Despite a few prosperous years in the late 1950's and early 1960's Congressional attempts to revitalize U.S. labor failed due to the Bracero Program, designed to recruit five million Mexican farm workers to aid farmers in the states along the Mexican border.¹²

A similar law that commenced with good economic intentions but ultimately failed was the Natural Origins Act of 1924.¹³ This Act was later consolidated into the inclusive Immigration and Nationality Act of 1952 (INA) and Operation Wetback of 1950.¹⁴ The Natural Origins Act confined the number of European immigrants to 150,000, prohibited Japanese immigrants entirely, and created "quotas for other nationalities" in order to preserve the status quo of ethnicity in the United

ty of California, Irvine. *Id.*

5. See generally *Developments in the Law — Immigration: Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1289 (1983) [hereinafter *Developments*].

6. See generally Cynthia W. Brooks, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 HOUS. J. INT'L L. 141 (1994).

7. *Id.*

8. Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (repealed 1952). For a discussion of the impact of this law, see KITTY CALAVITA, *U.S. IMMIGRATION AND THE CONTROL OF LABOR: 1820-1924*, at 41-51 (1984).

9. See Brooks, *supra* note 6, at 142 (citing Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 955).

10. Calavita, *supra* note 4, at 143.

11. *Id.*

12. *Id.*

13. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159-160.

14. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1988)).

States.¹⁵ Not only did this law conversely influence the many thousands of refugees fleeing Adolf Hitler's reign in Europe,¹⁶ but it also had virtually no effect on immigration reform.¹⁷ Operation Wetback was instigated in order to gather and extract immigrants who were illegally in the United States.¹⁸ Although successful in deporting many immigrants, it also resulted in the inadvertent extraction of legally residing citizens of the United States.¹⁹

During the 1970's and early 1980's, the population of illegal immigrants increased astronomically, "from two to twelve million."²⁰ Some critics argued that illegal immigrants depleted state funds.²¹ Others argued that illegal immigrants productively sustained the economy by working labor jobs that Americans usually dismissed as low paying.²²

After over a century of immigration reform failures, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).²³ This Act is distinguishable from prior Acts in that its purpose was not to place limits on the number of illegal immigrants entering the United States, but rather to focus on the underlying problem: "amnesty and employer sanctions."²⁴ The IRCA attempted to combat the incentive of a stable future and income by sanctioning employers who harbored and financed illegal immigrants.²⁵ By dismantling the incentive-driven economy of the United States for hunger-driven immigrants, the IRCA hoped to reduce illegal immigration. In so doing, the IRCA pardoned those immigrants who illegally resided in the United States before January 1, 1982.²⁶

15. McCurdy, *supra* note 3, at 2.

16. Although the Immigration Act of 1924 commenced as a well-intended legislative tool to preserve the status quo by barring access to illegal immigrants, it also inadvertently affected the fleeing refugees from the reigning horror of Adolf Hitler. *See id.*

17. *Id.*

18. Calavita, *supra* note 4, at 145 (citing KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992)).

19. *E.g.*, KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992).

20. Brooks, *supra* note 6, at 146 (citing Ann Cooper, *Hazy Numbers Complicate the Debate over How to Slow Illegal Immigration*, 17 NAT'L J. 1340, 1341-43 (1985)).

21. Brooks, *supra* note 6, at 147 (citing Eustace T. Francis, Note, *Taking Care of Business: The Potential Impact of Immigration Reform on Corporate Strategic Planning*, 5 GEO. IMMIG. L.J. 79, 81 (1991)).

22. Brooks, *supra* note 6, at 147 (citing Eustace T. Francis, Note, *Taking Care of Business: The Potential Impact of Immigration Reform on Corporate Strategic Planning*, 5 GEO. IMMIG. L.J. 79, 82 (1991)).

23. Eric J. Smith, Note, *Citizenship Discrimination and the Frank Amendment to the Immigration Reform and Control Act*, 35 WAYNE L. REV. 1523, 1526 (1989).

24. Brooks, *supra* note 6, at 147.

25. *Id.*

26. Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 121(d)(1)(A), 100

The Immigration Act of 1990 led to the next legislative attempt to reconstruct immigration policy.²⁷ Unlike the IRCA of 1986, which concentrated on U.S. employers who enticed illegal immigrants with a steady income, the Immigration Act of 1990 centered on the root of illegal immigration reform.²⁸ The 1990 Act instituted a strategy comprised of three woven subheadings: "family-sponsored,"²⁹ "diversity-based"³⁰ and "employment-based"³¹ immigration. "Congress hoped to assist the U.S. economy by significantly enlarging employment-based immigration, expediting the admission process, advancing the diversity of immigrant nationalities, and lessening the family-preference backlogs."³² Although this was a unique proposal in that it reduced illegal immigration by allowing for more legal immigrants, it did nothing to curb the prevailing migration northward from Mexico into the southern states.³³

Since the signing of the Constitution of the United States, national sovereignty has entitled the inherent right reserved of nation-states to allow or restrict the passage of citizens from other nation-states.³⁴ Freedom of movement is an inalienable right retained by United States' citizens. In *Fong Yue Ting v. United States*,³⁵ the Supreme Court asserted that nation-states have the inherent right of freedom of move-

Stat. 3359, 3393 (codified as amended at 8 U.S.C. §§ 1101-1557 (1988)).

27. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (amending various sections of the Immigration and Nationality Act).

28. See, e.g., Francis, *supra* note 22, at 84.

29. Brooks, *supra* note 6, at 148; see also Immigration Act of 1990, §§ 111-12. "The total number of family-sponsored visas for fiscal years 1992 through 1994 was 465,000." *Id.* § 101(a) (quoting Brooks, *supra* note 6, at 148).

30. Brooks, *supra* note 6, at 148; see also Immigration Act of 1990, §§ 131-34. "Beginning in fiscal year 1995, 55,000 visas will be allocated to immigrants from previously under-represented countries." *Id.* § 101(a).

31. Brooks, *supra* note 6, at 148; see also Immigration Act of 1990, §§ 121-24. "Congress wanted to utilize immigration laws to better serve the nation's economic policy." *Id.* § 121(a). "The employment-based category of immigrants includes five groups: 1) priority worker; 2) professionals holding an advanced degree or exceptional ability; and 3) skilled workers (each with 40,000 visas allocated); 4) special immigrants, such as ministers; and 5) investors (each with 10,000 visas allocated)." *Id.* (quoting Brooks, *supra* note 6, at 148).

32. Brooks, *supra* note 6, at 148.

33. See, e.g., 139 CONG. REC. S11,997 (daily ed. Sept. 20, 1993) (statement of Sen. Reid) "In 1982, 128,000 immigrants received Social security benefits. In 1992, . . . the number jumped to over 600,000[,] . . . an increase of almost 400 percent." 139 CONG. REC. S14,012, S14,033 (daily ed. Oct. 20, 1993) (statement of Sen. Feinstein) (debating the Immigration Law Enforcement Act of 1993).

34. U.S. CONST. art. X. Although the Constitution does not specifically identify where to draw the line on state sovereignty, states nonetheless should retain the right to hinder the passage of illegal immigrants regardless of whether or not it frustrates economic growth.

35. 149 U.S. 698 (1893).

ment within their borders. Thus, barring criminal restrictions, U.S. citizens maintain the right to freely move within the borders of the United States.³⁶ However, they are not required to remain within U.S. territory; they may travel as they please.

Freedom of movement is not an inherent right given to those who do not legally reside within the United States.³⁷ Undocumented immigrants are entitled to "substantive and procedural" rights, but they are granted those rights contingent upon their legal status.³⁸ Thus, immigrants reserve only those limited rights that are granted to them by the U.S. government, and in some cases, the U.S. Constitution.³⁹

Historically, employers were highly favored over workers.⁴⁰ As a result of the Civil War, the manufacturing expense of American-made products rocketed, while import taxes increased nearly fifty percent.⁴¹ Although the cost of production was not beneficial to the economy, employers reaped the benefits of tariffs that restricted opposition from imported products.⁴² Because of the unsuccessful attempts to reduce illegal immigration, workers were compelled to compete with low-budget foreign labor, and were thus forced to either work for virtually nothing or not work at all.⁴³ To the contrary, workers pointed to the inconsistency that existed between employment protection and workers'

36. U.S. CONST. art. X.

37. U.S. CONST. amend. XIV. Section 1 of the XIV Amendment of the Constitution states: that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

[T]he Founding Fathers maintained that '[all men] are endowed by their Creator' with 'unalienable rights.' In other words, these liberties and freedoms are the rights of U.S. citizens because they are inalienable rights of all men. Of course, at the signing of the Declaration of Independence and later the United States Constitution, 'all men' in practice referred to a minority of the U.S. population, excluding women, African-Americans, Native American Indians, and others. But, the fact that the principle was violated in practice does not detract from the point that the rights accruing to U.S. citizens were considered by the Founding Fathers to be 'endowed by the Creator,' and were therefore basic human rights, not merely rights of citizenship.

Calavita, *supra* note 4, at 147-48.

38. Calavita, *supra* note 4, at 148.

39. See generally CALAVITA, *supra* note 19.

40. *Id.* at 150.

41. *Id.* (citing BERNARD A. WEISBERGER, THE NEW INDUSTRIAL SOCIETY 26-27 (1969)).

42. Calavita, *supra* note 4, at 150.

43. See generally *id.*

rights.⁴⁴ "In 1982, approximately one out of four new jobs was for part-time or temporary work; a decade later, fully half of all new jobs were for such contingent work."⁴⁵

It is clear that the recurring disparity has occurred between Congressional intentions and counter-productive outcomes because of the demand for low-cost employment. When unemployment entered its highest levels, immigration substantially declined.⁴⁶ Similarly, during this same period, the usually high demand for foreign labor also declined.⁴⁷ However, the present economic situation of the United States sustains a high rate of unemployment with a need for low-wage employment,⁴⁸ yet it does not combat excessive immigration.

III. PROPOSITION 187 CLIMATIZES CURRENT ATTEMPTS TO REFORM IMMIGRATION IN THE UNITED STATES

With economic growth staggering and an ever present population of illegal immigrants rushing northward to the Mexican-American border, immigration reform emerged as one of the single most influential issues during the 1994 Congressional elections. Legislatures proposed numerous immigration reform bills to the House and Senate to prevent the uproar among U.S. citizens.⁴⁹ The bills range from in-

44. *Id.*

45. *Id.* at 151 (citing Peter T. Kilburn, *New Jobs Lack the Old Security in Time of "Disposable Workers"*, N.Y. TIMES, Mar. 15, 1993, at A1, A15).

46. See WAYNE A. CORNELIUS, *AMERICA IN THE ERA OF LIMITS: MIGRANTS, NATIVISTS, AND THE FUTURE OF U.S.-MEXICAN RELATIONS* (1982).

47. *Id.*

48. Calavita, *supra* note 4, at 151.

49. These bills include:

H.R. 2757, 103d Cong., 1st Sess. (1993) (bill to amend the Immigration and Nationality Act regarding alien smuggling); S. 1196, 103d Cong., 1st Sess. (1993) (bill to amend the Immigration and Nationality Act to increase criminal penalties for persons smuggling aliens into the United States); H.R. Con. Res. 117, 103d Cong., 1st Sess. (1993) (resolution relating to improved United States-Mexico cooperation in controlling illegal immigration); S. 457, 103d Cong., 1st Sess. (1993) (bill to prohibit payment of federal benefits to illegal aliens); H.R. 1153, 103d Cong., 1st Sess. (1993) (amendment to the Immigration and Nationality Act to provide for expanded pre-inspection at foreign airports); H.R. 1081, 103d Cong., 1st Sess. (1993) (bill to amend the Immigration and Nationality Act to prohibit transportation of illegal aliens for purposes of employment); H.R. 1083, 103d Cong., 1st Sess. (1993) (bill to prohibit federal financial assistance to localities who refuse to cooperate in the arrest and deportation of an unlawful alien); H.R. 3320, 103d Cong., 1st Sess. (1993) (bill to strengthen border security and stabilize immigration); S. 1351, 103d Cong., 1st Sess. (1993) (bill to strengthen border security and stabilize immigration); H.R. 1031, 103d Cong., 1st Sess. (1993) (bill to provide for improved enforcement of employer sanctions); H.R. 1620, 103d Cong., 1st Sess. (1993) (bill to provide for improved enforcement of employer sanctions); H.R. 1620, 103d Cong., 1st Sess. (1993) (bill to

creased border patrol⁵⁰ and a five-mile span of night lights⁵¹ to prevent the initial crossing of aliens, to the withholding of inherent Constitutional rights of education and safety.⁵²

Illegal immigration has existed for centuries without any enduring reform measures to satisfy U.S. citizens. This should neither suggest that Americans render current attempts at immigration reform invaluable, nor should it suggest that they do not intend to pursue further reform measures. Reforming the illegal immigration population is undoubtedly necessary. The question now is not where the United States begins curbing illegal immigration, but rather, where it draws its limits concerning those who can enter and for what reasons.

During the development of the recent Congressional immigration reform proposals, the focus was on the underlying purpose of immigration reform.⁵³ First, although immigrants benefit society by laboring at low-wage jobs, immigration needs to be repressed in order to subdue both hatred among the United States and Mexico and potential barriers to the North American Free Trade Agreement (NAFTA).⁵⁴ Second, southern states with high immigrant populations need financial support to accelerate their economies.⁵⁵ Finally, the United States must restructure the economy to provide disincentives for illegal immigrants

prohibit direct federal benefits and to end federal mandates for states to provide benefits for illegal aliens); H.R. 3860, 103d Cong., 2d Sess. (1994) (bill to amend the Immigration and Nationality Act and other laws relating to border security, illegal immigration, alien eligibility for Federal financial benefits, criminal activity by aliens, and alien smuggling); H.R. 4059, 103d Cong., 2d Sess. (1994) (bill to provide for the expedited deportation of criminal aliens); S. 1923, 103d Cong., 2d Sess. (1994) (bill to curb criminal activity by aliens and to protect U.S. workers from unfair labor competition); S. 2197, 103d Cong., 2d Sess. (1994) (bill to control illegal immigration to the United States, reduce incentives for illegal immigration, to reform asylum procedures, and to strengthen criminal penalties for smuggling aliens); S. 2533, 103d Cong., 2d Sess. (1994) (bill to protect Americans against criminal activity by aliens and to relieve pressure on public services by enhancing border security and diminishing legal immigration).

Brooks, *supra* note 6, at 142.

50. H.R. 3860, 103d Cong., 2d Sess. (1994).

51. *Id.*

52. *Id.*

53. *Id.*

54. Because illegal aliens are essentially fugitives from justice who unlawfully entered the United States without a valid green card, they should not acquire all rights and privileges that a law-abiding citizen receives. Therefore, providing disincentives to criminals, illegally residing in the southern states, should be a main priority to successfully curb illegal aliens from consuming hard working American citizens' and legal immigrants' wages.

55. Because illegal immigrants primarily remain in southern, more heavily populated immigrant states, and because those states must extol the undue economic burden by allowing those children to attend public schooling and receive health care without paying their taxes, the United States must finance new and improved measures to pay for these states' expenditures.

and more highly-skilled jobs for American workers.

In January, 1993, Representative McCandless proposed a bill that would entitle the Secretary of Defense to appoint 12,000 Department of Defense employees to expedite the Immigration and Naturalization Service (INS) and the U.S. Customs Service to improve control over the land borders.⁵⁶ Similarly, in 1995, Senator Kennedy,⁵⁷ Representative Deal,⁵⁸ and Representative Hunter,⁵⁹ as well as numerous other Representatives, sponsored bills⁶⁰ that would amend the Immigration

56. H.R. 245, 103d Cong., 1st Sess. (1993); *see also* Brooks, *supra* note 6, at 150.

57. S. 754, 104th Cong., 1st Sess. (1995). This bill's stated goal is to:

Amend the Immigration and Nationality Act to more effectively prevent illegal immigration by improving control over the land borders of the United States, preventing illegal employment of aliens, reducing procedural delays in removing illegal aliens from the United States, providing wiretap and asset forfeiture authority to combat alien smuggling and related crimes, and increasing penalties for bringing aliens unlawfully into the United States.

Id.

58. H.R. 1224, 104th Cong., 1st Sess. (1995). This bill aims to:

Amend title 10, United States Code, to authorize the Secretary of Defense to detail members of the Armed Forces to other Federal Agencies to assist such agencies in enforcing the drug, immigration, and customs laws of the United States in border areas, to make certain aliens ineligible for certain social services, and provide for grants to the States to compensate for State costs associated with resident lawful aliens.

Id.

59. H.R. 1018, 104th Cong., 1st Sess. (1995). "Amend the Immigration and Nationality Act and other laws of the United States relating to border security, illegal immigration, alien eligibility for Federal financial benefits and services, criminal activity by aliens, alien smuggling, fraudulent document use by aliens, asylum, terrorist aliens." *Id.*

60. H.R. 1535, 104th Cong., 1st Sess. (1995). Representative Gibbons sponsored a bill that amends "the Internal Revenue code of 1986 to revise the tax rules on expatriation, to modify the basis rules for nonresident aliens becoming citizens or residents." *Id.* S. 580, 104th Cong., 1st Sess. (1995). Senator Feinstein sponsored a bill that amends "the Immigration and Nationality Act to control illegal immigration to the United States, reduce incentives for illegal immigration, reform asylum procedures, strengthen criminal penalties for the smuggling of aliens, and reform other procedures." *Id.* H.R. 339, 104th Cong., 1st Sess. (1995). Representative Packard sponsored a bill to "provide for an increase in the number of Border Patrol agents, to provide for the deployment of Border Patrol agents at the southwest border, and to provide for additional detention facilities for illegal aliens." *Id.* H.R. 345, 104th Cong., 1st Sess. (1995). Representative Pickett sponsored a bill to "amend title 4, United States Code, to declare English as the official language of the Government of the United States and to amend the Immigration and Nationality Act to provide that public ceremonies for the admission of new citizens shall be considered solely in English." *Id.* S. 1096, 104th Cong., 1st Sess. (1995). Senator D'Amato sponsored a bill to "amend the Immigration and Nationality Act to provide that members of Hamas (commonly known as the Islamic Resistance Movement) be considered to be engaged in a terrorist activity and ineligible to receive visas and excluded from admission into the United States." *Id.* H.R. 88, 104th Cong., 1st Sess. (1995). Representative Callahan sponsored a bill to "propose an amendment to the Constitution of the United States to provide that no person born in the United States be a United States' citizen on ac-

and Nationality Act to strengthen border security.

In February 1993, Representative Beilenson sponsored a bill⁶¹ that increased enforcement of employer's authorization provisions, while Representative Filner sponsored his own similar bill in 1995.⁶² A similar Act that denied the transportation of aliens for occupational reasons was the Illegal Transportation Prevention Act of 1993.⁶³ The Federal Financial Assistance Prohibitions Regarding States and the Unlawful Aliens Act denied federal funding to states that did not detain and extradite illegal aliens.⁶⁴

In 1994, Governor Pete Wilson sponsored one of the most controversial immigration reform bills in the history of California: Proposition 187.⁶⁵ Proposition 187 does not purport to directly restrict the flow of aliens from Mexico over the California border; instead its objective is to refuse public education and non-emergency health care to illegal immigrants.⁶⁶ Governor Wilson certainly meant to discourage the continuing entrance of undocumented immigrants and to provoke those who presently resided within the borders of California to voluntarily depart.⁶⁷

Beginning in January 1996, Proposition 187 proposes to enforce immigration in public school districts in California by confirming the legal residency of all newly enrolled students.⁶⁸ Similarly, it also claims to validate the continuing education of previously enrolled students and their parents and to strictly execute regulations against those

count of birth in the United States unless a parent is a U.S. citizen at the time of the birth." *Id.* H.R. 1638, 104th Cong., 1st Sess. (1995). Representative Dornan sponsored a bill to "amend the Immigration and Nationality Act to provide that petitioners for immigration classification on the basis of immediate relative status to a citizen shall be required to pay only one fee when such petitioners are filed at the same time." *Id.* H.R. 1597, 104th Cong., 1st Sess. (1995). Representative Stump sponsored a bill to "amend the Immigration and Nationality Act with respect to the authority of the Attorney General to parole aliens into the United States." *Id.* S. 759, 104th Cong., 1st Sess. (1995). Senator Bradley sponsored a bill to "amend the Immigration and Nationality Act to limit the adjustment of status of aliens who are unlawfully residing in the United States." *Id.* H.R.J. Res. 87, 104th Cong., 1st Sess. (1995). Representative Stockman sponsored a bill "proposing an amendment to the Constitution of the United States regarding citizenship in the United States." *Id.*

61. H.R. 1031, 103d Cong., 1st Sess. (1993) (instructing the Secretary of Health and Human Services to develop a social security card that was counterfeit-resistant).

62. H.R. 1081, 103d Cong., 1st Sess. (1993); H.R. 1083, 103d Cong., 1st Sess. (1993).

63. H.R. 1081, 103d Cong., 1st Sess. (1993).

64. H.R. 1083, 103d Cong., 1st Sess. (1993).

65. See Stacey Colino, *The Fallout from Proposition 187*, 22 HUM. RTS. 16 (1995).

66. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994).

67. *Id.* at 202 (citing Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 149 n.117 (1994)).

68. Colino, *supra* note 65, at 17.

illegally residing in California.⁶⁹ After ninety days, if both parent and student have not shown proper identification and status, they are returned to their place of legal residence.⁷⁰

Likewise, public agencies and health care facilities are required to authenticate the legal citizenship of all individuals needing non-emergency health care before providing medical services.⁷¹ The illegal immigrant's right to medical assistance hinges upon whether the situation constitutes an emergency, whether the hospital is serviced by public or private funds, and whether it is a public or private institution.⁷² Unless undocumented immigrants need emergency health care, they will not be provided hospital services.⁷³

IV. PROPOSITION 187 CONFRONTS THE U.S. CONSTITUTION

Ultimately, the Supreme Court will consider whether Proposition 187 will adversely challenge and potentially amend the Constitution and the 1982 decision of *Plyler v. Doe*.⁷⁴ Current legislative attempts to revise immigration reform deviates from the Fourteenth Amendment of the Constitution, which states that "[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁷⁵ The Constitution embraces two fundamental rights that appear to thwart the Proposition. First, it purportedly entitles all children born in the United States to inherit the right, if desired, to become U.S. citizens.⁷⁶ Therefore, illegal immigrant females who deliver children within the United States that become U.S. citizens may subsequently be eligible for public benefits.⁷⁷ Second, the Supreme Court, in *Plyler v. Doe*, has interpreted the Fourteenth Amendment of the Constitution as a natural right that provides "equal protection" to all residents of the United States, regardless of their citizenship.⁷⁸

The Supreme Court, in a five to four split decision in *Plyler v. Doe*, held that a child who lives within the boundaries of the United

69. *Id.*

70. *Id.*

71. *Id.*

72. See Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271, 274 (1992).

73. *Id.*; see also Hospital Survey & Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) (codified as amended at 42 U.S.C. §§ 201-29, 241-86 (1988)).

74. 457 U.S. 202 (1982) (opinion by Justice William Brennan that established a right for undocumented immigrants to attend public schools).

75. U.S. CONST. amend. XIV, § 1.

76. McCurdy, *supra* note 3, at 12.

77. *Id.*

78. *Id.*; see also Michael J. Mandel et al., *The Price of Open Arms*, BUS. WEEK, June 21, 1993, at 32.

States, whether a citizen or not, has a right to both primary and secondary education.⁷⁹ Moreover, Justice Brennan, writing the majority opinion, stated that refusing free education to illegal immigrants residing in Texas is not an alternative means to preventing immigration "when compared to the alternative of prohibiting employment of illegal aliens."⁸⁰ The Court justified its decision by balancing the negative impact that uneducated children would have on society with the harm of having to expand the continually thinning educational resources.⁸¹

Those who strongly advocate Proposition 187 may have faith that the change in the mixture of the recently appointed Supreme Court Justices will allow them to deny children of illegal immigrants a public education.⁸² Justices William Brennan, Thurgood Marshall, and Lewis Powell, all participants in the *Plyler* majority, were followed by conservative Justices Clarence Thomas and Anthony M. Kennedy.⁸³ Nevertheless, a reversal of the prior Supreme Court ruling may necessitate a Constitutional amendment to deprive immigrant school children of the right to learn. An amendment appears distant according to Chief Justice Burger's dissenting opinion in *Plyler v. Doe*, which admitted that "[w]ere it our business to set the nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education."⁸⁴

Health and welfare needs clearly create a gap in prior holdings by the Supreme Court, because it has yet to rule directly on such needs. Justice Powell, writing the concurring opinion in *Plyler*, stated, "If the resident children of illegal aliens were denied welfare assistance . . . this also would be an impermissible penalizing of children because of their parents' status."⁸⁵ Therefore, if the Court were obliged to rule according to the strong sentiments of Justice Powell, Proposition 187 would be held unconstitutional. However, if the Supreme Court ruled that Proposition 187 was unconstitutional, serious discrepancies would arise as to the fairness of awarding equivalent privileges to children of U.S. citizens and those of illegal immigrants.⁸⁶

In the former case, the parents have presumably paid their taxes, probably voted, perhaps served in the military, possibly served on local community

79. Stein, *supra* note 2, at 42.

80. 457 U.S. 202 (1982).

81. See generally Stein, *supra* note 2, at 43.

82. Herman Schwartz, *Is California's Proposition 187 Constitutional? No: The Law is Clear, Only the Court has Changed*, 81 A.B.A. J. 43 (1995).

83. *Id.*

84. McCurdy, *supra* note 3, at 12.

85. Schwartz, *supra* note 82, at 44.

86. McCurdy, *supra* note 3, at 11.

organizations—in short, fulfilled their duties and obligations as citizens. Illegal parents, on the other hand, have entered the country only by violating its laws.⁸⁷

Our fundamental values of fairness are undermined. Although it may be true that immigrants come to America to realize the American dream, the idea that they can conceive children who upon delivery become U.S. citizens and receive benefits along with the illegal immigrants themselves appears prejudicial.⁸⁸ If the Supreme Court considers the issue of whether U.S. born children and their illegal parents are entitled to constitutional protection, as it inevitably must in the future, it may find itself amending the Constitution to exclude illegal immigrants from the Fourteenth Amendment.

V. CONSEQUENCES OF REFORM IF THE OUTCOME OF PROPOSITION 187 IS CONSTITUTIONAL

It was not long ago that the North American Free Trade Agreement was perceived as a new beginning between the United States and Mexico, a bilateral vision.⁸⁹ California's 1994 sustaining of Proposition 187, by a margin of fifty-nine percent to forty-one percent, completely disrupts that attempt at collaboration.⁹⁰ Clearly, when Californians marched to the polls in order to cast their votes, an anti-Mexican sentiment rang loud and clear throughout the state and the rest of the United States.⁹¹

Meanwhile, the Government and citizens of Mexico angrily responded with an outcry of their own.⁹² Mexico's President-elect, Ernesto Zedillo summarized his position: "We don't think [the attempted reform] is the way to deal with the problem. In fact, it only politicizes the problem, dangerously politicizes it. [However], we cannot object to legitimate enforcement of U.S. laws."⁹³ He continued to warn that the resentment Californians feel towards Mexicans could have dangerous political consequences if they "lead to deprivation or violation of basic human rights."⁹⁴ The strain this issue places on relations between the United States and Mexico undermines the trust need-

87. *Id.*

88. *Id.*

89. Denise Dresser, A "People" Treaty Urgently Needed, L.A. TIMES, Nov. 15, 1994, at 7.

90. *Id.*

91. *Id.*

92. See generally John M. Goshko, Mexican Leader Assails Anti-Immigrant Law. Zedillo says Proposition 187 Could Violate Human Rights of Mexicans Living in California, WASH. POST, Nov. 24, 1994, at A27.

93. *Id.*

94. *Id.*

ed for meaningful progress. The economies of both countries are tied to NAFTA, and both could experience unwanted economic setbacks related to the political failure of unenforced immigration law.

NAFTA was praised as an answer to both the North American immigration problem and Mexico's staggered economy.⁹⁵ However, this approach fails to recognize the inherent predicament in the Free Trade Agreement, although goods were freely transferable across the Mexican-American border, work was not.⁹⁶ Tariffs may eventually decline, but substantial strong-holds will not be reduced and wages will not increase.⁹⁷ NAFTA creates an ironic situation in which business executives cooperate, but fugitives and border patrols battle along the nations' borders.⁹⁸

VI. EFFECT OF PROPOSITION 187 ON EDUCATION

Beginning in January 1996, all public school districts in California must necessarily validate the legal position of newly arriving students and those that are returning.⁹⁹ Similarly, they must also validate the legal position of their parents or caretakers.¹⁰⁰ The problem arises when the parent or child is undocumented. "If his [or her] parents are undocumented, [the child] is going to have to choose between whether he [or she] goes to school and whether his [or her] parents get reported to the [Immigration and Naturalization Service]," said Robert Rubin, assistant director of the Lawyers' Committee for Civil Rights.¹⁰¹ Critics of Proposition 187 contend that if the measure passes, teachers will be thrust into the role of "cops" or snitches for the Immigration and Naturalization Service.¹⁰² Similarly, Rubin states that this will not aide in curbing illegal immigration because it is directed towards blameless school children.¹⁰³

Elisa Fernandez, an attorney with the Mexican-American Legal Defense and Educational Fund in San Francisco, acknowledges that the measure will compel 300,000 willing school children out onto the streets.¹⁰⁴ She states that "[a]part from the educational issue are the

95. Roberto L. Martinez, *NAFTA'S Effect on Human Rights at the Border*, 27 U.C. DAVIS L. REV. 979, 979 (1994). Martinez is the director of the United States-Mexico Border Project of the American Friends Service Committee in San Diego, California. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Colino, *supra* note 65, at 17.

100. *Id.*

101. *Id.*

102. Janice Bierley, *Teachers as INS Cops: an Ugly Lie*, L.A. TIMES, Nov. 4, 1994, at 7.

103. Colino, *supra* note 65, at 17.

104. *Id.*

ramifications to the rest of us of what it means to have those children out on the street with no education and nothing to do."¹⁰⁵ Many law enforcement agencies also strongly dislike the measure for fear that these children may become victims of crimes or become criminals themselves.¹⁰⁶

However, proponents of the measure contend that school teachers must inspect students infrequently.¹⁰⁷ Meanwhile, teachers are not student eligibility enforcers. Students have long been denied admission on the basis of geographical boundaries and other related issues.¹⁰⁸ The only new issue would be whether these students are legal and therefore deserve a state subsidized education. Because Proposition 187 applies strictly to public schools, advocates insist that illegal immigrants would not be thrust into the streets, but instead could enroll in private schools.¹⁰⁹ Those students who had a home before the measure passed would undoubtedly have one thereafter. Similarly, those who had parental nurturing and guidance before will not lose it because of a bill.

Educating the offspring of the majority of the population relegated to manual labor is self-defeating unless we expect a new wave of immigrants to assume vacant positions as the parents become less able to work. A real dichotomy is created with laborers' children who are educated by a system that is already full of people not willing to accept labor-intensive jobs.

VII. EFFECT OF PROPOSITION 187 ON HUMAN RIGHTS AND HEALTH CARE

Opponents of Proposition 187 also argue that if illegal immigrants are not provided health care, they will ultimately spread various types of diseases.¹¹⁰ Robert Rubin commented:

They're going to be denied immunizations, they're going to be denied early treatment for preventable diseases. And we're going to have contagious diseases. So at a time when we're seeing some very real scares around TB and other contagious diseases, we're going to be denying kids immunizations and we're going to be denying people early diagnosis for treatment of things.¹¹¹

On the other hand, advocates of Proposition 187 support the notion that if illegal immigrants need emergency health care, it will be provid-

105. *Id.*

106. *Id.*

107. Bierley, *supra* note 102.

108. *Id.*

109. *Id.*

110. Colino, *supra* note 65, at 17.

111. *Id.*

ed.¹¹² Governor Pete Wilson, the fundamental developer of Proposition 187, insists that health care professionals will reserve complete discretion in deciding the difference between the "essential and non-essential" medical care.¹¹³ Therefore, if the diseases are considered contagious or harmful, physicians may extend health care.¹¹⁴ Emergency medical care is always available.

VIII. EFFECT OF PROPOSITION 187 ON THE U.S. ECONOMY

When evaluating the effect of Proposition 187 and the added influx of illegal immigrants on the U.S. and Mexican economy, we must compare the constructive benefits to the disastrous consequences. While providing incentives for immigrants such as free public education and free emergency health care, states also provide other financial incentives that induce the continuing invasion.¹¹⁵ However, the greatest inducement remains the incalculable supply of high-paying jobs in the United States compared to that in Mexico.¹¹⁶ No other singular incentive brings illegal immigrants to the United States more than high-paying jobs and the American Dream.¹¹⁷

Critics' claims vary from the notion that immigration arouses the economy to beliefs that immigrants exhaust opportunities for employment and medical care while not repaying their dues to the government.¹¹⁸ According to Representative Burton, the estimated direct costs of illegal aliens in 1990 was \$5.4 billion, with \$963.5 million going to emergency medical care and \$831.7 million going toward the criminal justice system.¹¹⁹ Analysts continually generate a broad range of statistics. For example, "[f]or every seven immigrants who enter the job market, one blue-collar American worker loses a job."¹²⁰ Conversely, "for every increase of 100 people in the native

112. Dan Stein, *Higher Cost of Aliens Alters Legal Priorities*, 17 NAT'L L.J. 11, 23 (1994).

113. *Id.*

114. *Id.*

115. Pete Wilson, *About Time We Stopped Rewarding Illegals*, HOUS. CHRON., Aug. 29, 1993, at F1, F4.

116. *Developments*, *supra* note 5, at 1440-48. "What would the economy . . . look like if you didn't have this large pool of low-wage, largely undocumented labor? American workers don't want to pick fruit and vegetables, clean up as domestic workers and work in kitchens." Patrick Lee, *Studies Challenge View That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A1 (statement of Angelo Ancheta, executive director of the Coalition for Humane Immigrant Rights of Los Angeles).

117. *E.g.*, *Developments*, *supra* note 5, at 1438.

118. Brooks, *supra* note 6, at 146 (citing *Impact of Immigration on Welfare Programs: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 103-58 (1993)).

119. 139 CONG. REC. H4412, H4436 (daily ed. July 1, 1993).

120. 139 CONG. REC. S11,997 (daily ed. Sept. 20, 1993).

population, employment grew by [twenty-six] jobs."¹²¹

Dr. Donald Huddle, a pronounced Rice University economist, completed a year-long analysis¹²² of the governmental expenditures of immigration.¹²³ He determined that the "11.97 million post-1970 illegal immigrants, refugees, and asylees cost \$25.6 billion in public assistance and displacement in 1992 while only paying \$15.7 billion in taxes."¹²⁴ After 1992, 4.8 million illegal immigrants consumed welfare and other governmental handouts of "\$11.9 billion net of taxes they paid."¹²⁵ He predicts that before 2002, all of the immigrants who have migrated to the United States after 1970 will increase to 29.4 million.¹²⁶ This astounding total will eventually require \$668.5 billion in the equivalency of 1993 dollars.¹²⁷

Proponents of immigration reform refer to illegal immigrants as a detriment to the economy and the welfare program.¹²⁸ In Los Angeles County alone, illegal immigrants exhaust "\$196 million, or [thirty-seven percent], of the county's health services dollars."¹²⁹ The California State Auditor General recently approximated that the expense of health services rendered for illegal immigrants approached \$1 billion a year.¹³⁰ "According to a summary of the fiscal impact by California's Legislative Analyst, Prop [sic] 187 would result in annual savings of about \$200 million to the state and local governments, as a result of reduced costs for public services."¹³¹

On the other hand, immigration reform opponents argue that the preceding statistics misrepresent reality. They claim that immigration is good for the United States.¹³² They assert that immigrants are employed in positions that Americans historically dislike,¹³³ and there-

121. Brooks, *supra* note 6, at 156 (quoting Maria Enchautegui, a research associate at the Urban Institute in Washington and author of a recent institute study).

122. Brooks, *supra* note 6, at 157 (citing DONALD HUDDLE, *THE COSTS OF IMMIGRATION (EXECUTIVE SUMMARY)* (1993)).

123. Brooks, *supra* note 6, at 157 (citing *e.g.*, HUDDLE, *supra* note 122). "The study utilized 1990 census data, research by the Auditor General of California and the County of Los Angeles, and field research by academic economists George Borjas, David Card, Joseph Altonji, Vernon Briggs, and David Simcox." *Id.*

124. Brooks, *supra* note 6, at 157-58.

125. *Id.*

126. *Id.*

127. *Id.*

128. *E.g.*, Francis, *supra* note 22, at 81.

129. Brooks, *supra* note 6, at 149 (citing Sabin Russell, *Health Reform's Outcasts—No Coverage for Illegal Residents*, S.F. CHRON., Aug. 2, 1993, at A15).

130. Lee, *supra* note 116.

131. Colino, *supra* note 65, at 17.

132. See generally JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989).

133. Brooks, *supra* note 6, at 147; *e.g.*, Francis, *supra* note 22, at 79.

fore, they are not a burden on society.¹³⁴ The unemployed American population, whether qualified or not, desires more specialized jobs with higher paying wages. Farm labor jobs customarily held by immigrants are neither specialized nor high paying. One opponent argues: "Immigrants do not hurt our country, do not take jobs from us, do not take from the Government. Rather, they invigorate our country, enrich our economy, and ennoble our Government."¹³⁵ Similarly, others assert: "[T]he studies are clear that legal immigrants net out a positive economic contribution, not a negative one [a]nd the suggestion that legal immigrants burden their communities more than Americans who are already here is a fallacious one."¹³⁶

Although the government in the state of California would save approximately \$200 million, opponents maintain that it would require "tens of millions of dollars" each year in managerial costs for certifying nationality.¹³⁷ This would analogously jeopardize "\$15 billion in federal financing for public services due to conflicts with federal laws."¹³⁸ In a recent investigation done by the U.S. Bureau of Labor Statistics, U.S. born residents exhaust more welfare assistance and governmental aid than immigrants.¹³⁹ It is estimated that immigrants pay between \$12,000 and \$20,000 more to the government than they consume from the government.¹⁴⁰ Even if immigrants acquire forged labor licenses, they are inclined to pay their taxes instead of relying on governmental aid.¹⁴¹

IX. THE FUTURE OF PROPOSITION 187

The Supreme Court will ultimately be required to make a decision on Proposition 187. Declining to consider this appeal would result in a deferral to states' rights. Declaring Proposition 187 unconstitutional would perpetuate the impossible situation of establishing federal requirements without also providing a mechanism by which those requirements may be accomplished at a state and local level. Amending the Constitution to define the status of illegals and their children as non-citizens establishes clear guidelines for distribution of social benefits but may ultimately threaten NAFTA and similar agreements with those nations viewing this action as a closed gate to their citizens.

Declining to consider this case will result in a states' rights issue

134. Brooks, *supra* note 6, at 147; *e.g.*, Francis, *supra* note 22, at 79.

135. 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of John Miller).

136. 136 CONG. REC. H8713 (daily ed. Oct. 3, 1990) (statement of Sen. Packard).

137. Colino, *supra* note 65, at 17.

138. *Id.*

139. 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of John Miller).

140. *Id.*

141. Brooks, *supra* note 6, at 163; *e.g.*, Francis, *supra* note 22, at 81 n.16.

with variable rights for illegal immigrants and their children according to which state they happen to be in at the time. Previous Supreme Court decisions have burdened states with requirements for education and welfare benefits for children of illegals. Simultaneously, the states are required to provide social benefits in the absence of a mechanism to accomplish the federal mandate. To those states most affected, this has contributed to serious fiscal imbalances, some communities having gone bankrupt on a local level while trying to comply with federal requirements. The communities would also have to carry the responsibility of dealing with making unpopular decisions in the volatile atmosphere of reducing social benefits in one state, while another state may not choose to face the heat generated by reforming benefits for children of illegals.

Making Proposition 187 a states' rights issue is not the answer. Overturning Proposition 187 simply returns the states to their current status of impossibility. Clearly defining the Fourteenth Amendment is the only method to avoid the imbalances of further federal hypocrisy.

The Fourteenth Amendment clearly establishes citizenship requirements. Those who immigrate and meet the naturalization requirements should become citizens. Those who do so illegally should not become citizens. The need for clear definition regarding the children of illegals is paramount. The key to the resolution of this dilemma is held in the mechanism of implementation. Either the United States Government is able to provide a mechanism for providing for jurisdiction and social benefits for children of illegals or it is not. If the mechanism is present, then the amendment should be so defined. If the mechanism is not present, then the amendments should simply indicate that the children of illegals have the same rights as their parents.

X. WHY PROPOSITION 187 SHOULD BE UPHELD BY THE U.S. SUPREME COURT

Inevitably, the demonstrations of social disgust at such a proposal will be popular news footage. Those non-citizens with reduced social privilege will suffer a new status. The magnet for illegal immigration will be reduced. NAFTA and other trade agreements will survive because they are based upon economies becoming healthier. Productive citizens will enjoy greater benefits and the non-productive will be stimulated to seek productive, legal activity. The natural rights of legal citizens will be enhanced and preserved, and those who embrace illegal immigration for future gain will no longer be a threat to the United States.

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