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IMMIGRATION POSSES: U.S. IMMIGRATION LAW AND LOCAL ENFORCEMENT PRACTICES

*Kevin J. Fandl**

ABSTRACT

The failure of the United States Congress to pass comprehensive immigration legislation at a time when the issue of immigration has reached a boiling point has created an overwhelming demand by citizens for local reform. States have responded by enacting hundreds of laws that regulate immigration at the state level. This creates significant tension both between states with conflicting laws—which creates havens in some states and rampant enforcement in others—and between states and the federal government, which is ultimately responsible for regulating immigration law. This article examines the history of immigration legislation since the founding of the United States and looks at where the federal and state governments are today in meeting citizen demand for reform. It explores the relationship between state and federal enforcement of immigration law. Finally, it provides recommendations for effective reform and insights into why the current approach is likely to fail.

I. INTRODUCTION

Today, there are over nine million undocumented immigrants living in the United States.¹ Between a half-million and one million undocumented immigrants arrive each year. They account for roughly 5% of the total U.S. labor force. The vast majority of these immigrants work outside the agriculture sector.² We depend on these workers to fill construction, food processing, and maintenance jobs. Most of these workers have been in the U.S. for more than five years, and a large number have been in the U.S. more than ten years.³ According to a recent independent task force report, “[w]ithout immigration, we cannot sustain the growth and prosperity to which we have become accustomed.”⁴

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1. NAT’L IMMIGR. FORUM, BACKGROUND, IMMIGRATION ENFORCEMENT: WHAT HAS BEEN TRIED? WHAT HAS BEEN THE RESULT? 1 (2005), <http://www.immigrationforum.org/documents/TheDebate/EnforcementBorderInterior/EnforcementFactsBackground.pdf>.

2. *Id.* at 2.

3. *Id.*

4. INDEP. TASK FORCE ON IMMIGR. AND AMERICA’S FUTURE, IMMIGR. POLICY INST., IMMIGRATION AND AMERICA’S FUTURE: A NEW CHAPTER xvi (2006), available at <http://www.migrationpolicy.org/>

Despite this apparent demand for migrant labor in the U.S., there is significant concern over the presence of undocumented workers. The concern arises from three primary issues: 1) whether the presence of undocumented workers indicates a failed border policy that opens the possibility for terrorists or contraband to cross just as easily as undocumented immigrants; 2) whether these undocumented immigrants are draining social services such as education and welfare, and; 3) whether these undocumented immigrants are taking jobs that legal residents should have access to. Comprehensive immigration reform has attempted to respond to each of these concerns with a broad new immigration policy. However, due to the complexities of such a task, federal-level reform has been elusive.

This article addresses the reaction that states have had to the failed federal-level reform. I discuss the current practice of local and state law enforcement officials in enforcing, and in many cases enacting their own immigration laws within their jurisdictions. I begin with a historical examination of immigration law by looking at the change in policy perspectives since the founding of the United States. Then, I explain the policy and procedures being initiated both by Congress and at the local and state levels to enhance enforcement of immigration laws and how these operate in a federalist structure. Finally, I provide some brief recommendations for developing future immigration enforcement policy in order to craft a more effective system that balances the overwhelming supply and clear demand for immigrant labor in a country founded by immigrants.

II. FEDERAL IMMIGRATION LAW IN HISTORICAL CONTEXT

Benjamin Franklin was an early advocate of regulation on immigration. He was frustrated with the increase in the number of Germans entering Pennsylvania at the time and their unwillingness to learn English.⁵ However, George Washington took a more inclusive view of immigration policy:

The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions; whom we shall welcome to participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.⁶

Washington's argument carried the day in the passage of the first immigration law in the United States.

The United States passed its first immigration law in 1790, which formally moved the topic of immigration from state to federal control and which established a uniform rule of naturalization by requiring residence for two years.⁷ This residence requirement

task_force/new_chapter_summary.pdf.

5. See, e.g., ALAN HOUSTON, *BENJAMIN FRANKLIN AND THE POLITICS OF IMPROVEMENT* 137 (2008).

6. OTIS L. GRAHAM, *UNGUARDED GATES: A HISTORY OF AMERICA'S IMMIGRATION CRISIS* 4 (2004) (describing a 1783 letter from George Washington to a group of Irish immigrants).

7. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

was expanded to five years in 1795, where it remains today.⁸ It was not until 1798 that an alien registry was established and records of arriving aliens were kept.⁹ The following week, the first deportation law was established, allowing the deportation of any alien that the President deems to be dangerous to the United States.¹⁰ The scope of immigration laws in the eighteenth century did not go beyond establishing a residency period to become a citizen, forging the first immigrant registry, and giving the president the authority to deport dangerous aliens.

The first significant immigration law was the Steerage Act of 1819, which established continuing reporting requirements for all arriving vessels.¹¹ These reporting requirements were expanded upon over the subsequent years; however, not until 1862 was a prohibition on the type of immigrant enacted.¹² Thus, all non-dangerous immigrants were allowed entry into the United States and an opportunity to become citizens through the beginning of the Civil War.

In 1864, the first immigration commissioner was established to serve under the authority of the Department of State, establishing immigration as a foreign affairs concern.¹³ Explicit prohibitions on entry were passed in 1875. At first, only criminals and prostitutes were prohibited from entering the United States. In addition, bringing Oriental "coolies" to the United States to work as laborers without their voluntary consent was made a felony offense.¹⁴ In 1882, the Chinese Exclusion Act was passed, which remained in effect through 1943. This Act suspended Chinese laborer immigration, prohibited Chinese naturalization, and allowed Chinese illegally present in the U.S. to be deported.¹⁵

The Immigration Act of 1882 established immigration controls under the Department of the Treasury and expanded the class of inadmissible aliens.¹⁶ The first labor-based immigration laws were passed in 1885, which made it unlawful to import immigrant labor unless the immigrant was working as a foreign aid, actor, artist, lecturer, domestic servant, or skilled alien in an industry not yet established in the United States.¹⁷ In 1888, this Act was given more force by allowing the expulsion of aliens that arrived in violation of the labor-based immigration laws.¹⁸ At the end of the Eighteenth century, the focus of immigration law began shifting to the impact of immigration on labor.

What might be considered equivalent to comprehensive immigration reform in the nineteenth century—the Immigration Act of March 3, 1891—was enacted, which established the Bureau of Immigration within the Department of the Treasury and gave

8. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (repealed 1802).

9. Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802).

10. Act of June 25, 1798, ch. 58, 1 Stat. 570 (1798) (expired in 1800).

11. Act of Mar. 2, 1819, ch. 46, 3 Stat. 488.

12. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (prohibiting the transport of Chinese "coolies" on American vessels).

13. Act of July 4, 1864, ch. 246, 13 Stat. 385 (repealed in 1868).

14. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

15. Act of May 6, 1882, ch. 126, 22 Stat. 58.

16. Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

17. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.

18. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565.

the Secretary authority to pass rules for the inspection of aliens at the border.¹⁹ It also allowed for the deportation of any alien entering the United States unlawfully. The new Bureau was transferred to the Department of Commerce and Labor in 1903.²⁰ In 1907, the President was given authority to exclude aliens on the basis of impact to the U.S. labor market, highlighting concern about U.S. jobs for the first time.²¹

The first quantitative restriction on the entry of aliens was passed in 1921 with the Quota Law.²² The first limit was set at 3% of the foreign-born population in the United States during the 1910 census. In 1940, in the midst of the Second World War, the concern over immigration again changed, this time from a labor matter to a national security matter. The Immigration and Naturalization Service was transferred to the Department of Justice where it would morph into a national interest, rather than merely a labor market interest.²³ Over the intervening years, restrictions were placed on the entry of groups such as communists and anarchists, and the country's first refugee and asylum laws were enacted.

The Immigration and Nationality Act ("INA") that is still the basis for federal immigration law today was passed on June 27, 1952.²⁴ This Act enacted sweeping reforms and unified prior immigration legislation. In addition to removing restrictions based on race or sex, the INA changed the quota level to 1/6 of 1% of foreign-born aliens in the United States in 1920, expanded the class of deportable or excludable aliens, and established a centralized registration database. The quota system codified in the INA was eliminated by the Immigration and Nationality Act Amendments of 1965.²⁵ However, numerical restrictions were maintained with entry limits based on region. These amendments also added a requirement that the Secretary of Labor certify that a United States worker will not be displaced by an alien upon the issuance of a visa.²⁶ In 1978, the limit on immigrants was condensed to a worldwide maximum of 290,000.²⁷

The next major immigration legislation to be enacted was the Immigration Reform and Control Act of 1986 ("IRCA").²⁸ IRCA granted what might be considered amnesty to all aliens that were out of legal status and that had been since January 1, 1982. It also turned enforcement toward employers of unlawful alien workers. The Act also focused on border protection and established a classification for seasonal workers. Immigration law was again reformed substantially with the Immigration Act of 1990.²⁹ The cap for total immigrants to the United States was raised to 675,000 with a provision for yearly increases. Many categories of admission were rewritten, including the worker visa provision (H-1b), which received its first limit of 65,000 per year. Border protection

19. Ch. 551, 26 Stat. 1084.

20. Act of Feb. 14, 1903, Pub. L. No. 57-87, § 4, 32 Stat. 825, 826.

21. Immigration Act of Feb. 20, 1907, Pub. L. No. 59-96, § 1, 34 Stat. 898, 898.

22. Act of May 19, 1921, Pub. L. No. 67-5, § 2(a), 42 Stat. 5, 5.

23. Act of June 14, 1940, Pub. L. No. 76-75, § 3, 54 Stat. 230, 231.

24. Pub. L. No. 82-414, 66 Stat. 163.

25. Pub. L. No. 89-236, sec. 1, § 201(b), 79 Stat. 911, 911.

26. Sec. 3, § 201(b), 79 Stat. 911-13.

27. Act of Oct. 5, 1978, Pub. L. No. 95-412, sec. 1, § 201(b), 92 Stat. 907, 907.

28. Pub. L. No. 99-603, 100 Stat. 3359.

29. Pub. L. No. 101-649, 104 Stat. 4978.

and employer sanctions were again emphasized in this Act.

With the 1993 passage of the North American Free Trade Agreement, Canadian and Mexican workers were given temporary admission to work in the United States.³⁰ Canadians were not limited in number nor did they have to acquire a petition, labor certification or prior approval to enter. Mexicans, however, were limited to 5,500 per year and required all of those things.³¹ In 1996, two more major reforms were passed, the Antiterrorism and Effective Death Penalty Act (“AEDPA”)³² and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).³³ AEDPA focused largely on alien terrorists and criminals,³⁴ whereas the IIRIRA addressed border security, worksite enforcement and enacted tough restrictions on alien benefits.³⁵

Immigration again rose to the forefront of national security legislation immediately following the attacks on the United States in September, 2001. The USA PATRIOT Act of 2001 focused squarely on the role of immigration in combating terrorism.³⁶ It tightened border enforcement and increased federal authority to investigate potential terrorist activity, among other things. The Homeland Security Act of 2002 moved the INS to its new home within the newly created Department of Homeland Security (“DHS”). This move was largely made in an effort to align immigration enforcement with the war on terrorism.³⁷

While there are a significant number of small changes related to immigration law since its inception in the eighteenth century in the United States, the recent flurry of activity both at the state and federal levels is indicative of both the growing population and the growing concern over who is crossing the border. While early legislation aimed to limit the growth of the United States by nationality, the twentieth century saw a shift toward preventing entry for labor, and later for security concerns. As the world becomes more interdependent and travel becomes easier, security becomes an even greater concern and one that immigration law has struggled to address. Failure to address this issue at the national level has led many state governments to take matters into their own hands.

III. FEDERAL IMMIGRATION LAW TODAY

Historically, U.S. immigration law has been within the domain of federal law and supersedes any similar state or local legislation.³⁸ In general, a federal immigration

30. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 341(a)-(b), §§ 214(e)(2)-(5), 107 Stat. 2057, 2116-17 (1993).

31. *Id.*

32. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

33. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

34. § 401, 110 Stat. 1214 (1996).

35. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

36. Pub. L. No. 107-56, Titles IV-V, 115 Stat. 272, 342-68 (2001).

37. See, e.g., *Role of Immigration on the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. On the Judiciary*, 107th Cong. 14-16 (2002) (statement of Mark Krikorian, Executive Director, Center for Immigration Studies).

38. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); see, e. g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chy Lung v.*

officer³⁹ is an employee of DHS working on immigration-related issues. Immigration officers have special authorities and responsibilities with respect to the questioning, detention and search of immigrants at the border and in the interior of the United States.

For instance, immigration officers are vested with the right to briefly detain a person if they have reasonable suspicion that the person being questioned is an illegal alien in the United States. Also, immigration officers may question, without a warrant, any alien or person believed to be an alien as to his right to be, or to remain, in the United States. Questioning, alone, does not constitute a Fourth Amendment seizure. The person being interviewed, however, must voluntarily agree to remain during questioning. If the individual refuses to speak to the officer, absent reasonable suspicion that the individual is unlawfully present, the individual may not be detained.

However, with the 1996 passage of AEDPA⁴⁰ and IIRIRA,⁴¹ state and local law enforcement officials were given explicit authority to arrest and detain certain illegal aliens. Now:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.⁴²

It is well settled that immigration officers have the authority to temporarily detain a person to ask about their immigration status.⁴³ This authority is statutorily conferred upon immigration officers via the INA.⁴⁴ However, this authority vests only in federal officers. The statutory restrictions placed upon local and state law enforcement officers limit their ability to coordinate broad-scale immigration law enforcement on a local level. Yet it is evident that some state and local immigration enforcement activities

Freeman, 92 U.S. 275 (1876); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Passenger Cases*, 7 How. 283 (1849).

39. This term includes Department of Homeland Security employees that are immigration officers, inspectors and examiners, adjudications officers, Border Patrol agents, aircraft, airplane and helicopter pilots, deportation, detention and detention enforcement officers, investigators, special agents, investigative assistants, immigration enforcement agents, intelligence officers and agents, general attorney (practicing immigration law), applications adjudicators, contact representatives, legalization adjudicators, officers and assistants, forensic document analysts, fingerprint specialists, immigration information officers, immigration agents, asylum officers, or any Customs officer. See 8 C.F.R. § 103.1(b) (2008).

40. Antiterrorism and Effective Death Penalty Act § 439, 8 U.S.C. § 1252c (2006).

41. Illegal Immigration Reform and Immigration Responsibility Act, sec. 133, § 287(g).

42. 8 U.S.C. § 1252c(a)(1)–(2) (2006).

43. See, e.g., *Zepeda v. Immigration and Naturalization Service*, 753 F.2d 719 (9th Cir. 1983); *Ojedales v. Immigration and Naturalization Service*, 523 F.2d 286 (2d Cir. 1975).

44. Immigration and Nationality Act of 1952 § 287(a)(1), 8 U.S.C. § 1357(a)(1) (2006).

have recently taken place. To what extent are local and state law enforcement officials permitted to enforce federal immigration law? Further, does the growth of state and local enforcement of immigration law undermine the intent to make immigration enforcement a federal matter? To answer these questions, we must understand what role the state and local authorities are playing in immigration law enforcement.

IV. STATE AND LOCAL LAW ENFORCEMENT PRACTICE

As of November 2007, 46 states had enacted some form of legislation related to immigrants.⁴⁵ Over 1,562 bills were introduced in all 50 states. This is an increase of nearly 300% over 2006, indicating a strong push at the state level to fill gaps left by the lack of comprehensive immigration reform at the federal level.⁴⁶

The state legislation that has passed into law covers a variety of topics that affect immigrant residents, reflecting the environment for migration in that state. The National Conference on State Legislatures 2007 Report discussing these laws gives a good indication as to what the primary concerns of the states are and where they stand on illegal immigration. While broad generalizations would be inappropriate, we can deduce from the Report that certain states have been more active in restricting access to work, driver's licenses, and other state-level benefits (Arizona, Texas, South Carolina, Oregon, Virginia, Indiana, Kansas, Louisiana, Tennessee, Florida and Idaho) or in granting such access (California, Connecticut, Illinois, Pennsylvania, New York, Montana, Massachusetts and Maryland). Interestingly, although immigration cuts across party lines in many areas, state legislation enacted in republican-oriented states was largely more restrictive upon immigrants whereas that in democratic-oriented states it was generally less restrictive.⁴⁷

Some of the legislation that passed the state legislatures found agreement amongst a significant group of states, including legislation that tightened restrictions against human trafficking, healthcare for immigrant children, and legislation that punished employers for employing unauthorized workers.⁴⁸ Divisions in state sentiments arose in the areas of education, public benefits, legal services and identification. For instance, while California passed a law requiring state community colleges to favor refugees and bilingual applicants in their admissions criteria,⁴⁹ South Carolina passed a law specifying that undocumented immigrants may not receive tuition assistance or any other student aid for education in South Carolina.⁵⁰ With respect to health, Illinois passed two laws providing some health care coverage to immigrants over 65 years of age, regardless of legal status (unless in deportation proceedings) and a third law

45. NATIONAL CONFERENCE ON STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2007), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf> [hereinafter NCSL REPORT].

46. *Id.*

47. Based on the electoral college votes in the 2000 U.S. election (Oregon and Montana being exceptions to this assertion).

48. NCSL REPORT, *supra* note 45 at 6–10, 13–16.

49. *Id.* at 4 (referring to Community College Registered Nursing Program: Multicriteria Screening Process, Cal. Educ. Code § 78261.5 (West 2007)).

50. *Id.* at 6, *citing* H.B. 3620, 117th Gen. Assem (S.C. 2007).

funding community and migrant health centers.⁵¹ Many other states enacted similar legislation.

Identification cards, including driver's licenses, proved more controversial in state legislatures. Montana and Georgia limited the implementation of the federal REAL ID Act, which would require certain checks on identity by DHS.⁵² New York provided waivers for certificates to become a teacher or veterinarian for aliens.⁵³ Pennsylvania waived the citizenship requirement for public school teachers and allowed foreign nurses to receive Pennsylvania nursing certification.⁵⁴ Indiana, however, passed legislation requiring driver's licenses to expire along with the alien's visa date,⁵⁵ Kentucky passed a law requiring driver's license applicants to be in lawful status,⁵⁶ and Missouri requires driver's license applicants to be either United States citizens or lawful permanent residents.⁵⁷

With respect to legal services, two states, Indiana and Maryland, passed legislation expanding access for aliens to documentation in their own language and legal support services.⁵⁸ Oregon is the only state that passed a law making it illegal to provide an immigration consultation unless it is provided by an active member of the Oregon bar.⁵⁹ Several miscellaneous laws were also passed, including a declaration that English is the official language of Kansas,⁶⁰ that aliens pay an additional \$50 registration fee for registering their motor home in Florida,⁶¹ that funding be made available to build migrant housing in Michigan,⁶² and that a Citizenship for New Americans Program be created to help legal permanent residents acquire citizenship in Massachusetts.⁶³

The hodgepodge of current state legislation on immigration is indicative of the complexity of the issue. There is broad disagreement about the best approach to managing a growing supply of immigrants against substantial concern over national security and labor matters. Agreement does seem feasible in the areas of employer sanctions, immigrant healthcare and human trafficking; however, these issues are much less controversial than border control, public benefits, job opportunities and identification cards. Also, the areas in agreement have already largely been legislated

51. *Id.* at 11 (citing H.B. 664, 95th Gen. Assem. (Ill. 2007), H.B. 1257, 95th Gen. Assem. (Ill. 2007), and S.B. 241, 95th Gen. Assem. (Ill. 2007)).

52. *Id.* at 17 (citing S.B. 5, 2007-08 Gen. Assem. (Ga. 2007)); *id.* at 18 (citing H.B. 287, 2007 Leg. (Mont. 2007)).

53. NCSL REPORT, *supra* note 45 at 19 (referring to 2007 N.Y. Sess. Laws Ch. 612 (A. 8975) (McKinney) and 2007 N.Y. Sess. Laws Ch. 201 (S. 4083-B) (McKinney)).

54. *Id.* at 20 (referring to 2007 Pa. Legis. Serv. Act 2007-45 (H.B. 842) (West) and 2007 Pa. Legis. Serv. Act 2007-49 (H.B. 1254) (West)).

55. *Id.* at 20 (referring to 2007 Ind. Legis. Serv. P.L. 184-2007 (S.E.A. 463) (West)).

56. *Id.* at 18 (referring to 2007 Ky. Acts Ch. 23 (HB 144)).

57. *Id.* at 18 (referring to 2007 Mo. Legis. Serv. S.B. 308 (West)).

58. NCSL REPORT, *supra* note 45 at 23 (referring to 2007 Ind. Legis. Serv. P.L. 85-2007 (S.E.A. 445) (West), 2007 Maryland Laws Ch. 488 (H.B. 51)).

59. *Id.* at 23 (referring to 2007 Or. Laws Ch. 61 (H.B. 2356)). Note that non-attorneys are permitted to represent immigrants in immigration court proceedings; however, there have been recent cases alleging fraud in the conduct of such representations.

60. *Id.* at 24 (referring to 2007 Kansas Laws Ch. 186 (H.B. 2140)).

61. *Id.* at 23 (referring to 2007 Fla. Sess. Law Serv. Ch. 2007-242 (C.S.C.S.H.B. 275) (West)).

62. *Id.* at 24 (referring to 2007 Mich. Legis. Serv. P.A. 128 (S.B. 222) (West)).

63. NCSL REPORT, *supra* note 45 at 24 (referring to 2007 Mass. Legis. Serv. Ch. 61 (H.B. 4141) (West)).

upon at the federal level.

Immigration benefits, including education, healthcare, and drivers' licenses, have been found to be acceptable legislative acts by states. In *DeCanas v. Bica*, the U.S. Supreme Court held that state law would be preempted if it attempted to regulate immigration or make it impossible to comply with federal immigration law.⁶⁴ This decision has been applied to preempt state laws that require verification of immigration status in order to provide benefits,⁶⁵ or requirements to carry certain immigration documentation at all times,⁶⁶ for instance. Most states are within their rights to regulate the provision of benefits, but they cross into preempted territory when they attempt to effectuate enforcement actions, which is the subject of the following section.

A. Federal Response to State Demands

Due to public and Congressional discontent with the fact that immigration law enforcement was resigned solely to federal officials and that local and state officers were prevented from enforcing immigration laws in their own jurisdictions, legislation was passed that explicitly authorized local and state law enforcement agencies to enforce federal immigration laws, albeit with strict restrictions and federal oversight. In recommending the passage of such legislation, California Republican House Representative John Doolittle stated, "My amendment is supported by our local law enforcement because they know that fighting illegal immigration can no longer be left solely to Federal agencies. Let us untie the hands of those we ask to protect us and include my amendment in H.R. 2703 today."⁶⁷ According to the Tenth Circuit's interpretation of the Congressional Record associated with H.R. 2703:

[T]he purpose of § 1252c was to displace a perceived federal limitation on the ability of state and local officers to arrest aliens in the United States in violation of Federal immigration laws. This legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers.⁶⁸

Congress passed H.R. 2703, which added § 1252c to Title VIII of the U.S. Code, in 1996. This section explicitly permits state and local law enforcement to arrest and detain an individual who has been confirmed by immigration authorities to be an illegal immigrant and who has been convicted of a felony.⁶⁹

It is important to note that the new legislation does not confer broad arrest authority on state and local officials for immigration violations. Not only must illegal status first be confirmed by federal authorities, the alien must have been convicted of a felony or deported after such a conviction to allow for local or state arrest. Without this felony

64. 424 U.S. 351 (1976).

65. *LULAC v. Wilson*, 908 F. Supp. 755, 769–71 (C.D. Cal. 1995).

66. *State of Louisiana v. Neri Lopez*, 948 So. 2d 1121 (La. Ct. App. 4th Cir. 2006).

67. H.R. Res. 2703, 104th Cong., 142 Cong. Rec. 2191 (1996) (enacted) (comments of Rep. Doolittle).

68. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298–99 (10th Cir. 1999).

69. 8 U.S.C. § 1252c(a); *see also* INA §287(g)(1), 8 U.S.C. § 1357(a)(4)–(5).

conviction, or some other criminal activity that gives rise to probable cause,⁷⁰ only a federal officer may arrest the alien.⁷¹ Accordingly, this new legislation confirmed what some cases had already inferred—state and local officials have authority to detain illegal aliens who have been convicted of a felony or have reentered the country after being deported pursuant to such a felony. In addition, a state or local law enforcement agency that is interested in pursuing immigration enforcement activities directly must coordinate with U.S. Immigration and Customs Enforcement (“ICE”) to acquire the necessary training for cross-designation as immigration officers. This cross-designation is coordinated through the 287(g) program,⁷² which allows ICE to designate and train certain state and local law enforcement officers in immigration enforcement procedures and laws. This designation gives them only the authority permissible by the statute, but ensures that they perform their duties with appropriate knowledge of U.S. immigration law and under the direct supervision of federal officers.

The first major case arising out of this cross-designation legislation was *U.S. v. Vasquez-Alvarez* in 1999.⁷³ The court explained:

In particular, the United States observes this court has long held that state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law. In fact, this court has held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws.⁷⁴

Over the past several years, in accordance with that power, state and local legislatures have proposed over 100 ordinances and enacted at least forty ordinances permitting local enforcement of immigration laws.⁷⁵ Ordinances and regulations intended to legislate the local enforcement of immigration law are likely preempted by federal law. In July 2007, one such ordinance was struck down as unconstitutional by a federal court, potentially setting a precedent for other similar ordinances. The case, *Lozano v. City of Hazleton*, involved a local Pennsylvania ordinance that punished landlords or employers that were found to rent to or hire illegal immigrants. In the case, Judge Munley stated, “[t]he city could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not. The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public.”⁷⁶ The Pennsylvania Bar Association, the American Civil Liberties Union, and other groups reacted positively to this decision, finding that enforcement of immigration laws is a federal concern.⁷⁷

70. *Vasquez-Alvarez*, 176 F.3d at 1294.

71. *Id.*

72. INA § 287(g)(1), 8 U.S.C. § 1357(a)(4)–(5).

73. *Vasquez-Alvarez*, 176 F.3d at 1294.

74. *Id.* at 1296 (internal citations omitted); see *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983); see also *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 at n.3 (10th Cir. 1984).

75. Emily Bazar, *Town’s Illegal Immigration Law Tossed Pa. Locality Vows to Appeal Ruling*, USA TODAY, July 27, 2007, at 3A.

76. See *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 555 (M.D. Penn. 2007).

77. See, e.g., PABAR, *Pennsylvania Bar Association Supports Ruling in Hazleton Case*,

However, other groups, including the Federation for American Immigration Reform (FAIR), argued that the legislation in Hazleton would have allowed local authorities an avenue to prevent a growing problem that they lack the tools to stop. They intend to take the *Lozano* case to the Supreme Court along with the City of Hazleton.⁷⁸ Even if the high court were to accept the case for review, it is unlikely that they will find any merit to the Hazleton law as it is in direct contravention of both the Constitutional designation of immigration law as a federal concern and to the recent statutory authority granting local and state governments limited immigration enforcement power under strict conditions. Yet, like the civil rights rulings against racial discrimination in the 1960s, this Hazleton decision is also unlikely to stop local and state legislatures from seeking mechanisms to take enforcement into their own hands.

B. Scope of Authority

With the recent passage of several local and state-based immigration enforcement laws, it is imperative to determine the scope of permissible enforcement for local and state officials. Non-immigration officials would be permitted under current federal law to stop potential illegal immigrants and ask them general investigatory questions, including questions regarding their immigration status in the U.S. However, how far does local and state immigration law enforcement authority go?

It is well accepted that a police officer is free to ask a person for identification without implicating the Fourth Amendment.⁷⁹ “[I]nterrogation relating to one’s identity or a request for identification does not, by itself, constitute a Fourth Amendment seizure.”⁸⁰ Unless the circumstances of the encounter are so intimidating that a reasonable person would have believed he was not free to leave unless he responded, such questioning does not result in a Fourth Amendment seizure.⁸¹

A “seizure” or detention within the meaning of the Fourth Amendment includes more than general questioning. The basis for a stop must be the reasonable suspicion of the official that the person has been or is engaged in criminal activity. This activity could reasonably be illegal presence in the country.

Aliens, both legal and illegal, are protected, at least partially, by the Fourth and Fifth Amendments and courts may suppress the aliens’ pre-Miranda statements if the aliens were subjected to improper custodial interrogation, followed by criminal prosecution.⁸² Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Even questioning with respect to alienage,

<http://www.pabar.org/public/news%20releases/pr072607.asp>; ACLU, Federal Court Strikes Down Discriminatory Anti-Immigrant Law in Hazleton, Pennsylvania, <http://www.aclu.org/immigrants/discrim/31057prs20070726.html>.

78. See, e.g., FAIR, District Court Ruling is Not the End of the Road for Local Anti-Illegal Immigration Ordinances, http://www.fairus.org/site/PageServer?pagename=media_release7262007.

79. *Hibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 185 (2004).

80. *Id.* (quoting *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 216 (1984)).

81. *Delgado*, 466 U.S. at 216.

82. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

if alienage is an element of the crime being pursued, should not proceed without first providing *Miranda* warnings if an alien is in custody⁸³:

[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person, and the Fourth Amendment requires that the seizure be “reasonable.” As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.⁸⁴

Reasonable suspicion that criminal activity may be occurring is the established minimum standard for an officer of the law to stop a person for initial questioning.⁸⁵ The Court’s decisions make clear that questions concerning a suspect’s identity are a routine and accepted part of many *Terry* stops. “Obtaining a suspect’s name in the course of a *Terry* stop serves important government interests,” to include informing the officer whether a suspect is wanted for another offense, has a record of violence or mental disorder, or possibly clearing a suspect to allow the police to concentrate their efforts elsewhere.⁸⁶

However, “[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”⁸⁷ Reasonable suspicion may include questioning regarding a person’s immigration status.⁸⁸ It should be noted here that reasonable suspicion is not required for searches that take place at an international border, such as in an airport or seaport.

Establishing reasonable suspicion to stop a potential illegal immigrant requires some indication that criminal activity may be afoot. Stops based solely on the use of another language are unreasonable.⁸⁹ In addition, “[a] characteristic common to both legal and illegal immigrants does little to arouse reasonable suspicion” of illegal status.⁹⁰

Without reasonable suspicion, a local or state law enforcement stop is inherently unreasonable. In *Alarcon-Gonzalez*, law enforcement officers acquired a list of local roofing companies that might have been employing illegal immigrants. The list could make a case for reasonable suspicion to investigate workers at job sites run by those companies. However, this did not give the officers a reasonable basis to suspect that *Alarcon-Gonzalez*, who was employed by a company not on that list, might be an illegal

83. Questions that relate to alienage may not be admissible in a prosecution for illegal reentry under 8 U.S.C. § 1326 or under 18 U.S.C. § 922(g)(5) if the alien is not provided *Miranda* warnings, as alienage is an element of each offense.

84. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (quoting *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968)).

85. *See Terry*, 392 U.S. at 27.

86. *Hibel*, 542 U.S. at 186.

87. *Brignoni*, 422 U.S. at 881 (quoting *Adams v. Williams*, 407 U.S. 143, 145–46 (1972)).

88. *United States v. Torres-Monje*, 433 F.Supp.2d 1028, 1034 (D.N.D. 2006). *See Muehler v. Mena*, 544 U.S. 93, 100–101 (2005).

89. *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006).

90. *Id.*

alien. When Alarcon-Gonzalez was stopped by several immigration and local law-enforcement officers, he was committing no crime. Because no visible criminal activity was found by the agents before the seizure, and because Alarcon-Gonzalez did not feel free to leave, this seizure was a violation of the Fourth Amendment.⁹¹

Questioning in order to identify or request identification does not constitute a Fourth Amendment seizure. However, the individual being interviewed must voluntarily agree to remain during questioning. To detain an individual beyond initial questioning requires reasonable suspicion that the individual has committed a crime, is an alien who is unlawfully present, is an alien who is either inadmissible or removable from the U.S., or is a non-immigrant who is required to provide truthful information to ICE upon demand.⁹²

Although it is well established that a law enforcement officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer⁹³:

A finding of reasonable suspicion requires a particularized and objective basis for suspecting the person stopped of criminal activity. This particularity requirement means, in effect, that such a finding must be grounded in specific and articulable facts. Moreover, the objective nature of the inquiry ensures that courts will focus not on what the officer himself believed but, rather, on what a reasonable officer in his position would have thought.⁹⁴

Officers may approach a person or vehicle without reasonable suspicion to engage in a consensual encounter. “[A] law enforcement officer does not trigger an individual’s Fourth Amendment protections simply by approaching the person in public and asking routine questions. The trigger point for Fourth Amendment purposes is the presence or

91. *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 292–93 (10th Cir. 1996); *see, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886–887 (1975) (apparent Mexican ancestry of occupants of car alone did not provide reasonable suspicion that they were illegal aliens).

92. 8 C.F.R. § 214.1(f) (2008).

93. Although 8 U.S.C. § 1357(a)(4)–(5) allows an immigration officer to arrest an alien when the officer has “reason to believe” the alien is illegally present in the United States, courts have consistently held that in this circumstance this phrase is equivalent to probable cause. *See United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975), *cert. denied*, 423 U.S. 1035 (1975). It should be noted that an alien’s presence, whether legal or illegal, in the territory of the U.S. initiates their protection under the United States Constitution. However, when an alien is stopped at a border crossing or on an air or sea vessel, they have limited procedural and Constitutional rights. Aliens standing on the threshold of entry are “not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States.” *Ma v. Ashcroft*, 257 F.3d 1095, 1107 (9th Cir. 2001). This distinction applies to excludable but not to deportable aliens. Furthermore, even an alien that has entered the territorial jurisdiction of the U.S. may have limited protections. The “entry fiction” doctrine classifies aliens seeking admission but not yet legally admitted to be detained at the border (even though actually within the interior). These aliens do in fact have certain Constitutional protections, but which protections they have is unclear. Case law indicates that certain substantive constitutional rights, including the Fifth Amendment’s due process clause, do apply to these aliens. However, procedural rights with respect to the alien’s application for admission do not apply. *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004). This distinction remains important even after the changes to the INA made by the IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996), which eliminated the term “entry” and replaced it with the term “admission.” *See* 8 U.S.C. § 1101(a)(13)(A) (2006). *See also Henderson v. INS*, 157 F.3d 106, 111 n.5 (2d Cir. 1998).

94. *United States v. Espinoza*, 490 F.3d 41, 47 (1st Cir. 2007) (internal quotations and citations omitted).

absence of some cognizable coercion or constraint.”⁹⁵ The test is whether an objectively reasonable person would have felt obligated to stay.

Immigrants on the interior of the United States are conferred with many of the same procedural and substantive Constitutional rights as citizens. For instance:

The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: “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.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.⁹⁶

There is no distinction between legal and illegal presence in terms of which Constitutional protections apply to aliens in the United States. “There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”⁹⁷

C. Preemption

The power to regulate immigration law has always been within the exclusive jurisdiction of the federal government.⁹⁸ The classic case establishing this point with regard to immigration law is *Hines v. Davidowitz*, which states in part:

When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting

95. *Id.* at 48 (internal citations omitted).

96. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

97. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

98. *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (“That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution was pointed out by authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court.”).

foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California statute burdening immigration: "If (the United States) should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"⁹⁹

However, this was not the only such expression of intent to explicitly contain immigration enforcement powers in the federal government.¹⁰⁰ Immigration law enforcement has long been perceived as either a formal agreement between countries or a customary international law based upon the general practice of nations. The Court in *Hines* explained:

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. This country, like other nations, has entered into numerous treaties of amity and commerce since its inception—treaties entered into under express constitutional authority, and binding upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents—duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens. Concerning such treaties, this Court has said: 'While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other.'¹⁰¹

The Preemption Doctrine of the United States Constitution stipulates that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

99. *Hines*, 312 U.S. at 62–64.

100. See, e.g., *Henderson v. Mayor of New York*, 92 U.S. 259, 271 (1876). See generally *Memoirs, 2 CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON* 230 (1829) (letter to Mr. Wythe). Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view in 1787: 'My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty. *Id.*

101. *Hines*, 312 U.S. at 65.

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰²

Immigration is considered to be an area in which states are explicitly preempted from operating.¹⁰³ “In addition, the Supreme Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”¹⁰⁴ The court in *Adolfo* pointed out that this preemption did not prevent states from becoming involved in some secondary aspects of immigration law enforcement. Citing *Gonzalez v. City of Peoria*, the court found that while state officials could not detain a person based solely upon their presumed illegal status, they could temporarily detain such persons while contacting border patrol to pursue the investigation. “Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.”¹⁰⁵

Accordingly, states were not prohibited *per se* from the investigation of aliens. They were always permitted to inquire into immigration status during a routine stop, for example. “A state trooper has general investigatory authority to inquire into possible immigration violations.”¹⁰⁶ In general, state officials have also been empowered with the ability to make arrests of illegal immigrants when there is another crime involved. States were also not prohibited from creating labor laws that would impact illegal aliens, so long as they did not preempt existing federal law.¹⁰⁷

However, states have been prohibited by law from enacting statutes or laws that would directly regulate or control treatment of aliens, which is considered to be an exclusively federal area of law.¹⁰⁸ According to *Hines*, federal power in foreign affairs, which trumps state power, includes power over immigration, naturalization and deportation.¹⁰⁹ Clearly, the fine line separating what is legitimate state exercise of power over enforcement of federal immigration laws has been adjusted by case law for years; however, the conclusion has almost always been in favor of preemption when the question involves immigration enforcement without secondary bases of investigation.

102. U.S. CONST., art. VI, cl. 2.

103. See *In re Adolfo M.*, 275 Cal. Rptr. 619, 625 (Ct. App. 1990).

104. *Lopez v. Immigration and Naturalization Serv.*, 758 F.2d 1390, 1392 (10th Cir. 1985) (internal citations omitted); see also *In re Adolfo M.*, 275 Cal. Rptr. at 625.

105. *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

106. *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984).

107. See *De Canas v. Bica*, 424 U.S. 351, 353–354 (1976) (reversing a California court ruling that prohibited states from regulating the employment of illegal aliens); see also Austin T. Fragomen, Jr., *Supreme Court Rules That States Can Prohibit Unauthorized Employment by Aliens*, 10 Int'l Migration Rev. 253 (1976).

108. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (finding that state laws restricting the eligibility of aliens for welfare benefits merely because of alienage conflict with overriding national policies in area constitutionally entrusted to federal government); see also *Hines*, 312 U.S. at 62 (where the federal government has enacted a complete scheme for regulation of aliens, and has therein provided a standard for their registration, a state cannot, inconsistently with the purpose of Congress, interfere with, curtail, or complement the federal law, or enforce additional or auxiliary regulations.).

109. *Hines*, 312 U.S. at 62.

V. IMMIGRATION REFORM POLICY AND PRACTICE

State and local legislatures have taken the power granted to them under section 1252(c), in addition to the apparent public support they have, and used it to pass aggressive immigration enforcement laws and policies. Public dissatisfaction with federal enforcement of immigration laws has led to this state action.¹¹⁰ Recent polls indicate that the majority of the American public support immigration reform or better enforcement of existing immigration laws.¹¹¹ Interestingly, a vast majority of those polled said that they found the number of people crossing the border, whether legal or illegal, was too high.¹¹² This response seems to indicate that the problem is not the fact of workers crossing the border and taking jobs without proper registration alone, but rather more broadly all workers coming into the interior and competing for U.S. jobs, whether as illegal aliens or as legitimately documented foreign workers.

Congress attempted to pass a comprehensive immigration reform bill in June of 2007, but it failed to achieve the necessary votes. The bill would have taken several steps aimed at reducing the presence of illegal immigrants on the interior of the U.S., as well as preventing the entry of additional illegal aliens with such things as a fence on the border with Mexico. It would also have expanded the temporary worker program to allow for more visas, and thus more legal immigrants.¹¹³ Since that time, Congress has been considering several new proposals, including an increase in the number of worker visas for immigrants, an increase in the number of visas for agricultural workers, and a pathway to citizenship for many immigrants already in the U.S.¹¹⁴ These are positive steps, but they fail to address the broader concern that illegal immigration is worsening not because of insufficient enforcement mechanisms, but rather because of ineffective immigration policy. These concerns are addressed in the following section.

VI. U.S. IMMIGRATION POLICY REFORM

The responsibility to reform the nation's immigration laws rests with the U.S. Congress and the President. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."¹¹⁵ Reform of the existing immigration system is necessary for several reasons. First, as globalization has dramatically changed the content of the global workforce, domestic laws need to synchronize as much as possible with the need for efficient and effective worker exchange. Second, illegal immigrants are on the rise both because economic conditions

110. See, e.g., Cecilia Kang, *Illegal Immigration Dominates Conversation in Prince William*, WASH. POST, July 23, 2007, at D02 (noting the passage of a county ordinance that requires police to question immigration status and that cuts public services for illegal immigrants).

111. See FEDERATION FOR AMERICAN IMMIGRATION REFORM, PUBLIC OPINION POLLS ON IMMIGRATION, available at http://www.fairus.org/site/PageServer?pagename=research_researchd74c.

112. *Id.*

113. See, e.g., Press Release, The White House, Fact Sheet: Securing America Through Immigration Reform (Nov. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/20051128-3.html>.

114. See Richard E. Cohen, *A Free Kick for the Democrats*, NAT'L J. MAG., July 21, 2007, available at http://www.nationaljournal.com.libus.csd.mu.edu/njmagazine/nj_20070721_9.php.

115. *Matthews v. Diaz*, 426 U.S. 67, 81 (1976).

are more prosperous in the United States and because the American economy demands cheap labor. Accordingly, stemming the flow of illegal immigrants will significantly affect American businesses and jobs. Without low-cost workers, many jobs would be sent overseas for lower labor costs or U.S. businesses may become less competitive as a result of higher domestic labor costs. Less immigrant labor in the U.S. will likely result in higher consumer good costs as well as fewer job opportunities for U.S. workers due to outsourcing and shifting jobs overseas.

To address this, reform advocates must look to temporary worker visa programs, streamlined citizenship application processes, and even foreign assistance to alleviate the conditions that perpetuate the demand for U.S. jobs.¹¹⁶ Demand for affordable, foreign labor is strong in the United States, and as developing countries continue to grow in population size more rapidly than developed countries, the shift of labor from the former to the latter is inevitable as a basic supply and demand issue.

Additionally, immigration laws need to be reformed to facilitate the transition of illegal immigrants and legal temporary workers into either lawful permanent residents or long-term temporary workers. A significant number of immigrants that live and work in the U.S. and that pay taxes, have not committed any major crimes, and have a desire to remain and continue contributing to the domestic economy, have very few avenues to do so. A program that facilitates their processing and offers them a clear and effective mechanism for legalization is essential to prevent jails and detention facilities from overflowing with illegal immigrants charged with little more than a lack of documentation.

A. *Build Bridges, Not Fences*

The suggestion and broad support for building a fence on the Southern United States border with Mexico not only may be impractical, it may also be ineffective. Immigration from Mexico over the past century has helped the American economy take a lead in economic growth by keeping labor costs low. Despite this role, workers in Mexico are still struggling to make ends meet. The average worker in Mexico earns \$8,340 per year,¹¹⁷ whereas the average Mexican immigrant worker in the U.S. earns \$18,952 per year.¹¹⁸ The difference is so great that the risk of death and deportation from crossing the border appears reasonable. Compared to the risk of a starving family in Mexico, many Mexicans cross the border multiple times after being caught and deported, hoping to one day work enough days in the United States to earn money to provide for the basic necessities of their families back home. Unfortunately the likelihood that they will die in the process is increasing, averaging one death per day over the last four years.¹¹⁹

The idea of building a fence on the border is meant to increase the costs of illegal

116. INDEP. TASK FORCE ON IMMIGR. AND AMERICA'S FUTURE, *supra* note 4 at xvii (asserting that any new strategy, to be effective, must increase the number of legally admitted workers).

117. THE WORLD BANK GROUP, DOING BUSINESS 1 (2008), available at <http://www.doingbusiness.org/ExploreEconomies/?economyid=127> (last visited Sept. 4, 2008).

118. CENTER FOR IMMIGRATION STUDIES, POVERTY AND INCOME (1999), available at <http://www.cis.org/articles/2001/mexico/poverty.html>.

119. NAT'L IMMIGR. FORUM, *supra* note 1 at 1.

transit across the border, theoretically making it less likely for Mexican immigrants to skirt the law to enter the United States. From a policy perspective, a border fence will do little to improve the flow of Mexican immigrants into the U.S. Despite ten years of budget and manpower increases on the Southern border, including a 2006 Customs and Border Protection budget of \$6.7 billion, the number of undocumented aliens in the United States has continued to increase each year.¹²⁰ A fence on the border will create additional difficulties for border-crossers, thereby increasing the possibility that they will not get across or that they will have to revert to non-routine crossing techniques that could substantially increase the risk to their life. This policy sends a signal to Mexico as a country that America does not trust its Southern neighbor, flying in the face of the goodwill created by open trade since the implementation of the North American Free Trade Agreement, which was intended in part to ease transit across the border. Mexican President Felipe Calderon spoke of the fence in comparison to the wall separating East and West Germany during the Cold War: "The decision made by Congress and the U.S. government is deplorable . . . Humanity committed a grave error by constructing the Berlin wall and I am sure that today the United States is committing a grave error in constructing a wall along our northern border."¹²¹

If the proposed fence on the Mexican border were a policy aimed at the general protection of our borders, a fence would also be proposed for the Canadian border; rather, this effort is targeted squarely on Mexico, which received over \$133 billion in U.S. exports and sent \$198 billion in U.S. imports in 2006.¹²² Also, the increased risk that this puts on border-crossers does little to reduce illegal immigration but rather shifts the mechanism of crossing to more dangerous means. This could mean the employment of more human traffickers willing to bring illegal immigrants across the border in vehicles, more tunnels being dug, and more potentially violent responses toward border enforcement officers because a border-crosser may become more likely to fight to stay in the interior once they successfully cross a more dangerous frontier.

A better solution is to work with foreign governments to establish joint worker-exchange and other temporary immigration programs that facilitate open, yet regulated border policies. For instance, the U.S. could negotiate with Mexico to allow for a limited number of seasonal workers (based on U.S. demand for such workers) to stay through the end of the season with a priority placement for a renewed visa during the next season if they return to Mexico in the interim.¹²³ This maintains the necessary supply of labor during peak U.S. growing seasons while reducing the strain on domestic resources in the off-season. Coordination between the two countries could allow for the worker to spend the off-season with his family in Mexico knowing that he has a job

120. *Id.* See also, Jason Ackleson, *Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences*, 4 IMMIGR. POLICY IN FOCUS 2 (April 2005).

121. E. Eduardo Castillo, *Mexican President Criticizes U.S. Fence*, WASH. POST, Oct. 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601784.html>.

122. See U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, TRADE IN GOODS (IMPORTS, EXPORTS AND TRADE BALANCE) WITH MEXICO (2006), available at <http://www.census.gov/foreign-trade/balance/c2010.html>.

123. See INDEP. TASK FORCE ON IMMIGR. AND AMERICA'S FUTURE, *supra* note 4 at xvii (supporting the idea that engaging Mexico and Canada in long-term initiatives that work to improve the standard of living in both countries is needed).

again the following year.

For immigrants without a particular job opportunity in mind, yet clearly with the intention of finding work, a program should be established that links U.S. employers interested in immigrant labor with immigrant coordination agencies (which may not currently exist) to promote apprenticeships or other short-term learning periods for the workers. A certification process could be provided at the end of that visa period that allows the employer to renew for another six months (with a maximum period of, perhaps, one year), pay for the immigrant to return home with the wages that they've earned, or sponsor the worker to stay in the U.S. permanently using the permanent labor certification process, PERM. In each case, the risk of the immigrant overstaying their visa illegally is reduced as the bar to re-entry once illegal is high and the prospect of future income is higher when the law is adhered to. The employer has at least one-year to benefit from the low-cost labor and may wish to keep the worker permanently employed. The immigrant may find the work helpful to bring money home in the short term and is likely to take the option to return home with a free ticket and clean record than to risk overstaying and working illegally with the threat of bars to re-admission. Additionally, if this process is coordinated through immigrant coordination organizations in the U.S. and in the sending country, word will spread of a legal work opportunity in the U.S. that will attract otherwise illegal border crossers. This coordination with the foreign government can significantly reduce the possibility of a rising number of illegal immigrants in the U.S. while preserving the need to bring immigrants to the U.S. for short-term and potentially permanent work.

The border as a potential crossing point for criminals and terrorists cannot be ignored and must be secured. One option that is gaining traction is the use of smart border mechanisms that provide pre-screening of border-crossers and more technology enhancements that permit secure, rapid passage across the border. The implementation of such technology frees resources of Border Patrol agents to pursue more serious border-crossing related incidents.¹²⁴

B. Strengthen Federal Enforcement

Immigration law regulates the exchange of people across national borders. Monitoring and regulating this flow is the exclusive province of federal law because the federal government is responsible for managing the international borders and regulating the legal status of non-U.S. citizens on the interior of the United States. Were states left to determine who can and cannot be considered legal within their state borders, certain states would become immigration "havens" that allow for weaker enforcement,¹²⁵ and others would become attractive to citizens and legal residents that do not wish to be intermingled with illegal immigrants. This is reminiscent of the Civil Rights era when federal law clearly prohibited discrimination on many levels, yet states refused to abide by or sought out loopholes to the enforcement of these laws. The Civil Rights Act of 1964 was enacted primarily to change that. State advocates of federal immigration

124. Ackleson, *supra* note 120, at 2.

125. See, e.g., CBS2 Chicago, "Romney: Giuliani Made NYC Illegal Immigrant Haven" (Aug. 9, 2007), http://cbs2chicago.com/national/topstories_story_221085836.html.

enforcement authority pose a direct challenge to the proper functioning of the federal immigration regulation power.

Yet this does not leave states helpless. Immigration enforcement has been perceived on the federal level as a priority-based system. Limited resources are concentrated first and foremost on offenders that pose a direct threat to national security. After these aliens come aliens with criminal convictions, especially those involving human trafficking, drug trafficking, child pornography and other serious crimes. Only after that does enforcement of aliens with expired visas or illegal entries take center stage. This lower prioritization in no way indicates acceptance of illegal immigration – rather, it reflects the need to prioritize limited resources to promote the best interests of the American public. Recognizing this enforcement challenge, federal authorities support the use of the § 287(g) program, which offers a middle ground that maintains federal control over immigration law generally, but that facilitates some limited local law enforcement actions that are coordinated with ICE. While this solution is not a complete derogation of federal power, nor is it likely to end illegal immigration, it balances the national need to protect the best interests of the country while promoting state interest in maintaining an environment of legal workers and residents.

VII. CONCLUSION

Illegal immigration is not in anyone's best interests. It hurts U.S. communities by increasing the number of employers willing and able to employ and abuse underpaid workers that compete for what otherwise could be legal, regulated positions, and by raising tensions in communities that see illegal immigrants as a burden on society (which may or may not be true but the perception is real). It hurts immigrants because a vast number of them that have skills and a willingness to contribute to the American economy cannot either because they were denied visas for arbitrary reasons, they lost their legal status and remained in the U.S. illegally, or they entered the country improperly and are resigned to working in unregulated positions. The United States needs immigrants and prefers legal immigrants. This need includes seasonal workers, domestic workers, service industry workers, and high-tech engineers, programmers, technicians and professionals. Immigration policy should reflect this need by expanding the number of available visas, worker exchange programs, and mechanisms to adjust status while in the United States. Building fences and shifting federal immigration law enforcement into local authorities' hands without proper supervision and training will weaken the possibility that effective immigration policy will ever be achieved.

This debate cuts across party lines and involves a variety of viewpoints. Yet rather than working together to promote a modern immigration policy, proposed legislation is attacked for political reasons, such as its perceived grant of amnesty to illegal immigrants. A comprehensive immigration reform policy must be progressive by considering the need for immigrant labor in the future, effective by coordinating with foreign governments, labor organizations, domestic businesses and immigration coordination organizations, and clear so that both citizens and immigrants understand

the scope of the law and how it will be enforced. Without these features, and without immediate reform, we are likely to face more local efforts to bypass federal laws and take immigration law enforcement into their own hands to combat the rising number of immigrants that cannot stay because they have no right to work and cannot leave for fear of being barred from ever returning. As this tension grows, the risk for violent response and social upheaval increases. The time for effective and comprehensive reform is now.