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THE UNITED STATES OF IMMIGRATION: A NATION IN CRISIS

HOW FEAR HAS SHAPED IMMIGRATION LAW AND HAS LED US TO QUESTION BASIC CONSTITUTIONAL RIGHTS

PATRYCJA RYNDUCH*

I. INTRODUCTION

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!¹

Emma Lazarus²

You cannot spill a drop of American blood without spilling the blood
of the whole world . . .³

Herman Melville⁴

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The author would like to take this opportunity and thank her parents: Zofia and Jerzy Rynduch, whose journey inspired the topic for this Comment; her best friend and sister, Klaudia Rynduch, for keeping her motivated. The author would like to extend her thanks to a very important person in her life: Brad E. Karlin. Lastly, this Comment would not be possible without the support of Professor Corinne Morrissey.

1. The poem was chosen to be inscribed on the base of the Statute of Liberty, the monument the poem celebrates, and it remains the most moving and eloquent expression of an American ideal. LIBERTY STATE PARK, <http://www.libertystatepark.com/emma.htm> (last visited Dec. 7, 2011).

2. See *Emma Lazarus Biography*, ENCYCLOPEDIA OF WORLD BIOGRAPHY, <http://www.notablebiographies.com/Ki-Lo/Lazarus-Emma.html> (last visited Nov. 3, 2011) (summarizing the life of Emma Lazarus, a poet, who was born in New York City on July 22, 1849). She dedicated part of her life on behalf of Jewish immigrants. *Id.* Cancer cut her career short. *Id.* She died on November 19, 1887. *Id.*

3. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 161 (6th ed. 2008) (providing a history of immigration law and major developments in this particular area of law).

4. See *Herman Melville*, THE LITERATURE NETWORK, <http://www.online->

In 2004, John Doe lost his job and accrued a certain amount of debt while living in Puebla, Mexico.⁵ These circumstances forced him to take extraordinary measures in order to get back on his feet.⁶ He heard a rumor that Moises Rodriguez was looking for workers to bring to the United States.⁷ Soon enough, John and many others found themselves in Phoenix, Arizona.⁸ From there, they were transported to what can only be described as a labor camp in Hudson, Colorado.⁹ The camp did not have drinkable water; only one toilet out of four was functional; people had to sleep on the floor; and the units were infested with insects.¹⁰ Mr. Rodriguez finally “informed the workers that they each owed him \$1,300 in smuggling fees[,]”¹¹ but because the workers were paid below minimum wage, they were unable to pay off their debt.¹² In his wildest dreams, John never imagined that someday he would be a slave.¹³ Even though John and the other workers eventually took a stand against Mr. Rodriguez¹⁴—were freed, and received T-visas—for John, the American Dream became a nightmare.¹⁵

literature.com/melville/ (last visited Nov. 4, 2011) (exploring the life of Herman Melville, the author of *Moby Dick*).

5. See Patricia Medige, *The Labyrinth: Pursuing A Human Trafficking Case in Middle America*, 10 J. GENDER, RACE & JUST. 269, 273-78 (2007) (noting that when a group of migrant farm workers decided to stand up to their abusive farm labor contractor and the grower who employed him, they started what came to be a groundbreaking case in Colorado). These workers suffered from debt bondage, involuntary servitude, threats of retaliation, and other intimidation. *Id.* at 269. When they finally decided to fight back, they faced constant challenges in bringing forward their case. *Id.* This turned out to be “the first Colorado group case to claim violations of the Trafficking Victims Protection Act (TVPA).” *Id.* While the efforts to expose these violations and other unlawful conduct ultimately were successful, they also revealed a complicated system in need of extensive improvements. *Id.* at 282-83.

6. *Id.* at 273-74.

7. *Id.* at 274.

8. *Id.*

9. *Id.* at 275.

10. *Id.*

11. *Id.*

12. See *id.* at 277 (explaining that workers were not paid for all hours worked and “earned far less than the federally mandated minimum wage of \$5.15 per hour”; sometimes workers were paid \$2.90 per hour for more than sixty hours of work in a week).

13. *Id.* at 276-77.

14. *Id.* at 278.

15. See *id.* at 272 (describing a situation in which survivors of trafficking, who cooperate with law enforcement agencies in investigating a crime, may be eligible to apply for a four-year “T-visa” with a future possibility of obtaining lawful permanent residence status). To be eligible for a T-visa, the candidate must fulfill the following requirements: (a) the survivor must be a victim of trafficking; (b) the survivor must be physically present in the U.S. territory as a result of trafficking; (c) the survivor must have actively assisted and complied with law enforcement agencies’ requests in investigation and prosecution of trafficking; and (d) the survivor would suffer “extreme

This Comment argues that today, the American Dream—the ideal expressed by Emma Lazarus that is preserved at the entrance of the greatest nation in the world¹⁶—has been twisted and distorted by confusion, injustice, prejudice, and fear. Our immigration system is in major crisis; it is screaming for help in the name of those who, in this land of the free, have no voice.

Part II of this Comment details the historical journey of the development of our immigration system, and what has led to the current crisis. Part III analyzes what challenges we face today. Part III also focuses on three major issues: the human crisis of eleven million illegal immigrants; the conflict between the states and federal government and the inability of the federal government to deal with the current situation; and Fourteenth Amendment challenges to the right of citizenship. Part IV proposes a solution to dealing with the overwhelming number of illegal immigrants, and focuses more narrowly on border security and incentives for nonimmigrants to leave the country when specified by their visas. Finally, Part IV will also propose a solution to the phenomenon of birth tourism—citizenship rights of children born on United States soil to illegal immigrants.

II. BACKGROUND

This section will briefly cover the historical background of immigration law in the United States. It will discuss the birth of immigration law in the mid-1800s, will journey through its turning point in the post-World War II period, and will end with the current developments in immigration law seen through the lance of events that took place on September 11, 2001, in New York City.

A. *The Birth of Immigration Law*

The first census took place in 1790¹⁷ when the Republic had a “recorded population of 3,227,000.”¹⁸ *All* were immigrants from England, Germany, France, Spain, and Holland.¹⁹ There were also approximately one million black slaves and Native Americans.²⁰ For seventy-five years, the government did not see the need to regulate immigration, that is, until the mid-1800s when “4.5

hardship” upon removal. *Id.*

16. Lazarus, *supra* note 1.

17. ALEINIKOFF ET AL., *supra* note 3, at 159.

18. *Id.*

19. *See id.* at 158-59 (explaining that the “new land” looked like a “microcosm” of the European continent, but the small number of inhabitants was a concern; the settlers wanted to build a strong country and in order to do so they needed greater man power, hence the liberal approach with regards to early immigration policy).

20. *Id.* at 159.

million European immigrants arrived in the United States.”²¹ The first major flow of immigrants was followed by another five million in the next twenty years and that number steadily increased, resulting in sixteen million new occupants by the first decade of the 1900s.²² The huge number of new arrivals created tension between different ethnic groups.²³ The old arrivals became familiar with each other, leaving room for prejudice towards the newcomers.²⁴

In the 1870s a financial depression led the federal government to pass its first racist immigration law, the Chinese Exclusion Act.²⁵ The Act was designed to limit or even suspend immigration of Chinese workers in order to protect the “greater interest” of the country.²⁶ At that time, the government did not see anything wrong with excluding those who had so tirelessly worked to build the railroad system.²⁷ Similarly, just a few years prior to the Chinese Exclusion Act, the government indicated that it did not see anything inappropriate with denying citizenship rights to African Americans in the infamous case of *Dred Scott*.²⁸ In that case, the Supreme Court held that the *jus soli rule*,²⁹ a citizenship right based on birth in the national territory, did not apply to the

21. *Id.* at 161.

22. *Id.* at 163.

23. *Id.* at 162.

24. *See id.* at 161 (specifying that in the 1830s “the composition of the groups entering the United States began to change, and few U.S. residents thought so romantically about the new immigrants”). “It was easy to blame these new immigrants for many of the problems of the rapidly changing, increasingly urban nineteenth century U.S. society.” *Id.* at 162. New immigrants were accused of bringing intemperance, crime, and disease to the new world. *Id.*

25. *See* The Chinese Exclusion Case, 130 U.S. 581, 603, 611 (1889) (affirming the refusal of the United States to grant appellant, a Chinese laborer, entry into the United States because the legislature had the authority under the sovereign powers delegated by the Constitution to exclude foreigners).

26. *Id.* at 609 (excluding aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers).

27. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 15-17 (Oxford University Press 2006) (synthesizing the history of Chinese immigrants in America in the late 1800s with particular emphasis on the Chinese Exclusion Act).

28. *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (summarizing a case in which the petitioner was a slave of African descent). Scott brought suit in the federal court against respondent, his owner, for assault. *Id.* at 393. By the time the case had reached the United States Supreme Court, the Court dismissed the case for lack of jurisdiction because petitioner was not a citizen of Missouri as asserted in his original complaint, was not permitted to become a citizen, and no state had the power to grant him citizenship. *Id.* at 405-06.

29. ALEINIKOFF ET AL., *supra* note 3, at 36.

black population, thus inadvertently making African Americans aliens subject to removal.³⁰

During World War I, Congress enacted legislation in the form of the Immigration Act of 1924,³¹ which banned all immigration from Asia and created a quota system for selected nations.³² The Act ultimately destroyed one of this nation's ideals—that this country should provide “an asylum to the oppressed and the needy of the earth.”³³ Then came one of the darkest moments in U.S. immigration history: in 1939 Congress refused to rescue twenty thousand children from Nazi Germany even though there was substantial financial support from the American community.³⁴ Although, at the time, it appeared as though the United States enacted laws that were dictated by fears motivated by xenophobia and religious intolerance, economic progress eventually lent support to more tolerant immigration laws.

B. Turning the Tide

The hope to turn the tide of unfavorable immigration laws came with President Harry Truman,³⁵ who issued a directive in 1945 to admit forty thousand war refugees.³⁶ President Truman, through his presidency and beyond, worked tirelessly for the

30. *Id.*

31. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952).

32. ALEINIKOFF ET AL., *supra* note 3, at 170. The Act required “an annual limit of 150,000 Europeans, a complete prohibition on Japanese immigrants, the issuance and counting of visas against quotas abroad rather than on arrival, and the development of quotas based on the contribution of each nationality to the overall U.S. population . . .” *Id.* Descendants of slaves were excluded from the definition of the population of the United States. *Id.* The “law was designed to preserve . . . the racial and ethnic status quo of the United States.” *Id.*

33. *Id.* at 171.

34. U.S. Holocaust Memorial Museum, *Voyage of the St. Louis*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited Nov. 4, 2011) (describing the unfortunate voyage of the *St. Louis* ship, which set sail with over nine hundred refugees traveling from Nazi Germany hoping to find rescue at U.S. shores). The ship was not allowed to enter any U.S. port and was forced to sail back to Europe. *Id.* President Roosevelt could have issued an executive order to admit the *St. Louis* refugees, but the awareness of national xenophobia towards immigrants and the upcoming presidential election “were among the political considerations that militated against taking this extraordinary step in an unpopular cause.” *Id.* More importantly, the article mentions that Congressional leaders in both the House and Senate killed a bill, which “would have admitted 20,000 Jewish children from Germany above the existing quota.” *Id.*

35. See ORVILLE V. WEBSTER, *THE BOOK OF PRESIDENTS* 96 (JBG Publishing 1991) (summarizing the life of Harry S. Truman, 33d President of the United States, who was born in 1884 in Lamar, Missouri).

36. ALEINIKOFF ET AL., *supra* note 3, at 172.

United States to open its borders to war refugees.³⁷ Because of those efforts, Congress passed the Refugee Relief Act in 1953,³⁸ which allowed the admission of 214,000 refugees from primarily Communist countries.³⁹ Around that time, Congress passed the Immigration and Nationality Act,⁴⁰ which preserved the quota system, and “established a system of preferences of skilled workers and the relatives of U.S. citizens and permanent residents.”⁴¹ It also tightened security and screening processes.⁴²

Some believe that the major change in immigration law did not come until the 1960s when John F. Kennedy was elected president.⁴³ President Kennedy, as the first Irish/Catholic United States President, focused a major portion of his policy on immigration law.⁴⁴ He put the wheels of change in motion.⁴⁵ After Kennedy’s assassination, this change was continued by President Lyndon Johnson.⁴⁶ Under Johnson’s leadership, Congress finally abolished the national origin quotas, replacing them with a per-country limit of twenty thousand for every country outside the Western Hemisphere, with the overall ceiling set at 160,000.⁴⁷ A similar yet much larger ceiling was placed on the Western

37. *Id.* (explaining that U.S. soldiers who married overseas during WWII under the existing immigration laws were unable to bring their wives to the U.S.). There was an outcry, which led Congress to pass “the ‘War Brides Act’ in 1946, which permitted 120,000 alien wives, husbands and children of members of the armed forces to immigrate to the United States.” *Id.*

38. Refugee Relief Act, Pub. L. No. 83–203, 67 Stat. 400 (1953) (expired Dec. 31, 1956).

39. ALEINIKOFF ET AL., *supra* note 3, at 172.

40. See Immigration and Nationality Act, Pub. L. No. 82–414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) (denying asylum to immigrants who were unlawful, immoral, diseased in any way, politically radical, etc., and accepting those who were willing and able to assimilate into the U.S. economic, social, and political structures, which restructured how immigration law was handled).

41. ALEINIKOFF ET AL., *supra* note 3, at 173.

42. *Id.*

43. WEBSTER, *supra* note 35, at 103 (summarizing the life of John F. Kennedy, the 35th President of the United States); see also *About John F. Kennedy’s A Nation of Immigrants*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/immigrants/> (last visited Nov. 4, 2011) (stating that John F. Kennedy was passionate about the issue of immigration reform). He believed that America is a “nation of people who value both tradition and the exploration of new frontiers, people who deserve the freedom to build better lives for themselves in their adopted homeland.” *Id.*

44. See generally JOHN F. KENNEDY, A NATION OF IMMIGRANTS (Harper Perennial 2008) (presenting inspiring suggestions for immigration policy and offering chronological development of immigration in America).

45. ALEINIKOFF ET AL., *supra* note 3, at 174.

46. WEBSTER, *supra* note 35, at 107 (summarizing the life of Lyndon B. Johnson, the 36th President of the United States).

47. ALEINIKOFF ET AL., *supra* note 3, at 174.

Hemisphere.⁴⁸ The Eastern Hemisphere was also acknowledged with respect to close relatives, who from this point on could be sponsored by their relatives legally residing in the United States.⁴⁹ In his speech after signing the bill, President Johnson acknowledged four decades of harsh and unjust immigration policies where families were kept apart only because they were born in the wrong place.⁵⁰

However, the changes of the 1960s had a negative effect on the region closest to the United States.⁵¹ In the 1920s when the United States desperately needed the help of foreign workers, the United States and Mexican governments negotiated a temporary workers program.⁵² The program was designed to fill the void created by World War I.⁵³ In the years following World War II, however, the Spanish-speaking population increased substantially, and racial tensions started to build against those from Mexico and other Latin countries.⁵⁴

By the mid-1960s, the pressure to stop the flow of immigration from Mexico was so high that keeping up with the

48. *Id.*

49. *Id.*

50. *See id.* at 174-75 (summarizing Lyndon Johnson's speech upon signing the bill into law in 1965). He considered it a historic moment for the United States and immigration law. *Id.* He acknowledged that those wishing to immigrate shall be admitted on the basis of their skills and family ties. *Id.* To President Johnson, the fairness of this standard was self-evident, but the fact remained that for "over four decades the immigration policy of the United States has been twisted and has been distorted like a harsh injustice of the national origins quota system . . ." *Id.* at 175. President Johnson further stated that, "families were kept apart because a husband or a wife or a child had been born in the wrong place." *Id.* "Men of needed skill and talent were denied entrance because they came from southern or eastern Europe or from one of the developing continents." *Id.* He concluded by admitting that the broken system "violated the basic principle of American democracy." *Id.*

51. *Id.*

52. *See id.* at 172, 1304-05 (noting the negotiation of a temporary workers program also called The Bracero Program). The Bracero Agreement of 1949 provided that illegal workers shall be given preference under the U.S. Employment Service Certification. *Id.* at 1304. Border patrol agents would escort the illegal workers to the Mexican border, ask them to step to the Mexican side, and then they would bring them back as braceros. *Id.* The program ended in 1964. *Id.*; *see also The Bracero Program, THE FARMWORKERS WEBSITE*, <http://www.farmworkers.org/bracerop.html> (last visited Nov. 4, 2011) (discussing the details of the program). One of the most significant contributions to the growth of the agricultural economy was the creation of the Bracero Program in which more than four million Mexican farm laborers came to work the fields of this nation. *Id.* The braceros converted the agricultural fields of America into the most productive on the planet. *Id.* "On August 4, 1942, the U.S. and the Mexican government instituted the Bracero program." *Id.* "Thousands of impoverished Mexicans abandoned their rural communities and headed north to work as braceros." *Id.*

53. ALEINIKOFF ET AL., *supra* note 3, at 1303-04.

54. *Id.* at 175.

“Good Neighbor” policy was no longer possible.⁵⁵ As a result, Congress amended the ceiling that was put on the Western Hemisphere, which ultimately closed the last open door of U.S. immigration policy.⁵⁶ This added restriction and created a steadily increasing backlog of applicants from Latin America.⁵⁷ Soon, however, Congress realized that the double standard regarding the two hemispheres was creating more problems than good, and in 1976, the government passed a new law “to make regulations regarding immigration the same for both hemispheres.”⁵⁸

The new standard was later unified into one ceiling applicable to both hemispheres with 290,000 visas available worldwide, and with the family and employment preference system applied equally to both.⁵⁹ This was a significant change in immigration law as the preferential treatment with respect to “better” and “worse” parts of the world was taken out of the equation and for the first time since the 1790s the government applied equal treatment to all.⁶⁰

C. *Illegal Immigration – the In-House Problem*

The biggest and most sweeping immigration reform came in 1986 under the name of the Immigration Reform and Control Act (“IRCA”).⁶¹ The IRCA, among other things, opened a path for

55. Tom Barry, Laura Carlsen & John Gershman, *The Good Neighbor Policy – A History to Make Us Proud*, INT’L RELATIONS CTR. (Apr. 2005), <http://www.peace.ca/goodneighborpolicy.htm> (summarizing President Roosevelt’s inaugural address of March 1933, where the President announced a new approach to international relations that would become known as the Good Neighbor Policy). In his address, President Roosevelt expressed his intentions for the Good Neighbor Policy, the primary objective of which was to improve U.S. relations with nations around the world. *Id.* “But it was in the Western Hemisphere that FDR’s new foreign policy framework had its most dramatic impact.” *Id.* “If political relations were to improve, the United States had to open its doors to the Latin American and Caribbean economy.” *Id.* One of FDR’s goals of the program was to “end the demeaning cultural stereotyping of Latinos.” *Id.* “FDR’s Good Neighbor Policy came to a crashing close with the onset of the Cold War when the promotion of national security states trumped notions of cooperation and respect.” *Id.* Latin American and Caribbean countries “were regarded more as pawns in a new ‘great game’ that pitted the United States and its allies against communism.” *Id.*

56. See ALEINIKOFF ET AL., *supra* note 3, at 175 (noting that the provision went into effect, after congressional approval, on July 1, 1968).

57. *Id.*

58. *Id.* at 176.

59. *Id.*

60. *Id.*

61. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); see also *Immigration Reform and Control Act of 1986 (IRCA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVC>

illegal immigrants to legalize their status, and it finally recognized that part of the blame belonged to the employers who benefited from hiring illegal immigrants.⁶²

Leading up to the events of September 11, 2001,⁶³ the immigration policy primarily concerned itself with unlawful immigration.⁶⁴ This led to the passage of the Immigration Act of 1990,⁶⁵ which expanded family and employment-based immigration, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which placed tighter limitations on relief from deportation.⁶⁶

The terrorist attacks of 9/11 provided a “shift in much of the public’s thinking about immigration and national security.”⁶⁷ The

M100000ecd190aRCRD (last visited Nov. 5, 2011). IRCA “was passed in order to control and deter illegal immigration to the United States.” *Id.* Its major provisions allowed for legalization of undocumented aliens. *Id.* The Act applied to those “who had been continuously unlawfully present since 1982.” *Id.* The Act also included “sanctions for employers who knowingly hire undocumented workers,” and provided for “increased enforcement at U.S. borders.” *Id.* IRCA is considered one of the major failures of the immigration department because after implementation of the Act, illegal immigration to the United States tripled.

62. See ALEINIKOFF ET AL., *supra* note 3, at 179 (explaining major features of the IRCA, which were: “(1) imposition of penalties on employers who hire undocumented works (employer sanctions); (2) legalization of long-term undocumented noncitizens; (3) legalization of noncitizens who had performed agricultural labor in the United States; and (4) protection of U.S. citizens and permanent residents from employment discrimination occasioned by employer sections.”).

63. See *News and Events from September 11*, THE PEOPLE HISTORY, <http://www.thepeoplehistory.com/september11th.html> (last visited Nov. 5, 2011) (describing the events that took place on September 11, 2001, which consisted of a “series of terrorist attacks upon the United States of America.”). On that morning, two out of four hijacked commercial passenger jets were crashed into the Twin Towers of the World Trade Center in New York City. *Id.* The crash caused the collapse of both towers. *Id.* Terrorists crashed the third aircraft into the Pentagon. *Id.* “Passengers on the fourth hijacked aircraft attempted to retake control of their plane . . . which crashed into a field in rural Somerset County, Pennsylvania, killing all on board but in the process saving many other lives.” *Id.* The attacks claimed nearly three thousand lives, “including a number of fire fighters and rescue workers.” *Id.*

64. See ALEINIKOFF ET AL., *supra* note 3, at 180 (explaining the major shift in the immigration “debate” prompted by the events of September 11, 2001).

65. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (expanding employment-based immigration, providing additional visa numbers for some family-based categories, and creating the new category of “diversity immigration,” were the primary goals of the Act); see also DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE 28 (5th ed. 2005) (summarizing provisions of the Immigration Act of 1990).

66. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (addressing the need to streamline and accelerate the removal of noncitizens with criminal records as well as limiting available relief from deportation).

67. ALEINIKOFF ET AL., *supra* note 3, at 180.

Immigration and National Services Bureau was abolished and replaced with the Department of Homeland Security,⁶⁸ within the framework of the Homeland Security Act.⁶⁹ Congress, in passing the USA Patriot Act⁷⁰ and the Homeland Security Act,⁷¹ focused all of its attention on “tighten[ing] requirements for visas to the United States” and strengthening intelligence to protect the country from terrorist activities.⁷² The issue of illegal immigration, even though constantly present and finding no permanent solution in IRCA of 1986,⁷³ became a secondary concern.

A quarter century after the IRCA was enacted, the United States is facing an estimated eleven million illegal immigrants that have become a part of our society, with substantial economic and/or family ties to this land, and with no chance to come out of the shadows they live in today.⁷⁴

III. ANALYSIS

This section will cover three current immigration issues Congress is facing: (1) whether to resolve the issue of illegal immigration; (2) whether the states should attempt to override federal laws; and (3) whether children born to nonimmigrants

68. See *id.* at 268-70 (explaining the transformation of the Immigration and Naturalization Services [INS]). After September 11, Congress divided INS's former authorities between different units. *Id.* at 268. The Department of Homeland Security [DHS] inherited the INS functions. *Id.* at 270. DHS is made out of three separate bureaus: Customs and Border Protection [CBP], Immigration and Custom Enforcement [ICE], and Citizenship and Immigration Services [USCIS]. *Id.* CBP is responsible for border security with respect to people and cargo. *Id.* “CBP also staffs preclearance stations in Canada and the Caribbean, which permit the completion of inspection before passengers board the aircraft to the United States.” *Id.* ICE is responsible for “locating and arresting or charging persons illegally in the country” as well as “representing the government in removal proceedings in immigration court.” *Id.* at 272. USCIS deals with “adjudicating applications for various benefits.” *Id.* at 273.

69. See Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002); WEISSBRODT ET AL., *supra* note 65, at 46 (explaining that the Act abolished the Immigration and Naturalization Services and transferred most of its functions and operations to the Department of Homeland Security).

70. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); WEISSBRODT ET AL., *supra* note 65, at 47. The Act “broadened the definition of ‘terrorism’ as used in the grounds for inadmissibility and removal.” *Id.* Under this Act, “anyone who endorses or provides financial support to a terrorist organization, or who actually participates in terrorist activities, is inadmissible or removable.” *Id.*

71. Homeland Security Act, 116 Stat. 2135.

72. ALEINIKOFF ET AL., *supra* note 3, at 180.

73. Immigration Reform & Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

74. Mark Hugo Lopez et al., *Illegal Immigration Backlash Worries, Divides Latinos*, PEW HISPANIC CTR. (Oct. 28, 2010), <http://pewhispanic.org/reports/report.php?ReportID=128>.

should be recognized as U.S. citizens (“USCs”).

A. *Whether the United States Can Continuously Ignore Millions of Illegal Immigrants*

When Congress passed the IRCA in 1986, the new law was supposed to resolve the issue of close to five million illegal immigrants.⁷⁵ The Act created a path, offering amnesty to legalize the status of those who came across the U.S. borders illegally, that is, without inspection, and those who overstayed their properly obtained noncitizen visas.⁷⁶ It was a once-in-a-lifetime opportunity for these people to come out of the shadows and obtain permanent residency,⁷⁷ which would eventually lead to citizenship.⁷⁸ However, due to high cost, misinformation, and fraud, only about half of the eligible illegal aliens were able to take advantage of the chance to come clean and continue their lives without fear.⁷⁹ Roughly 1.4-2.7 million people were able to take advantage of this new American law, while others who chose not to or could not participate⁸⁰ faded into the background and created a platform for a new wave of illegal immigrants.⁸¹ One could say that IRCA failed in its purpose.

Today, a quarter century later, the United States is facing a similar situation. The reported number of eleven million illegal immigrants most likely does not reflect the true numbers this country is facing.⁸² Some sources say that there are close to twenty

75. NANCY RYTINA, *IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001* (Oct. 25, 2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>.

76. Vernon M. Briggs, *Immigration Reform and the U.S. Labor Force: The Questionable “Wisdom” of S.2611 (i.e. The Comprehensive Immigration Reform Act of 2006)*, CTR. FOR IMMIGRATION STUDIES (2006), available at <http://www.cis.org/node/568>.

77. *Id.*

78. ALENIKOFF ET AL., *supra* note 3, at 63-64.

79. *See id.* (explaining that one of the many requirements of IRCA was that a person had to reside in the U.S. continuously for five years, causing many applicants to lie about their date of arrival just to qualify for the program); David S. North, *A Bailout for Illegal Immigrants? Lessons from the Implementation of the 1986 IRCA Amnesty*, CTR. FOR IMMIGRATION STUDIES (2010), available at <http://www.cis.org/irca-amnesty> (filing an application under the IRCA law cost \$185 per person after the law was passed).

80. *See* North, *supra* note 79 (estimating that 2.7 million people took advantage of the amnesty); *see also* WEISSBRODT ET AL., *supra* note 65, at 26-27 (explaining that many undocumented noncitizens were reluctant to bring their unlawful presence to the attention of the INS by applying for amnesty; out of the four million estimated potential applicants the source claims that only 1.4 million people applied before the program expired).

81. *Id.*

82. Brad Knickerbocker, *Illegal Immigrants in the US: How Many Are There?*, THE CHRISTIAN SCI. MONITOR (May 16, 2006), <http://www.csmonitor.com/2006/0516/p01s02-ussc.html>.

million here illegally, and yet, they are very much a part of the socio-economical American landscape.⁸³

Just like in the mid-1800s when there was a racial bias against Chinese workers,⁸⁴ today that racial bias is turned toward nationals of Mexican and Latino origin, as they constitute the majority of undocumented workers.⁸⁵ There is an outcry from the American community that those illegals cost our society over \$100 billion every year.⁸⁶ It would be naïve to think that allowing such a huge number of people to reside within our borders is cost free,⁸⁷ but the average American does not realize that the illegal workers and their families substantially contribute to the currently very fragile U.S. economy by creating jobs and pumping their hard earned dollars back into the system.⁸⁸

83. *Id.*; see also *Immigration Amnesty*, U.S. IMMIGRATION AMNESTY, <http://www.usamnesty.org/> (last visited Nov. 5, 2011) (noting that the number of undocumented aliens is estimated somewhere between twelve and twenty million).

84. *Chinese Exclusion Case*, 130 U.S. at 611.

85. *Mexican Immigrants in the United States, 2008*, PEW HISPANIC CTR., 1 (Apr. 15, 2009), <http://pewhispanic.org/files/factsheets/47.pdf> (noting that Mexicans constitute around sixty percent of the estimated 11.9 million undocumented immigrants in this country).

86. Ed Barnes, *Illegal Immigration Costs U.S. \$113 Billion a Year, Study Finds*, FOXNEWS.COM (July 6, 2010), <http://www.foxnews.com/us/2010/07/02/immigration-costs-fair-amnesty-educations-costs-reform/> (estimating that illegal immigrants allegedly cost Native-American headed households an average of \$1117 per year, which amounts to \$113 billion per year).

87. See *id.* (supporting undocumented immigrants involves paying for medical care, education, food stamps, incarceration, and other social programs); see also Svetlana Lebedinski, *EMTALA: Treatment of Undocumented Aliens And The Financial Burden It Places on Hospitals*, 7 J.L. SOC'Y 146, 148 (2005) (explaining that “[p]oor working and living conditions, lack of health insurance or money to pay for medical care are reasons why undocumented aliens often seek medical care in a hospital’s emergency room for an illness that has become critical due to lack of preventative or early intervention treatment.”). In 2003, the federal government passed the Medicare Prescription Drug, Improvement, and Modernization Act (commonly known as the Federal Reimbursement of Emergency Health Services to Undocumented Aliens), an Act that directs \$1 billion for medical treatment of undocumented aliens. *Id.* at 163.

88. Bruce Vang, *Business & Finance: Benefits of Illegal Immigration Offset Cost on the U.S. Economy*, ASSOCIATED CONTENT FROM YAHOO! (Dec. 5, 2007), http://www.associatedcontent.com/article/464357/benefits_of_illegal_immigration_offset.html?cat=17; see Erwin de Leon, *The Economic Argument for Immigration Reform*, FEET IN 2 WORLDS (July 21, 2011), <http://news.feetintwoworlds.org/2011/07/21/de-leon-the-economic-argument-for-immigration-reform/> (stating that while talking about illegal immigration it should be highlighted that “immigration creates jobs rather than takes them away.”); see also Brian Grow et al., *Embracing Illegals*, BLOOMBERG BUSINESSWEEK (July 18, 2005), http://www.businessweek.com/magazine/content/05_29/b3943001_mz001.htm (explaining the importance of the vast number of illegal immigrants to our economy). The article explains that companies and banks, from the economic standpoint, cannot ignore what could be as many as a twenty million

Most nonimmigrants work in agriculture, construction, landscaping, home care, and the restaurant/hotel business.⁸⁹ They are active contributors to the U.S. economy by filling low-skilled jobs that USCIs refuse to perform because they are either overeducated for such work or because the work pays minimum wage.⁹⁰ For example, between January and June of 2009, California growers posted 1160 job offers; despite the challenging economy, only 233 native-born Americans showed interest and only thirty-six of them accepted the offers.⁹¹ Furthermore, the Virginia Farm Bureau Federation claims that “[i]f agriculture in the United States was to lose its foreign-born workforce, Farm Bureau economists estimate that \$5 billion to \$9 billion in annual production would be put in jeopardy.”⁹² One must keep in mind

persons market. *Id.* “Corporate sales and profits will get a shot in the arm if more of them move out of the cash economy, put their money in banks, and take out credit cards, car loans, and home mortgages.” *Id.*; see generally Judith Gans, *Immigrants in Arizona: Fiscal and Economic Impacts*, UDALL CTR. FOR STUDIES IN PUB. POL’Y (June 2008), available at <http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf> (giving an example of how illegal immigration impacts the economy of the state of Arizona). In 2004, “[a]pproximately 278,000 full-time-equivalent jobs [could] be attributed to non-citizen workers along with an estimated \$29 billion in output that include[d] \$10 billion in labor income and \$3.3 billion in other income.” *Id.* at 44. “Economic activity generated by non-citizens resulted in tax revenues to the state of approximately \$1.5 billion, of which 39 percent were business-related taxes and 45 percent were sales taxes.” *Id.* at 47. The statistics also focus on what would happen if we suddenly removed some of the unauthorized workers from the workforce, for example, in agriculture, “a 15-percent workforce reduction would result in losses of 3,300 full-time-equivalent jobs, \$601 million in output, labor income of \$199 million, and other income of \$116 million. The lost tax revenue to the state would be approximately \$25 million.” *Id.* at 53; Simone Wilson, *L.A. County Economy Would Shrink by More Than \$100 Billion If All Illegal Immigrants Were Deported*, Says UCLA Report, L.A. WEEKLY (May 5, 2011), http://blogs.laweekly.com/informer/2011/05/los_angeles_economy_illegal_immigrants_ucla.php.

89. *Statistical Portrait of Hispanics in the United States, 2008*, PEW HISPANIC CTR. Table 27 (2008), <http://pewhispanic.org/files/factsheets/hispanics2008/Table%2027.pdf> (explaining that most undocumented workers occupy jobs in the construction industry—over two million workers; production—over two million workers; cleaning—1.7 million workers; food preparation—1.2 million workers; transportation—1.2 million workers; and other—4.5 million workers).

90. See Vang, *supra* note 88 (explaining that because there is a shortage of unskilled workers in many areas of the U.S. economy the void is filled by the low-skilled illegal immigrant workers). Without their contribution the “productivity and economic growth of the economy would be slower and there would be fewer jobs for skilled labor,” which are usually filled by native-born Americans. *Id.*

91. Garance Burke, *Despite Economy, Americans Don’t Want Farm Work*, THE ASSOCIATED PRESS (Sept. 27, 2010), available at <http://www.businessweek.com/ap/financialnews/D9IGGQG00.htm>.

92. See generally *Agricultural Labor*, VA. FARM BUREAU FED’N,

that low-skilled jobs do not usually pay a substantial amount; for example, in farming the standard wage is \$10.25 an hour.⁹³ Such low wages keep the prices of goods and services relatively low.⁹⁴ Overall, immigration increases the income of legal U.S. residents by allowing the economy to utilize domestic resources more efficiently.⁹⁵

Additionally, many illegal aliens contribute to the U.S. economy in monetary value. The Associated Press reported that in 2003, Social Security received \$56.8 billion from wage reports that could not be matched to the person filing.⁹⁶ Nonimmigrants who use false Social Security numbers will never get that money back, since people who are here illegally are not eligible to receive Social Security benefits.⁹⁷ While American workers entertain the idea of retirement supported in part by their government, given the current state of affairs, the illegal ones will be working for as long as their minds and bodies allow.⁹⁸

The logical questions, at this point, are: "Why does our government allow for this to continue?"; "Are there no laws to control the inflow of illegal immigrants?"; "Why don't we allow the undocumented immigrants and overstays, who have already proven themselves, to legalize their status and escape the injustice they encounter daily?" There are no short answers to these questions. It is well known that immigration law is the exclusive province of Congress pursuant to Article I, Section 8 of the U.S.

http://www.vafarmbureau.org/PolicyAction/NationalIssues/Documents/critical_issues_ag_labor.pdf (last visited Nov. 5, 2011) (explaining that American agriculture faces shortage of farm workers every single year).

93. Burke, *supra* note 91.

94. Ethan Lewis, *The Impact of Immigration on American Workers and Businesses*, CHOICES MAGAZINE, <http://www.choicesmagazine.org/2007-1/immigration/2007-1-10.htm> (last visited Nov. 5, 2011) (stating that a recent study examined the impact of immigration on prices in twenty-five large U.S. metropolitan areas and discovered that a "10% increase in immigration lowered the price of 'low-skilled intensive' goods and services by 1%.").

95. GORDON H. HANSON, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 19 (Apr. 2007), available at <http://irps.ucsd.edu/assets/022/8797.pdf>.

96. See Immigration Chronicles, *Illegal Immigrants: Benefits and Negatives*, HOUSTON CHRONICLE, http://blogs.chron.com/immigration/archives/2008/08/post_151.html (last visited Nov. 6, 2011) (discussing the Associated Press report); CONGRESSIONAL BUDGET OFFICE, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGES OF STATE AND LOCAL GOVERNMENTS* 9 (Dec. 2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> (asserting that there are no direct measures of taxes paid by illegal immigrants and very often those estimates are inadequate). For example, in 2004 in Iowa, illegal immigrants paid between \$45.5-80 million in sales and income taxes; in 2006, New Mexico collected an estimated \$69 million in taxes from unauthorized immigrants. *Id.* at 10.

97. Immigration Chronicles, *supra* note 96.

98. *Id.*

Constitution.⁹⁹ Immigration law is governed by the Immigration and Nationality Act,¹⁰⁰ additional statutes, the Code of Federal Regulations,¹⁰¹ and treaties. However, because of a huge number of illegal aliens and a shortage of resources, it is not always possible for the federal government to control all aspects of immigration.¹⁰² For that reason, some states have started taking matters into their own hands.

B. Whether States Should Be Allowed to Take Matters Regarding Immigration into Their Own Hands

In the last couple of years, there has been a troubling trend as states have started implementing their own local immigration laws.¹⁰³ The most notorious example is the state of Arizona.¹⁰⁴ In July 2007, the Arizona Legislature enacted the Legal Arizona Workers Act (“the Arizona Act”),¹⁰⁵ which imposes sanctions on employers who “knowingly or intentionally” hire illegal immigrants¹⁰⁶—a provision that is already clearly stated in

99. See U.S. CONST. art. I, § 8 (stating that Congress has the power to determine who can enter the country and who can become its citizen: “Congress shall have power . . . to establish a uniform rule of naturalization . . .”).

100. ALEINIKOFF ET AL., *supra* note 3, at 173.

101. 8 C.F.R. § 204.5 (2010).

102. See Arian Campo-Flores, *Georgia Lawmakers Target Illegal Immigration*, WALL STREET J., Apr. 16, 2011, http://online.wsj.com/article/SB100014240527487036483045762652626633_84884.html (stating that “it is the federal government’s responsibility to ‘protect our borders and enforce visa and citizenship issues.’”).

103. *Id.*; see also Seth Hoy, *Utah Governor Signs Series of Controversial Immigration Bills*, IMMIGRATION IMPACT (Mar. 15, 2011), <http://immigrationimpact.com/2011/03/15/utah-governor-signs-controversial-package-of-immigration-bills/> (explaining that the Utah measure contains enforcement provisions as well as a temporary worker pilot program); and Gustavo Valdes, *Georgia Governor Signs Tough Anti-Illegal Immigration Law*, CNN (May 13, 2011), http://articles.cnn.com/2011-05-13/us/georgia.immigration.law_1_illegal-immigration-immigration-status-law-enforcement-officers?_s=PM:US (signaling that Georgia is taking the law into its own hands).

104. Kevin O’Leary, *Arizona’s Tough New Law Against Illegal Immigrants*, TIME (Apr. 16, 2010), available at <http://www.time.com/time/nation/article/0,8599,1982268,00.html>.

105. See Ann Allott, *Ann Allott on Arizona and Illinois Laws (and Lawsuits) on Undocumented Workers*, 2008 EMERGING ISSUES 980 (2007) (summarizing the provisions of the Legal Arizona Workers Act, which was signed by Arizona Governor Janet Napolitano in 2007). The act attaches criminal penalties to those employers who knowingly hire illegal workers. *Id.* Such violation might result “in the suspension of all business licenses held by the employer for ten days.” *Id.* It requires the employers to use “E-Verify,” which helps determine an employee’s legal status. *Id.*

106. *Id.*

IRCA.¹⁰⁷ However, the Ninth Circuit Court of Appeals found that the Arizona Act was a licensing law and, thus, IRCA did not expressly preempt it.¹⁰⁸ The United States Supreme Court recently affirmed the Ninth Circuit Court's decision.¹⁰⁹ The Court held that because Arizona's law "fit within the confines of IRCA's savings clause it did not conflict with the federal immigration law."¹¹⁰

It seems that the Arizona Act avoided preemptory challenge because Congress chose to leave licensing law authority to the states.¹¹¹ It could be speculated that the Court showed leniency with respect to the Arizona law because the state borders Mexico. As such, it faces more complex issues like alien smuggling and drug trafficking, which raise serious public concerns.¹¹² It is possible that the Court did not want to completely disable the state from self-protection.

In 2010, Arizona made another attempt at controlling immigration on its own, but this time it might have gone too far. "[T]he Arizona Legislature enacted a set of statutes and amendments embodied in the form of Senate Bill 1070."¹¹³ S.B. 1070 was signed into law by Governor Brewer on April 23, 2010,¹¹⁴ and it went into effect amidst protests around the country on July 29, 2010.¹¹⁵ The basic premise of S.B. 1070 requires police officers to check a person's immigration status; it makes it a crime not to carry immigration papers, and to transport unlawfully present

107. See Randall G. Shelley, Jr., *If You Want Something Done Right...: Chicanos Por La Causa v. Napolitano and the Return of Federalism to Immigration Law*, 43 AKRON. L. REV. 603, 606 (2010) (explaining that IRCA "provides for both civil and criminal sanctions against employers who knowingly hire, recruit, or refer unauthorized aliens for employment."). Additionally, one of the goals of IRCA was, through its provisions, to preempt all state laws designed to fight illegal immigration. *Id.* at 612.

108. *Id.* at 619. Employers are in the best position to determine whether someone is in or out of status for employment purposes. *Id.* at 622. And because the "provision merely imposes conditions on state business licenses," the provision shows to be a licensing law and thus it is not preempted by federal law. *Id.* at 617.

109. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

110. *Id.*

111. *Id.* at 1981.

112. Frosty Wooldridge, *Arizona Deals With Illegal Alien Immigration*, NEWSWITHVIEWS (Apr. 22, 2010), <http://www.newswithviews.com/Wooldridge/frosty563.htm>.

113. *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010); see also S. 1070 (Ariz. 2010) [hereinafter S.B. 1070] (embodying tougher restrictions on movements of illegal immigrants within the state of Arizona).

114. *United States v. Arizona*, 703 F. Supp. 2d at 985.

115. Jim Roope, *Protests Planned Ahead of Arizona's Controversial Immigration Law*, CNN RADIO (July 26, 2010), http://articles.cnn.com/2010-07-26/us/arizona.immigration.protests_1_immigrant-rights-activist-immigration-status-controversial-immigration?_s=PM:US.

aliens.¹¹⁶ The United States challenged the constitutionality of the new law by filing a complaint in federal court claiming “that the power to regulate immigration is vested exclusively with the federal government, and the provisions of S.B. 1070 are therefore preempted by federal law.”¹¹⁷ The U.S. government simultaneously filed a preliminary injunction to forbid the state from enforcing the most controversial provisions of S.B. 1070.¹¹⁸

The court agreed with the United States and preliminarily enjoined Arizona from enforcing Section 2(B), which allows police officers to check the immigration status of any person during a routine stop.¹¹⁹ The court took a similar approach to Section 3, which makes it a crime if an alien fails to apply for alien registration papers,¹²⁰ and a portion of Section 5, which makes it a crime for an alien to seek employment.¹²¹ Additionally, the court estopped the enforcement of Section 6, which allows police officers to arrest a person without a warrant when there is cause to believe that the person committed a public offense.¹²² The

116. *United States v. Arizona*, 703 F. Supp. 2d at 985-86.

117. *See id.* at 986 (noting that S.B. 1070 was not a “freestanding statute” for preemption purposes, but rather an addition of “some new sections to the Arizona Revised Statutes.”). The court could not enjoin S.B. 1070 in its entirety. *Id.* The court held it was required to review the statute on a “section by section” basis because Section 12(A) of the statute provides for the severability of S.B. 1070’s provisions, meaning that if any provision is invalid, the invalidity does not affect other provisions. *Id.*

118. *Id.*

119. *Id.* at 987 (requiring that an officer make a “reasonable attempt to determine the immigration status” of a person stopped, detained, or arrested if a “reasonable suspicion exists that the person is unlawfully present in the United States.”). The Court held that the mandatory determination of immigration status “conflicts with federal law because it necessarily imposes substantial burdens on lawful immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country . . .” *Id.* at 994.

120. *Id.* at 998. The district court held that Section 3 makes it a state crime to violate registration laws and provides for state prosecution and penalties for violation of federal law. *Id.* Such treatment leads to open interference with the federal law and “harassment of aliens.” *Id.* Because “Section 3 stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt . . . to regulate alien registration.” *Id.* at 999.

121. *Id.* at 1000. In IRCA, Congress made a “deliberate choice not to criminally penalize unlawfully present aliens for performing work, much less for attempting to perform it.” *Id.* Instead, “IRCA provides penalties for employers who *knowingly* hire . . . an alien without work authorization.” *Id.* at 1001. IRCA also requires that persons seeking employment attest “under penalty of perjury” that they are aliens authorized to be hired. *Id.* Thus, the court held that Section 5 of S.B. 1070 conflicts with a federal approach and is preempted. *Id.* at 1002.

122. *Id.* at 1004. Here the district court determined that there is “substantial complexity in determining whether a particular public offense makes an alien removable,” a fact which makes it very likely that “officers will wrongfully arrest legal resident[s].” *Id.* at 1006. “Only the federal government has the

preliminary injunction was properly granted as these provisions infringe on personal freedoms of USCs and lawful immigrants.¹²³ In particular, Section 2(B) abridges freedom of movement within the state as there is no reasonable way to distinguish who is and who is not a legal resident, thereby requiring everyone to carry a proof of residence with them at all times.¹²⁴ The Ninth Circuit Court of Appeals affirmed the lower court's decision.¹²⁵ But a disturbing fact remains as states are tired of the federal government's inaction in matters related to immigration, and are trying to cure the situation on their own.¹²⁶

Other states, like Florida, have tried to work out a local solution as well.¹²⁷ The Florida legislature attempted to pass a law similar to the one in Arizona.¹²⁸ The law would have permitted local law enforcement to check the legal status of Florida residents during routine stops; however, that provision was dead on arrival and never saw the light of day in the Florida Congress.¹²⁹ In some cases, i.e., Utah, a rushed approach has led to tragic results.¹³⁰ In Utah, an anonymous letter containing a list of 1300 names of allegedly illegal aliens was sent to local media.¹³¹ Most names were of Hispanic origin, which created a local panic.¹³² Thus, preemption or not, this is most likely just the beginning of a much

authority" to impose such burden on legal residents. *Id.*

123. *Id.* at 995.

124. *Id.*

125. *United States v. Arizona*, 641 F.3d 339, 340 (9th Cir. 2011); *see also* CNN Wire Staff, *U.S. Appeals Court OKs Decision Blocking Arizona Immigration Law*, CNN (Apr. 11, 2011), <http://www.cnn.com/2011/US/04/11/arizona.immigration/index.html> (summarizing final decision of the Ninth Circuit Court of Appeals, which affirmed the preliminary injunction related to the provisions of the S.B. 1070 law, imposed by the Arizona district court).

126. Campo-Flores, *supra* note 102; Hoy, *supra* note 103.

127. *See Republicans Bring Arizona-style Immigration Law to Florida*, ORLANDO SENTINEL, available at http://blogs.orlandosentinel.com/news_hispanicaffairs/2010/08/state-republicans-bringing-arizona-style-immigration-law-to-florida.html (last visited Nov. 6, 2011) (summarizing Republican William Snyder's attempts to introduce similar law to S.B. 1070 in Florida). Florida law enforcement agents would be obligated "to check the status of suspected illegal immigrants," and businesses would also be required to check the status of their future employees. *Id.* The bill died before it could be reviewed by the Florida Legislature. *Id.*

128. *Id.*

129. Javier Manjarres, *FL Senate Fails to Pass Immigration Reform*, SHARK TANK (May 3, 2011), <http://shark-tank.net/2011/05/03/14389/>.

130. *See List of Alleged Illegal Immigrants Mailed in Utah*, FOX NEWS (July 13, 2010), <http://www.foxnews.com/us/2010/07/13/list-containing-names-purported-illegals-mailed-utah/> (explaining a tragic occurrence in Utah). In Utah, an anonymous group mailed a list to local media and law enforcement agencies containing 1300 names of allegedly illegal immigrants and demanding their immediate deportation. *Id.*

131. *Id.*

132. *Id.*

broader trend that might have dangerous consequences. In fact, the Supreme Court's recent decision in *Chamber of Commerce v. Whiting* upholding the Arizona Act¹³³ could be perceived as a green light for the states to take immigration matters into their own hands and further their attempts to circumvent federal laws.¹³⁴

The situation in Arizona has created an opportunity for another controversial issue to resurface, and that is the issue of citizenship of children born to their illegal parents.

C. Whether Children Born to Undocumented Aliens Should Be Automatically Awarded U.S. Citizenship

The Fourteenth Amendment to the United States Constitution states: "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."¹³⁵ The citizenship rights are based on the *jus soli* principle, that is, a person is deemed a citizen based on his or her birthplace.¹³⁶ This concept started gaining a lot of criticism in the mid-1980s when scholars and politicians began paying closer attention to the number of illegal aliens in the country and their "anchor babies."¹³⁷ The Citizenship Clause's opponents' major argument was that Congress had not considered the issue of illegal immigration, as it was operating in a world in which unrestricted immigration to the United States was actually encouraged.¹³⁸ The Framers had "no intention of establishing a universal rule of birthright citizenship."¹³⁹ According to their ideology, "citizenship required in addition [to mere birth on the soil] the existence of conditions indicating mutual consent to political membership."¹⁴⁰

133. *Whiting*, 131 S. Ct. at 1987; see generally John Gibeaut, *Alien Resurrection: Justices Open the Door for States to Control Immigration Status*, A.B.A. J. (Aug. 19, 2011, 3:26 PM), available at http://www.abajournal.com/news/article/alien_resurrection_justices_open_the_door_for_states_to_control_immigration/ (explaining potential impact of the Supreme Court's decision in *Chamber of Commerce v. Whiting* on states that are attempting to resolve the issue of dysfunctional immigration laws on their own).

134. Gibeaut, *supra* note 133, at 22-23.

135. U.S. CONST. amend. XIV, § 1.

136. ALEINIKOFF ET AL., *supra* note 3, at 15.

137. See *id.* at 33 (explaining that when the framers of the Citizenship Clause adopted the common-law rule of birthright citizenship, immigration to the United States was entirely unregulated because the concept of illegal immigration did not exist). Opponents of the Citizenship Clause claim that birthright citizenship for the children of illegal and temporary visitors is a matter of congressional choice rather than a constitutional prescription. *Id.* at 33-35. They believe that once the incentive of citizenship is removed, illegal immigration will shrink drastically. *Id.*

138. *Id.* at 33-35.

139. *Id.* at 34.

140. *Id.* at 35.

In 2005, Congressman Tom Tancredo introduced legislation limiting birthright citizenship to children who had a parent who was either a USC or a lawful permanent resident.¹⁴¹ The proposed legislation never became law.¹⁴² Last year, the issue gained new traction after Senator Lindsey Graham said in July of 2010 that “he might offer an amendment to revoke birthright citizenship for American-born children of illegal immigrants.”¹⁴³ However, considering that fifty-six percent of the U.S. population opposes any changes to the Fourteenth Amendment, such attempts are likely to fail.¹⁴⁴

On the other hand, those in favor of the Citizenship Clause claim that there is nothing in it that would prohibit children born to illegal aliens from obtaining U.S. citizenship.¹⁴⁵ Illegal aliens are subject to deportation and criminal punishment because they are under the jurisdiction of the United States.¹⁴⁶ The same

141. See *id.* at 43 (explaining his reasoning behind the proposal, Tom Tancredo stated that in passing the Fourteenth Amendment, Senator Lyman Trumbull’s intent was for the United States jurisdiction to “cover only persons who did not owe allegiance to anybody else.”). The Amendment was not to “include persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers.” *Id.* “Being subject to the jurisdiction of the United States does not mean merely being [born] within its borders,” but it means that a “person owes something to the state, [and] is fully under the state’s authority.” *Id.* Illegal immigrants cannot serve in the military; cannot serve as jurors, etc. *Id.* Their unlawful presence is a blatant “denial of [U.S.] jurisdiction and a refusal to be subject to its laws.” *Id.*

142. Citizenship Reform Act of 2005, H.R. 698, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-698> (last visited Nov. 6, 2011).

143. See Julia Preston, *Births to Illegal Immigrants Are Studied*, N.Y. TIMES, Aug. 11, 2010, <http://www.nytimes.com/2010/08/12/us/12babies.html> (stating that eight percent of babies born in 2008 had at least one parent who was an illegal alien). Nearly four out of five children born to illegal immigrant families are American citizens because they were born in the U.S. *Id.* Senator Graham’s attempt is not the first one to abolish the Citizenship Clause of the Fourteenth Amendment. *Id.* His comments appealed to many Americans. *Id.* However, most of them remain unconvinced that altering the Constitution is the proper way to deal with the issue. *Id.* The accusation that illegal immigrants cross the border just to “drop” a baby is inconsistent with the study conducted by the Pew Hispanic Center. *Id.* The Pew figures show that “80 percent of mothers in the country illegally have been here for over a year” and “more than half of them have been here for more than five years.” *Id.* These figures show a different problem, that is, that young women form families with legal residents or USCs, which leads to possible separation of families in the future. *Id.* The immediate focus should be on shrinking the illegal population rather than altering the Constitution. *Id.*

144. *Id.*

145. ALEINIKOFF ET AL., *supra* note 3, at 36-37.

146. See *id.* at 37 (noting that “nothing in the language of the Citizenship Clause . . . or its traditional interpretation, requires that the parents of a child born in the United States must be permanent residents . . .”). The Supreme Court has treated temporary aliens as “equivalent to resident aliens

rationale applies to their children, meaning that if we choose to punish a person for breaking our laws, we must also award them with what is guaranteed by the U.S. Constitution. We cannot apply the law selectively just because the concept of an “anchor baby” terrifies some politicians.¹⁴⁷ Furthermore, the “anchor baby” principal is largely a myth, as courts have refused on multiple occasions to grant asylum to parents just because they had U.S.-born children.¹⁴⁸ Parents who seek asylum on such grounds must meet the extremely unusual hardship standard, which is determined on a case-by-case basis.¹⁴⁹

Instead of attacking those who, whether we like it or not, contribute to our communities, very often pay taxes, and work hard to support their families, perhaps the debate should turn toward the phenomenon of so-called “birth tourism.”¹⁵⁰ This idea is based on wealthy people who fly to the United States so that their children can be born on U.S. soil in order to secure U.S. citizenship for their kids.¹⁵¹ They usually fly into the U.S. two to three months

... because both are subject to the authority of the government.” *Id.* at 37-38. “[D]eportable aliens are subject to the jurisdiction of the United States”; that jurisdiction is what “makes them deportable, and often subject to criminal punishment as well.” *Id.* *Jus soli* rule has a similar interpretation with our Canadian neighbors, where citizenship is extended “to all children born in the territory except the children of foreign diplomats.” *Id.*

147. Gebe Martinez, Ann Garcia & Jessica Arons, *Birthright Citizenship Debate Is a Thinly Veiled Attack on Immigrant Mothers*, CTR. FOR AM. PROGRESS (Aug. 18, 2010), http://www.americanprogress.org/issue/s/2010/08/citizenship_debate.html.

148. See *In re Andazola*, 23 I & N Dec. 319, 335 (B.I.A. 2002) (presenting a case of a single Mexican woman, a mother of two United States citizens who could not meet the extremely unusual hardship standard and was ordered to return to Mexico); see also *In re Monreal*, 23 I & N Dec. 56, 57 (B.I.A. 2001) (summarizing the case of a thirty-four-year-old Mexican national who was the father of three United States citizen children). The petitioner could not satisfy the extreme hardship standard as he was working for ten years for his uncle’s business and had a brother living in Mexico who also worked for the same business; his wife lived in Mexico with one of their children; and the other children could speak, read, and write Spanish, the children would not suffer any major hardship if their father were ordered to return to Mexico. *Id.* at 57-58. The father’s petition for asylum was denied. *Id.* at 56.

149. See ALENIKOFF ET AL., *supra* note 3, at 796 (establishing that exceptional and extremely unusual hardship requires showing that an alien’s USC or permanent alien “spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure.”).

150. See David H. King, *Expanding the Residency Rights on Non-Nationals in the European Community*, 29 LOY. L.A. INT’L & COMP. L. REV. 291, 291 (2007) (explaining that birth tourism is not only a U.S. phenomenon, but it also presents a problem in Western Europe).

151. Devin Dwyer, *A New Baby Boom? Foreign “Birth Tourists” Seek U.S. Citizenship for Their Children*, ABC NEWS (Apr. 14, 2010), <http://abcnews.go.com/Politics/birth-tourism-industry-markets-us-citizenship-abroad/story?id=10359956>.

before the birth and go back to their home countries soon after.¹⁵² Such endeavors cost anywhere from thirty to fifty thousand dollars,¹⁵³ but the parents do this so that someday their kids can freely travel to the United States and have access to U.S. educational and social benefits without dealing with the headache of immigration regulations.¹⁵⁴ One can understand that this is done simply to give these kids a choice in the future and not for some heinous purpose;¹⁵⁵ nevertheless, there seems to be something wrong with this approach as it is premeditated abuse of U.S. citizenship laws without a shred of loyalty in return.

Regardless of how we justify the current situation regarding the issues discussed above, the bottom line is that the immigration system has been failing the American people and those who deal with it (or avoid it) on a daily basis. Instead of wasting energy on wild, unfounded conspiracy theories like the one regarding “terror babies,”¹⁵⁶ that energy should be used to come up with constructive plans for solving current national dilemmas. These notions, for example, the idea put forth by Texas Congressman Louie Gohmert—that terrorists breed babies in the United States, so-called “terror babies,” train them abroad, and later return to “wreak vengeance” on the United States¹⁵⁷—should be abandoned. Such wild imagination could be better utilized by coming up with positive plans for solving the national immigration nightmare—the eleven million aliens who have no chance for legalizing their status.

IV. PROPOSAL

Unites States immigration, as it stands now, has two major battles to fight. The first one is related to the eleven million illegal immigrants already in the United States. The second one is related to preventing this situation from reoccurring in the future once the former is fixed. The first battle consists of finding a path for the illegal aliens to come out of the shadows and finally legally

152. *Id.*

153. *See id.* (explaining that hospital bills can be as high as \$30,000 and the pre and post hospital stays at a hotel can cost around \$7750 per month plus tax; the hotel package usually includes “airport transfer, baby cradle and a gift set for the mother.”).

154. *Id.*

155. *Id.*

156. *See* Anderson Cooper, “*Terror Babies*” Conspiracy, CNN (Aug. 12, 2010), <http://ac360.blogs.cnn.com/2010/08/12/video-rep-gohmert-on-terror-babies-conspiracy/> (broadcasting an interview between Anderson Cooper and Congressman Louie Gohmert in order to find out about actual evidence regarding the conspiracy theory of “terror babies,” Mr. Cooper failed in his attempts as Mr. Gohmert kept screaming throughout the interview and refused to answer any questions).

157. *Id.*

join the American society. This is very closely related to border security and ways that would discourage people from attempting to stay in our country illegally. Additionally, the government should implement tougher, uniform sanctions for employers, and put an end to the *jus soli* rule embodied in the Citizenship Clause of the Fourteenth Amendment.

A. *How to Resolve the Issue of Eleven Million "Illegals" Already Residing in the United States*

As discussed above, removal of eleven million illegal aliens is neither feasible nor a practical solution.¹⁵⁸ Some of the undocumented aliens and overstays have lived among us for over twenty years.¹⁵⁹ The fact that there is no way for them to adjust their status in some legal way is a testament to how broken our immigration system has been for a long time.

Many illegal aliens could potentially be eligible for adjustment of status through their family connections: spouses, parents, siblings, and children who are over twenty-one years old.¹⁶⁰ However, because Congress put an end to § 245(i),¹⁶¹ a pilot

158. See Darryl Fears, *\$41 Billion Cost Projected to Remove Illegal Entrants*, WASH. POST, July 26, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501605.html> (asserting that from a purely financial perspective, removal of ten million illegal immigrants would cost the government close to \$41 billion per year). This is more than the annual budget of the Department of Homeland Security. *Id.* The number includes the process of "arresting, detaining, prosecuting and removing immigrants who have entered the United States illegally or overstayed their visas." *Id.* The total cost could be estimated at \$206 to \$230 billion over a five-year period. *Id.*

159. ALEINIKOFF ET AL., *supra* note 3, at 1293.

160. *Id.* at 300-03. This section summarizes family-sponsored immigration. *Id.* There are four preference categories assigned to family reunification and an "immediate relative" category. *Id.* at 300. The "immediate relative" category applies to spouses, children under 21, and parents of the U.S. citizens. *Id.* The four preference categories are divided accordingly: (1) unmarried sons and daughters of the U.S. citizens; (2) spouses and unmarried sons and daughters of lawful permanent resident aliens; (3) married sons and daughters of U.S. citizens; and (4) brothers and sisters of U.S. citizens. *Id.* at 301-02. These four preference groups are subject to yearly quotas. *Id.*

161. See *id.* at 660-61 (explaining the reasoning behind § 245(i) and its functional purpose). "In August 1994, Congress introduced [this provision] on a three-year trial basis." *Id.* at 660. A person could remain in the U.S. while adjusting their status and the person also acquired the right to be "accompanied by counsel during the procedure[.]" *Id.* "In 1995 and 1996, about 345,000 persons adjusted [their status] under [this provision] each year." *Id.* at 661. Because opponents of the provision became very vocal about it, calling it amnesty, "Congress ultimately adopted a compromise, allowing § 245(i) to lapse but with a broad grandfather clause, benefiting people on whose behalf a visa petition . . . was filed on or before January 14, 1998." *Id.* The expiration date was later extended to cover people who filed their visa petition by April 30, 2001. *Id.* Tens of thousands of people attempted to file paperwork before

program that lasted three years and allowed for adjustment of status without the need to leave the country; however, all those who filed their papers after April 30, 2001, can no longer adjust their status under this provision.¹⁶² Very often when it is their turn to receive a visa number that would allow them to apply for permanent residency, they are ordered to leave the country. Once they leave the country, they are subject to a three or ten-year bar before they can reenter the United States again.¹⁶³ Because of such harsh penalties, those who could potentially adjust their status would rather keep quiet and maintain the status quo. It is very important to keep in mind that these people have a lot at stake: their families, properties, and sometimes small businesses.

This “no-way-out” situation creates a vicious cycle: if one cannot adjust his status, one cannot gain lawful employment that would provide him with health insurance and decent wages; without health insurance and livable wages these people are forced to extend their hand toward the government and in critical situations ask for financial/medical support, which creates the known burden on the taxpayers.¹⁶⁴ It is worth remembering that § 245(i) relief came with a \$1000 penalty.¹⁶⁵ If this was increased to \$3,000 per person and only half of the illegal aliens (six million) applied for adjustment of status, the U.S. government would be able to collect \$18 billion.¹⁶⁶

This, of course, would not resolve the situation for those who have no valid family connection. For the remaining majority, the

the assigned deadline. *Id.* That brought additional pressure on Congress to pass another extension bill, but before that could happen, “the September 11 attacks occurred and the legislative effort lost momentum.” *Id.*

162. *Id.*

163. *See id.* (explaining the three and ten-year bars). “A noncitizen who has been unlawfully present for a period longer than 180 days,” but less than a year, is “barred for three years” from the United States. *Id.* A period of illegal presence of one year or more qualifies a person for a ten-year bar before they can enter the U.S. again under INA § 212(a)(9)(B)(i). *Id.* Today, in order to avoid the three or ten-year bar, a person must apply for a waiver for which the standards are very strict. *Id.*

164. *Illegal Immigration a \$113 Billion a Year Drain on U.S. Taxpayers, FED’N FOR AM. IMMIGRATION REFORM* (July 6, 2010), http://www.fairus.org/site/News2/443152277?page=NewsArticle&id=23198&security=1601&news_iv_ctrl=1741; *see generally* CONGRESSIONAL BUDGET OFFICE, *supra* note 96 (explaining the education and healthcare costs related to illegal immigrants).

165. *See* ALENIKOFF ET AL., *supra* note 3, at 660 (noting that a “\$1,000 [penalty fee] on top of the normal I-485 filing fee,” was attached to filing under the § 245(i) provision).

166. *See generally* Crystal Patterson, *Quick Guide to Kennedy-McCain Immigration Bill*, DAILY KOS (May 13, 2005), <http://www.dailykos.com/story/2005/5/13/112653/285> (explaining that the Kennedy-McCain proposal called for a \$2000 penalty in 2005). Considering that it is 2011, that number could be increased to \$3000.

federal government should create a new category that would allow the remaining illegal aliens to file for adjustment of status in light of the following strict guidelines: (1) a five-year minimum residency in the country; (2) current up-keep with IRS requirements; (3) basic knowledge of the English language; (4) compliance with an appropriate financial penalty; and (5) a clean criminal record. Those who could not comply with these requirements immediately would get a three to six month grace period in which they would have a chance to make themselves eligible. The financial requirements could be paid in installments, something that could be determined on a case-by-case basis.

The first requirement is necessary because adjustment should be offered only to those who have already proven themselves as stand-up members of our communities. The fourth requirement would remind those applying that they did, in fact, break the law in one form or another and there must be at least a monetary penalty. The other requirements are included in the N-400 form when lawful aliens apply for U.S. citizenship,¹⁶⁷ and because adjustment of status would ultimately open a path to citizenship for these people, it is only appropriate that they meet these requirements ahead of time. The proposed requirements should sound familiar, as some of them were a part of the Kennedy-McCain Immigration Bill of 2005, which also proposed that new immigration reform should require a clean criminal record, fines (\$2000), and English/civic classes for immigrants.¹⁶⁸

This new category of applicants would be reviewed in appropriate order after family and employment-based petitions.¹⁶⁹ This would require the government to temporarily lift caps on all

167. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, N-400, Application for Naturalization, *available at* <http://www.uscis.gov/files/form/n-400.pdf>. Part 5 of the application requires a detailed explanation regarding a person's criminal record; subparts of Part 10 require confirmation as to whether a person failed to file income taxes; and the interview that is the extension of the application process requires proof of basic knowledge of the English language and Civics. *Id.*

168. *See* Patterson, *supra* note 166 (explaining the provisions of the proposed bill).

169. *See* ALEINIKOFF ET AL., *supra* note 3, at 303-04 (explaining employment-based immigration). The employment-based immigration is divided into five preference groups. *Id.* The first is designed for priority workers, that is, workers with "extraordinary abilities." *Id.* at 303. The second one is reserved for workers with advanced degrees in science, arts, or business. *Id.* The third preference applies to "skilled and unskilled workers who would fill positions for which there is a shortage of American workers." *Id.* The fourth category includes "special immigrants" like "religious workers, [or] former longtime employees of the U.S. government . . ." *Id.* at 304. And the last preference group applies to those who are willing to invest in the U.S. market and whose investment will create at least ten jobs in the U.S. *Id.*

already existing categories.¹⁷⁰ To get everyone through the system would most likely take a few years. In the meantime, everyone during their waiting period, regardless of category, upon showing a receipt of eligibility, should be able to obtain a Social Security number and work authorization without any additional rights, so that these people could at least work legally while waiting for their green cards. Once a person successfully becomes a legal permanent resident, the green card should be conditional, meaning that, for five years after receiving permanent residency status, a person promises not to become a public charge and promises to be a law-abiding resident.¹⁷¹ Applying for government benefits and/or committing a felony could amount to immediate revocation of such privilege and should trigger immediate deportation proceedings.

The plan should be simple in guidelines and application, and should not go away just because we provide a way out of hiding for the existing number of illegals. A few years after implementation, the five presented requirements could be adjusted to stricter ones, i.e., the residency aspect could be raised to ten years, but the plan itself should not be discontinued. We will never be rid of illegal immigration completely, but with additional safeguards (discussed *infra*), we can set a goal to minimize it to several thousand a year trickling through the system rather than a couple million each year.

The next major issue would be to ensure that nothing like this ever happens again. That involves tighter border security and stricter enforcement of internal immigration laws.

170. *Id.* at 300-10 (explaining that both family and employment-based immigrations involve numerical caps in how many visas a year can be assigned to petitioners; caps are not applicable to “immediate relatives” (family-based immigration)). These annual numerical ceilings create backlogs that go back ten to twenty years. *Id.* For example, if a sibling, a United States citizen, files an application for her brother or sister in 2010, that brother or sister will not receive a visa number for ten to twelve years, and if the beneficiary happens to be of Mexican origin her brother or sister has no chance of obtaining a visa number for close to twenty years. *Id.* at 309. Quotas for employment-based immigration are not that stringent and immigration for most of the categories is up-to-date on the filed applications. *Id.*; see also *Visa Bulletin for October 2010*, U.S. DEP’T OF STATE, http://travel.state.gov/visa/bulletin/bulletin_5145.html (last visited Nov. 7, 2011) (displaying the availability of the immigrant visa numbers by family and employment-based categories; the bulletin is updated monthly and any applicant can monitor the progress of his or her application online).

171. See Immigration and Nationality Act, 8 U.S.C. § 1227(a)(5) (explaining that noncitizens are deportable if they fall into one of the listed categories). One of these categories makes a person deportable when he/she becomes a “public charge,” meaning the person is unable to financially support him/herself and has to rely on help from the U.S. government for daily necessities such as unemployment benefits, food stamps, etc. *Id.*

B. How to Improve Our Border Security in Order to Minimize Smuggling of the Illegal Aliens

This security problem applies to both the Mexican and Canadian borders. Tactics such as building a taller wall, adding a couple new helicopters, or increasing the number of surveillance cameras have proven futile in the past. From the beginning, the government's contract with Boeing regarding better border surveillance did not inspire much confidence either.¹⁷² The skepticism of the plan proved to be justified when, by the end of 2010, the government had spent close to \$1 billion of taxpayers' money, yet Boeing only managed to come up with fifty-three miles of virtual fence instead of the promised six thousand miles by the end of 2009.¹⁷³ Fortunately, the Department of Homeland Security officially canceled the project in January 2011.¹⁷⁴

The United States needs a major new approach that would once and for all discourage people from crossing, smuggling, and being smuggled across the U.S. borders. The solution is frighteningly simple—we must get our armed forces involved in the process. However, one wants to look at this problem; nobody can deny that we are in a constant war with the invisible hand of illegal immigration. All the states bordering Canada and Mexico already have multiple military bases in their territories, i.e., California has seven Air Force, four Army, two Coast Guard, six Marine Corps., and thirteen Navy bases; Washington has two Air Force, one Army, and four Navy bases, etc.¹⁷⁵ The President, as the Commander-in-Chief, could order our military to get actively involved in patrolling our borders. They have the man power, the equipment, and the necessary training. Along with the border patrol agents, the military could make crossing our borders illegally a virtually impossible task. After all, we have almost one million military personal on active duty in the continental United States; that number does not include or impact the troops stationed overseas.¹⁷⁶

172. See Anderson Cooper 360°, *KTH: Virtual Border Fence a Virtual Disaster*, CNN (Dec. 30, 2010), <http://ac360.blogs.cnn.com/2010/12/30/kth-virtual-border-fence-a-virtual-disaster/> (explaining the contract between the U.S. Government and Boeing Corporation regarding a virtual fence, which was supposed to strengthen border security and stop illegal crossings). The government entered into the contract with Boeing during George W. Bush's presidency. *Id.*

173. *Id.*

174. Julia Preston, *Homeland Security Cancels 'Virtual Fence' After \$1 Billion is Spent*, N.Y. TIMES, Jan. 14, 2011, <http://www.nytimes.com/2011/01/15/us/politics/15fence.html>.

175. See MILITARY BASES DIRECTORY, <http://militarybases.com/> (last visited Nov. 7, 2011) (providing a list of all military bases throughout the United States, including relevant specifications).

176. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY

This approach would probably also discourage drug trafficking, which has in recent years become a serious problem.¹⁷⁷ The 2009 budget for the Department of Defense was close to \$515.5 billion,¹⁷⁸ and in 2010 that number was increased to \$636.3 billion.¹⁷⁹ It is hard to believe that only \$1.5 billion has been dedicated to fighting our domestic war.¹⁸⁰ But of course, tighter border security cannot be the only discouraging factor; there must be stricter immigration laws that are enforced on a daily basis.

C. How to Discourage Illegal Aliens from Staying on U.S. Soil

There are a multitude of ideas for sanctions and restrictions regarding keeping undocumented aliens from the U.S. territory. These sanctions can be imposed on illegal aliens directly, or may be imposed indirectly by punishing employers, landlords, and others who openly do business with them. One of the ideas that comes to mind, but has been very poorly implemented, is the E-Verify program.¹⁸¹

REGIONAL AREA AND BY COUNTRY (309A) (Sept. 30, 2010), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1009.pdf>. The list details the number of troops stationed in the U.S. and its territories as well as troops stationed abroad as of September 30, 2010. *Id.*

177. See *Mexican Drug Trafficking*, N.Y. TIMES, Oct. 25, 2011, http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html (summarizing recent developments in the war on drugs in Mexico and its impact on the U.S. and Mexican relationship as well as its negative influence on the states that share the border with Mexico). The failed attempts of the Mexican government to effectively deal with drug cartels have strained relations with the United States. *Id.* The spillover violence has started to present a threat to the states that border Mexico, to the point that the governors of those states are currently debating whether this calls for measures that would appropriately deal with a situation that is closely equivalent to a threat of national security. *Id.* President Obama's administration created a new plan to help the Mexican government deal with this rapidly growing problem as well as assist substantially financially. *Id.*

178. See DEP'T OF DEFENSE, THE BUDGET FOR FISCAL YEAR 2009, available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/defense.pdf> (summarizing the United States Department of Defense budget for 2009). The document contains an itemized summary of the budget and its necessary increases in comparison to previous years. *Id.*

179. Agence France-Presse, *U.S. Senate Approves 2010 Military Budget*, DEFENSE TALK (Dec. 22, 2009), <http://www.defencetalk.com/us-senate-approves-2010-military-budget-23484/>. This document summarizes in general terms the reasons for the budget increase and its primarily targeted areas of spending. *Id.*

180. *Mexican Drug Trafficking*, *supra* note 177.

181. See Harry Asatrian & Ainsley Harrell, *To E-Verify or not to E-Verify*, 2009 EMERGING ISSUES 4512 (2009) (explaining the principles of the program and its development). The Immigration Reform and Control Act of 1986 made it "unlawful for an employer to hire . . . a worker with the knowledge that [he/she might be illegal and thus unauthorized] to work in the United States[.]" *Id.* IRCA provided for an employment verification system that was

1. *E-Verify*

E-Verify is a program already in place, operated by the Social Security Administration, which allows employers to electronically verify the work authorization of their newly hired workers.¹⁸² Currently, only seventeen states use the program, as it is voluntary.¹⁸³ Participation in the program costs money that not all businesses are willing to forfeit.¹⁸⁴ However, the program should be mandatory for all businesses, both private and governmental. It should have an annual fee based on the size of the workforce, and once fully implemented, it should apply to all new employees as well as some current ones selected at random. It should also be easy to use.

Private families who hire nannies and self-employed cleaning people should be able to verify their employment status at any Social Security office for a nominal charge. This would discourage illegal aliens from applying for any job in the United States, and it would make employers more cautious about who they offer jobs to in order to avoid fines that are already in place under IRCA regulations.¹⁸⁵

Another method of discouragement that could be very effective would be amending the Citizenship Clause of the Fourteenth Amendment.¹⁸⁶

telephone based. *Id.* But with the advanced developments of the internet, that system was soon replaced by web-based version called E-Verify—a program that has been highly criticized as to its accuracy, but currently the only such program in place to help minimize employment of illegal immigrants. *Id.*

182. *Id.* Employers are not permitted to prescreen job applicants. *Id.* After an employee is hired, he/she must fill out Form I-9. *Id.* Then the employer “enters information from the form into the E-Verify system, which electronically transmits the information to the government,” and, if needed, to the USCIS database. The verification takes anywhere from twenty-four hours to threedays. *Id.*

183. Scot Kersgaard, *Rhode Island Governor Rescinds State’s Participation in E-Verify and Other Programs*, THE COLO. INDEP. (Jan. 7, 2011), <http://coloradoindependent.com/71248/rhode-island-governor-rescinds-states-participation-in-e-verify-and-secure-communities>. Less than a day after taking the office, the Rhode Island governor, Lincoln D. Chaffee, signed a repeal of the Executive Order on E-Verify program. *Id.*; see also Lamar Smith, *Make E-Verify the Law of the Entire Land*, THE WASH. TIMES, June 17, 2011, <http://www.washingtontimes.com/news/2011/jun/17/make-e-verify-the-law-of-the-entire-land/> (promoting the usefulness and need for E-Verify across the country).

184. See Asatrian et al., *supra* note 181 (explaining that even though the program is offered cost-free, nevertheless, employers still incur costs when enrolling in and operating the system; some costs cannot be easily quantified as those involving additional recruitment efforts and in some cases delayed production).

185. The Immigration Reform & Control Act § 274(A).

186. U.S. CONST. amend. XIV, § 1.

2. Citizenship Clause

As previously discussed, all children born on U.S. soil are granted automatic citizenship according to the Citizenship Clause of the Fourteenth Amendment.¹⁸⁷ Americans love their Constitution and do not like when changes are made to it, but desperate times call for desperate measures and perhaps we have outgrown the *jus soli* principle¹⁸⁸ of the Clause. Our allies, like the United Kingdom, Ireland, India, and Australia, certainly did and changed how their country's citizenship is granted.¹⁸⁹ For example, Ireland passed the Irish Nationality and Citizenship Act of 2004, which went into effect in January of 2005.¹⁹⁰ The Act provides that noncitizens must reside lawfully in the country for "three years within the four years immediately preceding the child's birth, before their child can acquire Irish nationality."¹⁹¹ A similar law in the United States could potentially have a huge impact on illegal aliens, as the knowledge would make many parents seeking to enter for the sole purpose of giving birth leave or would deter them from entering in the first place. It would also eliminate the issue of birth tourism.

Ultimately, the federal government could, although it is not advisable, slowly fade out most privileges that illegal aliens have access to, i.e., the right to education, the right to own land, etc.¹⁹²

187. *Id.*

188. ALEINIKOFF ET AL., *supra* note 3, at 15.

189. See Allen Greenberg, *Legal View: Make Birthright Law Fix Part of U.S. Immigration Reform*, LEGALNEWS.COM (Aug. 23, 2010), <http://www.legalnews.com/detroit/1002251> (arguing for a change in our birthright laws in reliance on examples from other countries that in recent years have changed their citizenship laws); see also ALEINIKOFF ET AL., *supra* note 3, at 38 (noting that the United Kingdom stepped away from the pure application of the *jus soli* rule by enacting a statute in 1981 that allows children born in the United Kingdom to acquire British citizenship only if one of the parents is a British national or permanent resident of UK territories).

190. David H. King, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, 29 LOY. L.A. INT'L & COMP. L. REV. 291, 307 (2007). The change in Irish citizenship laws was triggered by a case involving Chinese nationals who chose Ireland as the birth place of their second child as, back then, the Irish constitution granted *jus soli* citizenship. *Id.* at 292. Because of their daughter's Irish citizenship, the parents were able to reside in any Member State under the Union Citizenship Clause. *Id.* at 294. This loophole ignited a "fierce debate in Ireland leading to a referendum," which concluded in the Irish National and Citizenship Act of 2004, and which eliminated the *jus soli* principle for children of noncitizens. *Id.* at 307.

191. *Id.* at 307.

192. *About the ACLU's Immigrants' Rights Project*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project> (last visited Nov. 7, 2011) (explaining that the "fundamental constitutional protections of due process and equal protection embodied in our Constitution and Bill of Rights apply to every 'person' and are not limited to

But one thing is for certain—none of the restrictive ideas should ever be implemented until we, as a nation, come up with a reasonable solution for these people to legalize their status. We already have many necessary laws on the books, the government just needs to enforce them systematically rather than on a convenience basis, which is usually dictated by the economic climate.¹⁹³ As of right now, illegal aliens live in fear twenty-four hours a day; there is no need to terrorize them any further until they get a second chance in life.

Over the summer of 2011, President Obama loosened the federal government's tough grip on illegal immigration and lit a spark of hope that perhaps the immigration issue is not entirely dead for this administration. While Congress was enjoying its summer break, President Obama's administration announced a shift in the deportation policy, meaning that the Department of Homeland Security will "review 300,000 deportation cases pending in the federal immigration courts."¹⁹⁴ The "low priority cases," the ones "not involving violent and dangerous crimes," will be dismissed, and there will be an opportunity for these people to apply for work authorization.¹⁹⁵ At the time this Comment was written, the precise rules were still being hashed out. This action is certainly a move in the right direction, but there is still much to be done.

V. CONCLUSION

Needless to say, this Comment only scratches the surface of the problems with our country's immigration system. It also provides only a sample of solutions that could be implemented. But one thing is for certain—doing nothing is not a solution. Immigration cannot and should not be a political issue—immigration will always be a *human* issue. Illegal aliens' silent defiance of our laws does not come from spite or hatred towards the United States or its people; rather, it comes from a deep admiration for this nation and the longing for a chance of their own version of the American Dream. Instead of creating more opportunities for hatred, prejudice, and racial profiling, which is

citizens.”).

193. See ALEINIKOFF ET AL., *supra* note 3, at 1304 (noting that in 1950s INS district chiefs enhanced the supply of undocumented workers for seasonal employment). “Border Patrol officials told agents to stay away from designated ranches and farms . . .” *Id.* The informal approach led to substantial increase of illegal immigration. *Id.*

194. See Catherine E. Shoichet, *Immigration Attorneys: U.S. Deportation Policy Shift Starting*, CNN (Aug. 26, 2011), <http://www.cnn.com/2011/POLITICS/08/26/deportation.policy/> (reporting on the newest immigration development related to deportation policies).

195. *Id.*

on the rise again in our country, it is time to find and implement workable solutions. We seem to understand the privilege of pardon for criminals. Why is pardon for these people so hard to comprehend? There is no better time than the present to fix our broken immigration system, and once again become the nation that Emma Lazarus idealized in her poem.