A NATION THAT WELCOMES IMMIGRANTS?
AN HISTORICAL EXAMINATION OF UNITED STATES IMMIGRATION POLICY

James F. Smith[*]

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[*] Senior Lecturer, University of California, Davis School of Law. B.S. 1964, Arizona State University at Tempe; J.D. 1967, University of California at Berkeley.

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-tost to me,
I lift my lamp beside the golden door!

— Emma Lazarus, inscription on the Statue of Liberty

The United States has had one of the most generous and open immigration policies in the world. But since the ratification of the Constitution, United States immigration policy has been schizophrenic. Early Americans welcomed immigrants as a source of strength and vitality for a growing nation. However, from the 1830s on, when the Irish immigrants were castigated as unfit, some Americans began to view immigrants not as a resource, but as a cause of social and economic decline. These concerns have prompted a United States immigration policy that has at times been inconsistent, racist, and surprisingly un-American.

This Article examines the history of United States immigration policy. Part I discusses the history of United States immigration and naturalization legislation. Part II discusses United States immigration policy towards Mexico.

I. THE HISTORY OF UNITED STATES IMMIGRATION AND NATURALIZATION LEGISLATION

In the first century following ratification of the Constitution, Americans viewed immigration as a welcome source of national strength and wealth.[1] With few exceptions, immigration remained unregulated. The

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[1] The Declaration of Independence itself cites restrictions on immigration as one of the causes for the American Revolution. *See also* EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 48 (1981) (quoting Abraham Lincoln, who encouraged immigration in a speech to Congress in 1863). Thomas Jefferson viewed the United States as an asylum for oppressed humanity. 11 ANNALS OF CONGRESS 16 (1801). President Tyler extended an invitation to the people of other countries to come and settle in the United States. CONG. GLOBE, 28th Cong., 1st Sess. 9 (1843).

nation's first immigration legislation, the Alien and Sedition Act of 1798, gave the president power to deport aliens he deemed "dangerous to the peace and safety of the United States." The Act also required registration of all aliens.[2] It expired in two years without having been used. The Alien Enemies and Alien Friends Act of 1798[3] permitted the deportation of all alien males fourteen and older who were natives, subjects, or citizens of any country at war with the United States.[4] President Thomas Jefferson criticized these measures for their failure to provide due process.

During the first three quarters of the 18th century, Congress resisted any further attempts to regulate immigration. In the 1830s and 1840s, a large influx of poor rural Catholics led to calls for "quality control" of immigrants by excluding criminals, paupers, and lunatics. This period witnessed the emergence of organized groups of "nativists" who favored restrictionist immigration policies. Such groups, which in the 1830s included the Secret Order of the Star Spangled Banner and the Know Nothing political party, have had a continuing influence in the United States.[5] But the dominant consensus favored an open immigration policy and Congress continued to defer to individual states to regulate immigration.[6]

A. Selective Admissions

United States possession of the former Mexican territories and discovery of gold in California lead to a large influx of Chinese and European immigrants. The rush to develop the West and build the transcontinental railroad demanded a quick supply of cheap labor. Both Chinese laborers and Mexican workers filled this need. Often, these laborers signed work contracts in return for transportation to the United States. Congress initially objected to such contracts trade as a form of slave trading.[7]

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[2] 1 Stat. 570 (1798).

[3] 50 U.S.C. §§ 21-23 (1988).

[4] 1 Stat. 577 (1798); *see also* Lawrence H. Fuchs & Susan B. Forbes, *Select Commission on Immigration and Refugee Policy [SCIRP], U.S. Immigration Policy and the National Interest*, 92-93, 161-216, *reprinted in* THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 40-59 (2d ed. 1986).

[5] *See* Fuchs & Forbes, *supra* note 4, at 44 (discussing nativist groups).

[6] HUTCHINSON, *supra* note 1, at 46.

[7] *Id.* at 42; *see also* The Coolie Act of 1862, 12 Stat. 340 (1862).

The Immigration Act of 1875[8] prohibited immigrant labor contracts based on fraud and made contracting to supply Chinese laborers a felony. The measure also designated felony criminals and prostitutes as excludable classes of aliens. The exclusion of Chinese workers lead to a labor shortage in the West and to increased recruitment of Mexican workers.[9] In 1880, the United States negotiated a treaty with China permitting the former to regulate or temporarily suspend Chinese immigration.[10]

The Chinese Exclusion Act of 1882 was the United States' first comprehensive effort to restrict immigration. Congress responded to the economic depression of the time by scapegoating the Chinese as the source of unemployment and other economic dislocation. The hue and cry against the Chinese included the xenophobic complaints that they had failed to assimilate "our customs" and had "brought" with them prostitution. Some also feared that increased Chinese immigration could depress white settlement in the West.[11] The Act banned the immigration of Chinese laborers for ten years, provided for the deportation of illegal Chinese immigrants, and prohibited Chinese from becoming United States citizens.[12] These racist restrictions were later extended to all Asians, natives of India, and others.[13]

The Act instituted a head tax on all immigrants (except Canadians and Mexicans)[14] to defray the cost of regulating immigration and caring for immigrants. It provided for the exclusion of any convict, lunatic, idiot, or other person likely to become a public charge. Excluded aliens were to be returned to their country of origin. Immigrant convicts could be deported even after leaving the ship.[15]

This new policy of designating "excludable aliens" was later

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[8] 18 Stat. 378 (1875).

[9] Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 69 (1975).

[10] HUTCHINSON, *supra* note 1, at 76-77.

[11] *Id.* at 76.

[12] 22 Stat. 58 (1882).

[13] Immigration Act of 1917, 39 Stat. 874, 876 (1917).

[14] 23 Stat. 58 (1884); 34 Stat. 898 (1907).

[15] *Id.*

expanded to include aliens hired under labor contracts (1885),[16] paupers, polygamists, the insane and diseased (1891),[17] anarchists or subversives (1903),[18] the disabled (1907), stowaways, illiterates over age 16, alcoholics and psychotics (1917),[19] persons ineligible to become citizens (most Asians) and non-immigrants without proper documents (1924),[20] drug addicts, immoral sex-offenders, laborers not in demand in the United States, those previously deported for any reason and those aiding illegal aliens (1952).[21]

The 1917 enactment of the literacy test was an important symbolic victory for those nativist groups who favored a more restrictionist policy.[22] This controversial provision would have excluded a large portion of the nation's 19th century immigrants. In 1907, after the failure of the restrictionists to establish the test, Congress established the Dellingham Commission to study the impact of immigration on the United States. The Commission strongly recommended the literacy test to keep out inferior foreigners.[23] The measure became law in 1917 after four presidential vetoes.[24] However, it largely failed to control immigration in the manner that its proponents had intended because aspiring immigrants simply became literate.[25]

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[16] Alien Contract Labor Act, ch. 164, 23 Stat. 332 (1885); Act of February 23, 1887, ch. 220, 24 Stat. 414 (1887).

[17] Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084 (1891).

[18] Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1214; Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889; Anarchist Act of 1918, ch. 186, § 1, 40 Stat. 1012; Act of June 5, 1920, ch. 251, § 1, 41 Stat. 1009. Current versions are codified at 8 U.S.C. §§ 1182(a) (27)-(29), 1251(a) (15)-(16) (1988). *See generally* W. PRESTON JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 4 (1963).

[19] Act of February 5, 1917, ch. 29, § 3, 39 Stat. 875 (1917).

[20] Act of May 26, 1924, ch. 190, 43 Stat. 153 (1924).

[21] Immigration and Nationality Act, Pub. L. No. 414, § 212, 66 Stat. 163, 182-85 (1952).

[22] The 1917 Act codified the list of alien categories to be excluded and banned most immigration from Asia.

[23] Fuchs & Forbes, *supra* note 4, at 50.

[24] President Cleveland (1896), President Taft (1913), and President Wilson (1914 and 1917).

[25] Fuchs & Forbes, *supra* note 4, at 52.

B. National Origin Quotas (1921-1965)

Congressional concern about immigration was heightened immediately after World War I. Many Americans feared that millions of European refugees would immigrate to the United States and settle in urban areas that already faced unemployment and housing shortages.[26] As an alternative to complete prohibition of immigration,[27] Congress passed the first law establishing quotas for immigration.[28] The Act limited immigration to a three percent quota based on the number of aliens of that nationality living in the United States in 1910. Immigrants from the Western Hemisphere were exempted[29] despite concerns that "citizen" factories would be created.[30]

The quota used in the 1921 legislation disproportionately favored the most recent immigrants. The National Origins Act of 1924 ("Johnson-Reed") adopted a quota system that was designed to preserve the Northern European and British Isles composition of the population. Its racist formula was designed to maintain the national origin of the United States as it existed in 1890. The 1924 Act significantly decreased the quota allotment to Southern and Eastern Europeans (44% to 12%).[31] The total number of immigrants from the Eastern Hemisphere was limited to 150,000. The Western Hemisphere remained exempt. However, from 1928 on, bills were

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[26] *See* The Immigration and Naturalization Systems of the United States, S. REP. NO. 1515, 91st Cong., 2d Sess. (1950). *See also* Esther Rosenfeld, *Fatal Lessons: United States Immigration Policy During the Holocaust,* 1 U.C. DAVIS J. INT'L L. & POL'Y 249 (1995) (detailing U.S. immigration policy during Holocaust).

[27] H. R. REP. NO. 14461, 66th Cong., 3d Sess. (1920).

[28] Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5 (1921). Operation of the previous quota was extended by two years. Act of May 11, 1922, ch. 187, § 1, 42 Stat. 540 (1922).

[29] Congress's extreme concern with European refugee immigration best explains the Western Hemisphere exemption. World War I did not ravage the Western Hemisphere; therefore, Congress did not fear a huge influx of immigrants from the Western Hemisphere. Also, immigration from Europe constituted nearly 80% of total immigration between 1911 and 1920. Accordingly, Congress was less concerned with non-European immigration.

[30] 60 CONG. REC. 3443 (1921).

[31] 43 Stat. 153 (1924).

introduced in Congress to eliminate the exemption.[32] Abraham Lincoln's prophetic statement that should the nativists have their way, the Declaration of Independence would be rewritten to read: "All men are created equal, except Negroes, foreigners, and Catholics" seemed at hand.

C. *The Elimination of the Quota System and Illegalization of the Mexican Worker (1952, 1965-1976)*

During World War II, Congress repealed the exclusion legislation of 1882 because it felt that such legislation represented a continuing insult to its Chinese ally.[33] However, in 1952, the McCarran-Walter Act, which codified and revised United States immigration laws [hereafter the Immigration and Nationality Act or "INA"] and preserved the national origins quota system.[34] This provoked President Truman's veto, which Congress later overrode. The Act strengthened the exclusion provisions and made the naturalization process more rigorous.[35] It also eliminated all exclusions based on race and established a preference system favoring highly skilled workers.

In 1952, Congress also passed the so-called "Wetback Act," which was designed to discourage illegal immigration from Mexico.[36] The act permitted the Border Patrol to enter private lands within 25 miles of the border between the United States and Mexico.[37]

D. *The Immigration Act of 1965*

The United States civil rights movement of the 1960s greatly influenced the first major change in the Nation's immigration policy since

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[32] H. R. REP. 10,995; H. R. REP. 6465; H. R. REP. 15,079; *see* HUTCHINSON, *supra* note 1, at 209 (noting that sugar beet growers blocked passage of bill in 1928).

[33] 60 Stat. 1353 (1943).

[34] 66 Stat. 163, 175-76 (1952).

[35] Lawrence A. Fuchs, *Immitration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 434 (1983).

[36] Act of June 27, 1952, ch. 8, 66 Stat. 163, 228-29 (1952), *codified at* 8 U.S.C. § 1324(a) (1988).

[37] 60 Stat. 865 (1946); *see also infra,* notes 107-112 and accompanying text (discussing Wetback Act).

the National Origins Act of 1924. President John F. Kennedy had written a book, *A Nation of Immigrants,* which denounced the national origins quota system. Following Kennedy's assassination, President Johnson forcefully supported reform.[38] The Immigration Act of 1965 represented a step away from racially motivated quotas and toward a more humane system of immigration.[39] The 1965 Act abolished the national origin quotas system and also the Asian-Pacific triangle immigration restriction provisions of the 1952 Act. It replaced these restrictions with a per-country limit on every country outside of the Western Hemisphere. Eastern Hemisphere immigration was limited to 160,000 with a per-country limit of 20,000 immigrants per year.

The price for the abolition of the national origins system was, for the first time, to limit Western Hemisphere immigration (annual limit of 120,000).[40] The new system closed the last "Good Neighbor"[41] or open door policy of United States immigration. Although the Johnson Administration opposed the Western Hemisphere limitation, one researcher has written that:

> It can only be inferred that the . . . [limitations] . . . were to reassure those concerned at the possibility of large immigration from Latin America or fearful of ill effects on the labor market or to provide a *quid pro quo* to influential members of Congress or interest groups in return for their support of the bill.[42]

Future immigrants from the Western Hemisphere, without certain close relatives who were United States citizens or lawful permanent residents, would have to demonstrate their qualifications as skilled workers who were then in short supply.

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[38] HUTCHINSON, *supra* note 1, at 435.

[39] 79 Stat. 911 (1965).

[40] Fuchs & Forbes, *supra* note 4, at 57.

[41] "Good Neighbor" is a phrase made popular by President Franklin Delano Roosevelt to describe friendly relations between the United States and Latin America.

[42] HUTCHINSON, *supra* note 1, at 378.

E. Immigration Legislation (1970-76)

By 1970, the end of the Bracero Program[43] and the imposition of the Western Hemisphere quotas and labor certification requirements had caused United States immigration policy toward Mexico to change from a generally open door policy to a more restrictive one.[44] Inevitably, "illegal immigration" from Mexico became a political issue. Congress had illegalized the Mexican worker and now had to deal with the "problem."[45] By 1971, it began to consider legislation to control the Mexican "illegal alien" problem. Representatives from the Mexican-American community argued that the United States should consider the special historic, geographic, social, and economic ties between the United States and Mexico. Certainly, the integrated economic and labor markets had existed before the creation of the international border and were continued for over a century under the open door policies.[46] Nonetheless, Congress has repeatedly rejected efforts to establish a preferential quota for Mexico, citing the distaste for any type of national origins quotas.[47]

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[43] *See infra* notes 101-105 and accompanying text (discussing Bracero Program).

[44] In 1976, Western Hemisphere countries, including Mexico, were subjected to the 20,000 per country limit. Act of Oct. 20, 1976, Pub. L. 94-571, 90 Stat. 2703 (1976). While the legislation was neutral on its face, it had a uniquely prejudicial effect on Mexico, the only country to have exceeded that limit in the past several years. *The 'Rodino Bill' an Example of Prejudice Toward Mexican Immigration to the United States,* 2 CHICANO L. REV. 40, 46 (1975). Congress also noted that illegal immigration was so high that the proposed 35,000 limit for Mexico would still be insufficient. H. R. REP. NO. 94-1553, 94th Cong., 2d Sess. 9 (1975).

[45] The INS reported having deported 30,000 Mexicans in 1961, 108,000 in 1967 after the end of the Bracero program, and 450,000 in 1979. INS Annual Reports, 1961, 1967, and 1979. INS Commissioner Raymond F. Farrell directly attributed the rise in Mexican illegal immigration to the end of the Bracero program and the imposition of the Western Hemisphere quotas. *Hearings before House Subcomm. of the Judiciary,* 92nd Cong., 1st Sess. 19 (1971) (statement of Raymond F. Farrell, Commissioner, INS).

[46] H. R. REP. NO. 1, 92d Cong., 1st Sess., pt. 1, at 216, 269-70 1971.

[47] Both Presidents Gerald Ford and Jimmy Carter stated their support for a special quota for Mexico, but neither administrations took action to make this a reality. Fuchs & Forbes, *supra* note 4, at 58.

F. The Refugee Act of 1980

Throughout most of its history, the United States has treated refugees as simply another category of immigrants subject to the applicable admissions criteria and quotas. For example, in 1939 Congress defeated a bill to rescue 20,000 from Nazi Germany on the grounds that it would exceed the German quota. Following World War II, Congress was more generous and passed the Refugee Relief Act of 1948, under which 214,000 persons were admitted. However, the United States declined to join the 1951 United Nations Convention Relating to the Status of Refugees.[48]

In 1956 and 1957, Congress enacted measures to provide refugee status to those fleeing certain communist Eastern European countries and the Middle East. However, these provisions were also subject to the United States' refugee country quotas of the refugees. Throughout the 1960s and 1970s, the principal means for refugee admission was through the INS conditional entry or paroling power. The Refugee Act of 1980 was designed to bring the United States into conformity with the Refugee Protocol of 1968, which followed the 1951 Convention. It was also aimed to develop an ongoing mechanism for the admission of refugees abroad and the adjudication of political asylum claims in the United States.

G. Immigration Reform and Control Act of 1986 ("Simpson-Rodino," hereafter "IRCA")

The early 1980s saw a vigorous debate over United States immigration policies. Undocumented workers were seen as the foot soldiers of a "silent invasion." Many were concerned that the United States had lost control of its borders. Through employer sanctions, Senator Alan Simpson led the crusade to stop the "pull" factor of undocumented immigration. Liberals, however, were able to barter for a so-called amnesty or legalization law for certain aliens who were long-term residents despite their undocumented status.

Thus, the major reforms of the INA by the IRCA were: 1) to impose employer sanctions in the form of civil fines[49] and possible criminal

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[48] 189 U.N.T.S. 137.

[49] Imposed fines will be not less than $250.00 nor more than $2000.00 for each unauthorized alien. 8 C.F.R. 274a.10 (1994). Employers may also be fined between $100.00 and $1,000.00 for each failure to complete I-9 forms (document verification). Immigration & Naturalization Act [INA], § 274A(e)(4), *codified at* 8 U.S.C. § 1324a(e)(4) (1988).

penalties[50] for the knowing hiring or continued employment of an "unauthorized alien";[51] 2) to create the so-called amnesty program under which aliens unlawfully in the country since before January 1, 1982 could apply for the newly created status of "temporary resident" (if successful, such aliens could later apply for permanent residence);[52] 3) to create a category of "Special Agricultural Workers" ("SAWs")[53] and "Replenishment Agricultural Workers" ("RAWs")[54] who could more easily qualify as temporary residents on the basis of having worked in "seasonal agricultural services,"[55] and 4) to create a new category of non-immigrant workers (H-2A).[56]

The legalization and SAW programs were short-term programs that ended in 1988.[57] However, the employer sanctions and agricultural worker

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[50] INA § 274A(f), *codified at* 8 U.S.C. § 1324a(f) (1988). This code section provides for criminal penalties for a "pattern or practice" of unauthorized employment. *Id.*

[51] INA § 274A(a)(1), (h)(3), *codified at* 8 U.S.C. § 1324a(a)(1), (h)(3) (1988). Although the hiring of such aliens after November 6, 1986 is prohibited, employees hired before that date may be retained. IRCA § 101(a)(3); 8 C.F.R. § 274a (1994).

[52] INA § 245A, *codified at* 8 U.S.C. § 1255a (1988) (explaining that applications for permanent residence will be granted 18 months after temporary status is acquired if alien is otherwise eligible for immigrant visa and has "minimum understanding of ordinary English and knowledge or understanding of history and government of United States, or . . . is satisfactorily pursuing a course of study . . . to achieve . . . [these goals]." INA § 245A(b)(1)(D), *codified at* 8 U.S.C. § 1255a(b)(1)(D) (1988).

[53] INA § 210, *codified at* 8 U.S.C. § 1160 (1988). To be eligible for this program an alien must prove that he worked in a perishable crop for at least 90 days between May 1, 1985 and May 1, 1986.

[54] INA § 210A, *codified at* 8 U.S.C. § 1161 (1988).

[55] The legislation defines "seasonal agricultural service" as the performance of field work related to planting, cultural practices, cultivation, growing, and harvesting of fruits and vegetables or every kind and other perishable commodities, as defined in the regulations by the Secretary of Agriculture. INA § 210(h), *codified at* 8 U.S.C. § 1160(h) (1988).

[56] INA §§ 101(a)(15)(H)(ii), 216; *codified at* 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1186 (1988).

[57] The period for legalization applications ended on May 4, 1988. INA § 245(a)(1)(A), *codified at* 8 U.S.C. § 1255(a)(1)(A) (1988). The SAW application period ended November 30, 1988. INA § 210(a)(1)(A), *codified at* 8 U.S.C.

provisions presented significant long-term changes in the immigration laws of the United States for all employers. Before the IRCA, the knowing employment of undocumented workers was not illegal. However, the act of transporting, concealing, harboring, or encouraging the entry of undocumented aliens has been punishable as a felony since 1952. The act of entering the United States without inspection has been a misdemeanor since the enactment of the INA in 1952. Aliens, however, were typically deported, not prosecuted.[58] Also, the smuggling provisions were not used against employers because of the famous "Texas Proviso" that exempted employers.[59]

The IRCA not only repealed the "Texas Proviso" but now requires all employers[60] to verify that each new employee possesses documents which demonstrate that she is authorized to work.[61] Both the employer and

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§ 1160(a)(1)(A) (1988). Approximately 2 people million applied for legalization. About 10% of that number applied for the SAW program. Both programs have been the subject of considerable criticism and litigation. Critics charge that the INS administered the programs in such a rigorous fashion that thousands have been arbitrarily disqualified. For example, the INS regulations bar those who have left the United States for more than 45 days on any one occasion or for a total absence of more than 180 days. *See* 8 C.F.R. § 245a.2(h)(1) (1994). Also, only individuals were eligible to qualify, and not their spouses or children, which discouraged many from applying who feared that their family would be broken up. Although the legalization documents are confidential and may not be used to effect deportations, potential applicants were skeptical. SAW applicants did not receive the cooperation of the INS in obtaining the necessary proof of their employment from recalcitrant former employers.

[58] INA § 275, *codified at* 8 U.S.C. § 1325 (1988).

[59] The Texas Proviso stated: "Provided, however, that for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." INS § 274, *codified at* 8 U.S.C. § 1255 (1988). *See also infra* notes 107-112 (discussing Wetback Act).

[60] The exemption covers "casual employment of an individual; who provided domestic service in a private home that is sporadic, irregular or intermittent." Also, independent contractors are not considered employees. 8 C.F.R. § 274a.1(f)-(h) (1994). The legislative history of the IRCA provides an exception to "casual hires (*i.e.* those that do not involve the existence of an employer/employee relationship)." H. R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 57 (1986).

[61] Employers must complete Form I-9, which states that they have inspected the required documents for all employees who were hired after November 6, 1986 and were still employed after May, 1987. INA § 272A(a)(1)(B), *codified at* 8 U.S.C.

the employee must sign a form under penalty of perjury.[62] The employer must swear that she has examined certain documents and that the employee is either a United States citizen, lawful permanent resident, or alien for three years or one year after the employment terminates, whichever occurs first.[63]

If the employer determines that "the document reasonably appears on its face to be genuine,"[64] such "good faith" examination establishes an "affirmative defense" to the sanctions.[65] These documents include those which establish citizenship,[66] lawful permanent residence,[67] a social security card plus proof of identity, or employment authorization by the INS.[68]

Because of the fears expressed that the IRCA would result in discrimination against "foreign appearing" workers, the IRCA prohibits discrimination on the basis of "national origin" or "citizenship status."[69] These provisions only protect citizens and permanent residents who demonstrate that they are "intending citizens" by formally declaring their intention to become naturalized in a timely fashion, once they are eligible to do so.[70] Also, an employer may hire a United States citizen in preference to an alien if the two are "equally qualified."[71] When President Reagan signed the IRCA, he signed a statement that these provisions only

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§ 1324a(a)(1)(B) (1988); 8 C.F.R. § 274a.2 (1994).

[62] Form I-9 (Employer Eligibility Verification).

[63] INA § 274A(B), *codified at* 8 U.S.C. § 1324a(B) (1988); 8 C.F.R. § 274a.2(a) (1994).

[64] INA § 274A(b)(1)(A), *codified at* 8 U.S.C. § 1324a(b)(1)(A) (1988).

[65] INA § 274A(a)(3), *codified at* 8 U.S.C. § 1324a(a)(3) (1988); 8 C.F.R. § 274a.4 (1994).

[66] These documents have been held to include birth certificate, United States passport, certificate of citizenship or of naturalization.

[67] Form I-551 (green card).

[68] *See generally* INA § 274A(b)(1)(B)-(D), *codified at* 8 U.S.C. § 1324a(b)(1)(B)-(D) (1988).

[69] INA § 274(B)(a)(1), *codified at* 8 U.S.C. § 1324B(a)(1) (1988).

[70] INA § 274(B)(a)(3), *codified at* 8 U.S.C. § 1324B(a)(3) (1988).

[71] INA § 274(B)(a)(2), (4), *codified at* 8 U.S.C. § 1324B(a)(2), (4) (1988).

covered "discriminatory intent" and not actions having a "disparate impact."[72] If this interpretation is correct it would be difficult to prove such discrimination, as there is no requirement that records be kept of employment applicants who are not hired.[73]

There is little doubt that the passage of the IRCA has resulted in the proliferation of falsified documents.[74] In effect, the undocumented workers who were previously merely subject to deportation have now become the "falsely documented." In order to secure employment, these workers present false documents, which is a crime. If the primary goal of these provisions is to deter the worker's employment, then there is little indication that the employer's sanction law has been successful. Limited resources for enforcement and the employer's good faith defense for having inspected documents have reduced the program to little more than paperwork, except for the relatively few employers who have suffered civil penalties for violation.

The employer sanctions and legalization provisions appear relatively harsh when compared to the agricultural features of the IRCA. The necessary residence and labor requirements for the SAWs are more favorable because SAWs may effectively commute across the border.[75] SAWs may become permanent residents without meeting the "basic citizenship" requirements.[76] If the SAWs, who are not required to remain in agricultural work, and the non-immigrant agricultural workers in the new H-2A program do not meet the needs of agribusiness employers, the IRCA provides a safety valve. Here, the IRCA authorizes "replenishment agricultural workers" if the Secretaries of Agriculture and Labor determine that a shortage of available agricultural workers exist.[77] This generous provision for agricultural employers reflects the employer's political power.

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[72] Statement by the President, reprinted in 63 Interp. Rel. 1036, 1037 (1986).

[73] 8 C.F.R. § 274a.2 (1994).

[74] Martha Brannigan, *Amnesty Program for Illegal Immigrants Spurs Increase in Fraudulent Documents*, WALL ST. J., Jan. 25, 1988, at 33.

[75] INA § 210(a)(4), (b)(3), (c) & (g), *codified at* 8 U.S.C. 1160(a)(4), (b)(3), (c) & (g) (1988).

[76] INA § 210(a)(2), *codified at* 8 U.S.C. § 1160(a)(2) (1988).

[77] INA § 210A, *codified at* 8 U.S.C. § 1161 (1988).

H. The Immigration Act of 1990

The Immigration Act of 1990[78] changed the landscape of the legal migration system.[79] The Act greatly increased employment-based immigration, allowed additional visas for some family-based categories, and created the new category of "diversity immigrants," that Congress designed to provide visas to aliens from "low admission" countries and regions.[80]

The conservative supporters of the Immigration Act of 1990 argued for fewer, or "better," immigrants.[81] The liberals, on the other hand, hoped that the Act would provide a more humane and generous immigration policy.[82] After years of trench warfare among the lobbyists, both sides seemed to have attained their objectives: Latinos and Asians received an increased number of visas for relatives, and businesses received easier access to imported skilled labor.[83] The changes aimed to restructure the ethnic mix of the immigrant pool by admitting more people who had no familial connections in the United States.[84] However, the practical effect of these changes was to give preferential treatment to the "better" immigrants such as millionaires and the highly-educated or highly-skilled.[85] Under the Act, wealthy foreigners can now buy their way into the United States as permanent residents. The price for the American Dream: $1 million. Congressman Bereuter observed that such a system of preferences is antithetical to the very words of the Statue of Liberty. Under the 1990 Immigration Act, the inscription on the Statue of Liberty should be changed from "Give me your tired, your poor" to "Give me a million bucks."[86] The poor and the less-educated immigrants are, simply stated, not as welcome as they have sometimes been.

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[78] Immigration Act of 1990, Pub. L. No. 101-69, 104 Stat. 3537 (1990).

[79] ALEINIKOFF & MARTIN, *supra* note 4, at 61.

[80] *Id.*

[81] *See* Brae Canlen, *Who Gets In? A Breakdown of U.S. Immigration Numbers Reveals a Policy with No Rules and Many Exceptions,* CAL. LAW., Aug. 1994, at 2.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 135 CONG. REC. H7911 (1990) (statement of Sen. Bereuter).

II. POLICIES TOWARD MEXICO (1930-64): REPATRIATION, BRACEROS, "OPERATION WETBACK," THE "WETBACK ACT," "OPERATION JOBS" AND IRCA

The Treaty of Guadalupe-Hidalgo (1848), which settled the Mexican-American War of 1847, sought to clarify the status of former Mexican citizens.[87] Mexicans remaining in the former Mexican territories were free to stay or to go to Mexico. Those who stayed could elect to be treated as either United States or Mexican citizens. If they did not elect within one year, they automatically became United States citizens. Most Mexicans remained rather than moving to Mexico.[88]

Little attention was paid to the newly created international border.[89] In the 1920s, the United States and Mexico entered into another treaty recognizing the citizenship rights of those traveling between the countries.[90] Most of the 20th century's Mexican immigrants have come to the United States in search of employment. This employment-based immigration has been continuous and significant but with varied legal and policy responses. One author has described the situation as follows:

> [I]llegal immigration from Mexico has been an integral part of a *de facto* U.S. policy with respect to the use of Mexican labor. Bluntly stated, the *de facto* policy has been — bring them in when they are needed, send them back when they aren't.[91]

It has been estimated that between 1900 and 1930 over 300,000 Mexican immigrants were legally admitted to the United States. Perhaps as many as one million undocumented immigrants settled in the same period. The Border Patrol was formed in 1924, but had little manpower on the southern border until much later.[92]

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[87] 9 Stat. 922 (1848).

[88] *See* Gerald P. Lopez, *Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy,* 28 UCLA L. REV. 615, 642 (1981).

[89] *Id.* at 643. There were no records kept of immigration across the border until the early twentieth century. Fuchs & Forbes, *supra* note 4, at 53.

[90] 15 Stat. 687 (1868).

[91] Walter Fogel, *Illegal Alien Workers in the United States*, 16 INDUS. REL. 243, 246 (1977).

[92] *See generally* Fuchs & Forbes, *supra* note 4, at 53 (discussing Immigration Act of 1924).

The literacy and the contract labor exclusions of the 1917 Immigration Act contained a provision allowing the Commissioner of Immigration and the Secretary of Labor to waive immigration law provisions for temporary workers.[93] Under the Departmental Order of 1918, the Commissioner waived the head tax, contract labor laws and literacy requirements for Mexican laborers.[94] Attempts to amend those prior acts to exempt agricultural labor *expressly* or to prohibit aliens from commuting failed.[95] As a result, facing no serious restrictions, southwestern agricultural employers continued to rely on immigrant Mexican workers. These exceptions have been described as "the first Bracero program."[96]

A. Repatriation (1930)

During the depression years of 1921 and the 1930s, the Mexican government, like the United States government, directly participated in the repatriation of Mexican workers.[97] Mexicans were scapegoated as the cause of unemployment.[98] According to Mexican government statistics, 345,000 Mexicans — almost the number of immigrants counted in 1920 — returned to their homelands between 1929 and 1932, resulting in a net loss of Mexican immigration.[99] The State Department argued against placing a statutory ceiling on Mexican immigration because of potential for harm to the bilateral relation with Mexico. Congress deferred to administrative action which strictly enforced existing laws reducing Mexican immigration

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[93] Act of Feb. 5, 1917, 39 Stat. 874, 878 (1917).

[94] Departmental Order No. 52641/202. *See* U.S. Imm. Serv. Bull. Vol. I, No. 3, at 1-4 (1918). *See also* Cardenas, *supra* note 9, at 68.

The admission of temporary contract laborers was authorized by section 3 of the 1917 Immigration Act; after 1951 it operated under Public Law 78, enacted that year.

[95] H. R. Rep. No. 7864 (1896).

[96] Cardenas, *supra* note 9, at 68.

[97] Manuel Garcia y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942-64: Antecedents, Operation and Legacy*, WORKING PAPERS IN U.S.-MEXICAN STUDIES, U.C. SAN DIEGO 1, 6-11 (1981).

[98] Congressional Research Service, *Illegal Aliens: Analysis and Background, House Committee on the Judiciary,* 95th Cong., 1st Sess. 50-55, 48-49 (Comm. Print. 1977), *reprinted in* ALEINIKOFF & MARTIN, *supra* note 4, at 746-47.

[99] Garcia y Griego, *supra* note 97, at 11.

from 4000 to 250 per month.[100]

B. Braceros

The United States farm labor shortage caused by World War II led to a series of bilateral agreements with Mexico designed to alleviate the shortage.[101] The Bracero program, which was extended until 1964,[102] provided mechanisms for sending Mexican workers to United States agricultural areas. These understandings were a continuation of the pattern of recruitment and then repatriation of the Mexican workers. This pattern resulted from the active involvement of both governments. Nearly 500,000 Mexicans participated in the Bracero program at its peak in 1956.

After the United States and Mexico failed to renegotiate the Bracero Treaty in 1954, the Congress amended Public Law 78 to allow the United States to operate the program unilaterally.[103] As P.L. 78 illustrates, the two governments were not always in agreement. But by 1954, given the relative surplus of workers, the United States had the bargaining power to continue the program despite Mexican opposition. In two dramatic incidents in 1948 and 1954, the INS actively recruited workers in violation of existing agreements.[104]

With the rise of the civil rights movement in the United States in the early 1960s, Congress became increasingly concerned with the condition of both domestic and Mexican farm laborers. The 1956 publication of Ernesto Galarza's *Strangers in Our Fields,* documented the widespread abuses of the Bracero's rights under both international and domestic law and marked the beginning of increasing opposition (e.g., for labor unions and civil rights

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[100] *See* Hutchinson, *supra* note 1, at 217. The INS administrators enforced the restrictive literacy, contract labor, and public charge exclusions rather than waiving them. Cardenas, *supra* note 9, at 68. The illegal denial of welfare benefits was another technique. *See* ALEINIKOFF & MARTIN, *supra* note 4, at 747.

[101] Act of April 29, 1943, Pub. L. No. 45, 57 Stat. 70 (1943); Act of Feb. 14, 1944, Pub. L. No. 229, 58 Stat. 11 (1944). The laws waived the head tax, contract labor provisions, and literacy requirements for the workers. The workers had to be photographed and fingerprinted in accordance with the recently passed Alien Registration Act. Act of June 29, 1940, 54 Stat. 670 (1940). Workers could be deported for failing to obey INS regulations.

[102] Act of Aug. 9, 1946, Pub. L. No. 707, 60 Stat. 969 (1946).

[103] 65 Stat. 119 (1951).

[104] Garcia y Griego, *supra* note 97, at 39.

groups) to P.L. 78.[105] Congress feared that use of Mexican workers depressed the wages and working conditions of United States workers and that farmers had little incentive to pay higher wages. P.L. 78 was allowed to expire in 1963.

While the Bracero program regulated legal migration, it also engendered illegal migration. Once workers became familiar with the United States and in many cases married and had children, they were not likely to simply return. In the meantime, their success in the United States became a beacon call for their former countrymen. Similarly, the SAW, RAW, and H-2A provisions of the IRCA, which encourage legal agricultural migration, will, undoubtedly, have the same effect.

California Governor Pete Wilson argued for these generous agricultural provisions then later complained about the use of social services by such workers. Although it is said that you cannot have it both ways, United States immigration policy had done just that. Indeed, the United States immigration policy toward Mexico may be fairly characterized as "bring in the workers when needed, whatever their status, and scapegoat them and drive them away when they are not." Such ebbs and flows have much to do with the economic cycle of the United States.[106] California's scapegoating of the undocumented worker in the Proposition 187 campaign may be seen in this context.

C. *Operation Wetback & Operation Jobs*

During the early 1950s, the INS reported that its increased apprehensions demonstrated "the greatest peacetime invasion complacently suffered by a country under open, flagrant, contemptuous violation of its laws."[107] This kind of rhetoric, along with an economic depression, resulted in the passage of the "Wetback Act," which provided criminal sanctions for the smuggling, harboring, and entry of aliens who had not

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[105] *Id.* at 44-46.

[106] *See generally* Barbara Nesbet & Sherilyn K. Sellgren, *California's Proposition 187: A Painful History Repeats Itself,* 1 U.C. DAVIS J. INT'L L. & POL'Y 153 (1995) (discussing cyclical nature of U.S. economy and immigration policy); Minty Siu Chung, *Proposition 187: A Beginner's Tour Through a Recurring Nightmare,* 1 U.C. DAVIS J. INT'L L. & POL'Y 267 (1995) (comparing California's initiative to historical anti-Asian legislation).

[107] *Id.* at 23.

been legally admitted and inspected.[108] One consequence of the "Wetback Act" has been the practice of placing in custody those undocumented workers who could be "material witnesses" in the criminal prosecution of the smuggler.[109]

The "Wetback" provisions were not, however, vigorously enforced. This was due to political pressure, particularly from the Southwest, to cut back appropriations to the Border Patrol. Many overstay or otherwise deportable Braceros were legalized. Essentially, the employers and their political representatives decided that even though it increased apprehensions, the legalization of a steady supply of workers was the best solution. As legalization figures increased, apprehension rates went down.[110]

In 1954, the INS located and deported over 300,000 Mexicans under Operation Wetback. In a campaign reminiscent of the 1994 Proposition 187 campaign, there was widespread scapegoating of the Mexican immigrants for disease, loss of jobs, welfare, and border crime. The campaign was preceded by widespread scapegoating of the Mexican immigrants for disease, labor strikes, subversive and Communist infiltration, and border

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[108] Act of March 20, 1952, Pub. L. No. 283, 66 Stat. 26 (1952); INA § 275, *codified at* 8 U.S.C. § 1325 (1988).

[109] 18 U.S.C. § 3144 (1988). These witnesses are often held in custody for weeks to months while a defendant charged with unlawful transportation of aliens is frequently released on bail and has fewer constitutional rights than accused smugglers. *See* United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974); United States v. Anfield, 539 F.2d 674 (9th Cir. 1976).

In *In re* (Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the Western Dist. of Texas), 612 F. Supp 940, 944-945 (W.D.Tex. 1985), the court ruled that the statutory law of 8 U.S.C. §§ 3142 and 3144 and the Fifth Amendment required appointment of counsel to represent the alien material witnesses. The court later issued a standing order requiring that alien material witnesses be deposed and released within sixty days of the date of their detention. U.S. v. Guadian-Salazar, 824 F.2d 344 (5th Cir. 1987).

The INS regulations provide:

> No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States . . . as a witness in, or as a party to, any criminal case under investigation or pending in the United States: Provided, . . . [the] . . . alien . . . may be permitted to depart . . . with the consent of the appropriate prosecuting authority.

8 C.F.R. §§ 215.2(a), 215.3(g) (1994).

[110] *See* Garcia y Griego, *supra* note 97, at 24.

crimes.[111] In addition, in 1982 the INS undertook Operation Jobs, a well-publicized campaign to provide jobs for domestic workers. Under this campaign, the INS conducted raids on suspected employers of undocumented workers. Over 5,000 workers were arrested across the nation.[112]

CONCLUSION

The foregoing history is not a seamless web. An open immigration policy helped settle the West. Yet the Chinese and Mexicans who provided the cheap labor to do the job have on more than one occasion been blamed for most of the nation's ills. If the future is as the past, it seems likely that restrictionist immigration forces will be met by groups who take pride in our immigration history and continue to view immigrants as a resource, not a liability. The balance of this political jostling will depend on the state of the nation's economy and the generosity of its spirit. However, California's Proposition 187 campaign has a new and more sinister ring. Depriving children of their education or workers of their health care is not only mean-spirited, but terribly short sighted.

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[111] *Id.* at 28.

[112] *See* ALEINIKOFF & MARTIN, *supra* note 4, at 40.