

## REMARKS

### ADMINISTRATIVE LAW: IMMIGRATION, AMNESTY, AND THE RULE OF LAW, 2007 NATIONAL LAWYERS CONVENTION OF THE FEDERALIST SOCIETY

*T. Alexander Aleinikoff\**

Immigration is a divisive issue, but it is interesting that it is not one that necessarily falls along partisan lines. Recall when President Bush made common cause with the Democratic majority in the House and the Senate in 2007, and they were unable together to pass comprehensive immigration reform legislation.<sup>1</sup> Why is that? Rudy Giuliani may have had it right: After the failure of the legislation, he said that the problem with the bill was that there was no overarching theme; there was no compelling narrative to the legislation.<sup>2</sup> I agree with that.

The bill that was proposed in the House and the Senate was one that simply seemed to be cobbled together as a *mélange* of compromise provisions and conflicting elements: border enforcement, regularization, and the guest worker program.<sup>3</sup> It didn't hold together. Interestingly, that combination of elements had worked in 1986, the last time we had major immigration reform. In that legislation, Congress imposed sanctions on employers who hired undocumented immigrants, and also provided a massive legalization program.<sup>4</sup> But in 1986, we had a consistent story that put those elements together.

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\* T. Alexander Aleinikoff is the Dean of the Law Center and Executive Vice President for Law Center Affairs, Georgetown University. He is a graduate of Swarthmore College and Yale Law School. From 1981 to 1984, he was a professor at the University of Michigan Law School. Dean Aleinikoff served as general counsel and executive associate commissioner for programs at the Immigration and Naturalization Service for several years during the Clinton administration. From 1997 to 2004, he was a senior associate at the Migration Policy Institute, where he now serves on the board of trustees. Dean Aleinikoff has been a member of the Georgetown faculty since 1997. He has written widely on immigration, refugee, and citizenship law and policy, and he is the co-author of a leading casebook on immigration and citizenship law.

1. See Jonathan Weisman, *Immigration Bill Dies in Senate*, WASH. POST, June 29, 2007, at A1.

2. Council on Foreign Relations, *Campaign 2008: The Candidates on Immigration*, CFR.ORG, Aug. 24, 2008, [http://www.cfr.org/publication/14766/c2008\\_and\\_immigration.html](http://www.cfr.org/publication/14766/c2008_and_immigration.html). Rudy Giuliani opposed the 2007 Senate comprehensive immigration reform bill and, after its collapse, referred to the bill as a "typical Washington mess." *Id.*

3. See Weisman, *supra* note 1, at A1.

4. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 §§ 101 and 201(a) (1986).

The claim in 1986 was that we were going to end illegal immigration forever. The idea was that (1) we would legalize long-stayers who were here; (2) those not eligible for legalization would not be able to find work (because of employer sanctions) and therefore would leave the United States; and (3) the flow of undocumented workers would end because new arrivals would not be able to find work. We now know that the strategy failed dismally. Because of the ready availability of fraudulent documents, the employer sanction provisions have yielded the odd combination of high compliance and zero deterrence. But whatever the outcomes have been, the narrative in 1986 was persuasive.

This story does not sell today. There is no reasonable claim that the package of measures that were debated in the House and the Senate and supported by the President will have any material impact on undocumented migration. There is no clear way to fix employer sanctions anytime soon. The widely discussed “smart cards” or “swipe cards” will be years in the making.<sup>5</sup> Meanwhile massive work will need to be done on government databases to clean up misspelled, duplicate, and false names. Nor is there any reason to believe that the border will be effectively sealed anytime soon. Amnesty now is not defended in terms of ending undocumented migration; indeed, given the subsequent history of the 1986 legislation, it is argued that regularization leads to more undocumented migration.<sup>6</sup>

In the most recent debates, the Left and Right have not agreed on a coherent narrative. Indeed, the position of each side is fundamentally unattractive to the other and to many Americans. From the left, the story is one of human rights. Undocumented workers have earned their status in the United States; regularization is then not an amnesty. But this argument does not have widespread appeal. Undocumented immigrants may have basic human rights not to be subjected to harsh treatment, but they do not necessarily have a right to a status simply by coming here and working for a few years.

From the Right, the narrative has been that undocumented immigrants are criminals. Yet most of the nation finds this judgment too harsh. Many Americans know undocumented workers who watch their children, tend their lawns, and take care of their elderly parents. These workers tend to be rather law-abiding because they don't want to fall into the hands of authorities who may then send them home. Nor can

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5. See generally Robert Pear, '86 Law Looms Over Immigration Fight, N.Y. TIMES, June 12, 2007, at A15.

6. See generally GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007).

one view as plausible the Right's demand that the border be sealed. And, if one is not in favor of a legalization program for some of the twelve million unauthorized migrants in the United States, suggestions need to be made about what to do with that population; clearly there is no widespread support for intrusive neighborhood raids and mass deportations.

The narrative that needs to be constructed, I believe, would focus on the dynamics of demographics. Here is the brief story: Immigration will be the primary engine to the growth of the United States' labor force over the next several generations. The number of native citizens in their primary working years—from eighteen to fifty-four—will not grow for the next twenty or thirty years.<sup>7</sup> As many native workers will be entering the labor force as will be leaving it. If we are going to grow our workforce and have a dynamic economy, that growth will have to come either from immigration or from people working longer.

Second, immigration flows have an “hour-glass” distribution that matches domestic needs. Immigrants tend to be both more highly skilled and lower skilled than average Americans.<sup>8</sup> This suggests the need for some kind of legal status for the undocumented workers already here and for robust policies of integration.

In this story, enforcement is not a price paid for regularization. Rather, enforcement is necessary for the system as a whole to have integrity—a system of laws and rules.

It seems to me that what we need in this system is a law of sensible rules—one that starts with regularization of status, reorganizes the categories we have, and recognizes the long-term trends in immigration in order to harness the benefits of immigration.

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7. See MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, REPORT OF THE INDEPENDENT TASK FORCE IMMIGRATION AND AMERICA'S FUTURE 3-4 (2006).

8. *Id.* at 9.

These Remarks are a wonderful example of what Justice Thomas was referring to when he said that this society is foremost in promoting non-ideological exchange. The problem, however, is that it makes for boring television.

How can we connect this non-ideological exchange with what is on television? I would like to attempt to make this connection by beginning with a reference to my twenty-one-year-old son. He is a faithful fan, some would say a fanatical fan, of Rush Limbaugh and Bill O'Reilly. And therefore, he knows exactly how to solve the immigration mess. He says we should fence the border, then round up all the illegal immigrants and send them back to their home country. After this, they may get in line and come back legally if they choose. He believes that is a very simple solution to illegal immigration.

We agree on the basic principles. That is, I agree on securing the border. But for me, it is not only about the border. It is a question of United States sovereignty, terrorism, and our relationship to the rest of the world. My son and I agree that all immigration ought to be according to law. That is the only kind of immigration we need. In relating immigration to the rule of law, however, it is often forgotten that the rule of law also includes issues of separation of powers and federalism. Thus, it seems to me that we must ask ourselves about the means to the end of curtailing illegal immigration. We agree on an end, but what are the legal and constitutional issues regarding the means? Such questions rarely get discussed on television.

This Remark discusses what I see wrong with the simple solution and how we might approach illegal immigration in ways that are both more effective and more consistent with the Constitution. The federal government may be able to fence the border if the voters want that to be done. However, there are a number of obstacles to consider. First, fencing the borders is going to take a long time.<sup>1</sup> And second, there is a lot of evidence to the effect that some of the past efforts with fences along the border have only compounded the problem.<sup>2</sup> As briefly mentioned in Professor Neuman's Remark, some of the government's

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\* John Baker is the Dale Bennett Professor of Law, Louisiana State University; B.A., University of Dallas, 1969; J.D., University of Michigan Law School, 1972; Ph.D., University of London, 2003.

1. See GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007).

2. See Gerald L. Neuman, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1335, 1336 (2008); see also HANSON, *supra* note 1, at 34.

“get tough” policies have actually exacerbated the problem. Most notably, the 1996 reforms motivated illegal immigrants to stay in the United States, rather than voluntarily returning to their own country.<sup>3</sup> According to immigration lawyers, illegal immigrants went home because they learned from their lawyers that, by doing so, they would be able to return legally.

The fundamental problem with immigration policy since the 1996 legislation is that it imposes bars to legal reentry against those who have come here illegally. There is a three-year bar, a ten-year bar, and a permanent bar.<sup>4</sup> So this whole notion that we can solve the problem by getting illegals to go back to their country, stand in line, and come back legally is simply based on a false premise. It is not possible to do that under current law without some kind of waiver.

As for a roundup, Homeland Security—contrary to popular impressions—has increased enforcement, especially during the last six months.<sup>5</sup> Round-ups have focused particularly on businesses.<sup>6</sup> However, Homeland Security has realized that they do not have the resources to do all that is needed. This is why there has been an emphasis, as discussed by Professor Kobach, on getting state law enforcement involved.<sup>7</sup> But we have to face the facts. The Department of Justice simply is not taking cases at the same rate that they are being filed. Part of the issue may be that the Department of Justice has brought some bad cases. Part of the enforcement problem may also be that United States attorneys do not completely take direction from Washington. Many in Congress do not think that United States attorneys should be directed by the White House or even the Attorney General as to which cases that they should prosecute.<sup>8</sup> We thus have a problem of establishing a consistent approach to enforcement internally within this Administration.

As for the states, Professor Kobach has written about the power of states to enforce immigration laws, or to do so at least under certain

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3. See Neuman, *supra* note 2, at 1336.

4. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1182(a) (1996)).

5. Adam Nossiter, *Hundreds of Factory Workers Are Held in Immigration Raid*, N.Y. TIMES, Aug. 26, 2008, at A12.

6. *Id.*

7. See Kris W. Kobach, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1323, 1328 (2008).

8. See Dan Eggen & Paul Kane, *Senators Chastise Gonzales at Hearing*, WASH. POST, Apr. 20, 2007, at A4. Some Senators argued that United States attorneys were fired for not following instructions from GOP officials that they should concentrate their efforts on certain crimes such as voter fraud. *Id.*

circumstances.<sup>9</sup> This is a complex problem. I would like to point out two things. First, the federal government, under the *Printz* case, cannot force the states to enforce federal laws.<sup>10</sup> That is to say, Congress and the Executive lack the constitutional power to co-opt states into carrying out federal policy.<sup>11</sup> That is a separate question from the clear principle that states are bound by the Constitution, federal laws pursuant to the Constitution, and Supreme Court interpretations of both. But in terms of co-opting state agencies and executive agencies, *Printz* pretty much rules out making the states enforce federal immigration laws.<sup>12</sup> Second, there are also limits on what states can do with respect to immigration when they are not authorized by the federal government to act.

We can relate this back to the “Passenger Cases” in 1849.<sup>13</sup> While there are certain areas that bump up against immigration where the states are able to act under the police power, there are limits to what states can do in terms of discouraging immigration.<sup>14</sup> Indeed, New York and Massachusetts attempted in the nineteenth century to keep out Irish immigrants.<sup>15</sup> They ultimately failed because immigration is a matter involving our national borders and, therefore, committed to the federal government, not the state government.<sup>16</sup> The problem of immigration ultimately is the responsibility of Congress. That, however, does not mean that the Executive branch should fail to enforce existing law. Indeed, the solution, it seems to me, is enforcement first, but not for the reasons usually given.

What do I mean by this? First of all, the President’s primary job, under separation of powers, is to execute the laws.<sup>17</sup> While he can certainly seek to change the law, he is supposed to enforce the law as it exists until it is changed. But there is another reason why the President ought to enforce the immigration laws, and to do so vigorously. Enforcing any law will expose unanticipated problems. Many of the opposing opinions about immigration are based on conjecture about

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9. See generally Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (discussing that there is inherent authority for states to enforce federal immigration laws and Congress has not preempted such state enforcement).

10. See generally *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government does not have the authority to direct state officials to carry out federal programs).

11. *Id.* at 933.

12. *Id.* at 935.

13. See generally *The Passenger Cases*, 48 U.S. 283 (1849) (holding that states do not have the constitutional power to tax aliens entering at the ports of those respective states).

14. *Id.* at 425-26.

15. See *id.* at 284-85.

16. *Id.* at 442-43.

17. U.S. CONST. art. II, § 3.

what will happen if the existing laws are well enforced. The effects of enforcement will differ in various areas of the country. Moreover, there are likely to be different opinions around this country about whether those effects are desirable or not. Attitudes toward legal, as well as illegal, immigration are certainly affected by who bears the costs and who benefits from immigration. In many communities, it may be that citizens want to get rid of all workers from outside of the country. Doing so may or may not result in increased employment for Americans. We cannot really know except by enforcing the law. As an aside, we who lived through Katrina do know that not a single roof in Louisiana or Mississippi would have been replaced after the hurricane if the federal government had not suspended immigration enforcement in the affected area.

We live in a federal system. As per Federalist 10, people have many different views on most matters of policy.<sup>18</sup> The place to resolve conflicts among those views is in Congress. As a result, most matters of policy require compromise in order to enact legislation. Of course, Congress does not want to tackle immigration issues in this spirit. If, however, the President enforces existing law and it proves to be economically damaging enough, his action would force Congress to meet its obligation by reaching an agreement to make some changes in the law.

While I support vigorous enforcement against illegal immigration, I am also concerned about the creeping jurisdiction of Homeland Security away from the borders. Thanks to Congress and, largely, the Republicans, the country has, since the 1970s, taken a tough “law and order” approach at the federal level on matters that properly belong to the states.<sup>19</sup> Thirty years later, people have realized how federalized much of the crime in this country has become. If you consider the creeping jurisdiction of Homeland Security—not only into critical infrastructure, but into places such as meatpacking plants—you realize that we are stretching the “war on terrorism” internally to the point of militarizing law enforcement.<sup>20</sup>

Now, just as I think that the Left is wrong to judicialize war,<sup>21</sup> it is

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18. THE FEDERALIST NO. 10 (James Madison) (discussing the problems and dangers that faction poses to a republican government).

19. See AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998), available at [www.nacdl.org/public.nsf/legislation/overcriminalization/\\$file/fedcrimlaw2.pdf](http://www.nacdl.org/public.nsf/legislation/overcriminalization/$file/fedcrimlaw2.pdf) (last visited Sept. 24, 2008).

20. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 27-29 (2007), available at [http://www.dhs.gov/xlibrary/assets/nat\\_strat\\_homelandsecurity\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf).

21. See generally John S. Baker, Jr., *Competing Paradigms of Constitutional Power in 'The War on Terrorism,'* 19 NOTRE DAME J.L. ETHICS & PUB. POL.'Y 5 (2005).

wrong to centralize and militarize law enforcement. Why? Under our Constitution, we are not a unitary state like France.<sup>22</sup> Not everything can or should be solved by the federal government. Apart from the fundamental constitutional objection, the federal government simply cannot take over all law enforcement unless the number of federal law enforcement agents and the number of federal judges increase to a size equal to the total of police officers and judges in the fifty states. As it is, the federal government cannot handle its responsibilities to United States. The federal failure to enforce immigration law effectively ought not to be the basis for creating a completely monolithic state. That is not the view of liberty given to us by our founders.

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22. See 1958 CONST. 20.

## I. INTRODUCTION

Recent years have seen an unprecedented number of state laws proposed and enacted on the subject of illegal immigration.<sup>1</sup> In addition, municipalities across the country have enacted ordinances designed to discourage illegal immigration and the employment of unauthorized aliens.<sup>2</sup> Some observers have suggested that these efforts are simply the result of energized political activists, frustrated with inaction in Congress, turning their attention to state and local legislation.<sup>3</sup> According to this view, such state and local laws are merely spillover consequences of the larger debate regarding controversial immigration bills in Congress.

These explanations do not accurately reflect what has been happening in the effort to confront illegal immigration at the state and local level. To be sure, frustration with congressional inaction sometimes fuels enthusiasm for state and local action. But that explanation does not fully account for what has been occurring in state legislatures and city halls nationwide. Independent forces motivate state and local governments to confront illegal immigration within their respective jurisdictions. While illegal immigration is a national issue, the consequences are felt first and foremost at the state and local level.

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\* Professor of Law, University of Missouri (Kansas City) School of Law. A.B. 1988, Harvard University; M. Phil. 1990, Oxford University; D. Phil. 1992, Oxford University; J.D. 1995, Yale Law School. During 2001–03, the author was White House Fellow and Counsel to United States Attorney General John Ashcroft, serving as the Attorney General’s chief adviser on immigration law and border security. The author is also counsel representing the municipalities of Hazleton, Pennsylvania, Valley Park, Missouri, and Farmers Branch, Texas, and counsel advising the state of Arizona in the defense of illegal-immigration-related ordinances and statutes.

1. In 2007, at least 1562 immigration bills were submitted, up from 570 in 2006. Of the bills submitted, 240 were enacted into law, up from 84 in 2006. NATIONAL CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT: 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

2. See Hazleton, Pa., Ordinance 2006-18 (2006); Valley Park, Mo., Ordinance 1722 (2007).

3. See, e.g., Damien Cave, *States Take New Tack on Illegal Immigration*, N.Y. TIMES, June 9, 2008, at A1 (reporting that “inaction” on the part of the federal government has caused state legislatures to give “local authorities wider berth” on immigration matters); Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14 (describing the decision by a Hazleton, Pennsylvania judge to strike down a local immigration ordinance and the reactions thereto).

## II. THE FISCAL BURDEN

Without question, the most significant force driving action at the state and local level is a fiscal one. In city after city, and state after state, governments have acted for one overriding reason: they can't afford not to. Illegal immigration is expensive.<sup>4</sup> And the taxpayer bears an extraordinary burden in any city or state that includes a large population of illegal aliens.<sup>5</sup> The net cost of illegal immigration at all levels of government (minus any tax revenues derived from illegal aliens) is massive. In 2007, Robert Rector of The Heritage Foundation published the most comprehensive and rigorous study to date on the net fiscal cost of illegal immigration.<sup>6</sup> His study concluded that low-skilled aliens (defined as those households "headed by immigrants without a high school diploma" and comprised predominantly of households headed by illegal aliens) impose a net fiscal cost of \$89.1 billion a year.<sup>7</sup> Those figures reflect all sorts of government services, from primary and secondary education to medical care to costs of criminal incarceration, to

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4. ROBERT RECTOR, THE HERITAGE FOUND., THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO STATE AND LOCAL TAXPAYERS: TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION COMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY 15-16 (2007), <http://www.heritage.org/research/immigration/tst052107a.cfm> [hereinafter RECTOR TESTIMONY].

5. I use the term "illegal alien" because it is a legally accurate term used repeatedly in the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1356(r)(3)(ii) (2000) ("expenses associated with the detention of illegal aliens"); *id.* § 1366(1) (2000) ("the number of illegal aliens incarcerated in Federal and State prisons"). Another phrase that is used throughout the immigration laws of the United States is "alien not lawfully present in the United States." *See, e.g., id.* § 1229a(c)(2) (2000) ("the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States"); *id.* § 1357(g)(10) (2000) ("for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"). This term, however, is a bit too cumbersome for a writing of this nature. A third term, "unauthorized alien," is found in federal immigration laws, but is limited to the employment context. *See, e.g., id.* § 1324a(a) (2000) ("to hire, or to recruit, or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien"); *id.* § 1324b(a)(1) (2000) ("other than an unauthorized alien, as defined in section 1324a(h)(3) of this title"). In contrast, the ambiguous terms "undocumented immigrant" and "undocumented alien" do not appear anywhere in the immigration laws of the United States. *See id.* § 1101, *et seq.* (2000). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely "illegal alien."

6. *See* ROBERT RECTOR, CHRISTINE KIM & SHANEA WATKINS, THE HERITAGE FOUND., HERITAGE SPECIAL REPORT: THE FISCAL COST OF LOW-SKILL HOUSEHOLDS TO THE U.S. TAXPAYER (2007), <http://www.heritage.org/research/welfare/sr12.cfm> [hereinafter RECTOR REPORT]. In 2005, another study estimated, with considerably less detailed analysis, that the net cost of illegal immigration was approximately \$65 billion a year. ROBERT JUSTICH & BETTY NG, BEAR STEARNS ASSET MGMT., INC., THE UNDERGROUND LABOR FORCE IS RISING TO THE SURFACE 2 (2005), [www.bearstearns.com/bscportal/pdfs/underground.pdf](http://www.bearstearns.com/bscportal/pdfs/underground.pdf).

7. *See* RECTOR TESTIMONY, *supra* note 4, at 10. Rector's testimony is based on the full report. *See* RECTOR REPORT, *supra* note 6, at 1.

the use of general public goods by low-skilled alien households.<sup>8</sup>

State and local governments bear the majority of that burden. According to 2002 federal government figures, the net cost of illegal immigration at the federal level was \$10.4 billion a year.<sup>9</sup> Not surprisingly, because most of the \$89.1 billion falls on the shoulders of state and local governments, there has been an extraordinary amount of activity at the state and local level to discourage illegal immigration into the communities' respective jurisdictions.<sup>10</sup>

Arizona is a case in point. In 2007, Arizona became the first state in the union to enact a law requiring all employers to use the "E-Verify" system to verify the employment authorization of all newly-hired employees.<sup>11</sup> That law was later sustained by the United States Court of Appeals for the Ninth Circuit against a legal challenge brought by a coalition of interest groups in the state.<sup>12</sup> This was the fourth in a line of Arizona statutes and popular initiatives designed to reduce illegal immigration. The first was Proposition 200, which was passed in 2004 with over fifty-five percent of the vote.<sup>13</sup> Proposition 200 denied public benefits to illegal aliens.<sup>14</sup> The second was Arizona's law against human smuggling, enacted in 2005.<sup>15</sup> The third was Arizona's Proposition 300, which denied in-state tuition rates and other post-secondary education benefits to illegal aliens; Proposition 300 passed with a stunning 71.4 percent of the vote.<sup>16</sup>

This series of measures reflected the growing realization among

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8. RECTOR REPORT, *supra* note 6, at 1, 4, 6.

9. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 5 (2004), <http://www.cis.org/articles/2004/fiscal.pdf>.

10. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-212 to -214 (2007); GA. CODE ANN. § 50-36-1 (2007); *see also supra* notes 2-3 and accompanying text.

11. *See* ARIZ. REV. STAT. ANN. §§ 23-212 to -214; *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1060 (D. Ariz. 2008). In 2008, Mississippi became the second state in the country to mandate that all private businesses use the E-Verify system. *See* Mississippi Employment Protection Act, S.B. 2988 (Mar. 17, 2008).

12. *See generally* *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536 (9th Cir. Sept. 17, 2008). The author served as counsel on the legal team defending the Arizona statute.

13. *See* Ariz. Sec'y of State, 2004 General Election, <http://www.azsos.gov/election/2004/General/Canvass2004General.pdf> (last visited June 28, 2008).

14. David Kelly, *Illegal Immigrant Measure Upheld: Judge Says Arizona Can Enforce a Proposition Barring Some Services to the Undocumented*, L.A. TIMES, Dec. 23, 2004, at A13.

15. That law was challenged in state court on preemption grounds and was sustained. *Arizona v. Salazar*, No. CR2006-005932-003 DT, slip. op. at 6-9 (Super. Ct. of Ariz., June 9, 2006). The author served as counsel assisting Maricopa County, Arizona, in its defense of the law against the preemption challenge.

16. Ariz. Sec'y of State, 2006 General Election (Unofficial Results), <http://www.azsos.gov/results/2006/general/BM300.htm>.

voters and legislators that Arizona taxpayers were under siege as a result of illegal immigration. The total cost of providing services to Arizona's estimated 475,000 illegal aliens is approximately \$1.3 billion a year.<sup>17</sup> The biggest ticket item is providing free public primary and secondary education to children in illegal alien-headed households; doing so cost Arizona taxpayers approximately \$748.3 million in 2005.<sup>18</sup> When Arizona's 2007 statute requiring employers to use the E-Verify system prompted thousands of illegal aliens to self-deport, the Arizona school system immediately began to experience some relief, with a \$48.6 million surplus suddenly appearing in Fiscal Year ("FY") 2008.<sup>19</sup> Another large source of taxpayer expense lies in the cost of incarcerating illegal alien criminals in Arizona's state prison system, which is approximately \$80 million a year.<sup>20</sup>

Arizona's fiscal burden may not come as a great surprise, given its location on the border. However, as has been often said, every state is a border state now.<sup>21</sup> Numerous other states have experienced a recent influx of illegal immigration. For example, Georgia saw its illegal alien population nearly double from 228,000 in 2000 to an estimated 440,000 in 2007, and Georgia taxpayers soon experienced the fiscal burdens that came with this influx.<sup>22</sup> The total cost is approximately \$1.2 billion a year, of which the cost of providing free public education is approximately \$952 million a year.<sup>23</sup> Predictably, in 2006 the Georgia Legislature responded to these fiscal burdens by enacting the Georgia Security and Immigration Compliance Act to discourage further illegal immigration into the state.<sup>24</sup> The fiscal cost of illegal immigration

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17. FED'N FOR AM. IMMIGRATION REFORM, ARIZONA: ILLEGAL ALIENS (2007), available at [http://www.fairus.org/site/PageServer?pagename=research\\_research82b2](http://www.fairus.org/site/PageServer?pagename=research_research82b2).

18. JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED (2007), available at <http://www.azleg.gov/jlbc/mfh-dec-07.pdf>.

19. J. LEGIS. BUDGET COMM., MONTHLY FISCAL HIGHLIGHTS 2 (2007), available at <http://www.azleg.gov/jlbc/mfh-dec-07.pdf>. See also Jacques Billeaud, *Employer-Sanctions Law Forces Illegal Immigrants to Move On*, ASSOCIATED PRESS, SIERRA VISTA HERALD, Mar. 3, 2008, available at <http://www.svherald.com/articles/2008/03/03/news/doc47cb9f7c14db5486886624.txt> (reporting that many illegal immigrants left Arizona after laws were passed to reduce spending on educating and providing health care for illegal immigrants).

20. The \$80 million estimate is based upon 2004 figures. FED'N FOR AM. IMMIGRATION REFORM, *supra* note 17.

21. See, e.g., Kathy Kiely, *Immigration Issue Takes Flight*, USA TODAY, July 20, 2006, at 4A; Andy Sher, *Ex-Rivals Pledge to Back Corker*, CHATTANOOGA TIMES FREE PRESS, Aug. 6, 2006, at 10A.

22. See FED'N FOR AM. IMMIGRATION REFORM, EXTENDED IMMIGRATION DATA FOR GEORGIA (2008), available at [http://www.fairus.org/site/PageServer?pagename=research\\_research3920](http://www.fairus.org/site/PageServer?pagename=research_research3920).

23. *Id.*

24. GA. CODE ANN. § 50-36-1 (2007).

prompted other states in the interior of the country to enact omnibus immigration bills in the years that followed—most notably, Oklahoma in 2007 and Missouri in 2008.<sup>25</sup>

A similar increase in fiscal burdens often drives cities to act. This was demonstrated clearly in Hazleton, Pennsylvania, which enacted its Illegal Immigration Relief Act in 2006.<sup>26</sup> Hazleton's population exploded from approximately 22,000 in the 2000 census to 30,000-33,000 in 2005.<sup>27</sup> However, the earned income tax receipts on which the city relied for its revenues remained flat. This reflected the fact that much of the population increase was due to illegal immigration, and the new arrivals were either working off the books or earning so little that they were paying little or nothing in taxes.<sup>28</sup> Meanwhile, expenditures for routine city services that reflect the size of the population, such as trash removal, increased by nearly fifty-percent.<sup>29</sup> Expenditures by the local school district for its English as a Second Language program rose from \$500 in 2000 to over \$1.1 million in 2006.<sup>30</sup> The fiscal pressures pushing the City to reduce the burdens of illegal immigration were undeniable.

Such city ordinances and state statutes designed to discourage illegal immigration have been sustained repeatedly in the courts of the United States against federal preemption challenges. In 1976, in the landmark case of *DeCanas v. Bica*, the Supreme Court of the United States sustained a California law that imposed sanctions on the employers of illegal aliens.<sup>31</sup> Then, in 1986, Congress expressly carved out a window for states and cities to act by suspending the business licenses of those businesses that employ unauthorized aliens.<sup>32</sup> In addition, Congress enacted other legislation in the 1990s that demonstrated its objective of promoting state and local assistance in discouraging illegal immigration.<sup>33</sup> As a result, recent state and local

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25. Mo. Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at MO. REV. STAT. § 285.530; Okla. H.B. 1804 (2007), codified at OKLA. STAT. ANN. tit. 56, § 71 (West 2008).

26. That ordinance is the subject of litigation currently pending before the Third Circuit of the U.S. Court of Appeals (Case No. 07-3531). The author is lead attorney representing the City of Hazleton in the appeal from the decision of the Middle District of Pennsylvania. *See* *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484, 554 (M.D. Penn. 2007).

27. *Lozano*, 496 F. Supp. 2d at 484.

28. Joint Appendix at A1647, A1399-1400, A2290-91, *Lozano v. Hazleton*, No. 07-3531 (3d Cir. filed Apr. 8, 2008) (on file with author).

29. *Id.*

30. *Id.*

31. *DeCanas v. Bica*, 424 U.S. 351, 354 (1975).

32. 8 U.S.C. § 1324a(h)(2) (2000).

33. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of*

laws discouraging illegal immigration have been sustained in federal courts. Arizona's 2007 employment law was sustained by the District of Arizona and thereafter by the Ninth Circuit.<sup>34</sup> Moreover, the Eastern District of Missouri sustained a Valley Park, Missouri, ordinance that provided for the suspension of the business licenses of employers of unauthorized aliens.<sup>35</sup> These statutes and ordinances allow cities and states to take measured steps to reinforce compliance with federal immigration law in their jurisdictions.

Not only have such efforts succeeded against preemption challenges in court, they have also been successful in reducing illegal immigration within the jurisdictions involved.<sup>36</sup> Illegal aliens quickly become aware of which cities and states have taken steps to reinforce the rule of law in immigration. In February 2008, United States Secretary of Homeland Security Michael Chertoff noted the impact of such laws in deterring illegal immigration: "The state of Arizona . . . in the last couple of days had its new rule requiring E-Verify use sustained by the federal courts, and we are beginning to see that illegal workers are picking up and leaving . . . . I think we've really been making some substantial progress with the help of state and local governments."<sup>37</sup> The combination of state and local action with stepped-up federal enforcement activity produced dramatic results in 2007-08. For the first time in many years, the illegal alien population in the United States actually *decreased* by an estimated 1.3 million between August 2007 and May 2008—a decrease that began *prior* to the general decline in

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*Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 203-08 (2005).

34. See generally *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536 (9th Cir. Sept. 17, 2008);

35. *Gray v. Valley Park*, No. 4:07CV00881(ERW), 2008 WL 294294, at \*9-10, \*30-31 (E.D. Mo., Jan. 31, 2008). The plaintiffs who lost before the District Court appealed the decision on jurisdictional grounds to the Eighth Circuit of the United States Court of Appeals. *Gray v. Valley Park*, No. 08-1681 (8th Cir. filed Aug. 15, 2008). That appeal is pending at the time of this writing. The author is serving as lead counsel defending the City of Valley Park, Missouri. The only federal court to reach a different holding in a final order is the United States District Court for the Middle District of Pennsylvania. See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484, 554 (M.D. Penn. 2007). The Middle District of Pennsylvania set aside the binding Supreme Court precedent of *DeCanas*. *Id.* at 524.

36. This success has been most notable in Arizona, where the 2007 law requiring E-Verify participation and prohibiting the knowing employment of unauthorized aliens prompted the self-deportation of thousands of illegal aliens when the law became effective on January 1, 2008. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13; Daniel González, *Apartments Going Empty as Hiring Law Hits Migrants*, ARIZONA REPUBLIC, Jan. 31, 2008, at A1.

37. Sec'y of Homeland Sec. Michael B. Chertoff & U.S. Attorney Gen. Michael B. Mukasey, Remarks at a Briefing on Immigration Enforcement and Border Security Efforts (Feb. 22, 2008), available at [http://www.dhs.gov/xnews/releases/pr\\_1203722713615.shtm](http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm).

employment in the United States and therefore could not be attributed primarily to a slowing economy.<sup>38</sup>

### III. AMNESTY IS NOT THE ANSWER

Despite the fact that such enforcement efforts have proven effective in inducing illegal aliens to self-deport, proponents of a massive amnesty for illegal aliens assert that amnesty is nevertheless necessary to “solve” the illegal immigration problem in one easy step.<sup>39</sup> This facile assertion completely ignores the fiscal costs of illegal immigration. Although allowing millions of illegal aliens to adjust to a legal status does “reduce” the population of illegal aliens (by redefining them as lawfully present), it achieves little else. Giving illegal aliens a path to a legal status does virtually nothing to reduce the fiscal burden imposed by illegal immigration.

Indeed, amnesty exacerbates the fiscal costs of illegal immigration. Making illegal aliens legal does not make them fiscally positive. On the contrary, it makes them eligible for *more* government benefits, especially at the federal level—where the newly-legalized aliens become eligible for a wide range of entitlements. One of the biggest is Social Security benefits. For example, the amnesty proposal that was debated and rejected in the United States Senate in 2007<sup>40</sup> would have cost approximately \$2.6 trillion,<sup>41</sup> resulting in the largest expansion of the welfare state in thirty years.<sup>42</sup> It would also have hastened the bankruptcy of the Social Security system.<sup>43</sup> Meanwhile, amnesty would have done nothing to reduce the fiscal burdens borne by American cities and states. In short, amnesty is expensive at every level of government.

Another consequence of “solving” the illegal immigration problem through amnesty is rampant fraud by amnesty applicants. We know this from experience. In 1986, as part of the Immigration Reform and

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38. STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGRATION STUDIES, *HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL ALIEN POPULATION* (July 2008), <http://www.cis.org/articles/2008/back808.pdf>.

39. I define amnesty in immigration law the way most people understand it: providing a legal status to large categories of illegal aliens (regardless of whether or not “fines” or other fees are imposed upon recipients of the amnesty).

40. Comprehensive Immigration Reform Act, S.A. 1150, 110th Cong. § 601(f)(2) (proposed amendment to S. 1348).

41. ROBERT RECTOR, THE HERITAGE FOUND., *AMNESTY WILL COST U.S. TAXPAYERS AT LEAST \$2.6 TRILLION 1* (2007), <http://www.heritage.org/Research/Immigration/wm1490.cfm> (“Overall, the net cost to taxpayers of retirement benefits for amnesty recipients is likely to be at least \$2.6 trillion.”) [hereinafter RECTOR RESEARCH].

42. ROBERT E. RECTOR AND CHRISTINE KIM, *THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO THE U.S. TAXPAYER 22* (2007), <http://www.heritage.org/research/Immigration/sr14.cfm>.

43. RECTOR RESEARCH, *supra* note 41, at 6.

Control Act (“IRCA”), the first and largest amnesty was granted to approximately 2.7 million “seasonal agricultural workers.”<sup>44</sup> Amnesty immediately led to a surge in illegal immigration as hundreds of thousands of new illegal aliens entered in order to fraudulently claim that they were eligible for amnesty.<sup>45</sup> The Immigration and Naturalization Service (“INS”) detected 398,000 cases of possible fraud—some from illegal aliens who arrived after IRCA was passed, others from illegal aliens already in the United States who submitted fraudulent applications claiming that they were eligible for amnesty.<sup>46</sup> There were undoubtedly many more cases that the INS never detected.

In addition to causing a spike in unlawful alien entries by aliens seeking to fraudulently claim amnesty, the 1986 amnesty also encouraged millions of illegal aliens to enter the United States in succeeding years, in the hope that they would benefit from the next amnesty.<sup>47</sup> Of course, in 1986, the amnesty was advertised as the one and only amnesty that the United States would ever grant.<sup>48</sup> The incoming illegal aliens did not believe it. The 1990s witnessed the greatest wave of illegal immigration ever.<sup>49</sup> In retrospect, the illegal aliens were right—plenty of Senators in 2007 felt no compulsion to observe the pledge that Congress made in 1986. There is no reason to believe that the results would be different the next time around.

Another problem with fraud in amnesty applications is the fact that individual terrorists have successfully obtained amnesty in the past, and more terrorists will almost certainly do so if another major amnesty is offered in the future. For example, Mahmud “The Red” Abouhalima, a leader of the 1993 World Trade Center bombing, was legalized as a seasonal agricultural worker as part of the 1986 amnesty.<sup>50</sup> He had

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44. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 301 (1986).

45. Roberto Suro, *False Migrant Claims: Fraud on a Huge Scale*, N.Y. TIMES, Nov. 12, 1989, at A1; RECTOR RESEARCH, *supra* note 41, at 6.

46. Suro, *supra* note 45, at A1.

47. Robert Pear, *'86 Law Looms Over Immigration Fight*, N.Y. TIMES, June 12, 2007, at A1; RECTOR RESEARCH, *supra* note 41, at 9.

48. John Cornyn, *Immigration Reform: Back to the Future*, May 1, 2006, <http://yalelawjournal.org/images/pdfs/44.pdf>.

49. See STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, EIGHT MILLION ILLEGAL ALIENS IN 2000: CENSUS BUREAU FINDING RAISES CONCERN OVER BORDER CONTROL IN LIGHT OF TERRORIST THREAT (2001), <http://www.cis.org/articles/2001/censusrelease1001.html>.

50. 9/11 AND TERRORIST TRAVEL: A STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 194 (2004); MARK KRICKORIAN, CTR. FOR IMMIGRATION STUDIES, SECURING THE HOMELAND THROUGH IMMIGRATION LAW ENFORCEMENT, TESTIMONY PREPARED FOR THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS (2003), <http://www.cis.org/articles/2003/mkstestimony410.html>.

actually been working as a cab driver.<sup>51</sup> His newly-acquired legal status allowed him to travel abroad, including several trips to Pakistan where he received terrorist training.<sup>52</sup> His brother, Mohammed, who was also involved in the 1993 attack, received amnesty as well.<sup>53</sup>

The proposed amnesty of 2007 would have been particularly vulnerable to terrorist manipulation. The process outlined in the amnesty legislation would have given United States Citizenship and Immigration Services (“USCIS”) only one business day to do a quick background check before issuing a provisional Z visa.<sup>54</sup> Supporters of the bill apparently imagined that the United States government possessed a massive database of all the world’s terrorists and criminals, in searchable digital format. But the reality is that the United States still relies on many paper records. Plus, much of the information that is necessary to properly screen amnesty applicants is in the hands of foreign governments. Obtaining such information in twenty-four hours is difficult, if not impossible. Moreover, the 2007 amnesty bill also did not require any photo identification sufficient to verify an applicant’s asserted identity—which meant that an alien terrorist would have been free to invent an entirely clean, fictional name and obtain amnesty (and a federal ID) under that name. An applicant could have stated that his name was “Rumpelstiltskin” and produced a few easily-falsified documents attributable to such a name. In all likelihood, USCIS would have had no basis on which to deny the application.<sup>55</sup>

The proposed amnesty of 2007 would have also resulted in a complete breakdown of the USCIS bureaucracy. That is a reality of which many Senators were apparently unaware in June 2007. Assume that twelve million illegal aliens would have applied for the amnesty. The bill required illegal aliens to file their initial applications within one year.<sup>56</sup> There are 250 days in the calendar year on which the federal government is open for business.<sup>57</sup> That means that there would have been an average of 48,000 applications for the probationary Z visas every day, with significant fluctuations from that average likely to occur. There are approximately 3000 status adjudicators employed by USCIS.

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51. *Id.*

52. *Id.*

53. 9/11 AND TERRORIST TRAVEL, *supra* note 50, at 190.

54. KRIS W. KOBACH, THE HERITAGE FOUND., THE SENATE IMMIGRATION BILL: A NATIONAL SECURITY NIGHTMARE 2 (2007), <http://www.heritage.org/Research/Immigration/wm1513.cfm>.

55. *Id.* at 3.

56. Comprehensive Immigration Reform Act, S.A. 1150, 110th Cong. § 601(f)(2) (proposed amendment to S. 1348).

57. Kris W. Kobach, *R.X. for Breakdown*, N.Y. POST, May 27, 2007, at A1.

This number cannot be increased quickly, due to the difficulty of hiring new adjudicators, and the delay of training them. The Senate bill of 2007 would have only added a paltry one hundred status adjudicators a year for five years—“subject to the availability of appropriations.”<sup>58</sup> 48,000 applications spread among 3000 status adjudicators meant an average of sixteen amnesty applications per adjudicator, per day. Of course, on some days, the number of applications could have been double that amount. And with each application, the adjudicator would have had only one day to discover if the alien is a criminal or a national security threat.

It is a bleak picture. Unfortunately, it gets worse. Those numbers assumed that the adjudicators were not already busy. In FY 2005, USCIS received 6.3 million applications for immigration benefits—on top of a backlog of several million unresolved applications.<sup>59</sup> USCIS was already stretched to the breaking point. According to a 2006 Government Accountability Office (“GAO”) study, because adjudicators had to go through so many applications for benefits (permanent residency applications, asylum applications, etc.) every day, they spent too little time scrutinizing them.<sup>60</sup> As a result, the GAO concluded, failure to detect fraud was already “an ongoing and serious problem” at the agency.<sup>61</sup> The backbreaking workload created a “‘high-pressure’ production environment.”<sup>62</sup> It is widely known that an unofficial “six-minute rule” applies in some offices—spend no more than six minutes looking at any single application.<sup>63</sup> It is a bureaucratic sweatshop.

As a result, USCIS does not regularly engage in commonsense verification with outside agencies—for example, calling a state’s Department of Motor Vehicles to see if two people claiming to be married actually live at the same address. Such detailed scrutiny is too time-consuming.<sup>64</sup> And many adjudicators are actually discouraged from requesting more information from aliens who submit suspicious applications. So what would the 2007 Senate amnesty bill have done? Triple the incoming workload by adding approximately twelve million amnesty applications in a single year. Not only that, the twelve million Z visa holders would have had to come back in four years to renew their amnesty status. The six-minute rule would have become a *de facto* two-

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58. *Id.*

59. *Id.*

60. *Id.*

61. U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION BENEFITS: ADDITIONAL CONTROLS AND A SANCTIONS STRATEGY COULD ENHANCE DHS’S ABILITY TO CONTROL BENEFIT FRAUD 4 (2006).

62. *Id.* at 6.

63. Kobach, *supra* note 57, at A1.

64. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 61, at 25.

minute rule. Millions of fraudulent applications likely would have been accepted.<sup>65</sup> It was “a recipe for bureaucratic collapse.”<sup>66</sup>

However, even if granting amnesty to twelve million illegal aliens could be accomplished with ease, it would not alleviate the burden that so many cities and states are bearing. Illegal immigration is expensive—very expensive—for the cities and states in which the illegal aliens live. An amnesty, like so many “solutions” that gain currency in the halls of Congress, is no solution at all.

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65. Kobach, *supra* note 57, at A1.

66. *Id.* If the 2007 bill had been enacted, it is likely that USCIS would have responded to the impossible bureaucratic task of implementing the amnesty by hiring contractors to review the amnesty applications. Doing so would have increased the total number of personnel available, but it would have created its own complications. The independent contractors likely would have lacked experience in detecting fraudulent applications, and the federal government would have been hard pressed to conduct security investigations on the independent contractors in time to implement the initial stages of the amnesty.

This Remark will begin with some historical observations before turning to the contemporary situation. As a scholar, I prefer to provide greater complexity, but I will focus on the highlights for the purposes of this Remark.

First, a general observation about the history of United States immigration policy. Our borders have never been legally open, and should not be. The federal government took over the regulation of immigration from the states after the Civil War.<sup>1</sup> Initially, federal law only identified categories of aliens that Congress considered undesirable as immigrants to the United States, and did not try to limit the numbers of desirable immigrants. The great watershed in immigration policy occurred in the 1920s, when Congress placed annual limitations on the number of otherwise desirable immigrants.<sup>2</sup> Restricting the volume of immigration required the government to define priorities among immigrants, and from 1924 until 1965, the leading principle of the United States immigrant selection process was the ethnic national origins quota. That system was finally abolished in 1965, and replaced by a tripartite policy that gave preferences to family members of citizens and resident aliens, to employees with needed skills, and to refugees.<sup>3</sup> In modified form, this policy still operates today.<sup>4</sup>

Second, since the 1920s the United States has repeatedly found it appropriate to regularize the status of otherwise desirable immigrants who had entered or remained in violation of the legislation. You can call that a legalization or an amnesty; in rational discourse nothing turns on the label. For example, amnesties for long-term residents were enacted in 1929, 1940, 1958, 1965, and 1986.<sup>5</sup> The 1986 amnesty gave lawful resident status to over two-and-a-half million people.<sup>6</sup>

Today it is estimated that there are more than twelve million

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\* Gerald L. Neuman is the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School.

1. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19-43 (1996); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 185-93 (2006).

2. See ZOLBERG, *supra* note 1, at 243-44.

3. See *id.* at 333.

4. See *id.* at 380-81.

5. Act of Mar. 2, 1929, ch. 536, 45 Stat. 1512; Nationality Act of 1940, ch. 876, § 328, 54 Stat. 1151; Act of Aug. 8, 1958, Pub. L. No. 85-616, 72 Stat. 545; Act of Oct. 3, 1965, Pub. L. No. 89-236, § 19, 79 Stat. 920; Pub. L. No. 99-603, §§ 201, 203, 302, 100 Stat. 3394, 3405, 3417 (1986).

6. ZOLBERG, *supra* note 1, at 372.

unlawful residents.<sup>7</sup> I do not mind using the phrase “illegal alien” to describe them, but we should understand that it is not a well-defined legal term, and it describes a wide variety of people and situations. Some simply entered without permission; some were temporarily admitted but overstayed; some are entitled to legal status but are waiting for the government to act; some have applied for asylum as the law permits and are awaiting a decision; some came involuntarily—for example, having been brought as children by their parents.<sup>8</sup> One unforeseen consequence of stricter border enforcement since the 1980s has been that people who would otherwise have been seasonal migrant workers traveling alone have been pressured to settle down as permanent illegal immigrants with families.<sup>9</sup>

By the government’s own estimates as of January 2006, roughly one million illegal aliens had lived here for over twenty-one years; another one-and-a-quarter million for over sixteen years; almost two million for over eleven years; three-and-a-quarter million more for over six years; and roughly four million for less than six years.<sup>10</sup>

The government report does not break these figures down by ages, but private demographers estimated in 2004 that there were more than one-and-a-half million unlawfully resident children, and almost two million families with at least one unauthorized parent and at least one citizen child.<sup>11</sup>

Having twelve million residents without legal status raises serious and complex rule of law issues, from a number of perspectives. One is the illegal conduct that brought them here, though in some cases it occurred many years ago. Many children came here by no fault of their own and have grown up in our society and face a serious dilemma because they were lawfully educated here but cannot lawfully be employed. Another rule of law issue is the vulnerability of the unauthorized population to crime or other violations of their legal rights; their status can inhibit them from seeking protection or redress.

The continuing presence of these children and adults raises a

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7. GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007).

8. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 9 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

9. See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 128-33 (2002).

10. MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 2 (2007), available at [www.dhs.gov/xlibrary/assets/statistics/publications/ill\\_pe\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf).

11. PASSEL, *supra* note 8, at 18-19.

number of questions. For example: How many years of productive, taxpaying, otherwise law-abiding life here make up for an illegal start and the acquisition of false documents? How can we efficiently and accurately administer a system that does not leave us guessing about our actual population, and that enables us to identify significant threats to safety, health, and national security? Our political process needs to address these questions, not avoid them with simplistic slogans and myths.

If we are concerned about illegality, we should also be concerned about the illegal conduct of employers as well as employees. Many employers knowingly employ unauthorized aliens (that *is* a legal term<sup>12</sup>), but the political power of employers has been exercised to push the burden of illegality onto employees and to make employer sanctions difficult to enforce against employers.<sup>13</sup> If we are concerned with illegal conduct, we should also focus on other forms of employer illegality, such as occupational safety violations and the breaking of unions.

Rule of law problems in immigration enforcement should also attract our attention, such as the failure of the Department of Homeland Security to adjudicate meritorious applications,<sup>14</sup> and the Attorney General's crippling of the appellate function of the Board of Immigration Appeals in 2002.<sup>15</sup>

We should also focus on the illegal conduct of municipal officials, such as the adoption of unlawful local employer sanctions ordinances, which clearly violate an express prohibition in the 1986 Immigration Act.<sup>16</sup> That prohibition was the product of employers' political power, and I would not try to defend it on *a priori* moral grounds, but it is the law of the land, and its violation raises rule of law issues like any other positive law.

Compliance with law by government officials is, after all, the primary meaning of the rule of law.

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12. 8 U.S.C. § 1324a(h)(3) (2006) (defining an "unauthorized alien" in relation to employment as one who is neither a lawful permanent resident nor otherwise authorized to accept the employment).

13. See MASSEY ET AL., *supra* note 9, at 119-21.

14. See CITIZENSHIP & IMMIGRATION SERVICES OMBUDSMAN, DEP'T OF HOMELAND SEC., ANNUAL REPORT 2007 11-16 (2007), available at [www.dhs.gov/xlibrary/assets/CISOMB\\_Annual\\_Report\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf) (discussing delays and current backlog).

15. See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 632-33 (2006).

16. 8 U.S.C. § 1324a(h)(2).