ARTICLES

THE FUTURE OF U.S. IMMIGRATION LAW

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I. INTRODUCTION

Immigration reform is rapidly becoming a major political issue in 1994. With economic growth at a standstill and a new wave of immigrants rushing to our shores, some sixty-five percent of Americans now favor tighter immigration laws.[1] Dozens of immigration bills have been introduced in Congress, bills which call for everything from a strengthening of the Border Patrol to a constitutional amendment altering the basis of citizenship. For President Clinton and congressional Democrats, political analyst Charles Cook has warned, immigration "is a hot potato" that is "headed their way, whether they like it or not."[2]

Already, the immigration debate has returned to first principles, going beyond the obscure legal technicalities of the various laws to more fundamental questions about how many and what kind of immigrants we should accept. The challenge before the U.S. Congress is to manage immigration reform calmly and rationally, avoiding the sort of racial tension and xenophobia that has come to characterize the recent European debate on the issue.[3] This alone is a daunting task given the volatility of the subject, volatility magnified by the changing racial composition of American immigrants. "Immigration is a subject," Michael Kinsley points out, "on which very few opinions are changed because of arguments or statistics."[4]

This does not mean that we must avoid the current urge to reform altogether, or that we should not contemplate additional measures to control illegal immigration. Reforming U.S. immigration law is clearly necessary. The question now is not whether we will have immigration reform, but what form it will take.

In the course of this debate, policy-makers should keep three ideas at the forefront of their thinking. First, immigration in general has unquestionably been beneficial for the United States. Virtually every economic and sociological study on the question has concluded that, in the long-run, immigrants have contributed to the well-being of American society.[5] Second, a complete halt to immigration is not only undesirable, but also impossible. Thus, we must view immigration, in the phrasing of one expert, as a phenomenon to be managed, not a problem to be solved.[6] Finally, the context for the

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1. Morton M. Kondracke, *Immigration to Be Demagogues' Next Issue After NAFTA*, ROLL CALL, Nov. 18, 1993, at 6.

2. Charles E. Cook, *Immigration Issue Will Be Next Year's Political Hot Potato*, ROLL CALL, July 15, 1993, at 8.

3. *See infra* notes 45-46 and accompanying text.

4. Michael Kinsley, *TRB*, THE NEW REPUBLIC, Dec. 28, 1992, at 6.

5. Julian L. Simon, *The Nativists Are Wrong*, WALL ST. J., Aug. 4, 1993, at A8.

6. Martha Angle, *Immigration's Bridges Have Ups and Downs*, 51 CONG. Q. WKLY. REP. 710

immigration debate is set by economic conditions, both at home and abroad. A stronger domestic economy would allay fears of American workers while improved economic conditions in the developing world will help reduce the numbers of those who migrate in search of economic opportunity.

With these thoughts in mind, this essay seeks to reassess the basic foundations of U.S. immigration law. The article surveys current immigration law, the scope of the immigration "problem," and the primary issues in the immigration debate. It concludes by examining proposals for immigration reform.

II. CURRENT LAW

U.S. immigration law is the tangled product of a long legislative history. None of the ideas or themes alive in today's immigration debates are new. As the following summary will demonstrate, the issues surrounding immigration have changed little if at all since the eighteenth century.

Intent on preserving a source of labor and capital from abroad, and with millions of square miles of unsettled country to offer, the United States maintained basically open borders throughout the eighteenth and most of the nineteenth centuries. In 1790, for example, Congress passed an immigration act that required only a two-year period of residency and the renunciation of other national loyalties for citizenship. In 1802 the residency requirement was permanently set at five years, and these simple provisions remained the basis of U.S. citizenship and immigration law for three-quarters of a century.[7]

By the 1880s, however, a strong wave of anti-immigration sentiment was sweeping the United States.[8] It was occasioned by a shift in the ethnic makeup of immigrants, although those immigrants remained largely European. The first truly restrictive immigration measures were the infamous "Chinese exclusion laws," adopted in the 1880s, which sought to restrain the alleged torrent of Chinese immigrants that had begun with the California Gold Rush in 1848.[9] These laws were "the product of economic and political concerns laced with racism and nativism,"[10] and the arguments of eighteenth-century nativists are echoed today by proponents of stricter immigration laws. Anti-immigration forces of the time contended that new immigrants, from China and the fringes of Europe, represented somehow a less worthy or racially pure stock of potential Americans.[11] Even during the debate over the initial immigration act in 1790, opponents had called for halting the admission of "the common class of vagrants, paupers and other outcasts of Europe." By the late 1800s, many of the new immigrants were thought of as "culturally different and incapable of this country's

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(1993) (quoting Jeremy M. Tinker, Staff Director, Senate Judiciary Subcommittee on Immigration and Refugee issues).

7. Staff of Select Commission on Immigration and Refugee Policy, 97th Cong., 2d Sess., U.S. Immigration Policy and the National Interest (Lawrence H. Fuchs and Susan S. Forbes, principal authors) (Comm. Print 1981) [hereinafter *Refugee Policy*] (cited in THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 42-43 (interim 2d ed. 1991)).

8. ALEINIKOFF & MARTIN, *supra* note 7, at 1.

9. *Id.*

10. *Id.* at 1, 7-39. Because the Constitution did not explicitly grant Congress the explicit power to regulate immigration, these laws were challenged in court. The Supreme Court, in two decisions of 1889 and 1893, adduced various reasons for such a congressional power. *See generally* Chae Chan Ping v. United States, 130 U.S. 581 (1889), Fong Yue Ting v United States, 149 U.S. 698 (1893).

11. *See* ALEINIKOFF & MARTIN, *supra* note 7, at 1.

version of self-government, and not because of their backgrounds but because they were thought to be biologically and inherently inferior. Influential professors of history, sociology and eugenics taught that some races could never become what came to be called '100 percent American.'"[12] In 1911, an influential study of immigration's effects concluded that modern immigration "differed markedly" from earlier immigration, that "the new immigration was dominated by the so-called inferior peoples," and that as a result "the United States no longer benefitted from a liberal immigration admissions policy."[13] Then as now, nativists often focused on the English language as an indicia of fitness; in 1906, they succeeded in establishing English as a requirement for citizenship.[14]

These various strands of nativist thinking culminated in the Immigration Act of 1924, known at the time as the National Origins Act.[15] This measure put a ceiling of 150,000 on European immigration, prohibited immigration from Japan, and called for the creation of various quotas for other nationalities calculated on the basis of the ethnic composition of the U.S. population. Its goal was clear: to preserve the racial and ethnic makeup of the United States as it existed at the time. Two decades later, this law would have the perverse effect of banning the immigration of tens of thousands of desperate refugees from Nazi-dominated Europe. The quota system remained in force until 1965.

By the early 1950s, many advocates of a more liberal immigration policy began to emerge. But they were not yet strong enough to halt the passage of the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act.[16] This legislation consolidated earlier immigration law and repealed some of its more obnoxious elements (such as the complete ban on Japanese immigration) but kept intact the quota system and the basic theory that immigration of certain peoples was a danger to be controlled. The Act passed over the veto of President Truman, who favored a more open immigration policy.[17]

It was only in the mid-1960s that the nearly 100-year-old quota policies were reversed. The Immigration Act of 1965, passed during the civil rights movement, eased the procedures for foreign-born family members to enter the country and reduced the pro-European racial bias of the immigration law, laying the groundwork for the current upsurge of Asian and Latin American immigrants. It replaced the quota system with a country limit of 20,000 for each country outside the Western Hemisphere and a total ceiling of 160,000 for those countries, an overall limit of 120,000 immigrants from the Western Hemisphere, and preferences for close relatives of those already living in the United States. In 1978, individual hemisphere ceilings gave way to a worldwide limit of 290,000, with the same country ceilings and preferences in place.[18]

A Select Commission on Immigration and Refugee Policy, created by Congress in 1978, made its recommendations for further immigration reform in 1981. It recognized that immigration was good for the country, and proposed a two-track policy:

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12. *Refugee Policy, supra* note 7 (cited in ALEINIKOFF & MARTIN, *supra* note 7, at 42, 45-46).
13. ALEINIKOFF & MARTIN, *supra* note 7, at 49.
14. *Id.* at 1.
15. The Immigration Act of 1924, Ch. 190, 43 Stat. 153 (1924).
16. The Immigration and Nationality Act of 1952, Ch. 477, 66 Stat. 163 (1952).
17. ALEINIKOFF & MARTIN, *supra* note 7, at 54-56.
18. *Id.* at 56-58.

"closing the back door to undocumented/illegal migration, [and] opening the front door a little more to accommodate legal migration in the interests of this country."[19] The 1986 Immigration Reform and Control Act (IRCA)[20] was the first legislation to reflect this strategy; it established new penalties for employers who tapped the illegal labor force while granting an amnesty to those illegals already in the country. The idea was to display compassion for those immigrants already here while making it harder for new ones to find jobs. Of the two provisions, the second certainly worked: some 2.5 million illegals applied for and received permanent residency status under the amnesty law. But while border crossings fell for a time, from 1.8 million in 1986 to 800,000 in 1989, by 1991 they were back up to 1.2 million and climbing again—suggesting that the employer sanctions provisions were either insufficient or ineffective.[21]

In 1990, a new immigration act[22] liberalized U.S. immigration policy even more. It raised the annual quota for legal immigration by about forty percent, from half a million to roughly 700,000. This again supported the Select Commission's goal of liberalizing legal immigration. The 1990 act also explicitly used immigration as an economic policy tool aimed at providing skilled and unskilled labor to key U.S. industries, streamlined and modified various admissions procedures, and included provisions designed to increase the diversity of immigrants by reserving slots for countries that had been underrepresented in the past.[23]

In July of 1993, President Clinton unveiled his first initiative on immigration.[24] He issued proposed legislation calling for tighter control on illegal asylum seekers and on the organized shipment of aliens for profit, such as the shiploads of Chinese illegals that began showing up off U.S. coasts in large numbers by 1993.[25] He also proposed $172.5 million in new spending on immigration control, including $45 million for 600 new Border Patrol personnel (a provision drawn from congressional proposals) and equipment (a drastic change from the initial Clinton budget, which had proposed cutting ninety-three Border Patrol slots); a $45 million update for the U.S. State Department overseas visa processing system; and a $60 million revision of the INS processing system.[26]

III. THE SCOPE OF IMMIGRATION

It is important to keep the current level of immigration in perspective. In percentage terms, it is not the greatest immigrant rush in history. More than fifteen percent of U.S. citizens were foreign-born around the turn of the century; even at the current pace of migration, we will not return to the ten-percent level until sometime between 2000 and 2100.[27] While nearly three-quarters of Americans want tighter con-

19. Miguel Lawson and Marianne Grin, Note, *Recent Developments: The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978*, 33 HARV. INT'L LAW J. 255, 257 (1992) (citation omitted).

20. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

21. *See* Angle, *supra* note 6, at 723.

22. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

23. For a complete analysis of the law, *see* Lawson and Grin, *supra* note 19, at 255-76.

24. Holly Idelson, *Clinton's Immigration Changes Aim to Stop Abuses*, 51 CONG. Q. WKLY. REP. 2061 (1993).

25. Joyce Barnathan, *Trying to Staunch the Flow from Fujian*, BUSINESS WEEK, June 21, 1993, at 34-35; and Melinda Liu, *How to Play the Asylum Game*, NEWSWEEK, Aug. 2, 1993, at 23.

26. *See supra* note 6, at 751.

27. Michael J. Mandel et al., *The Price of Open Arms*, BUSINESS WEEK, June 21, 1993, at 32.

trols on immigration, only two percent rank the issue as one of the most serious problems the nation faces.[28]

Moreover, the weight of economic evidence is overwhelming that, on the whole, immigration is good for the United States.[29] Highly-educated foreigners bring scientific and technical skills when they emigrate; Silicon Valley, for example, is brimming with foreign-born scientific minds.[30] Because they had the "moxie" to fight their way into the United States in search of new opportunities, many immigrants are dedicated and hard-working; most find gainful employment, and together they pay tens of billions in taxes.[31] Immigrant entrepreneurs create businesses and jobs, in some cases helping to revitalize decayed urban areas that native-born businessmen avoid.[32] And if immigration does hurt the least well-educated of Americans by competing for low-paying jobs—an effect that has not been substantiated in most economic studies—that is an argument for improving the educational level of native-born Americans, not banning immigration.

Studies also demonstrate that even illegal immigrants contribute more than they take from the U.S. economy.[33] Over seventy percent of illegals are estimated to pay Social Security and federal taxes, yet, on average, only five percent use free public hospitals, four percent ever collect unemployment benefits, one-half of one percent receive welfare payments, and less than four percent place children in public schools.[34] After an exhaustive review of the evidence, Julian Simon concludes that "natives exploit illegal immigrants through the public coffers by taking much more from the illegals in taxes than is spent on them in public expenditures."[35] He cites one extensive study from 1984 which concludes that "tax revenues from undocumented aliens clearly exceed costs to provide public services to them."[36]

Nonetheless, immigration today is taking place in the context of a slow U.S. economy and enormous pressure on federal, state, and local budgets. The short-term costs of immigration have, therefore, been placed in sharp relief. The burden is especially high in those six states—California, Texas, New York, Florida, Illinois, and New Jersey—where three-quarters of legal immigrants reside; when illegal immigration is included, over ninety percent of all immigrants are believed to live in those same states.[37] Twenty-five percent of the jail population in southern California is estimated to be comprised of illegal aliens;[38] California lawmakers put the annual welfare cost of illegals in their state alone at between $2 and $3 billion.[39] This reflects, not a net drag on the economy produced by immigration (whose net effects are still positive),

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28. George C. Church, *Send Back Your Tired, Your Poor*, TIME, June 21, 1993, at 26.

29. *See generally* JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION (1989). *See also* Larry Rohter, *Revisiting Immigration and the Open-Door Policy*, N.Y. TIMES, Sep. 19, 1993, at D4; and Patrick Lee, *Studies Challenge Idea That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A1, A7.

30. Robert D. Hoff, *High Tech's Huddled Masses*, BUSINESS WEEK, July 13, 1992, at 120.

31. Michael J. Mandel, *The Immigrants*, BUSINESS WEEK, July 13, 1992, at 114.

32. *Id.* at 118.

33. *See supra* notes 29 and 31.

34. *Id.*

35. SIMON, *supra* note 29, at 296.

36. SIDNEY WEINTRAUB & GILBERTO CARDENAS, THE USE OF PUBLIC SERVICES BY UNDOCUMENTED ALIENS IN TEXAS: A STUDY OF STATE COSTS AND REVENUES xxxi (1984).

37. Rohter, *supra* note 29, at 4.

38. Mandel et al., *supra* note 27, at 33-34.

39. Lee, *supra* note 29, at A7.

but a distributional problem: while most of the costs of illegal immigration are born by states and localities, most of the tax revenues garnered from immigrants go to the federal government. Thus while economic studies show illegals to be a net boon to the economy, they do constitute a net cost to a number of particularly hard-hit states, as high as $2,000 annually per immigrant family in California.[40]

In the state and local context, the chief cost of illegal immigration is in the area of education. In 1982, the U.S. Supreme Court, in *Plyler v. Doe*,[41] struck down a Texas law that denied access to public education to illegal immigrants. Some argue that this constitutional prohibition against denying education to illegal aliens has created a significant burden for many states; one study has found that an "overwhelmingly large proportion of the costs for services used by the illegals—somewhere between 85 percent and 93 percent—goes for education."[42]

Moreover, while the number of immigrants is not overwhelming by historical standards, their changing racial composition has complicated the issue. Where once the United States was largely the recipient of European immigrants, now most of those who arrive seeking citizenship are from Latin America and the Caribbean (48 percent of legal immigrants) or Asia (35 percent); Europeans comprise only 12 percent of immigrants. And those numbers are for legal immigration; because the 200,000 or more illegals come almost entirely from Latin America and Asia, the percentage of total immigration from those areas is even higher.[43] Immigration is, therefore, helping to change the face of America—a phenomenon welcomed by some and condemned by others.

Immigration may also be contributing to a subtle but important shift in the demographic makeup of the country. Recent studies have suggested that the influx of immigrants to the six states mentioned above has caused lower-income people in those areas to move elsewhere, usually to neighboring states, in search of economic opportunities. The 1990 census, for example, indicates that, as 120,000 legal immigrants arrived from Mexico and elsewhere into Texas, some 61,000 poor Americans left that same state, most for New Mexico, Colorado, and Arizona. Some 150,000 immigrants arrived in New York, and over 90,000 lower-income New Yorkers left, many for Virginia, North Carolina, and Florida.[44] It is too early to tell the long-term effects of this migration pattern—they could be either positive (spreading the burden of immigration and bringing entrepreneurial immigrants into depressed urban areas) or negative (adding immigrants to the urban underclass while dramatically increasing the welfare burden on states to which the poor are fleeing).

In the growing tension over immigration resides a palpable risk of backlash. Such a backlash is already well underway in Europe, where immigrants have faced violent attacks. For example, French Interior Minister Charles Pasqua has called for "zero immigration,"[45] and Germany concluded a tortured debate by ending the constitutional right of immigrants to asylum.[46] As in the United States, the tensions have

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40. SIMON, *supra* note 29, at 293.
41. Plyler v. Doe, 457 U.S. 202 (1982).
42. SIMON, *supra* note 29, at 294.
43. Mandel et al., *supra* note 31, at 114.
44. Barbara Vobejda, *Poor Americans Are Seen Fleeing Some States as Immigrants Move In*, WASH. POST, Sept. 12, 1993, at A3.
45. Roger Cohen, *French Immigration Curbs Provokes Cabinet Rift*, N.Y. TIMES, Jun. 23, 1993, at A4.
46. John Darnton, *Western Europe is Ending Its Welcome to Immigrants*, N.Y. TIMES, Aug. 10,

been sparked as much by the racial makeup of immigrants as by their pure numbers. In France, for example, the foreign population has remained largely the same over the past several years but has become increasingly Arab and African in character.[47]

This brief review of our immigration challenge has hopefully suggested that our problem today is not "too many" immigrants; nor is it that immigration per se is a burden on the American economy—quite the contrary. No persuasive economic reason exists to reverse U.S. immigration policy or to slash the number of legal immigrants allowed to enter the country. But a case could be made for adjustments to immigration law to achieve three purposes: to curtail illegal immigration, to reduce the short-term economic burden imposed by illegal immigrants on the state and local economies hardest hit by the phenomenon, and to take effective action to head off the rising anti-immigrant sentiment in the United States.

IV. THE PRESERVATION OF CULTURE ARGUMENT

Some make a different argument for immigration reform. The United States has an interest in promoting a specific kind of community, they argue, one based on Western values associated with Anglo-Saxon peoples. In this view, many of the principles on which the United States was founded—individual liberty, political liberalism, laissez-faire economics—emerged directly from a Western tradition of thought. For these observers, the changing racial composition of America's immigrants is a source of concern.[48]

In its basic terms, this is merely a replay of the nativist argument against immigration that flourished from the 1880s to the 1920s. It yet again raises another basic question for U.S. immigration law: Should it favor certain ethnic groups over others? Our answer must be a resounding "no."

The premium on establishing a definable group of "Americans" is indeed an important consideration today, and is magnified by the need for a stronger American community. Most social commentators writing today agree that the United States needs an infusion of common values and obligations to temper the rampant individualism that has come to characterize our society and our private life.[49] We need a stronger sense of collective morality and fraternity, greater individual responsibility to match our rights, a reinvigoration of the family structure, and a more decentralized and effective system of governance. In short, on the local and state levels especially, but also as a nation, we need a stronger sense of community; a more robust network of families, neighborhood assemblies, churches, nonprofit groups, and other associations that promote fraternity and cooperation. This broad political philosophy has become known as communitarianism.[50]

1993, at A1; *Violence in Germany*, CONG. Q. WKLY. REP., Feb. 12, 1993, at 135; and Henry Kamm, *In Europe's Upheaval, Doors Close to Foreigners*, N.Y. TIMES, Feb. 10, 1993, at A1.

47. *Zero Option*, THE ECONOMIST, June 12, 1993, at 57.

48. Former Republican presidential candidate Patrick Buchanan is associated with this point of view. *See also* Peter Brimelow, *Time to Rethink Immigration*, NAT'L REV., Jun. 22, 1992, at 34-35, 44-46. Some connect immigration to the rise of "multiculturalism" in left-wing circles. *See* Lawrence Auster, *The Forbidden Topic*, NAT'L REV., Apr. 27, 1992, at 42-44. A large number of historical and current opinions on the subject are drawn together in JOHN CHALBERG, IMMIGRATION: OPPOSING VIEWPOINTS (1992). For a summary of the debate, *see Are Immigrants a Threat to American Values and Culture?*, CONG. Q. WKLY REP., Sept. 24, 1993, at 857.

49. *See infra* note 50.

50. MICHAEL WALZER, SPHERES OF JUSTICE (1993); For some basic works on the subject, *see e.g.*

When mutual obligations between government and governed are strong, the very possession of citizenship becomes an important public good, strong both in the rights and duties it confers. Michael Walzer is a prominent communitarian who has carefully thought through the question of immigration and citizenship. "The primary good that we distribute to one another" in modern societies, Walzer explains, "is membership in some human community."[51] In order to have any hope of fostering fraternity and cooperation in a society, there must be some stability and recognizable national membership in the population. "The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life," Walzer continues. "At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants."[52] This limited "right of closure" is critical, Walzer concludes, for without it "there could be no communities at all . . . . For it is only as members somewhere that men and women can hope to share in all the other social goods—security, wealth, honor, office, and power—that communal life makes possible."[53]

Walzer is clearly right, but the question he leaves unanswered is how strictly immigration must be restrained to promote a strong community. If our national culture is a broad enough tent to shelter many individual traditions, then immigration and a more diverse nation pose no threat to that culture. If, on the other hand, our national values are narrow and particular, and will not admit the practices and beliefs of peoples from around the world, then we would be well-served to bias our immigration laws toward those who come from similar cultures.

In fact, the United States is, always has been, and takes enormous pride from being the most diverse, tolerant nation on earth. Americans are already a varied people, and any set of common values would, even today, have to respect that variance. Any common culture that can embrace white Catholics in Boston, Hispanics in Miami, African Americans in Los Angeles, Hasidic Jews in New York City, Poles in Chicago, and all the farmers, ranchers, businessmen, academics, and priests in between must certainly be capable of accommodating new immigrants as well. "Though the fabric of the United States is woven from diverse strands," argues legal scholar David Martin, "the country has been notably successful in encouraging newcomers, or at least the children of newcomers, to identify closely with the polity . . . . This assimilative capacity . . . represents a precious national asset."[54] Indeed, the "identifying value of American citizenship is precisely its capacity to accept newcomers—immigrants, refugees, asylum-seekers—into the polity."[55]

The United States is built upon values that can easily stretch to take account of

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JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1983); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1992); and AMITAI ETZIONI, THE SPIRIT OF COMMUNITY (1992).

51. WALZER, *supra* note 50, at 31.

52. *Id.* at 39.

53. *Id.* at 63.

54. David A. Martin, *Membership and Consent: Abstract or Organic?* 11 YALE J. OF INT'L LAW 278, 283 (1985) (book review).

55. David S. Schwartz, *The Amorality of Consent*, 74 CAL. L. REV. 2143, 2163 (1986) (book review).

many individual beliefs. Political philosopher William Galston, who is sympathetic to the communitarian cause, has outlined what he believes to be a stronger yet representative set of values appropriate to a tolerant, open democracy. These include courage, law-abidingness, loyalty, independence, family values, tolerance, a work ethic, an ability to delay gratification, and adaptability.[56] Clearly, immigrant groups can reflect these values at least as well as native-born Americans. Indeed, in terms of courage, family values, work ethic, and delay of gratification, recent immigrants can probably teach the rest of us a thing or two.

The idea that non-Europeans are somehow less likely, as a group, to espouse "American" values is simply racial bigotry masquerading as social theory. If immigrants retain the social and political principles of their countries of origin, as many of the nativists suggest, then why did so many Europeans fleeing from repressive states early in this century have no effect on our politics? Why should we have accepted Russian refugees during the Cold War, and why should we accept Cubans today? Why, indeed, would disaffected citizens of the world's most powerful monarchy establish a democracy here in the first place?

The very fact that this same argument against immigration was made at the turn of the century, and turned out to be demonstrably incorrect, should cast serious doubt on any new case for cultural purity. One could argue that to be a German or Italian or Greek immigrant in 1900 was to be as different from the norm as is a Chinese or Mexican immigrant today. European immigrants founded their own ethnic enclaves, often failed to learn English, even (in a few cases) continued to use the national currencies of their countries of origin. They had wildly different ideas (when they arrived) of what government should do. And yet today, would anyone argue that the average Italian-American, or German-American, or Greek-American is not fully American? That they are somehow incapable of embracing American values? There is no reason to believe that Asian and Latin American immigrants could not similarly become as firmly embedded into the tapestry of American culture; millions of them already are.

Obviously, America is becoming a more diverse country, but this does not mean that the central tenets of its civil society need be undermined. As Julian Simon has argued,

> Immigration does increase *diversity* in a variety of ways—foods eaten, ethnic festivals celebrated, types of schools operated privately, foreign-language newspapers published. But this is variation *around* the main line, rather than an alteration in the central tendencies of national life. Nativists confuse the one with the other, in error or purposely for its scare power.[57]

Many of those who claim immigration threatens American culture have a very specific notion of what their culture should be,[58] a far narrower and more exclusive notion than I believe most Americans would approve. Plenty of room exists to expand our areas of common culture and the duties of American citizens before we become particular enough to exclude any immigrants.

In sum, U.S. immigration law should not favor one racial group over another. Even a more disciplined version of American culture can welcome and benefit from

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56. WILLIAM GALSTON, LIBERAL PURPOSES 220-224 (1991).
57. Julian L. Simon, *Why Control the Borders?*, NAT'L REV., Feb. 1, 1993 at 28.
58. *See supra* note 48.

immigrants from around the world. Cultural arguments, therefore, provide no better case than economic ones for a broad-based shift in U.S. immigration policy, either to severely restrict the numbers or fine-tune the ethnic makeup of future immigrants.

V. AMENDING THE CONSTITUTION?

Ultimately, those who seek fundamental reforms in U.S. immigration law inevitably run headlong into the U.S. Constitution. The Constitution contains two provisions with dramatic implications for immigration. First, it provides that any child born in the United States shall be eligible for citizenship. Illegal immigrants can therefore, under current law, come to the United States and have children who immediately become citizens. This right stems from the initial phrase of the Fourteenth Amendment, which holds that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," a provision originally included in the Amendment to overturn the infamous *Dred Scott*[59] decision and provide citizenship to all former slaves in the United States. As one immigration law textbook concludes, the practical effect of this rule (known as *jus soli*) is that "[B]irth in the territorial United States, even to parents fresh across the border after an illegal entry, results in U.S. citizenship."[60] Once their children are citizens, the illegal parents can apply for public benefits—as is happening more and more in such states as California and Texas.

Second, as noted above, the Constitution has been interpreted by the Supreme Court as establishing an equal protection right to certain forms of benefits, such as public education, to all residents of the United States, whether or not they are citizens. Some contend that this constitutional right to benefits is playing havoc with state and local budgets in those states most subject to legal and illegal immigration.[61]

Several bills in Congress have proposed a constitutional amendment that would restrict automatic citizenship for those born in the United States to persons with legal parents, thus ending the ability of illegals to have children who become citizens.[62] Others have suggested that *Plyler v. Doe* be vitiated through federal action to eliminate the constitutional right of illegal aliens to public services.[63]

These bills pose two constitutional questions. Should we amend the Constitution to eliminate, or clarify, the Fourteenth Amendment's guarantee of citizenship by birthright? And should we deny public services to illegal residents of the United States?

On the first question, some have made the argument that birthright is an arbitrary basis for citizenship. Like the authors of current legislation, they point to the growing burdens associated with illegal immigration, and contend that one part of the solution must be to eliminate the automatic claim to citizenship of the children of illegal aliens. The promise of such citizenship is a factor, they argue, in the growing tide of illegal migration to the United States.[64] Some legal scholars argue specifically that the Con-

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59. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

60. ALEINIKOFF & MARTIN, *supra* note 7, at 976.

61. *See* Mandel, *supra* note 27.

62. H. J. Res. 117, 103rd Cong., 1st Sess. (1993), proposed by Rep. Anthony Beilenson (D-CA), which as of this writing has nine cosponsors.

63. This is the implied effect of many of Governor Pete Wilson's proposals in California, which deny certain state benefits to illegals. *See California Scapegoats*, N.Y. TIMES, August 16, 1993, at A16.

64. The most extended and scholarly attempt to do so is PETER H. SCHUCK & ROGERS M.

stitution has been misinterpreted, that the Fourteenth Amendment was never intended to grant birthright citizenship to illegals.[65]

The birthright guarantee of citizenship is a precious tradition that we should be very cautious about qualifying. It is, in some ways, the most basic right we possess. If Walzer is right and membership in a community is the most fundamental public good, then access to that good is also our most fundamental right; and in the end, "[B]irthright citizenship is the only protection an individual has against tyranny."[66] This fact is glaringly apparent in the origins of the *jus soli* rule—the Fourteenth Amendment, that great and inclusive piece of law that overturned *Dred Scott's* view of "American citizenship as a club open only to whites."[67] If we vitiated the birthright standard, holding citizenship hostage to various conditions could become a terrible discriminatory weapon.[68]

However, there is something inconsistent and unjust about a law that grants equal rights of citizenship to children of naturalized Americans and those of illegal aliens. In the former case, the parents have presumably paid their taxes, probably voted, perhaps served in the military, possibly served on local community organizations—in short, fulfilled their duties and obligations as citizens. Illegal parents, on the other hand, have entered the country only by violating its laws. Why is it that their children should have an equal claim on the rights and benefits of Americans? Such a standard undermines the value of playing by the rules and respect for the rule of law, two of our most important shared national values. Although most studies (as well as anecdotal evidence) indicate that illegal immigrants come here primarily in search of jobs, the notion that they can arrive and have children who will be citizens—and whose citizenship will entitle the illegals themselves to some benefits—must be enticing. Thus, while there are risks in tampering with the birthright guarantee, the question of illegals may be so unique that it can be exempted from the Fourteenth Amendment standard without endangering the birthrights of other Americans.[69] The risk that this proposal would

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SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). Against the birthright (or ascriptive) version of citizenship, Schuck and Smith propose a model of "consensual" citizenship, which would place more emphasis on a society's right to choose its own members, and the members in turn to choose their citizenship. This model would limit birthright citizenship to children of those who are already citizens, while simultaneously making it easier for those who are already citizens to choose expatriation. By making membership in society more a matter of choice, the authors contend, their model would be "more likely to generate a genuine sense of community among all citizens than the existing scheme." *Id.* at 4-5.

65. The Fourteenth Amendment states that "[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The question is how broadly this applies. After a few narrow holdings, the Supreme Court ruled in 1898, in United States v. Wong Kim Ark, 169 U.S. 649 (1898), that the Fourteenth Amendment made Wong a citizen because he was born in the United States, even though his parents were Chinese nationals ineligible for naturalization. 169 U.S. at 473. This case has been used to uphold a very broad reading of the Amendment. The problem is that Wong Kim Ark's parents, while not eligible for citizenship, *had entered the country legally* and were legal permanent residents. Therefore, it is not at all clear that the Court's decision actually establishes a *jus soli* standard for children of *illegal* immigrants. This fact provides a major argument for Schuck and Smith. For background information on the issue, *see* THE CENTER FOR IMMIGRATION STUDIES, SCOPE, No. 16 (Fall 1993) at 3-4.

66. Schwartz, *supra* note 55, at 2170.

67. Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 488 (1987) (book review).

68. Schwartz, *supra* note 55, at 2150-51 n.20.

69. Being a child of an illegal immigrant is a fundamentally different category from any other category that one could imagine. If the parents are legal residents, then birthright citizenship should

deport people who live in the United States for many years is hardly a unique one; such a group already exists today—the illegal immigrants who come into this country illegally and strive to avoid deportation for decades.[70]

It may be time, therefore, to open a national debate on the real and proper meaning of the birthright guarantee as it applies to illegal immigrants. The first step would be to bring a case to the Supreme Court to get clarification of the meaning of the Fourteenth Amendment. If the Court ruled that it did not apply to illegals, no further action would be necessary. However, if the Court did not rule that way, then less dramatic means of combatting the problem of illegal immigration must be attempted before amending the Constitution. Some of those means are outlined below. Only if these other steps proved insufficient, and only if a period of careful national deliberation determined that modifying the Fourteenth Amendment would pose no danger to broader liberties, should the dramatic step of amending the Constitution be considered.

What of the second proposal—to modify the Constitution so as to essentially overturn *Plyler v. Doe*? The issue is not a constitutional one from Congress' perspective; *Plyler* was decided on Fourteenth Amendment grounds prohibiting *state* laws from denying equal protection, and the decision explicitly noted that congressional action to achieve the same goal as the Texas law would not be subject to court review.[71] When Congress examines what kind of benefits illegal residents should receive, therefore, it must do so on policy grounds rather than constitutional ones.

The benefit at issue in *Plyler*, and at the core of many states' difficulties with illegal immigration, is education. Yet this is the one benefit the federal government has the worst case for denying. As the Court noted in *Plyler*, denying public education strikes at the children of illegal immigrants, not the immigrants themselves; arguments for halting benefits "from those whose very presence within the United States is the product of their own unlawful conduct" do not hold to laws "imposing disabilities on the minor *children* of such illegal entrants."[72] If the children are innocents, it makes little sense for the state to seek redress against them.

Even more powerfully, the denial of educational benefits would have an especially pernicious effect on children. As the Court argued in *Plyler*, the lack of education

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apply, regardless of other conditions that might exist. Any new law or constitutional amendment that aimed at denying citizenship to children of illegals could (and should) even *specify* this, expressly prohibiting the denial of birthright citizenship on any other grounds.

70. Hundreds of thousands of illegal immigrants already come into our country, collect benefits, live for decades, establish ties to the community, and so on. By and large, our policy is to deport them if caught. That same principle could hold true for their children—as long as the children are accompanied by competent parents. And from time to time, as we did in 1986, we can offer a general amnesty for immigrants already here to wipe the slate clean from the past and prevent the U.S. resident of 30 years from being sent back to a country with which the "immigrant" no longer has any ties.

71. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 135 (1982). One commentator has suggested that the core constitutional issues here deal with federalism, not equal protection: "Congress may treat aliens differently from citizens . . . so long as it has a rational basis for doing so," but states may only make that distinction when "acting consistently with federal policy regarding aliens." Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond*, Plyler v. Doe, 44 PITT. L. REV. 329, 334-35 (1983) (arguing that the lack of federal sanction for the Texas law was a major argument in the Supreme Court's refusal to uphold it in *Plyler*.)

72. 457 U.S. at 219-20.

> imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.[73]

This rationale would hold even if these children remained illegals their whole lives, but it is especially compelling given that many of them might later become citizens—either through *ad hoc* naturalization or, as in the Immigration Act of 1990, across-the-board amnesties granted by future legislation. It is not in our interests to create a permanently alienated class of people who, once citizens, will impose greater burdens upon the society.[74]

Even Chief Justice Burger, in his dissent to *Plyler* (a 5-4 decision that, interestingly, might come out differently given the more conservative makeup of today's Court), admitted, "Were it our business to set the nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education."[75] Burger merely objected to the Court's intrusion into legislative business.

Depriving illegal immigrant children of an education does not, therefore, turn out to be a very good idea. What about other benefits? As noted above, illegal immigrant claims on welfare, health, and unemployment benefits are extremely low, as one might expect given the illegals' status. The one benefit that we can deny, and the one which constitutes the overwhelming motivation for most illegal immigration, is employment. We can attempt to prevent illegals from obtaining jobs, which merely entails better enforcement of existing legal standards, not any constitutional amendments or fundamentally new legal principles.

VI. GOALS OF REFORM

Short of constitutional amendments, then, what immigration reforms could we pursue? What are the promising directions for new legislation?

To begin, a sound foundation for U.S. immigration law is the common-sense principle that nations must exercise some control of their borders. If a hundred million, or even ten or twenty million, immigrants arrived in a single year, our social fabric and network of social welfare would be stretched to the breaking point. Unlimited immigration to the United States "would in fact constitute a grave threat to its existence," and, therefore, "government's interest in cases involving aliens is compelling; it is nothing less than the preservation of the society itself."[76] Michael Walzer's arguments also support this basic idea; we cannot maintain a sound political community with completely porous borders. Theoretical arguments to the contrary—provocative

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73. *Id.* at 223.

74. Some might argue that there is some tension between this argument and the case, which I have not fully endorsed, for a denial of birthright citizenship for the children of illegals. But the two are not at all contradictory: one can argue that children of illegals should not automatically become citizens, and admit that, as long as they are here and not being deported, we have an interest in educating them. In fact, this is precisely the argument of *Plyler*, which guarantees education even for children who have *entered* the United States illegally; had those children been born here, they would be citizens and not subject to a denial of education.

75. 457 U.S. at 242.

76. *See supra* note 50, at 376.

free-market assertions that we might as well allow anyone to come here, and then let the market determine who gets jobs—ignore the obvious social upheavals that would result from such a policy. Moreover, the resources of the country are limited; if we hope to maintain an enlightened policy of compassion toward all those who reside in our territory, we must do something to restrain illegal immigration. Otherwise, the burdens would become too great, and a terrible anti-immigrant backlash would result.

The distastefulness of more extreme anti-immigration measures should, therefore, not be allowed to discredit legitimate efforts to enforce our immigration laws. "We are continuously reminded that we are a nation of immigrants," David Martin perceptively observes, and this "generates a vague feeling of guilt" about laws "to curb illegal immigration." Martin argues (following Michael Walzer) that the fairest immigration controls are those aimed at people

> born elsewhere, already enjoying another national affiliation—and before the time when lengthy presence generates significant affiliative ties to this country. Societal consent, in short, should take effect through a firm insistence on choice at the point of initial entry for residence purposes, not at the point of political membership.[77]

What this principle, and in fact the entire preceding analysis, suggests is that reforms of U.S. immigration policy ought to seek two goals—better enforcement of existing immigration laws and more direct aid to those states that bear most of the immigration burden—without lapsing into mean-spirited attacks on immigrants, legal or illegal, who are already here. Immigration, as such, is undeniably good for the United States; reducing the number of legal immigrants allowed each year would be counterproductive.[78] Policies aimed at curbing illegal entry would help address immigration's short-term costs without creating an anti-immigrant bias in our national laws. If this notion sounds familiar, it should; it is a modified version of the basic principle enunciated by the Select Commission on Immigration and Refugee Policy in 1981[79]—tighter controls on illegal immigration combined with a relatively liberal (though not, today, *more* liberal) policy toward legal immigration. The weight of the evidence suggests that this principle should continue to guide U.S. immigration policy.

In an important sense, our most basic response to illegal immigration must be economic in nature. If we can bring about domestic and worldwide economic recoveries, as political analyst William Schneider points out, "there will be less pressure on immigrants to come here. Americans will feel less threatened economically. And the pressure on government finances will diminish as revenues roll in. The answer, it appears, is still the stupid economy."[80] Certain aspects of foreign economic policy can help improve economic conditions abroad and, in the long-term, reduce immigration, both legal and illegal; thus we can properly think of the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), the continu-

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77. Martin, *supra* note 54, at 294-96; Walzer, *supra* note 50, at 60-61.

78. S. 1351, 103d Cong., 1st Sess. (1993) (Sen. Harry Reid, D-NV) This would include the Immigration Stabilization Act of 1993, introduced in October by several members of the House. Its main provision is to reduce legal annual immigration from the current level of roughly 800,000 to 300,000.

79. STAFF OF SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., 2D SESS., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Lawrence H. Fuchs and Susan S. Forbes, principal authors) (Comm. Print 1981).

80. *See* William Schneider, *Americans Turn Against Immigration*, NAT'L J., July 24, 1993, at 1900.

ation of Most-Favored Nation (MFN) status for China,[81] and U.S. foreign economic assistance as components of our immigration policy. Nonetheless, despite our best efforts, economic conditions in the developing world will not improve to the point where illegal immigration ends completely. Some form of short-term answer is necessary.

Various proposals have been made in Congress to achieve this goal. Several bills provide for better enforcement against employers, including more vigorous enforcement of the 1986 Reform Act.[82] Another means of reducing the flow of illegal aliens would be to strengthen the Border Patrol, State Department and INS processing systems, and other means of controlling the flow of immigration. This was the direction of President Clinton's July policy announcement. The United States can and should do even more.[83] The recent success of efforts near El Paso, Texas suggests that border control can work when implemented with enough energy.[84] The United States should also tighten the rules governing political asylum to prevent immigrants from entering the country under the guise of seeking asylum and then disappearing before their case can be heard. Also, the United States needs more expeditious, yet humane, methods of deportation; our immigration laws apply to those illegals already here as well as to those attempting to get in.

A second set of measures would direct additional financial assistance to those states and localities that bear the brunt of the short-term costs of immigration. The federal government, of course, has limited funds for this enterprise. One promising idea has been proposed by a number of legislators, including Senator Dianne Feinstein (D-CA): a small toll imposed at the U.S.-Mexican and U.S.-Canadian borders. Most of the proceeds could go to those six states where immigration has imposed the largest burdens to help them pay for the education, health care, and other expenses of new immigrants. A portion of the proceeds could be used to fund a further expansion of the Border Patrol.

VII. CONCLUSION

The time has certainly come for reforms in U.S. immigration law. In pursuing such reforms, however, the United States must take care to avoid striking at the principle of legal immigration itself, which has been and continues to be of great value to the United States. Reasonable steps aimed at curtailing *illegal* immigration are justified, but dramatic reversals of our liberal immigration laws or new constitutional amendments are not.

As I suggested above, however, in the long run immigration is an economic issue, not a legal one. Only an economic recovery will provide more jobs for all Americans, including legal immigrants; and only economic growth in the developing world will reduce the incentive for emigration to the United States, both legal and illegal. In this context, NAFTA may well be decisive in determining the immigration

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81. *See* Exec. Order No. 12,850, 58 Fed. Reg. 31,327 (1993) ("Conditions for Renewal of Most Favored Nation Status for the People's Republic of China in 1994").

82. H.R. 341, 103rd Cong., 1st Sess. (1993) (Charles Schumer's (D-NY) bill amends the Fair Labor Standards Act of 1938 to increase penalties for abuse of low-income labor).

83. H.R. 1017, 103rd Cong., 1st Sess (1993) (Rep. James Traficant's (D-OH), bill calls on the government to use military forces on the border, raising important constitutional, moral, and pragmatic questions, and at this stage at least, constitutes an overreaction).

84. Richard Woodbury, *Slamming the Door*, TIME, October 25, 1993, at 34.

challenge the United States faces in the next century. Once it is fully implemented, NAFTA will help cement in place Mexico's economic reforms and set the stage for growth and prosperity.[85] Eventually Mexico itself might become a magnet for immigration from populations further south. If NAFTA had been defeated, investor confidence would have plummeted, Mexico's reforms would have been discredited, the Mexican currency would have been devalued and inflation would have accelerated. The result would have been a short-term surge in illegal immigrants and the perpetuation of such migrant flows indefinitely. For the 103rd Congress, therefore, the most important piece of "immigration law" debated—and thankfully, with President Bill Clinton's inspired leadership, passed—may well turn out to be the North American Free Trade Agreement.

85. Thomas J. Espenshade and Dolores Acevedo, *NAFTA's Trojan Horse*, N.Y. TIMES, Sept. 13, 1993, at A21 (One estimate, assuming moderate predictions of NAFTA's long-term effects on the Mexican economy, suggests that the treaty would eventually help reduce illegal immigration by 40 percent).