Denver Law Review

Volume 84
Issue 4 *Symposium - Immigration: Both Sides of the Fence*

Article 7

January 2007

Reexamining Immigration: Is It Local or National Issue?

Marlin W. Burke

Reexamining Immigration: Is It Local or National Issue?

REEXAMINING IMMIGRATION: IS IT A LOCAL OR NATIONAL ISSUE?

MARLIN W. BURKE†

INTRODUCTION

Immigration, especially illegal immigration, is a subject currently generating intense controversy in American political and social discourse. To varying degrees, the subject has been controversial over the past one-hundred-eighty years, beginning with attempts by New York and Massachusetts to tax masters of ships who brought aliens into New York and Boston Harbors.[1] The Chinese Cooley Taxes in California were the first anti-immigration laws that were directed at a specific racial or ethnic group. Since then, the object of public anti-immigrant ire has been aimed, at different times, at the Irish, Italians, Germans, Eastern Europeans, Asians, both Chinese and Japanese, and Mexicans.

Since 2000, legal immigrants have entered the United States at a rate of nearly one million per year. Since the late 1990's, undocumented immigration is thought to have equaled and may even have exceeded legal immigration.[2] The federal government appears to receive a net gain from the cost-benefit ratio arising out of dollars expended for services provided to immigrants and taxes paid by immigrants including those who are undocumented.[3] Local governments may be suffering a net loss

---

† Marlin W. Burke is an attorney who has been practicing law since 1971. For five years he was a prosecutor for the City of Lakewood, Colorado. After leaving that position, he entered private practice where he enjoyed a civil litigation practice focusing on personal injury, civil rights and employment law. He practiced before all Colorado trial and appellate courts, the Federal District Court of Colorado and the Tenth Circuit Court of Appeals. He interrupted his practice for a time to serve as an Administrative Law Judge for the Colorado Department of Administrative Hearings where he heard workers' compensation matters. He authored a work entitled "Disabilities, Civil Rights and Workers' Compensation Law in Colorado," 1993, Colorado Legal Publishing Company, Library of Congress Catalog Card Number 93-070635. More recently his practice has focused on immigration law and family law involving immigration and international laws. He lectures frequently on immigration law for civic and legal professional organizations. He was the recipient of the 2007 Colorado Adult Education and Colorado Department of Education Volunteer of the Year Award for his many years of teaching of naturalization classes to new immigrants.

1. The first U.S. Supreme Court case dealing with immigration is *Smith v. Turner*, 48 U.S. 283 (1849). It involved head taxes imposed by the states of New York and Massachusetts on masters of ships bringing aliens into their ports. *Id.* at 392, 409. The Massachusetts law required the ship's master to post a one-thousand-dollar bond, a very large sum at that time, if on inspection any of the aliens were found to be lunatics or other undesirables. *Id.* at 409. The Court found that the taxes violated the Commerce Clause of the U.S. Constitution. *Id.* at 410.

2. *See* JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 6 (2005), *available at* http://pewhispanic.org/files/reports/46.pdf; *see also* U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION STATISTICS: STATUS OF THE IMPLEMENTATION OF THE NATIONAL ACADEMY OF SCIENCES' RECOMMENDATIONS 3 (1998), *available at* http://www.gao.gov/archive/1998/gg98119.pdf.

3. *See* sources cited *infra* notes 64-72.

in that equation, though it is far from certain that they are.[4] Whether or not local governments are in fact suffering a deficit in the equation, the public perception is certainly that local services including schools, hospitals, law enforcement, and social services budgets are being overtaxed by immigration, particularly undocumented immigration. Other concerns voiced by anti-immigration groups and individuals that get considerable attention from the public are that immigrants are able to compete unfairly for employment in the United States because large numbers of undocumented laborers depress wages and fill jobs that would otherwise be held by U.S. citizens. Though competent research studies do not support that premise, it is nonetheless a widely accepted perception and was a favorite mantra of many politicians during the 2006 election campaign.[5]

Because the bulk of immigration, especially undocumented immigration, is from Latin America, mostly Mexico, concern is expressed that the racial, religious, and social makeup of the country is threatened. Though there are unquestionably racist and xenophobic undertones in that argument, the fact that it is frequently expressed, even in the halls of Congress by prominent public figures, indicates that it is resonating with the public.[6] How much the fear is embedded in public emotion that American, Northern European influenced culture may be diluted to its

---

4. *See* RICH JONES ET AL., THE BELL POLICY CTR., EFFECTS ON COLORADO AND THE NATION: A REVIEW OF RESEARCH 11 (2005), *available at* http://www.thebell.org/pdf/IMG-brief12-05.pdf (focusing on undocumented immigration); CAROLE KEETON STRAYHORN, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY 20 (2006), *available at* http://www.cpa.state.tx.us/specialrpt/undocumented/undocumented.pdf (same); *see also* JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS (1995), http://www.cato.org/pubs/policy_report/pr-immig.html (follow "Summary of Important Facts about Immigration") (focusing on both legal and undocumented immigration); IMMIGRATION POLICY CTR., ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE 15 (2005), *available at* http://www.ailf.org/ipc/special_report/2005_bridging.pdf (same); VIVEK WADHWA ET AL., AMERICA'S NEW IMMIGRANT ENTREPRENEURS 3 (2007), *available at* http://memp.pratt.duke.edu/downloads/americas_new_immigrant_entrepreneurs.pdf (discussing the impact of educated immigrants engaged in technological, scientific, and entrepreneurial endeavors).

5. *See* RAKESH KOCHHAR, GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF THE NATIVE BORN (2006), *available at* http://pewhispanic.org/reports/report.php?ReportID=69; *see also* SIMON, *supra* note 3.

6. This is an argument expressed by Richard D. Lamm, former Governor of Colorado. *See* RICHARD D. LAMM & GARY IMHOFF, The IMMIGRATION TIME BOMB: THE FRAGMENTING OF AMERICA (1985). This argument is also promoted by FAIR (Federation for American Immigration Reform), a well-financed and high-profile anti-immigration group. *See Unlicensed to Kill*, FAIR, http://www.fairus.org/site/PageServer?pagename=iic_unlicensed (last visited Mar. 20, 2007). This position is also supported by Rep. Steve King (R) from Iowa. *See, e.g.*, Press Release from Rep. Steve King (R) of Iowa: Press Release, Representative Steve King, Biting the Hand That Feeds You (Apr. 25, 2006), *available at* http://www.kingforcongress.com/clippings/desk-immigration4-06.htm. Rep. King was appointed ranking member of the Immigration Subcommittee of the House Judicial Committee in January of 2007. Press Release, Representative Steve King, King Named Member of Immigration Subcommittee (Jan. 17, 2007), *available at* http://www.house.gov/apps/list/press/ia05_king/ PRImmigRankingMember011707.html. It is also a frequent comment from Rep. Tom Tancredo (R) from Colorado, who has referred to it as the Balkanization of the nation. *See, e.g.*, Representative Tom Tancredo, Remarks at Miami Rotary Club (Dec. 14, 2006), *available at* http://tancredo.house.gov/Media/ TancredoMiamiSpeech.pdf.

detriment by cultures from other parts of the world has not been measured.

Another variation on the same theme is that the country cannot support the population increases that continued tolerance of immigration, whether legal or undocumented, will bring. Increases in population, the argument goes, will necessarily degrade the environment and quality of life in America.[7] Fear for national and personal security is also intertwined into the immigration discussion.[8] The 9/11 conspirators were all foreign nationals who gained entry to the United States. To the embarrassment of the former Immigration and Naturalization Service, Mohamed Atta was posthumously granted an entry visa even after his notoriety was known to almost everyone in the country.[9]

Analysis of reputable studies and of the public perceptions expressed in these arguments demonstrates how much fear is a part of the equation. Morality is also a part of the mix. Immigrants, whether legal or undocumented, are human beings, often with sympathetic stories. Because many immigrants have lived and worked in the country for many years, have contributed positively to our society, have families, and have hopes and dreams that are hard for most of us to ignore, the moral questions become both uncomfortable and inescapable.[10]

No one at any level of government or the general public denies that the nation's immigration system is broken. The statement is so often repeated it has become a mantra that raises neither surprise nor objection when it is stated. The system is broken, in part, because it lacks a foundation. The nation does not have a consistent, cohesive immigration

---

7. This too is an argument promoted by Richard D. Lamm. *See* LAMM & IMHOFF, *supra* note 5. Lamm presented this argument in his campaign with the action group Defend Colorado Now in an effort to amend the Colorado Constitution to restrict undocumented immigrants' access to public benefits. *See* Myung Oak Kim, *Lamm's Words Draw Fire*, ROCKY MTN. NEWS, July 27, 2006, at 5A; *see also The Population-Environment Connection*, FAIR, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersfd36 (last visited Mar. 20, 2007).

8. The Farmers Branch, Texas municipal ordinance, placing restrictions on renting housing to undocumented persons, actually cited security concerns arising out of the fact that the 9/11 terrorists were foreign nationals as a part of the justification for the passage of the ordinance. *See e.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), *available at* http://www.ci.farmersbranch.tx.us/Communication/Ordinance%20No%202892.html; Farmers Branch, Tex., Proposed Ordinance 2903 (Jan. 17, 2007), *available at* http://www.ci.farmersbranch.tx.us/Communication/Proposed%20Ordinance%202903.doc.

9. *See INS Blunders Prove Need for Major Shake-up*, ALAMEDA TIMES-STAR, Mar. 26, 2002.

10. Archbishop Charles J. Chaput of Denver has spoken frequently and eloquently concerning these issues throughout the year 2006 in many public appearances. *See, e.g.*, Press Release, Archbishop Charles J. Chaput, Statement by Archbishop Charles J. Chaput on the Arrests of Unauthorized Workers (Dec. 13, 2006), *available at* http://www.justiceforimmigrants.org/files/+Chaput-Arrests.pdf. The subject has also been addressed by Baptist and Jewish religious leaders. *See, e.g.*, Eunice Moscoso, *Religious Leaders Urge Compassion for Illegal Immigrants*, THE OXFORD PRESS, Sept. 27, 2006, *available at* http://www.oxfordpress.com/n/content/shared/news/stories/2006/09/IMMIGRATION_27_COX_W6482.html; Charles Hurt, *Immigration Debate Gets Religious: Group's Deal May Please Neither Side*, WASH. TIMES, Jan. 8, 2007, at A01.

policy. Because the nation has no immigration policy, it cannot have a workable system to implement it. From the outset, immigration laws have been a patchwork of mostly ad hoc restrictions crafted in response to some perceived threat to the national economy, social fabric, or security. The restrictions have often been racially motivated. Some of the restrictions were later withdrawn, but that was done in a piecemeal manner. This is not to say that efforts at devising a comprehensive immigration policy have not been attempted at various times. Attempts at major reform were made in 1924, 1952, 1965, 1986, 1990, and 1996.[11] Unfortunately, rather than scraping the existing law and starting fresh with a specific goal in mind, these efforts simply built on each other in ways that were often inconsistent and conflicting, resulting in a nearly incomprehensible compilation of laws made even more complex by frequent piecemeal changes. The resulting body of law falls far short of truly defining a national immigration policy.

Neither Congress nor the Executive Branch have offered effective leadership on the subject over the past several decades or articulated a comprehensive policy of immigration or a system to implement such a policy. State and local governments generally recognize that direct regulation of immigration is reserved to Congress by the U.S. Constitution. The result of the vacuum of leadership at a national level, however, is that state and local governments have begun to move into the field by obliquely regulating immigration. This is done by regulating areas ancillary to immigration, such as by imposing identification requirements on everyone, citizens and non-citizens alike. The intention here is to deny the necessities of a comfortable existence to anyone unable to demonstrate lawful presence in the United States. Some such local and state legislation denies drivers licenses to the undocumented, prohibits employers from employing such persons, and prohibits landlords from renting to persons who cannot produce certain kinds of identification.[12] But, the anti-immigrant furor does not stop with the undocumented. It stretches even to legal immigrants. There are movements afoot to restrict the right of U.S. citizen immigrants to sponsor their relatives for entry to the country, which is referred to as "chain immigration" by anti-immigration restrictionists, and to deny the automatic grant of citizenship

11. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 1-8 (2004).

12. By way of example, Colorado passed three such pieces of legislation, bills numbered 1023, 1017 and 1343 in its regular and special 2006 sessions. *See* Myung Oak Kim, *New Era for Colorado Owens Puts Pen to Tough Immigration Bills Aimed at Identifying Legal Citizens*, ROCKY MTN. NEWS, Aug. 1, 2006, at 5A. A variety of bills prohibiting landlords from renting housing to undocumented migrants were passed in Altoona, Pennsylvania, Hazleton, Pennsylvania, Escondido, California and Farmers Branch, Texas. *See Another Town Gets Tough on Illegals*, WORLDNETDAILY.COM, Oct. 26, 2006, http://worldnetdaily.com/news/article.asp?ARTICLE_ID =52625. The State of Texas has several such bills pending before its legislature in 2007. *See* Ralph Blumenthal, *Texas Lawmakers Put New Focus on Illegal Immigration*, N.Y. TIMES, Nov. 16, 2006, at A22.

to children born to undocumented immigrants in the United States, which is otherwise guaranteed by the Fourteenth Amendment of the U.S. Constitution.[13]

Some have suggested that local governments should be allowed to regulate areas ancillary to immigration in a manner that would discourage immigration because the federal government is overwhelmed by the number of immigrants entering the United States and because the brunt of the costs of immigration is born by local governments.[14] However, regulation of immigration and all of its aspects is and must be exclusively a federal issue, and no state or local regulation of even ancillary aspects of immigration can or should be permitted. National security and economic and social policy issues surrounding this topic are so inseparable that one cannot be fairly discussed without discussing the others. The questions go to the very heart of the sovereignty of the nation and to the constitutional imperatives granting Congress and the President the right to regulate domestic and foreign commerce and foreign policy. They go to the heart of constitutional concepts of equal protection and liberty that are the foundation of American democracy and to the heart of how we define a civil society within our borders.

I. DEFINING THE TERMS

The law defines terms related to immigration. There is also a great amount of public discussion regarding terms that either have no meaning in the law or are used indiscriminately without regard to important distinctions. Therefore, a definition of a few terms is necessary to clarify this discussion. An "immigrant" in the Immigration and Naturalization Act (the "INA") is anyone who comes into the United States with the permission of the U.S. government and with the intent of remaining permanently in the United States.[15] A "non-immigrant" in the INA is anyone who enters the United States with the consent of the United States government but who enters with the intention of returning to his native country.[16] There are two dozen visa categories to cover persons within this definition. An undocumented alien is anyone who enters the United States without permission to enter (i.e., without checking through a check point) or who enters with permission but overstays the time he or she was allowed to remain in the United States. Within this latter cate-

13. *See* Hurt, *supra* note 9, at A01; *see also Chain Immigration*, FAIR, http://www.fairus.org/site/ PageServer?pagename=iic_immigrationissuecenters3e2a (last visited Mar. 20, 2007).

14. *See* NumbersUSA, State and Local Immigration Action Center, http://www.numbersusa.com/hottopic/ordinances.html (last visited Mar. 20, 2007).

15. *See* 8 U.S.C. § 1101(15) (2006).

16. *See id.* § 1101(15). Neither "immigrant" nor "non-immigrant" is defined in so many words in either the federal statute at title 8 of the U.S. Code or the regulations adopted to implement the statues at 8 C.F.R. Rather, the definitions of these terms are derived from many pages of definitions regarding what is an alien and under what circumstances an alien may admitted to the United States.

gory are also sub-categories of individuals who may have become persona non grata[17] because they violated the terms of their permission to remain in the United States and also categories of individuals who entered without authorization but who may become "legal" if they fit within some very limited circumstances. The term "illegal alien" and the term "illegal" used as a noun as opposed to an adjective as commonly used in the popular lexicon are not defined in law. In the popular lexicon, these terms are imprecise and are indiscriminately used to describe a variety of categories of individuals, sometimes even mixing categories. For purposes of this discussion, immigrants are defined as the INA has defined them, namely, persons who entered legally with the intention to stay permanently. "Undocumented migrants" shall mean anybody who either entered with no documents or stayed beyond the date specified in their entry documents. There are other large categories of individuals, such as temporary visa holders and persons who violated the terms of their visas by committing criminal violations or working without authorization, but these people are not subjects of this discussion. Here, we are concerned with migrants who are "immigrants" and those migrants who are undocumented and therefore, outside of the law regardless of whether or not they intend to remain permanently in the United States. Both of these categories of individuals will be covered within the subject of "immigration."

II. STATE AND LOCAL INITIATIVES

California, because of its port cities and its border with Mexico has long been concerned with immigration. It was there that the Cooley Taxes were imposed on Chinese immigrants of the 1860's. The taxes were an effort to discourage Chinese immigrants who had been imported to work the mines and build railroads from establishing businesses in or remaining in California. In the 1980's and 1990's, anti-Mexican sentiment reached a peak in California with the passage of a referendum measure submitted to the state's voters, Proposition 187.[18] It passed by a margin of 59% to 41% of the popular vote.[19] It intended to establish cooperation between local and federal government employees to identify and report persons without documents, to require state and local employees to verify the identity of persons with whom they came into contact, and to deny state-funded health care, social services, and education to undocumented migrants.[20] Proposition 187 was written in very sweeping language. It was attacked in five separate lawsuits that were consoli-

17. Persona non grata means "fully unacceptable or unwelcome, especially to a foreign government." About.com, persona non grata, http://www.answers.com/topic/persona-non-grata (last visited Mar. 20, 2007).

18. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

19. *See Wilson*, 908 F. Supp. at 763.

20. *See id.*

dated into one federal district court case, *League of United Latin American Citizens v. Wilson*.[21] Most, though not all, of the provisions of the initiative were found to violate the U.S. Constitution.[22]

Not deterred by the decision in that case, however, more than twenty states have within recent years passed legislation with similar intent. In 2006, Colorado passed seventeen separate pieces of legislation intended to identify undocumented migrants, to limit publicly-funded services and benefits to them, and to require all persons regardless of citizenship or immigration status to provide specified identification documents to obtain drivers licenses and professional and business licenses.[23] Requirements are imposed by Colorado law on employers to verify the immigration status of persons working for them.[24] Peace officers, a broad range of persons in Colorado with law enforcement functions, are required to report undocumented persons with whom they come into contact to federal authorities.[25]

The State of Georgia passed legislation prohibiting employers in Georgia from claiming tax exemptions for wages paid to undocumented workers.[26] Following that lead, Colorado passed two pieces of legislation with similar purposes, one disqualifying employers who knowingly employ undocumented migrants from exempting wages paid to them from their state income taxes and another that requires employers to withhold a percentage of the gross wages paid to their undocumented workers for state income taxes.[27] Both the Georgia and the Colorado legislation would seem to give permission to employ undocumented workers so long as the employer pays the required tax premium. It, however, has been a violation of federal law to employ undocumented workers since 1986.[28] In addition, other pieces of legislation also passed in 2006 in Colorado impose heavy consequences on employers who knowingly employ undocumented workers; consequences that are different from the federal penalties imposed for the same behavior.

Municipalities also began joining the restrictionist parade of attack in 2006. Altoona, Pennsylvania, for example, even though it has no immigrant population, passed ordinances requiring landlords and employers

---

21. *See id.*

22. *See id.* at 786-87.

23. ANN MORSE ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRATION POLICY (2006), *available at* http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm.

24. H.R. 1017, 65th Gen. Assemb., 1st Extraordinary Sess. (Colo. 2006).

25. S. 90, 65th Gen. Assemb., 2nd Reg. Sess. (Colo. 2006). In Colorado HB 1023, HB 1343, HB 1017, and SB 90 all passed in 2006. *See* MORSE ET AL., *supra* note 22.

26. *See* S. 529, 148th Gen. Assemb., Reg. Sess. (Ga. 2006).

27. *See* H.R. 1015, 65th Gen. Assemb., 1st Extraordinary Sess. (Colo. 2006); H.R. 1017, 65th Gen. Assemb., 1st Extraordinary Sess. (Colo. 2006).

28. *See* 8 U.S.C. § 1324(a) (2006).

to verify the identities of their employees and tenants.[29] The town wants to be prepared in the event any foreign nationals ever move into town. Hazleton, Pennsylvania, which did at least have some undocumented migrant population, passed a series of three ordinances. The first requires the "occupants" of any "premises" to register proof of citizenship with the City of Hazleton, to pay an occupancy tax, and to obtain a permit from the city to occupy a property.[30] Additionally, every landlord has to obtain a permit from the city to lease property.[31] The second ordinance requires city employees to investigate complaints of harboring illegal aliens or employing unauthorized workers made by any city official, resident, or business entity.[32] This ordinance imposes fines and penalties, including revocations of licenses allowing one to lease his or her property and other prohibitions against anyone providing shelter or "harboring" "illegal aliens" from collecting rent. It imposes suspensions of business permits for employing "illegal aliens." The third ordinance made English the official language of the City of Hazleton.[33]

Since mid-2006, sixty municipalities in twenty-one states have considered similar legislation. At least fifteen, including Escondido, California and Farmers Branch, Texas, a suburb of Dallas, have passed it.[34] Arizona has long been known for its vocal restrictionist movements.[35] The state of Texas has a full palate of such restrictive legislative proposals on its agenda for the 2007 session.[36] The proposals are designed to prohibit undocumented migrants or anyone suspected of falling into that category from working in the state or from receiving any public assistance. Taneytown, Maryland and Pahrump, Nevada passed English as official language ordinances in November, 2006.[37] Colorado has laws on the books that make it impossible to get a drivers license or automobile insurance without specified documentation.[38] The movement of state and local governmental entities toward regulation of immigration by regulating the matters that make living within a community possible appears to be a freight train traveling on a downhill grade.

---

29. *See* Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34.

30. *See* Hazleton, Pa., Ordinance 2006-13 (proposed Aug. 15, 2006).

31. *See id.*

32. *See* Hazleton, Pa., Ordinance 2006-18 (proposed Sept. 12, 2006).

33. *See* Hazleton, Pa., Ordinance 2006-19 (proposed Sept. 12, 2006).

34. Fair Immigration Reform Movement, Database of Local Immigration Ordinances, http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html [hereinafter Database of Local Immigration Ordinances].

35. *See* Mark K. Matthews, *Arizona Lashes Out at Illegal Immigration*, STATELINE.ORG, Aug. 31, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=51473.

36. Miguel Bustillo, *Texas May Pull Up the Welcome Mat*, L.A. TIMES, Feb. 27, 2007, at A1.

37. Database of Local Immigration Ordinances, *supra* note 34.

38. *See* H.R. 1023, 65th Gen. Assemb., 1st Extraordinary Sess. (Colo. 2006); *see also* April M. Washington, *Red Tape Ensnares State's New ID Law*, ROCKY MTN. NEWS, Sep. 25, 2006, *available at* http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_5019363,00.html.

III. MOTIVES BEHIND THE LEGISLATION

The officially-stated reasons for the passage of this kind of legislation and what is apparent from comments made by policy makers outside of legislative chambers are quite different. Additionally, analysis of information available from reputable research organizations when placed beside the legislation enacted reveals surprising contradictions.

The Mayor of the City of Hazleton, Pennsylvania stated, "[I]llegal immigrants are destroying the city. I don't want them here, period."[39] He claimed his "small town budget is buckling under the strain of illegal immigrants" and "some people come to this country and refuse to learn English, creating a language barrier for city employees."[40] He further stated, "'illegal aliens' have contributed significantly to an increase in the crime rate [and] other problems in Hazleton."[41] When pressed on the matter, however, the Mayor has publicly admitted on several occasions that the city has no statistics or any other evidence to support these claims.[42] He furthermore does not know if any illegal aliens work in the city.[43] Nonetheless, the preamble to the ordinances justifying the reasons for passage state:

> That unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.[44]

In Colorado, during the summer of 2006, the state's governor called a special legislative session to deal with a purported crisis in the state caused by payment of public moneys to undocumented migrants through programs designed to assist the poor. The governor claimed migrants were placing a strain on medical services, law enforcement, county and municipal jails, and other public services.[45] The special session of the legislature met and began considering proposed legislation by conducting public hearings in which heads of various state government agencies and

---

39. Robert Tanner, *Illegal Immigration Now a Local Issue*, TULSA WORLD, July 20, 2006, at A12.

40. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order at 5, Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Pa. 2006) (No. 3:06-cv-01586).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* David Migoya, *New Era on Immigration*, DENV. POST, Aug. 1, 2006, at A01; *see also* Mark P. Couch, *State Special Session Legislators in Dark on Immigrant Costs*, DENV. POST, July 6, 2006, at A01.

departments were called to testify about the costs and stresses placed on their agencies and departments by undocumented migrants.[46] None could cite any.[47] Furthermore, none could point to any program in which undocumented migrants were being paid welfare assistance benefits such as Medicaid, food stamps, or other such benefits.[48] After nearly a week of hearings, the governor finally declared that the reason the legislature was not finding evidence of such costs was because it was not asking the right people.[49] The legislature then went on to pass ten separate pieces of legislation, all of which were signed by the governor.[50] Only one of those bills dealt with the expenditure of public funds on undocumented migrants.[51]

Feeling the pressure of the upcoming general election in November, the legislature went well beyond the governor's call to pass legislation prohibiting undocumented persons from collecting public assistance and passed legislation dealing with a wide range of issues. Some of the bills passed dealt with requiring employers to verify the identity of their laborers and penalizing employers for intentionally employing undocumented laborers,[52] something the Federal government has done since 1986. Others dealt with restricting business and professional licenses to undocumented migrants.[53] There were measures passed addressing transportation of undocumented persons through the state and attempting to address exploitation of undocumented labor.[54] In fairness, it should be said that part of the reason some heads of agencies and departments could not demonstrate how much money might be spent on undocumented migrants, especially in the areas of law enforcement and the prison and jail systems, is that records have never been kept in such a way as to identify the costs that might be specifically attributed to undocumented migrants. Whatever the reason, however, there was no evidence produced that undocumented migrants were putting a measurable strain on public services. Nonetheless, the special session of the legislature called to deal with this phantom crisis passed a dozen laws to remedy it.

The Colorado Legislature followed up by conducting hearings after it convened in January of 2007 to determine how much money had been spent enforcing these laws, since some had taken effect on August 1,

---

46. *See* Couch, *supra* note 45.
47. *See id.*
48. *See* Rebecca Boyle, *Legislators Unclear on Impact of Illegals*, GREELEY TRIB., July 6, 2006.
49. *Id.*
50. *See* David Migoya, *supra* note 45, at A01.
51. *See id.*
52. *See id.*; Bruce Finley, *Bosses Bypass Worker Status Website*, DENV. POST, Mar. 28, 2006.
53. Migoya, *supra* note 45, at A01.
54. Mark P. Couch & Chris Frates, *Parties at Odds on Immigration Bill*, DENV. POST, July 10, 2006, at A01.

2006, and how much money had been saved by enforcing the laws.[55] The cost of enforcement was $2.03 million dollars in five months, but no savings were identified.[56] The intended cumulative effect of the legislation when it was passed, however, was clearly to make it impossible for undocumented migrants to live in Colorado and to force them to go somewhere, anywhere else.

The reasons nearly always given to justify the passage of these kinds of legislative enactments are the adverse economic impact of undocumented migrants and the increase in the crime rate attributed to them. Yet, reputable studies do not support either the underlying premise that there is a large expenditure of public funds that is not offset by taxes withheld from the wages paid to undocumented laborers or that immigrants commit more crime than any other demographic group. In fact, there has been $463 billion paid into Social Security that is unassigned.[57] This is money that has been paid by unknown persons who will never be able to draw on it. It is thought that nearly all of this money was paid into the system by undocumented migrants.[58] The sum is currently growing at a rate of more than six billion dollars per year.[59] That sum, together with the interest it generates each year, is a very significant boon to the Social Security system. Where governmental entities are funded by sales tax on purchases of consumer goods, the regressive nature of the tax itself assures that undocumented migrants pay at least their fair share, if not more, of those taxes. In Texas, where the 2007 legislative agenda contains several legislative proposals directed at assuring that public funds are not being expended to benefit undocumented migrants, the State Comptroller just completed a report indicating that "the absence of the estimated 1.4 million undocumented immigrants in Texas in fiscal 2005 would have been a loss to our gross state product of $17.7 billion."[60] Also, the Comptroller's Office estimates that state revenues collected from undocumented immigrants exceeded what the state spent on services by $424.7 million.[61] "While state revenues exceed expenditures for undocumented immigrants, local governments and hospitals experience the opposite, with the estimated difference being $928.9 million for 2005."[62] What the Comptroller does not say is that the net loss, considering both state and local revenues, is $524.2 million which, in a

55. Mark P. Couch, *Colorado Immigration Law Falls Short of Goal*, DENV. POST, Jan. 25, 2006, at A01.
56. *See id.*
57. JONES ET AL., *supra* note 4, at 12-13.
58. *See id.*
59. *See id.* at 13.
60. STRAYHORN, *supra* note 4, at 3.
61. *Id.* at 20.
62. *Id.*

state the size of Texas, is a rather small portion of local government budgets in the state.[63]

The Bell Policy Institute ("Bell") did a similar study in Colorado where it is estimated that there are approximately 200,000 to 250,000 undocumented migrants.[64] Bell's conclusion was that "[u]nder most scenarios, immigrants pay more in taxes to all levels of government than they consume in services."[65] "However, there tends to be a net surplus at the federal level and a net cost to states and localities."[66] Even that last statement is open to question, however, if one looks fairly at all of the data. Bell estimated that the cost of providing federally-mandated services to undocumented migrants in Colorado by state and local governments is about $225 million.[67] Taxes paid by undocumented migrants to state and local governments are estimated to be somewhere between $159 and $194 million.[68] Bell acknowledges that it is nearly impossible to know what the percentage of undocumented labor is paid "on the books" as opposed to "under the table."[69] Bell adopted the assumption that only fifty percent of undocumented workers are paid on the books.[70] This figure is taken from a figure given in an estimate made by the Center for Immigrant Studies.[71] The Social Security Administration estimates that seventy-five percent of undocumented laborers are paid "on the books."[72] It is clear that in view of the difficulty of gathering hard data, either figure is just a guess. If one even splits the difference between the Bell estimate and the Social Security Administration's estimate of what percentage of undocumented laborers pay taxes, the shortfall between the costs of services and benefits rendered and the amount of revenues collected evaporates.

Do undocumented migrants depress wages of citizen and lawfully-authorized laborers? Again, the public perception is that they do, a perception fueled by public officials, journalists, and other opinion-makers who often make this speculation. Yet, almost every one of the many reputable studies conducted on this question concludes either that there is almost no impact or that if there is impact, it is only among laborers with less than a high-school education and virtually no skills.[73] The category

63. *See id.*

64. JONES ET AL., *supra* note 4, at 1; ROBIN BAKER & RICH JONES, STATE AND LOCAL TAXES PAID IN COLORADO BY UNDOCUMENTED IMMIGRANTS 1 (June 30, 2006), *available at* http://www.thebell.org/pdf/IMG/Brf3taxes.pdf.

65. JONES ET AL., *supra* note 4, at 1.

66. *Id.*

67. BAKER & JONES, *supra* note 64, at 1.

68. *Id.*

69. *See id.* at 3.

70. *Id.*

71. *Id.*

72. *Id.* at 3.

73. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET 11 (Nov. 2005) [hereinafter CBO, LABOR MARKET], *available at* http://www.cbo.gov/ftpdocs/68xx/doc6853/11-10-Immigration.pdf (noting that two decades of

of unskilled workers with less than a high-school education includes less than six percent of the native-born labor population, and this percentage is shrinking.[74] This makes sense when one realizes that the part of the labor market where undocumented migrants compete is in the low-skill sector. Those studies that do find an adverse impact on domestic labor conclude that competition by undocumented labor depresses wages in that sector by only one to two percent.[75] Why then, is there an urgency to pass legislation to protect the domestic labor market?

The effect of the spate of laws clamping down on undocumented labor and employers was already felt in the fall of 2006. Complaints by farmers in Colorado, the Pacific Northwest, and the U.S. Northeast were not that they had to pay too much for labor to harvest their crops, but rather that they could not find labor at all. When considering this information along with the projections of the U.S. Department of Labor that five of the ten fastest growing employment areas between now and 2014 are projected to be in the low-skill job sector,[76] the disconnect between the arguments made about job displacement and wage depression caused by migrants and the realities of the job market become startling.[77] Quite clearly, what employers are saying is true. We cannot fill the labor demand in this sector from our domestic labor pool.

The disconnect between the argument that "illegal aliens" contribute to high crime rates and carefully-gathered data is equally as great. The crime rate among immigrants and undocumented migrants is about the same or a little lower than it is in the population as a whole.[78] The recidivism rate for immigrants is lower than it is for the native-born.[79]

---

growth of the foreign-born workforce in the United States has reduced average earnings of high school dropouts by as little as nothing to only as much as ten percent); KOCHAR, *supra* note 4 (stating that "[n]o consistent pattern emerges to show that native-born workers suffered or benefited from increased numbers of foreign-born workers"); Giovanni Peri, *How Immigrants Effect California Employment and Wages*, CALIFORNIA COUNTS, Feb. 2007, *available at* http://www.ppic.org/main/publication.asp?i=737; *Written Testimony Before the Subcomm. for Immigration, Citizenship, Refugees, Border Security and International Law of the H. Judiciary Comm.* (Mar. 30, 2007) (statement of Dan Siciliano, Executive Director, Program in Law, Economics, and Business, Stanford Law School; Senior Research Fellow, Immigration Policy Center, American Immigration Law Foundation), *available at* http://judiciary.house.gov/media/pdfs/Siciliano070330.pdf.

74. CBO, LABOR MARKET, *supra* note 73, at 16.

75. SIMON, *supra* note 4. The Congressional Budget Office issued a report analyzing the approaches used to research this subject. The results are somewhat ambivalent, but there is no significant evidence of job displacement, except perhaps in the very low-skill labor market where it might be as low as 0.04 percent. *See* CBO, LABOR MARKET, *supra* note 73.

76. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT PROJECTIONS 2004-2014 tbl. 3d (2005), *available at* http://www.bls.gov/news.release/ecopro.t06.htm; Norman C. Saunders, *A Summary of BLS Projections to 2014*, MONTHLY LABOR REVIEW, Nov. 2005, at 3, *available at* http://www.bls.gov/opub/mlr/2005/11/art1full.pdf.

77. *See* CBO, LABOR MARKET, *supra* note 73, at 20.

78. CARL F. HOROWITZ, CTR. FOR IMMIGRATION STUDIES, AN EXAMINATION OF U.S. IMMIGRATION POLICY AND SERIOUS CRIME 5 (Apr. 2001), *available at* http://www.cis.org/articles/2001/crime/crime.pdf.

79. *Id.* at 11.

The argument concerning the impact of immigration on the physical environment, that is, that the country cannot sustain population increases caused by immigration, defies not only our own history but population demographics all over the world. In the past fifty years, the population of the United States has grown. More dramatic is the fact that our population has moved from rural areas into cities, making them substantially denser. Yet, even within our memories, our physical environment is substantially cleaner. There is no question that our air, water, and environment in general are cleaner than they were in the first three quarters of the last century. A look at the world at large tells us that many of the world's poorest, most despoiled places have relatively low population densities. How can these facts be true? Because the capacity of land to carry population depends upon a variety of factors, including political and economic stability, education, wise use of resources, wealth, technology, and political will. The least important of all the factors in this equation is population density.

Developing and maintaining a sustainable environment entails a highly complex balance of a very wide variety of factors including, but not limited to: water availability and quality, national wealth, education, disease management and eradication, governance, political stability, culture, food production, agricultural practices, overgrazing, soil erosion and degradation, deforestation, desertification, resource management, human, chemical and refuse waste disposal, control of carbon dioxide emissions and other air quality issues including control of sulphur dioxide and fly ash, availability of technology, communications equipment and the know how to use it, satellite surveillance, systems of land and water ownership and allocation, sedimentation and erosion of coastal areas.[80] In 1970, two thirds of the world's population lived in rural, low population density areas. Yet, an examination of these source materials as well as many others available indicates that the planet has seen a general and alarming degradation in the intervening time. There is no logic to the idea that the United States can preserve its currently relatively desirable environmental condition by walling itself off from the world's population migrations and making itself a pristine island on a degraded planet. Climate change, dirty air and rising water know no boundaries to say nothing of the economic and geopolitical implications caused by planetary degradation. At the same time that the world's poorest and least dense places saw deterioration, richer and much more densely populated areas saw dramatic environmental improvement. London and Los Angeles once infamous for their dirty air tackled and much im-

80. *See generally* World Watch Institute, www.worldwatch.org (last visited Apr. 16, 2007); HENNING STEINFELD ET AL., LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS (2006), *available at* http://www.virtualcentre.org/en/library/key_pub/longshad/A0701E00.pdf; WORLD WATER ASSESSMENT PROGRAMME, UNITED NATIONS, WATER A SHARED RESPONSIBILITY, THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2 (2006), *available at* http://unesdoc.unesco.org/images/0014/001431/143120e.pdf.

proved their air quality. Lake Erie was once considered dead. The Cuyahoga River, one of the rivers feeding Erie was so polluted with petrochemicals between 1936 and 1969 that the river actually caught fire several times. While still not pristine, it is now a nearly healthy ecosystem.[81] Lake Erie now boasts of being a fisherman's paradise.

Even a desert can support a burgeoning city if the other factors are present. Some examples are Los Angeles, Phoenix, and Las Vegas. Anybody familiar with the water wars of the American West knows that the Imperial Valley of California as well as the cities of Los Angeles, Las Vegas and Phoenix, all existing in the an arid, desert climate, live only because of the water they pull from the Colorado River. The Colorado carries the third largest volume of water of all the rivers in the United States, exceeded only by the Mississippi and Columbia Rivers, but because of the demand of upstream users, it becomes almost a dry river bed by the time it reaches its confluence with the Sea of Cortez in the Gulf of California.[82]

IV. THE CONSTITUTIONAL PERSPECTIVE

Article I, Section 8 of the U.S. Constitution speaks to the subject of immigration in one very brief sentence: "Congress shall have the power . . . to establish an uniform rule of naturalization . . . throughout the United States . . . ."[83] Alexander Hamilton made clear in commenting on the powers reserved to Congress in Federalist No. 32, that even though Congress and the states may share some powers, Congress was granted the power to make *uniform law* with respect to immigration, and this power "must necessarily be exclusive; because if each State had the power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE."[84] Federalist Papers 3, 4, 5, 42, and 80 discuss, at considerable length, the necessity of reserving certain powers exclusively to the federal government and how state intervention in those areas is inherently dangerous to the preservation of the Union.[85] In Federalist No. 42, James

81. *See* U.S. Environmental Protection Agency, Cuyahoga River Area of Concern, http://epa.gov/glnpo/aoc/cuyahoga.html (last visited Apr. 16, 2007).

82. *See* Jim Erickson, *Fiercer Water Wars Seen for West*, ROCKY MTN. NEWS, Feb. 22, 2007, *available at* http://www.rockymountainnews.com/drmn/cda/article_print/0,1983,DRMN_15_5369379_ARTICLE-DETAIL-PRINT,00.html; Randal C. Archibold & Kirk Johnson, *No Longer Waiting for Rain, An Arid West Takes Action*, N.Y. TIMES, Apr. 4, 2007, at A1.

83. U.S. CONST. art. I, § 8, cl. 4.

84. Alexander Hamilton, *Federalist No. 32, The Same Subject Continued: Concerning the General Powers of Taxation*, THE DAILY ADVERTISER, Jan. 3, 1788, *available at* http://www.foundingfathers.info/federalistpapers/fed32.htm.

85. John Jay, *Federalist No. 3, The Same Subject Continued: Concerning Dangers from Foreign Force and Influence*, INDEPENDENT JOURNAL, *available at* http://www.foundingfathers.info/federalistpapers/fed03.htm; John Jay, *Federalist No. 4, The Same Subject Continued: Concerning Dangers from Foreign Force and Influence*, INDEPENDENT JOURNAL, *available at* http://www.foundingfathers.info/federalistpapers/fed04.htm; John Jay, *Federalist No. 5, The Same Subject Continued: Concerning Dangers from Foreign Force and Influence*, INDEPENDENT JOURNAL, *available at* http://www.foundingfathers.info/federalistpapers/fed05.htm; James Madison, *Federalist No. 42, The Powers Conferred by the Constitution Further Considered*,

Madison discussed the mischief that had been caused under the Articles of Confederation by the various states imposing differing requirements for naturalization.[86]

Hines v. Davidowitz[87] dealt with factual circumstances somewhat similar to those we are dealing with in our current legal and social environment. In the 1930's, the country went through very hard economic times. Communism became a fad for some of the public and was seen as perhaps a better alternative to the nation's economic system which did not seem to be working very well at the time. War was looming on the horizon, and immigrants were seen by some as a competitive threat to the domestic labor market. In reaction to the public fears of the time, a number of local governments, including Pennsylvania, passed alien registration laws.[88] The Pennsylvania law was before the court in the *Hines* case.[89] Justice Black delivered an elegantly-written opinion discussing a wide range of constitutional considerations as they relate to this issue.[90] Justice Black focused on the power reserved to Congress and the Executive Branch to make treaties and control foreign policy.[91] Article I, Section 8 reserves to Congress the authority to regulate foreign and domestic commerce and foreign affairs. Article II, Section 2 reserves to the President the power to make treaties. Finally, Article VI is the Supremacy Clause.

> That the supremacy of national power in the general field of foreign affairs, including power over immigration, naturalization and deportation is made clear . . . . When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land . . . . One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country . . . This country, like other nations, has entered into numerous treaties of amity and commerce since its inception—treaties entered into under express constitutional authority, and binding upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other

---

N.Y. PACKET, Jan. 22, 1788 [hereinafter Madison, *Federalist No. 42*], *available at* http://www.foundingfathers.info/federalistpapers/fed42.htm; Alexander Hamilton, *Federalist No. 80, The Powers of the Judiciary*, MCLEANS, *available at* http://www.foundingfathers.info/federalistpapers/fed80.htm.

86. Madison, *Federalist No. 42*, *supra* note 85.

87. 312 U.S. 52 (1941).

88. *Hines*, 312 U.S. at 56.

89. *Id.*

90. *See id.*

91. *See id.* at 63-81.

> lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents—duties which our State Department has successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens . . . . Our Constitution and our Civil Rights Act have guaranteed to aliens "the equal protection of the laws (which) is a pledge of the protection of equal laws."[92]

That immigration is exclusively a national issue has been reaffirmed repeatedly since *Hines*. Nonetheless, the argument has continued to be reasserted that while the ability of states to directly regulate immigration is proscribed, regulating other areas that only peripherally affect immigration are within the purview of states. Some fuel for the argument can be found in court opinions at the turn of the twentieth century which approved discrimination between aliens and citizens. Justice Cardozo once wrote:

> To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful . . . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.[93]

This doctrine was referred to as the "special public-interest doctrine."

Takahashi v. Fish & Game Commission,[94] however, cast doubt on the "special public-interest doctrine" when that case examined such discriminatory legislation under the lens of the Fourteenth Amendment.[95] Takahashi was a fisherman and a legal resident of the United States.[96] California tried to limit fishing within it coastal waters to U.S. citizens.[97] The court held that the Fourteenth Amendment requires that "all *persons* lawfully in the country shall abide in any state on an equality of legal privileges with all citizens under non discriminatory laws."[98] Following the same reasoning, the Court in *Graham v. Richardson*[99] reviewed a

92. *Id.* at 62-69 (footnotes omitted).
93. People v. Crane, 108 N.E. 427, 428-30 (N.Y. 1915).
94. 334 U.S. 410 (1948).
95. *See Takahashi*, 334 U.S. at 417-20.
96. *Id.* at 412.
97. *Id.* at 412-14.
98. *Id.* at 420 (emphasis added).
99. 403 U.S. 365 (1971).

Pennsylvania statute that restricted welfare benefits to citizens to the exclusion of lawful permanent residents and an Arizona statute that restricted such benefits to citizens and lawful permanent residents who had resided in the state for a minimum of fifteen years.[100] The Court affirmed that the equal protection requirements of the Fourteenth Amendment could not tolerate that sort of discrimination.[101]

In 1940, Congress enacted the Smith Act, an alien and sedition act making it unlawful to advocate violent overthrow of the government.[102] Anti-communist hysteria was building at that point in time. Forty-two states also enacted alien and sedition acts.[103] Some closely mirrored the federal act and provided many protections against arbitrary enforcement while others were quite the opposite. The Supreme Court held, in looking at a Pennsylvania Alien and Sedition Act, that advocating the violent overthrow of government is by its nature a matter of national concern because it affects everybody in the country, not just those in a single state.[104] Legislation regulating such conduct is necessarily a matter of national concern and preempts the field.[105] However, the Court also said that state legislation is not necessarily precluded in a field where state regulation is usually accepted just because it touches upon an area preempted by national interests.[106] The Court set out tests to determine whether or not an area is preempted by federal law.[107] Preemption occurs where: (1) the federal scheme of regulation is so pervasive that one can reasonably conclude that Congress intended to occupy the field and there is no way for the states to supplement it; (2) where the subject is so dominated by federal interest that one must assume there is no room for state laws on the same subject; or (3) the enforcement of a state act presents a serious danger of conflict between the state and the federal administration of a program.[108] The notion that conflict between the administration of state and federal laws can raise the issue of preemption has evolved further. It is possible that the two laws may be actually conflicting.[109] It can occur where it is virtually impossible to comply with both statutes at the same time. In *Fidelity Savings & Loan Ass'n v. de la Cuesta*,[110] there was conflict between state and federal regulations promulgated in addition to the statutes themselves.[111] The Court held that

100. *Graham*, 403 U.S. at 367-68.
101. *See id.* at 382.
102. 18 U.S.C. § 2385 (2006).
103. CHARLES CORKER, THE FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 266-306 (1955).
104. Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956) (citing Commonwealth v. Nelson, 104 A.2d 133, 142 (Pa. 1954)).
105. *Nelson*, 350 U.S. at 504-05.
106. *See id.* at 500.
107. *See id.* at 501-02.
108. *Id.* at 504-05.
109. *See* Rose v. Ark. State Police, 479 U.S. 1, 4 (1986) (per curium).
110. 458 U.S. 141 (1982).
111. *Id.* at 154-55.

state regulations that conflict with federally promulgated rules require the same preemption proscription as do conflicts between state and federal statutes.[112] Finally, preemption may be found where a state law stands as an obstacle to the accomplishment of all of the purposes of federal law.[113]

One case that dealt with the issue of whether a state can prohibit an employer from knowingly employing aliens not entitled to lawful residence in the United States is *DeCanas v. Bica*.[114] In *DeCanas*, the Court upheld the state regulation.[115] Justice Brennan commented that while regulation of immigration is exclusively a federal power:

> [T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised . . . . [S]tanding alone, the fact that aliens are subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted to the country, and the conditions under a legal entrant may remain.[116]

Justice Brennan goes on to say that there is no indication in the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular.

> Nor can such intent be derived from the scope and detail of the INA. The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . (that) central aim of federal regulation." This conclusion is buttressed by the fact that comprehensiveness of legislation governing entry and stay of aliens was to be expected in light of the nature and complexity of the subject. As the Court said in another legislative context: "Given the complexity of the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent."[117]

It is questionable whether this part of Justice Brennan's opinion in *DeCanas* is still good law. Because, in 1986, Congress created prohibitions against employment of undocumented migrants and attached severe

112. *See id.* at 153-54.
113. *See* Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); Hines v. Davidowitz, 312 U.S. 52, 66 (1941).
114. 424 U.S. 351 (1976).
115. *DeCanas*, 424 U.S. at 365.
116. *Id.* at 355.
117. *Id.* at 359-60 (citations omitted).

penalties against employers for doing so,[118] it is quite likely that if this same challenge of this state statute were made today, the result might be very different. Additionally, it would be surprising in view of the extensive body of law (including statutory, regulatory, and case law) that now exists defining who is removable from the United States. To do so would ignore that vast body of law that has developed over the past century. The rights given such persons, and the conditions of their removal, that anyone could make a credible argument that the central concern of the INA is limited to identifying the terms and conditions for the admission of only "lawful" immigrants to the United States while ignoring that vast body of law concerning the removal of removable aliens.[119]

In a related case not regarding immigration, *Cipollone v. Liggett Group, Inc.*,[120] Justice Stevens succinctly restated the requirements of the Supremacy Clause:

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, "'[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis."

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, *or if federal law so thoroughly occupies a legislative field* "'*as to make reasonable the inference that Congress left no room for the States to supplement it.*'"[121]

Justice Stevens did not cite *DeCanas* among his citations supporting his opinion in 1992 nor did he discuss that case. The opinion appears to be a blend of precedent requiring that, for preemption to be found, Congress must have clearly stated its intent to occupy the field and precedent allowing consideration of the other criteria. Preemption will not just be assumed because the regulations in the field are complex. An analysis of the cases considering whether or not federal legislation preempts a particular state or local enactment reveals that courts take a methodical approach to analyzing the facts and applying these several tests.[122]

Though the preambles to state and local legislation justifying the enactment of such legislation are usually formulistic recitations framed in terms of public health and safety,[123] the true purpose behind so much

---

118. *See* Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

119. *See* Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

120. 505 U.S. 504 (1992).

121. *Cipollone*, 505 U.S. at 516 (citations omitted, emphasis added).

122. *See Nelson*, 350 U.S. at 502-10.

123. *See* S. 2, Stats. 1993-94, 1st Ex. Sess., at c.17 (Ca. 1999).

local legislation is simply to drive undocumented migrants somewhere, anywhere else, so long as it is not within the boundaries of the locality enacting the legislation. This is an issue that needs to be visited. No one knows, because no one has tried to track them, where undocumented migrants go when faced with this kind of restrictive legislation. Logically, it is to anywhere that the legal and social climate is better. The intent of those passing the legislation is that the undocumented will be driven to their home countries. That intention, however, defies logic. No one argues that the reason most migrants leave their homes to travel to the United States, often at great personal risk and sacrifice, is because they cannot provide for themselves and their families at home. Why then, would anybody seriously think they would return to such a place? How bad would the social and legal climate in the United States have to become to reverse that migration?

In the 1930's, dust bowl days, large numbers of people made destitute by prolonged drought left their farms on the Midwestern prairies for California. Californians soon developed the same enmity towards those migrants that they have toward Mexican migrants today. The state passed a statute,[124] which provided: "Every person, firm or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor."[125]

In *Edwards v. California*,[126] a man named Edwards went to Texas to get his brother-in-law, Frank Duncan, to take him to California. Duncan had only twenty dollars to his name in Texas.[127] By the time the two reached California, he had spent it.[128] Upon reaching California, Duncan lived with Edwards for ten days while he, Duncan, applied for public assistance from the Farm Security Administration.[129] Duncan was unemployed during the ten days that he lived with Edwards.[130] Edwards was charged, convicted, and sentenced to six months in jail for violating the statute.[131]

The constitutionality of the California statute was attacked under the Commerce Clause of the U.S. Constitution at Article I, Section 8.[132] Justice Byers' opinion is instructive:

---

124. CAL. WELFARE & INST. CODE § 2615 Stat. 1937, 1406 (1941), *invalidated by* Edwards v. California, 314 U.S. 160, 166 (1941).
125. *Edwards*, 314 U.S. at 165-66.
126. *Id.* at 160.
127. *Id.* at 165.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 165-66.
132. *Id.*

> The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern . . . . We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government . . . . The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon the "wisdom, need or appropriateness" of the legislative efforts of States to solve such difficulties.
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity . . . . And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a state might gain a momentary respite from the pressure of events by the expedient of shutting its gates to the outside world. But in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[133]

It makes no sense that cities or states should be able to export those it considers to be an undesirable burden—whether they be the homeless or the disadvantaged or undocumented migrants or anyone else considered undesirable—from their boundaries and unto the backs of their neighbors. Whether a city or state attempts to isolate itself by excluding imports of "problem" people into its boundaries or by exporting them out of its boundaries, the evil of the resulting mischief is the same.

After viewing the histories of these cases, one is forced to conclude that there really is nothing new or different in the facts or in the discussion of the current concerns about undocumented migrants. It is true that in most of the cases discussed, the people involved in the facts giving rise to the controversies were U.S. citizens. In only one, *DeCanas*, were the subjects of the local legislation undocumented migrants. Does the fact that the laws are directed against the undocumented and not against citizens or legally-present immigrants matter? In *DeCanas*, which dealt with a California employment statute that punished employers for employing undocumented laborers, that issue was not raised. The Fourteenth Amendment to the Constitution, however, provides that no state shall deprive any *person* of life, liberty, or property or deny to any *person* equal protection of the law.[134] Justice Stone's language in *Hines v.*

133. *Id.* at 166-67 (citation omitted).
134. U.S. CONST. amend. XIV, § 1.

Davidowitz signals the answer to our question. It is of importance, he says, "that this [kind of] legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or . . . laws regulating the labels on cans."[135]

Finally, it is often stated that as a nation we must tend to our cultural heritage. It is a popular argument, often made in legislative chambers from city councils and in the halls of Congress, and it even currently goes unchallenged in the popular media. But, it is important to note that this is not a new argument either. From Cooley Taxes, to the Chinese Exclusion Act, to signs that said, "No dogs or Irish allowed," to Jim Crow laws that segregated everything from drinking fountains to bathrooms and put Black people on the back of the bus, the argument has been the same. (Black Americans are not usually mentioned in a discussion about immigrants. However, it must be remembered that African slaves were an immigrant population that was forcefully brought to our shores and not allowed to assimilate into mainstream society. The story of Jim Crow laws and the civil rights movement is just another chapter, perhaps the most troubling one, in our very troubled immigration history.) The only thing that has changed over time is the identity of the people at whom public ire is directed. The argument that "we must tend to our cultural heritage" assumes some innate superiority of the culture founded in the British Isles. It assumes, too, that the culture is so fragile that it cannot absorb, adapt, and survive the pressures brought by exposure to new cultures. It profoundly distrusts the lessons taught by two-hundred years of our history and the genius of the American melting pot. The argument is repugnant to the very concept upon which the nation was built, that all *persons* are created equal under law and that, as the Fourteenth Amendment states, not just citizens, but all *persons* are entitled to equal protection of the law, which as Justice Stone said in *Hines*, means the protection of equal law. It is clearly in the national interest that local laws enacted in deference to that kind of public sentiment be preempted, even if Congress has not occupied the field by enactments of its own statute. Though, it must also be said that at this point in time it is hard to imagine any field in which Congress has not legislated that would affect immigrant and migrant populations.

CONCLUSION

It has been facetiously said that nothing is ever really new. In the discussion of immigration, certainly, that statement is true. Contrary to the myth we have constructed (and like to believe about ourselves) that we are a welcoming nation, the truth is that the country has a very long, uneasy history regarding its immigrants that goes back to the very first immigration law passed by Congress in 1790 restricting immigration to

135. *Hines*, 312 U.S. at 68.

free, white males.[136] The parochialism that pervaded public feeling about the subject in the new states even before the Constitution was written was discussed with concern by the founding fathers. As can be seen by examining the facts of Supreme Court cases dealing with this subject throughout our history, the arguments for isolating and resisting the influx of new groups of people recycle each time another group immigrates and seeks acceptance into the culture.

While these attitudes have been unchanging throughout our history, another phenomenon is now afoot. It is indisputable that our native-born population is now aging and its birth rate declining at the same time that the world is becoming global, scientifically, technologically, and economically. Our ability to compete with nations who have talent pools many times the size of our own, India and China for example, depends upon our ability to draw talent from other places in the world. That, in turn, depends not only upon the educational and professional opportunity we can offer but upon a well thought out immigration policy giving access to what the nation can offer.

At the same time, maintaining a viable economic infrastructure requires that we meet labor needs in the unskilled labor market since it provides a critical part of the whole without which the rest cannot function. All reliable data indicates that not only is our native-born birth rate declining while the demand for unskilled labor is expanding, but additionally, we train our children to aspire to a better professional and social status than an unskilled labor market can give them.[137]

The nexus of these trends makes absolutely clear the direction that must be taken. This thesis has tried to point out that the debate about immigration is not rational. At the state and local level it cannot realistically be expected to be rational. One cannot expect local officials dealing with local issues and pressures to adopt national or global perspectives in solving problems. That is not their job. They are, after all, local officials, not Congresspersons. Those facts, of themselves, make the most compelling argument that immigration is and must be a national issue. But, it does not stop even there. The age of instant and global communication in an integrated world places unprecedented demands on diplomacy. It is impossible to offer friendship and good will to a people abroad while treating them as unwanted at home. Justice Stone's comments in *Hines v. Davidowitz* are more true today than they were even when he wrote them.

136. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790), *repealed by* United States Naturalization Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1795).

137. *See* CBO, LABOR MARKET, *supra* note 73, at 3 tbl.1, 6 tbl.2.