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Essay

**An Immigration Crisis in a Nation of Immigrants: Why Amending the Fourteenth Amendment Won't Solve Our Problems**

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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.<sup>1</sup>

I. PRESENT FEDERAL IMMIGRATION POLICIES & CHALLENGES

The recent economic recession brought about staggering job loss nationwide and the highest unemployment rate since the late 1970s and early 1980s.<sup>2</sup> As a result, some Americans,

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1. U.S. CONST. amend. XIV, § 1.

2. See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/surveymost?ln> (select "Unemployment Rate—Civilian Labor Force—LNS14000000"; then select year range "1970" to "2012") (last visited Feb. 23, 2012). During roughly this same period of economic recession, the Hispanic population of the United States has grown substantially—most markedly in the South and Midwest. PEW RESEARCH CTR., *CENSUS 2010: 50 MILLION LATINOS: HISPANICS ACCOUNT FOR*

unable to find work or fearful of losing their jobs, believe that unauthorized immigrants<sup>3</sup> will take jobs from U.S. citizens.<sup>4</sup> In addition, many state and local governments are faced with severe budget deficits and no longer have the funds to continue providing services to U.S. citizens, due in part to the costs of providing services to the growing unauthorized immigrant population.<sup>5</sup> Many Americans in our post-9/11 society also worry that those who intend to harm our nation will take advantage of our open borders.<sup>6</sup> In response to these fears and realities, citizens across the United States have demanded legislative action to solve the nation's immigration crisis.<sup>7</sup>

In recent years, many "solutions" on the local, state, and federal levels have been proposed, but little substantive action has occurred. Among them is the suggestion of a controversial constitutional amendment.<sup>8</sup> In keeping with the Immigration and Nationality Act (INA),<sup>9</sup> common law,<sup>10</sup> and the Constitution,<sup>11</sup> all children born within the United States and subject to its jurisdiction acquire birthright citizenship based solely on the location of their birth. Current law does not consider the

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MORE THAN HALF OF NATION'S GROWTH IN PAST DECADE 1, 3 (2011), *available at* <http://www.pewhispanic.org/files/reports/140.pdf>.

3. I recognize that the term used in our immigration laws for unlawfully present noncitizens is "illegal alien." *E.g.*, Immigration and Nationality Act, 8 U.S.C. § 1356(r)(3)(ii) (2006). For purposes of this Article, I use the term "unauthorized immigrants."

4. *See* STEVEN A. CAMAROTA & ASHLEY MONIQUE WEBSTER, CTR. FOR IMMIGRATION STUDIES, WHO BENEFITED FROM JOB GROWTH IN TEXAS? A LOOK AT EMPLOYMENT GAINS FOR IMMIGRANTS AND THE NATIVE-BORN, 2007 TO 2011, at 7 (2011), *available at* <http://www.cis.org/articles/2011/immigrant-job-growth-texas.pdf>.

5. *E.g.*, Michael Janofsky, *Phoenix Counts Its Many Challenges: Illegal Immigration, Unrelenting, Has Put a Strain on Services*, N.Y. TIMES, Apr. 11, 2001, at A14; *cf.* CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 3 (2007), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf>.

6. *See* Jerome R. Corsi, *Bush's Immigration Message Undermines His Message on Terrorism*, HUMAN EVENTS (Oct. 17, 2006), <http://www.humanevents.com/article.php?id=17557>.

7. *See, e.g.*, Manuel Quinones, *Farmers Demand Immigration Reform*, PUB. RADIO INT'L (Mar. 16, 2010, 7:05 AM), <http://www.pri.org/stories/politics-society/farmers-demand-immigration-reform1912.html>.

8. Ron Paul, *Rethinking Birthright Citizenship*, LEWROCKWELL.COM (Oct. 2, 2006), <http://www.lewrockwell.com/paul/paul346.html>.

9. 8 U.S.C. § 1401(a) (2006).

10. *See* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 138–39 (1997).

11. U.S. CONST. amend. XIV, § 1.

citizenship status of a child's parents in determining the citizenship of children born on U.S. soil.<sup>12</sup> Some U.S. citizens and legislators believe that excluding these children from the constitutional guarantee of birthright citizenship would reduce the number of unauthorized immigrants and help solve the current immigration crisis.<sup>13</sup> I disagree.

Like most Americans, I am a descendant of immigrants and a grateful beneficiary of the opportunities available to our nation's citizens. My grandparents emigrated from Mexico in the early twentieth century seeking a better life, and they found it working in the fields and farms of Texas. I am the son of a cotton picker and construction worker who did not go to school beyond the second grade, yet I became the Attorney General of the United States. We live in a country where dreams still come true no matter your last name or skin color. Diversity is one of the great strengths of the United States. The migration of ethnicities, cultures, and ideas has played a vital role in molding the United States into the great nation that it is today. It is this rich diversity, so entrenched in our national identity, which makes achieving the right immigration policy a most difficult task. We must strive for a policy that promotes our diversity, protects our families, and enhances our foreign policy, national security, and economy.

Our current federal immigration policy has failed to strike this balance. Every sovereign nation has the authority to determine who can be a citizen and who can lawfully be present within its borders.<sup>14</sup> Today, many Americans believe that our federal government has abandoned that responsibility.<sup>15</sup> As this nation's former chief law enforcement officer and a citizen who believes in the rule of law, I cannot condone anyone coming into this country illegally. However, as a father who wants the best for my own children, I understand why parents risk

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12. 8 U.S.C. § 1401(a).

13. See, e.g., Paul, *supra* note 8.

14. Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, 179 L.N.T.S. 89.

15. See, e.g., Statement by Jan Brewer, Governor, Ariz. (Apr. 23, 2010), available at [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf) (noting that Arizona's aggressive immigration law was spurred by "decades of federal inaction and misguided policy"); *Governor Bentley Statement on Immigration Law Ruling*, STATE OF ALA.: OFFICE OF GOVERNOR ROBERT BENTLEY (Oct. 14, 2011), [http://www.governor.alabama.gov/news/news\\_detail.aspx?ID=5744](http://www.governor.alabama.gov/news/news_detail.aspx?ID=5744) ("[B]y failing to do its job, the federal government has left the problem of dealing with illegal immigration to the States.").

coming to the United States and being separated from their children for extended periods—especially when there is relatively little chance of prosecution. While immediate action is required to resolve our current immigration crisis, state-level legislation and a constitutional amendment are not effective solutions. Instead, we should pass and enforce comprehensive immigration legislation at the federal level.

## II. AMENDING THE CONSTITUTION

The Supremacy Clause of the Constitution declares that the Constitution is the “supreme Law of the Land.”<sup>16</sup> With this supremacy in mind, the Framers sought to ensure that the Constitution would only be altered in extraordinary circumstances that could not be addressed effectively through legislation or regulation. They accomplished this by establishing a stringent amendment procedure. According to Article V of the Constitution, a constitutional amendment may be proposed in one of two ways: with approval of two-thirds of both Houses of Congress or upon the application of two-thirds of the states.<sup>17</sup> Once proposed, three-fourths of the states—thirty-eight states today—must ratify the amendment in order for it to go into effect.<sup>18</sup>

Since the Constitution’s ratification in 1788, only thirty-three amendments have been offered by Congress to the states for ratification.<sup>19</sup> Only twenty-seven of those received the requisite approval from the states.<sup>20</sup> Of those twenty-seven, the first ten, comprising the Bill of Rights, were adopted in 1791.<sup>21</sup> In the 220 years since the ratification of the Bill of Rights, the Constitution has only been amended seventeen times and Congress has never revised an amendment, although several amendments have been modified or repealed by subsequent amendment.<sup>22</sup> Among those seventeen amendments, the Fourteenth Amendment is most critical to the determination of citi-

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16. U.S. CONST. art. VI, cl. 2.

17. *Id.* art. V.

18. *Id.*

19. Darren R. Latham, *The Historical Amenability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 256 (2005).

20. *Id.* at 149 n.9.

21. *Bute v. Illinois*, 333 U.S. 640, 650 (1948).

22. *See, e.g.*, U.S. CONST. amend. XXI (repealing the Eighteenth Amendment); *id.* amend. XXVI, § 1 (clarifying that the right to vote, already established for all races and sexes in the Fifteenth and Nineteenth Amendments, could not be denied on the basis of age for those over eighteen years of age).

zenship for immigration purposes and to the current immigration debate.<sup>23</sup>

### III. HISTORY & INTERPRETATION OF THE FOURTEENTH AMENDMENT

Central to this chapter and to the discussion of amending the Constitution to restrict birthright citizenship is the phrase “subject to the jurisdiction thereof” contained in the Fourteenth Amendment.<sup>24</sup> While unauthorized immigrants may give birth to children within the boundaries of the United States, the children do not automatically obtain birthright citizenship unless they are also “subject to the jurisdiction” of the United States. Much like the term “unreasonable search and seizure” in the Fourth Amendment, the Constitution does not define precisely who is to be considered “subject to the jurisdiction” of the United States. In the absence of a constitutional definition, courts and legislators have been left to interpret the phrase’s meaning.

Prior to the Fourteenth Amendment, a constitutional definition of citizenship did not exist.<sup>25</sup> Lacking a precise statutory description, the United States borrowed the concept of *jus soli*—law of the soil—from British common law.<sup>26</sup> This doctrine, more commonly referred to as birthright citizenship, provides that any person born within this nation’s territory is a citizen of the United States and, therefore, a beneficiary of the protections of the Constitution.<sup>27</sup> It was commonly understood by the courts that the only exceptions to the application of the doctrine of *jus soli* were children born to foreign diplomats, hostile occupying forces, and children born on foreign ships.<sup>28</sup> Until the 1830s, this principle applied to everyone born within the terri-

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23. *Id.* amend. XIV, § 1; *see, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (finding that “[e]very citizen or subject of another country, while domiciled” in the United States is subject to its jurisdiction because he is “within the allegiance and the protection . . . of the United States”).

24. U.S. CONST. amend. XIV, § 1.

25. *See, e.g.*, Michael Gunlicks, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 GEO. WASH. L. REV. 551, 557 (1995).

26. Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in IMMIGRATION STORIES 51, 52 (David A. Martin & Peter H. Schuck eds., 2005).

27. *See id.*

28. *Legislation Denying Citizenship at Birth to Certain Children Born in the U.S.*, 19 Op. O.L.C. 340, 342 (1995).

tory, including in Northern and Southern states alike, free African Americans born on U.S. soil, “even as the judges upheld laws and practices that discriminated against them.”<sup>29</sup> With the rise of racial tensions and conflict between the states in the mid-1800s, however, the applicability of this doctrine to freed slaves and their descendents became a topic of hot debate: Were U.S. born children of African Americans subject to the discriminatory laws, or were they entitled to all the benefits of citizenship?

In a divergence from the commonly understood doctrine of birthright citizenship, the Supreme Court handed down its decision in *Dred Scott v. Sanford*.<sup>30</sup> In this case, the Court was faced with the issue of whether a man of African descent, born in the United States, who was formerly a slave and whose ancestors entered this country as slaves, upon emancipation was entitled to the rights, privileges, and immunities provided by the Constitution.<sup>31</sup> In this infamous decision, the Court rejected the doctrine of *jus soli* for former slaves and their progeny, regardless of their status as emancipated individuals. The Court further stated that former slaves were neither “citizens” nor “people of the United States.”<sup>32</sup> The Court described them as an “inferior class of beings” who did not have the rights and privileges that the Constitution traditionally granted to citizens under the established common law doctrine of birthright citizenship.<sup>33</sup>

This decision placed the protections of the Constitution, otherwise available to other U.S. born citizens, beyond the reach of African Americans. Congress responded during Reconstruction by passing the Civil Rights Act of 1866, which stated that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>34</sup> However, an act of Congress cannot override the Constitution, and can be revised or repealed by a subsequent act of Congress. In order to once and for all “place the right of citizenship based on birth within

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29. Salyer, *supra* note 26, at 53.

30. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856); Gunlicks, *supra* note 25, at 554.

31. See *Dred Scott*, 60 U.S. at 394.

32. *Id.* at 404–05.

33. *Id.*; see also Gunlicks, *supra* note 25, at 556–57.

34. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

the jurisdiction of the United States beyond question,”<sup>35</sup> the Fourteenth Amendment was adopted on July 9, 1868.<sup>36</sup> The Citizenship Clause of this amendment constitutionalized the common law doctrine of *jus soli* by establishing 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.”<sup>37</sup> Birthright citizenship was applicable from this point forward to “all persons” born within the United States and “subject to the jurisdiction thereof.”

Some commentators argue that the primary issue with regard to birthright citizenship at the time of the Fourteenth Amendment’s enactment was the classification of free African Americans, and thus, the phrase “subject to the jurisdiction thereof” does not include unauthorized immigrants.<sup>38</sup> However, the applicability of the Citizenship Clause to children born to immigrant parents was tested in the late 1800s with respect to the United States’ increasingly harsh treatment of persons of Chinese descent. During this period, the Chinese became “the first, and most despised, targets of post-Civil War nativism.”<sup>39</sup> The United States began implementing discriminatory policies based on the idea that the Chinese were so fundamentally different from Americans that they could never fully assimilate.<sup>40</sup> Some even saw the Chinese as “utterly unfit” and “wholly incompetent to exercise the important privileges of an American citizen.”<sup>41</sup> These beliefs led to a large-scale attack on birthright citizenship.<sup>42</sup>

In 1898, the Supreme Court addressed this issue and reaffirmed the Fourteenth Amendment right to birthright citizenship for the children of immigrants in its decision in *United States v. Wong Kim Ark*.<sup>43</sup> Over 100 years ago, the Court found

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35. 19 Op. O.L.C. at 340.

36. U.S. NAT’L ARCHIVES AND RECORDS ADMIN., [http://www.archives.gov/exhibits/charters/constitution\\_amendments\\_11-27.html](http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html) (last visited Nov. 9, 2011).

37. U.S. CONST. amend. XIV, § 1.

38. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, xvii (2d ed. 1997) (“[T]he authors of the Amendment, far from contemplating a social and political revolution, as defenders of judicial activism maintained, intended only to protect the freedmen from southern Black Codes that threatened to return them to slavery.”).

39. Salyer, *supra* note 26, at 56.

40. *Id.* at 76.

41. *Id.* at 59.

42. *Id.* at 58.

43. *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898).

that the “common law precedent of birthright citizenship [was] too well-rooted to abandon at that point in the nation’s history.”<sup>44</sup> It ultimately held that the Citizenship Clause of the Fourteenth Amendment conferred citizenship upon “a child born in the United States of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have permanent domicile and residence in the United States.”<sup>45</sup> Based on this permanent domicile and residence, the parents had subjected themselves and their son to the jurisdiction of the United States, thus guaranteeing young Wong Kim Ark citizenship based on the location of his birth. This decision also reinforced the nation’s sovereign power to determine what persons should be entitled to citizenship under the Constitution.<sup>46</sup> The Court further reiterated that the nation’s jurisdiction “within its own territory is necessarily exclusive and absolute.”<sup>47</sup> This set the nineteenth-century foundation for federal authority over immigration.<sup>48</sup>

Some critics argue that, because *Wong Kim Ark* involved a child born in the United States to parents who had established permanent domicile and residence in the United States, the Supreme Court has never spoken on the issue of birth right citizenship for children of unauthorized immigrants.<sup>49</sup> Children born to unauthorized immigrant parents meet the first requirement of birth within the United States. However, in order to qualify for birthright citizenship under the Fourteenth Amendment, they must also be “subject to the jurisdiction” of the United States. Because the plain language of the Constitution does not provide a definition of who is to be considered “subject to the jurisdiction” of the United States, an analysis of case law is required. The consideration of established precedent reveals at least three categories of persons deemed not subject to the jurisdiction of the United States: (1) children of members of Indian tribes subject to tribal laws;<sup>50</sup> (2) children born of dip-

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44. Salyer, *supra* note 26, at 74.

45. *Wong Kim Ark*, 169 U.S. at 653.

46. Salyer, *supra* note 26, at 75.

47. *Id.*

48. *See id.* at 75–78.

49. *See, e.g.*, Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 9–11 (2009).

50. Congress later abrogated this policy. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)); *see also* *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

lomatic representatives of a foreign state;<sup>51</sup> and (3) children born of alien enemies in hostile occupation.<sup>52</sup> Persons falling within any of these three categories are not considered “subject to the jurisdiction” of the United States, and, therefore, do not automatically become U.S. citizens based on their birth within the United States. Conversely, any person born within the territory of the United States, and subject to the jurisdiction thereof, are U.S. citizens.<sup>53</sup> Because the children of unauthorized immigrants born in the United States are subject to the jurisdiction of the United States, it follows that the Constitution guarantees them birthright citizenship.<sup>54</sup>

The text of another clause within the same section of the Fourteenth Amendment lends further support to the argument that children born here to unauthorized immigrants are to be considered “subject to the jurisdiction” of the United States. The Equal Protection Clause, immediately following the Citizenship Clause, provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>55</sup> The close proximity of these similar jurisdictional phrases suggests that they should be interpreted similarly. At least one Supreme Court justice would agree. In *Wong Kim Ark*, Justice Horace Gray stated:

It is impossible to construe the words “subject to the jurisdiction thereof,” in the opening sentence, as less comprehensive than the words “within its jurisdiction,” in the concluding sentence of the same section; or to hold that persons “within the jurisdiction” of one of the states of the Union are not “subject to the jurisdiction of the United States.”<sup>56</sup>

Although Justice Gray’s statement is not binding and has no precedential weight for courts, I would argue that it is consistent with established canons of statutory construction. It is a basic principle of these canons that “a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that fur-

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51. See *United States v. Wong Kim Ark*, 169 U.S. 649, 680–82 (1898).

52. See *id.* at 682.

53. James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, in *MADE IN AMERICA: MYTHS & FACTS ABOUT BIRTHRIGHT CITIZENSHIP* 6, 7–8 (Immigration Policy Ctr. 2009), available at <http://immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf>.

54. See *id.* at 8–12.

55. U.S. CONST. amend. XIV, § 1.

56. *Wong Kim Ark*, 169 U.S. at 687.

thers [the] statutory purposes.”<sup>57</sup> Moreover, “a term appearing in several places in a statutory text is generally read the same way each time it appears.”<sup>58</sup> Although the Citizenship Clause and Equal Protection Clause use slightly different wording, the term “jurisdiction” appears in each clause. Because these clauses are both contained in the same section of the Fourteenth Amendment, based on the canons of statutory construction, they should be given the same meaning. Accordingly, because the Supreme Court has held that the phrase “within its jurisdiction” applies to unauthorized immigrants,<sup>59</sup> it follows that the phrase “subject to the jurisdiction,” located in the sentence immediately preceding the phrase “within its jurisdiction,” should apply to unauthorized immigrants as well.

While the Supreme Court has yet to rule on birthright citizenship or the interpretation of “subject to the jurisdiction” in the context of a child born in the United States to unauthorized immigrants, it appears that if presented with the question, the Court would interpret the Fourteenth Amendment as conveying birthright citizenship, and extend its reasoning in *Wong Kim Ark* to include the children of unauthorized immigrants. However, because the federal government has yet to take action to alleviate the burdens of an ever increasing unauthorized immigrant population,<sup>60</sup> state and local governments have felt compelled to do so.

#### IV. PROPOSED STATE- & FEDERAL-LEVEL SOLUTIONS

As states are forced to respond to the influx of unauthorized immigrants and the tensions that their presence creates, many have taken matters into their own hands and proposed legislation that they believe would remedy their respective situations. Among the various solutions passed by state legislators, some of the most recurring themes are the ability to enforce federal immigration laws,<sup>61</sup> tracking money spent directly and indirectly to provide services to persons unlawfully present

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57. YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 1 (2009).

58. *Id.* at 8.

59. *See Plyler v. Doe*, 457 U.S. 202, 215 (1982).

60. *See infra* note 125.

61. *See, e.g.*, S.C. CODE ANN. § 16-9-460 (2011), *invalidated by* United States v. South Carolina, 2011 WL 6973241 (D.S.C. Dec. 22, 2011).

in the United States,<sup>62</sup> and classification of children born to unauthorized immigrant parents.<sup>63</sup> Federal-level citizenship legislation has taken the form of numerous bills proposing to reduce the unauthorized immigrant population by clarifying provisions relating to birthright citizenship and debate over the possibility of amending the Constitution.<sup>64</sup>

One of the most controversial state-level attempts to gain control of the illegal immigration problem is Arizona's Senate Bill 1070. When this article was submitted for publication, the U.S. Supreme Court had just granted Arizona's petition for certiorari for the Ninth Circuit's decision on S.B. 1070.<sup>65</sup> S.B. 1070 deals primarily with enforcement of federal immigration law and the creation of new criminal laws dealing specifically with immigrants, including trespass by unauthorized immigrants, the stopping and solicitation of unauthorized immigrant workers, and transportation of unauthorized immigrants.<sup>66</sup> Other notable state legislative efforts include South Carolina House Bill 87, which establishes an Illegal Immigration Enforcement Unit,<sup>67</sup> Utah House Bill 116, which establishes a guest-worker program whereby undocumented individuals could obtain permits to work in Utah,<sup>68</sup> and Georgia House Bill 87, which increases enforcement powers and requires many employers to check the immigration status of new hires.<sup>69</sup> Additionally, Alabama House Bill 56 would require schools to gather statistical data on students' immigration statuses,<sup>70</sup> businesses to E-

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62. See, e.g., GA. CODE ANN. § 50-26-1(e) (2011) (requiring applicants for public benefits to provide documentation verifying immigration status).

63. See, e.g., ALA. CODE § 31-13-27 (2011) (describing the process for determining the immigration classification of children in schools).

64. See IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 3-26 (11th ed. 2008).

65. See *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (holding that parts of Ariz. Rev. Stat. Ann. § 11-1051 were preempted by federal law), *cert. granted*, 132 S. Ct. 845 (Dec. 12, 2011).

66. See ARIZ. REV. STAT. ANN. §§ 11-1051, 13-2319 (2010).

67. See S.C. CODE ANN. § 23-6-60 (2011).

68. See Utah Immigration Accountability and Enforcement Act, H.B. 116, 2011 Leg., Gen. Sess. (Utah 2011).

69. See GA. CODE ANN. § 36-60-6 (2011).

70. ALA. CODE § 31-13-27(a)(5) (2011).

Verify the immigration statuses of employees,<sup>71</sup> and law enforcement to investigate a person's immigration status.<sup>72</sup>

In addition to state-level citizenship legislation, there have been several federal attempts, although all unsuccessful, over the last fifteen years to clarify the terminology that grants birthright citizenship in order to restrict its application to persons with at least one U.S. citizen, national, or legal permanent resident parent.<sup>73</sup> One example of a federal-level attempt to clarify citizenship by redefining who is considered "subject to the jurisdiction" of the United States is the "Birthright Citizenship Act of 2011," otherwise known as H.R. 140.<sup>74</sup> This proposed bill would amend Section 301 of the INA "to clarify those classes of individuals born in the United States who are nationals and citizens of the United States at birth."<sup>75</sup> While the Fourteenth Amendment sets forth the primary framework, H.R. 140 would essentially redefine the key phrase, "subject to the jurisdiction," to include: "(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces."<sup>76</sup> This would effectively exclude children born to unauthorized immigrants, commonly referred to as "anchor babies," from the longstanding constitutional guarantee of birthright citizenship. Legislation virtually identical to H.R. 140 was also proposed in 1995,<sup>77</sup> 2007,<sup>78</sup> and 2009.<sup>79</sup>

Perhaps the boldest of these proposals involves amending the United States Constitution.<sup>80</sup> While no formal bill has been

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71. See *id.* § 31-13-9(b). The U.S. Supreme Court held that a state-law requirement to E-Verify employees' work authorization status is constitutional. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) ("Arizona's use of E-Verify does not conflict with the federal scheme.").

72. See ALA. CODE § 31-13-5(f).

73. See, e.g., Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009); Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (2007).

74. See Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011).

75. *Id.*

76. *Id.* § 2.

77. See Citizenship Reform Act of 1995, H.R. 1363, 104th Cong. (1995).

78. See Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (2007).

79. See Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009).

80. See, e.g., *Lawmakers Consider Ending Citizenship for Children of Illegal Immigrants*, FOXNEWS.COM (July 29, 2010), <http://www.foxnews.com/politics/2010/07/29/lawmakers-consider-ending-citizenship-children-illegal-immigrants/> (quoting Sen. Lindsey Graham as saying: "We should change our Constitution and say if you come here illegally and you have a child, that child's automati-

introduced, some members of Congress believe that a constitutional amendment would help solve the current immigration crisis. In an interview with Fox News, Senator Lindsey Graham proclaimed that he may propose a constitutional amendment that would amend the Fourteenth Amendment to deny birthright citizenship to persons based on the origin of their parents.<sup>81</sup> According to Senator Graham, birthright citizenship is a “mistake.”<sup>82</sup> He stated that “people come here to have babies. They come here to drop a child. It’s called ‘drop and leave.’”<sup>83</sup> They “cross the border, they go the emergency room, have a child, and that child is automatically a U.S. citizen. That should not be the case. That attracts people here for all the wrong reasons.”<sup>84</sup> The proponents of H.R. 140 believe that the Citizenship Clause rewards unscrupulous foreigners who break U.S. laws by giving them an incentive to sneak into the United States to have children here and become attached to this country.<sup>85</sup> According to some, amending the Fourteenth Amendment to exclude children of unlawfully present parents would remove this incentive and reduce the unauthorized immigrant population in the United States.<sup>86</sup>

The current state and federal level legislative proposals are only the tip of the iceberg. As long as the federal government avoids taking measures to reform the nation’s immigration system, state and federal leaders, immersed in financial chaos, will continue to do what they believe necessary to resolve their particular circumstances and answer their citizen’s demands for action. However, as discussed below, amending or attempting to clarify the scope of the Fourteenth Amendment will do little to discourage illegal migration. Many of the state solutions will also be largely ineffective—and some likely unconstitutional—in addressing our current immigration crisis.

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cally not a citizen”).

81. *See id.*

82. Devin Dwyer, *Republicans Eye Change to Birthright Citizenship*, ABC NEWS (Aug. 3, 2010), <http://abcnews.go.com/Politics/birthright-citizenship-14th-amendment-republican-senators-explore-change/story?id=11313973#.T0qfv1eXRYU>.

83. Tim Gaynor, *Republicans Target Birthright Citizenship for Illegal Immigrants’ Children*, REUTERS (Aug. 4, 2010, 2:03 PM), <http://blogs.reuters.com/talesfromthetrail/tag/arizona-law/>.

84. *Id.*

85. *See Lawmakers Consider Ending Citizenship*, *supra* note 80.

86. *See id.*

A. REDEFINING CITIZENSHIP AT THE STATE AND FEDERAL LEVELS FAILS TO SOLVE OUR IMMIGRATION CRISIS

While states have proposed intriguing solutions to the immigration crisis, such piecemeal reform to the United States' intricate immigration system is bad policy and will ultimately prove ineffective.<sup>87</sup> The federal government is better positioned to address these issues on a national level in a coordinated, comprehensive fashion. The issue of illegal immigration lies at a peculiar crossroads between the powers and responsibilities of the federal government's sovereign authority over immigration and state enforcement and police powers. The Supreme Court has held that the "power to regulate immigration is unquestionably exclusively a federal power."<sup>88</sup> It describes "regulation" as including "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."<sup>89</sup> This language preempts many sub-federal actions while permitting state and local governments to take enforcement actions consistent with federal law.<sup>90</sup>

Some examples of state-level citizenship legislation that are likely to be preempted by federal law are proposals that attempt to place children born to unauthorized-immigrant parents in a separate class than children born to parents who are United States citizens. For example, Texas House Bill 292 proposed to modify birth certificates, so that they contain a field that would record the citizenship status of the infant's parents.<sup>91</sup> Under this bill, birth certificates would not be issued unless one of the infant's parents could prove United States citizenship.<sup>92</sup> If the parent could not produce such evidence, a "temporary report of alien birth" would be issued in place of a standard birth certificate.<sup>93</sup> Because this type of legislation appears to re-characterize the citizenship status of children born to citizens of other countries, the courts may ultimately determine that it attempts to "regulate" immigration and is there-

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87. See Complaint, *United States v. South Carolina*, No. 2:11-cv-02958-RMG (D.S.C. Oct. 31, 2011), available at <http://www.justice.gov/opa/documents/us-v-sc-complaint.pdf> (arguing that South Carolina's Act No. 69 is preempted by federal law).

88. *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

89. *Id.* at 355.

90. See *id.* at 354–55 (“[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration . . .”).

91. H.B. 292 § 1(e), 82d Leg., Reg. Sess. (Tex. 2011).

92. *Id.* § 4(a).

93. *Id.* § 2(b).

fore preempted by the federal government.<sup>94</sup> Where these state-level proposals are not preempted, they will create a patchwork network of immigration policy that will ultimately make enforcement of federal- and state-imposed regulations difficult, if not impossible.

Furthermore, efforts at the federal level to pass a statute to deny birthright citizenship to children born to unauthorized immigrant parents would be contrary to long-standing U.S. common law. A Department of Justice opinion supports this contention.<sup>95</sup> In 1995, Congress considered a bill that proposed to restrict birthright citizenship to exclude children born to unauthorized immigrants.<sup>96</sup> H.R. 1363, more commonly referred to as the “Citizenship Reform Act of 1995,” proposed to amend Section 301 of the INA, “which grants citizenship ‘at birth’ to all persons ‘born in the United States, and subject to the jurisdiction thereof.’”<sup>97</sup> The bill would “deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.”<sup>98</sup> Analogous with the most recent attempts to define citizenship, this bill inserted provisions that would specify persons who are to be considered “subject to the jurisdiction of the United States.”<sup>99</sup> Under this bill, two categories of children born on U.S. soil would be deemed “subject to the jurisdiction of the United States” and would therefore acquire birthright citizenship:<sup>100</sup> (1) a child born to wedded parents, at least one of which is a United States citizen or a noncitizen national, or a person lawfully admitted for per-

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94. The Supreme Court has found that Congress has plenary power to regulate immigration. *See* *INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question . . .”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one.”).

95. *See* 19 Op. O.L.C. at 340 (“Throughout this country’s history, the fundamental legal principle governing citizenship has been that birth within the territorial limits of the United States confers United States citizenship. The Constitution itself rests on this principle of the common law.”).

96. *See, e.g.*, Citizenship Reform Act of 1995, H.R. 1363, 104th Cong. (1995) (proposing to deny birthright citizenship to persons born within the jurisdiction of the United States).

97. *Id.*; 19 Op. O.L.C. at 340.

98. Citizenship Reform Act of 1995, H.R. 1363, 104th Cong. (1995).

99. *Id.*

100. *Id.*

manent residence (LPR) who resides in the United States;<sup>101</sup> or (2) children born to an unmarried woman with one of these statuses.<sup>102</sup> The bill attempted to redefine the language of the INA to exclude children born to parents without authorized resident status from automatically acquiring citizenship based on their place of birth.<sup>103</sup> The Department deemed H.R. 1363 to be “unconstitutional on its face” and stated that it would “flatly contradict our constitutional history and . . . traditions.”<sup>104</sup> The Department of Justice warned that “[i]t would be a grave mistake to alter the opening sentence of the Fourteenth Amendment without sober reflection on how it came to be part of our basic constitutional character.”<sup>105</sup>

The interplay between the power of the Supreme Court to interpret the Constitution, and of Congress to make laws, such as H.R. 140, that are intended to clarify and interpret the Constitution, is important to the outcome of the current Fourteenth Amendment debate. As the Supreme Court stated in its decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, in much the same way as is the Supreme Court, Congress “is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”<sup>106</sup> However, there are numerous examples where the courts have struck down acts of Congress as unconstitutional because they clearly violate the plain language of the Constitution, or are inconsistent with court precedents interpreting the Constitution.<sup>107</sup>

Finally, amending the Fourteenth Amendment is not the best or most effective way to solve the current immigration cri-

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101. *Id.*

102. *Id.*

103. *See id.* Note that the language this bill attempted to redefine just happens to mirror that of the Citizenship Clause of the Fourteenth Amendment. *Id.*

104. 19 Op. O.L.C. at 341.

105. *Id.* at 348.

106. 485 U.S. 568, 575 (1988).

107. *See, e.g.,* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (holding drug advertisement restriction unconstitutional); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (holding restriction on virtual child pornography unconstitutional); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001) (holding restriction on funding legal services that challenge federal or state welfare law unconstitutional); *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding line item veto unconstitutional).

sis and should be considered a last resort, used only when an issue cannot be appropriately addressed through existing avenues. This view is supported by the fact that the Framers made the amendment process extremely difficult, requiring an overwhelming consensus among Congress and ratification by a majority of the states.<sup>108</sup> In addition, a constitutional amendment will not address the economic reasons why immigrants continue to come to the United States. As is evidenced by Senator Graham's statements, many Americans seem to believe that a large portion of immigrants illegally enter the United States principally with the intent to deliver their children on U.S. soil, so that their children can enjoy all the rights and privileges that the Constitution granted to citizens. However, this incentive at best accounts for a fraction of unauthorized immigrants.<sup>109</sup> I believe that undocumented workers come here to provide for themselves and their families, in search of a better life, irrespective of the possibilities of U.S. citizenship.<sup>110</sup> To focus momentarily on one sender country, Mexico continues to suffer from wide-spread economic and political upheaval.<sup>111</sup> As long as debilitating poverty plagues Mexico, its most impoverished citizens will look to the United States for its greater economic opportunities. Excluding the children of unauthorized immigrants from the guarantee of birthright citizenship will not deter many citizens from Mexico and other sending countries from coming to the United States to provide for their families.

#### B. ALTERNATIVE SOLUTION: COMPREHENSIVE IMMIGRATION REFORM

A hodgepodge approach to reforming U.S. immigration law

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108. See U.S. CONST. art. V.

109. See Damien Cave, *Crossing Over, and Over*, N.Y. TIMES, Oct. 2, 2011, at A1 (showing that there is an increasing trend for illegal immigrants to come into the United States in order to be with their families that already live in the United States).

110. This is, at least in part, reflected by the fact that not all lawful permanent residents seek U.S. citizenship. See NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2010, at 4 tbl.4 (2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_lpr\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2010.pdf).

111. See Bureau of West. Hemisphere Affairs, *Background Note: Mexico*, U.S. DEP'T OF STATE (Nov. 16, 2011), <http://www.state.gov/r/pa/ei/bgn/35749.htm#econ>. But see Barbara Kotschwar, *Our Model Neighbor*, SLATE (Apr. 14, 2009, 10:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/foreigners/2009/04/our\\_model\\_neighbor.html](http://www.slate.com/articles/news_and_politics/foreigners/2009/04/our_model_neighbor.html)[http://www.slate.com/articles/news\\_and\\_politics/foreigners/2009/04/our\\_model\\_neighbor.html](http://www.slate.com/articles/news_and_politics/foreigners/2009/04/our_model_neighbor.html).

will only further complicate an already problematic system. Instead, Congress should pass and enforce comprehensive immigration legislation that secures our borders with the accelerated deployment of additional border agents, supported where appropriate with the National Guard and our military. We also need to utilize our newest technology, such as motion sensors and unmanned drones, instead of building a 3000-mile fence. I anticipate that opponents of tougher enforcement measures will claim the use of our military constitutes a militarizing of our southern border. Such criticism would be unfounded. Mexico uses its military to patrol its own southern border. The primary mission of our military could be to repel invasions and fight terrorism in countries like Afghanistan; but there is nothing inappropriate in using our military on our southern border solely in a support role to U.S. Customs and Border Protection and other law enforcement agencies in accordance with the Posse Comitatus Act.<sup>112</sup>

In addition, our immigration policy should strengthen our national economic policy and promote commerce. By most accounts, unauthorized immigrants contribute to our nation's economy. The positive long-term effects of legal immigration on the U.S. labor market include improved productivity, increased average income for native U.S. citizens and, in a growing economy, an increase in jobs sufficient to ensure that native U.S. citizen employees are not displaced.<sup>113</sup> Therefore, an immigration policy that works with and encourages immigrants to come to the United States lawfully, particularly skilled immigrants, will contribute to the strength of our economy.<sup>114</sup> Also, there are a number of skilled jobs for which Americans are not available and other low-skill jobs that native-born U.S. citizens just do not want.<sup>115</sup> For example, it is estimated that nearly sixty percent of farm workers in the United States are unauthorized immigrants.<sup>116</sup> Other low-skill fields that employ large num-

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112. See 18 U.S.C. § 1385 (2006) (requiring that the use of the army or air force to execute the laws must originate with the Constitution or an act of Congress).

113. GIOVANNI PERI, MIGRATION POLICY INST., THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION 4–5 (2010).

114. See FED. RESERVE BANK OF DALL., FROM BRAWN TO BRAINS: HOW IMMIGRATION WORKS FOR AMERICA 1, 14 (2010).

115. See *id.* at 11.

116. Julia Preston, *Illegal Workers Swept from Jobs in 'Silent Raids,'* N.Y. TIMES, July 10, 2010, at A12. Interestingly, Georgian farmers stated that new regulation "has scared away the migrant Hispanic workers they depend on to

bers of both legal and illegal immigrants include factories, construction, maintenance, etc.<sup>117</sup> In order to attract skilled and unskilled workers to fill these positions and sustain our economy, our immigration policy needs to include a more robust temporary-worker program. To ensure that a temporary worker's presence is only temporary, a portion of that worker's wages could be placed in escrow and released to him when he returns to his home country. Thus, comprehensive immigration reform should include a more robust temporary-worker program, without more bureaucracy creating delay and inefficiency that attracts both high-skilled and low-skilled workers to sustain our economic growth.

While the media often portray illegal immigration through dramatic scenes of people crossing the Rio Grande, digging tunnels, and climbing fences, the truth is that 4 to 5.5 million unauthorized immigrants, nearly half of the entire unauthorized immigrant population, entered the United States lawfully as temporary visitors and subsequently overstayed their visas.<sup>118</sup> Obtaining a non-immigrant visa for temporary admission to the United States is typically easier and less time intensive than attempting to gain legal permanent resident status. This ease of entry, coupled with the fact that, as of 2006, this nation had "no means of determining whether all the foreign nationals admitted for temporary stays actually leave the country," make the regulation and enforcement of the terms of non-immigrant visas vital to the success of the United States' immigration policy.<sup>119</sup> As recently as 2010, the Department of Homeland Security replied to my request that it does not have any statistics available on overstayers.<sup>120</sup> Congress should consider imposing monetary fines and otherwise severely penalize those who overstay their visas. We should also develop a more

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pick their fruits and vegetables," and have commissioned a study to quantify losses due to tougher state E-Verify requirements. See Jeremy Redmon, *Georgia Farmers to Seek Study of Losses Tied to Labor Shortages*, ATLANTA J.-CONST. (July 12, 2011, 2:15 PM), <http://www.ajc.com/news/georgia-farmers-to-see-1012576.html>.

117. See, e.g., GORDON H. HANSON, *MIGRATION POLICY INST., THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES* 1 (2009).

118. See PEW HISPANIC CTR., *MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1-4* (2006), available at <http://pewhispanic.org/files/factsheets/19.pdf>.

119. *Id.* at 2.

120. E-mail from John Simanski, Office of Immigration Statistics, Dep't of Homeland Sec., to Arslan Umarov (Apr. 14, 2011, 06:44 CST) (on file with author).

formal and practical process that keeps track of people who overstay their visas and provides incentives to their home countries to help the United States locate and track them.

Instead of rewarding those who break this nation's laws, our immigration policy should reinforce and foster respect for the law through effective enforcement. Effective law enforcement requires the imposition of tougher penalties on employers who hire undocumented workers. Companies that employ unauthorized immigrants save substantial amounts of money on labor and circumvent the process set forth by the INA, which requires the employer to file a visa petition on behalf of the worker and complete the necessary labor certification.<sup>121</sup> Not surprisingly, undocumented workers are vulnerable and sometimes exploited by unscrupulous employers.<sup>122</sup> Moreover, because our current immigration system provides only 10,000 visas to those immigrants seeking low-skilled jobs,<sup>123</sup> there is little incentive to attempt to come here legally to work in these areas. More temporary visa categories should be available for needed workers and specialists. Also, another way to encourage employers to pursue growth and continue to hire would be to streamline issuance to temporary workers of tamper-proof, picture ID cards by the Department of Homeland Security, so that employers can hire without fear of prosecution.<sup>124</sup> These cards could prominently list the duration of the worker's visa. Because many foreigners come to the United States seeking employment, this type of policy would provide the United States with documentation of their presence and enable the United States to ensure that those persons remain only temporarily unless they take the appropriate steps to gain a more permanent legal status.

Comprehensive reform must also deal with the 10.8 million unauthorized immigrants already present in the United States.<sup>125</sup> I understand that some Americans feel anger over

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121. See Immigration and Nationality Act § 212(a)(5), 8 U.S.C.A. § 1182(a)(5) (2009).

122. David Bacon, *Be Our Guests*, THE NATION, Sept. 27, 2004, at 22–26.

123. See, for example, INA § 203(b)(3)(B), which provides that no more than 10,000 immigrant visas may be available in any fiscal year to immigrants “who are capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”

124. See Lora L. Ries, *B-Verify: Transforming E-Verify Into a Biometric Employment Verification System*, 3 ALB. GOV'T L. REV. 271, 296 (2010).

125. Michael Hoefler et al., *Estimates of the Unauthorized Immigrant Popula-*

unauthorized immigrants; however, after extensive discussion in the White House, we concluded that our government is incapable of forcibly removing millions of people at one time. Even if feasible, such action would devastate industries such as agriculture, construction, and meat packing, and would disproportionately affect border-states and states with popular ports of entry. Instead, unauthorized immigrants who have long-standing ties to the community, wish to remain in this country, are verifiably employed, pay taxes, and have no criminal record should be allowed to remain in the United States under temporary legal status if they pay a penalty fee as an acknowledgment of violating the law. Such policy places unauthorized immigrants into a verifiable legal status and provides further security for our country in a post-9/11 world. Furthermore, on balance, I have no major policy objection with the concept of earned legalization in the future for these individuals, if they pay an additional penalty fee, continue to abide by the law,<sup>126</sup> remain employed and pay taxes, otherwise meet the current standards and requirements of citizenship, and are not given an advantage over those who followed the rules in pursuing citizenship.

Some opponents of comprehensive immigration reform claim it is amnesty.<sup>127</sup> I respectfully disagree. Merriam-Webster Dictionary defines “amnesty” as an act of a government authority by which pardon is granted to a large group of individuals;<sup>128</sup> “pardon” is defined as the excusing of an offense without exacting a penalty.<sup>129</sup> By definition, what I propose does not constitute amnesty because it includes a penalty. Other critics argue that awarding legal status will encourage further illegal immigration.<sup>130</sup> I respectfully disagree. If the legislation permitting legal status also requires secure borders,

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*tion Residing in the United States: January 2010*, U.S. DEP’T OF HOMELAND SECURITY (Feb. 2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf) (last visited Apr. 23, 2012).

126. The immigrant should not have a criminal record that would serve as an impediment under 8 U.S.C. § 1182(a)(2).

127. Mark Krikorian, *Amnesty, in English*, GUEST COMMENT ON NRO (Sept. 4, 2001, 12:20 PM), <http://old.nationalreview.com/comment/comment-krikorian090401.shtml>.

128. See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 41 (11th ed. 2003).

129. See *id.* at 900.

130. Kris W. Kobach & Matthew Spalding, *Rewarding Illegal Aliens: Senate Bill Undermines The Rule of Law*, THE HERITAGE FOUND. (May 23, 2007), <http://www.heritage.org/research/reports/2007/05/rewarding-illegal-aliens-senate-bill-undermines-the-rule-of-law>.

tougher workplace enforcement, a streamlined deportation process, and includes an eligibility date that cannot be met by foreigners not already here; then, I believe, we will not encourage further unlawful migration.

Comprehensive immigration reform should also include updating the INA,<sup>131</sup> the principle U.S. statute dealing with immigration law.<sup>132</sup> The INA is outdated, confusing, and internally inconsistent.<sup>133</sup> Congress should revise it based upon a coherent set of principles rather than the ad hoc patchwork it has become. The INA should be rewritten so that the average person can more easily understand it.

Finally, in order for federal comprehensive immigration reform to be effective, it must be fully funded at the front and back end of the enforcement process. Because the current policy is in such disrepair, successful comprehensive immigration reform *will* be costly. Permitting the current patchwork system to stay in place, however, will cost much more—it will continue to put our nation's economy and national security at risk. For these reasons, I challenge the President and Congress to collaborate to achieve comprehensive immigration reform as one of our nation's top priorities.

### CONCLUSION

Many sources, including the 9/11 Commission, have proposed a set of global immigration agreements that would require collaboration among the governments of various nations in order to, among other goals, strengthen security for global travel and border crossings.<sup>134</sup> I agree that global cooperation is important in ensuring our national security. However, global cooperation alone is not the solution to our immigration crisis. While increased communication and exchange of information between countries, amplified surveillance, and data collection could help to reduce the security risks posed by the current

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131. Also known as the McCarran-Walter Act, the INA was enacted into law on June 27, 1952, Pub. L. 82-414, 66 Stat. 163 (1952), and has been amended many times since then. 8 U.S.C.A. §§ 1101–1537 (2010).

132. Prior to 1952, other statutes combined to govern U.S. immigration law.

133. Compare 8 U.S.C.A. § 1182(a)(6)(A)(i) (2010) (stating that an alien who arrives “without being admitted or paroled . . . is inadmissible”), with 8 U.S.C.A. § 1255(i) (2010) (allowing admission in certain circumstances).

134. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 REPORT ch. 12.4 (2004), available at [http://www.9-11commission.gov/report/911Report\\_Ch12.htm](http://www.9-11commission.gov/report/911Report_Ch12.htm).

state of immigration,<sup>135</sup> I do not advise agreements with terms that restrict the United States' sovereign ability to decide who is and is not permitted within its territory. In a global economy, it would be wise for the United States to enter into international agreements that benefit its interests. For example, economic conditions in Mexico are undoubtedly a contributing factor pushing Mexicans to the United States. It is in our best interest and helpful to our immigration challenges to assist Mexico. Through international agreements, the United States can help Mexico build a stronger middle class and implement institutional reform that will bring greater integrity to the Mexican government and help curb the level of violence.<sup>136</sup> The United States should not, however, enter into any international agreement that empowers an international body or another nation to define citizenship in the United States or dictate who can be present within our borders. To forfeit this sovereign power in the name of international unity would be a grave mistake.

However, rejecting international control of our sovereignty does not mean that I accept the status quo. Our nation's immigration crisis has become increasingly more visible and the need for reform has grown increasingly more pressing, provoking states to take more localized actions. Some commentators believe that state actions are motivated in part by the fear that the American identity is changing: a fear of a growing Latino population.<sup>137</sup> There is undoubtedly some element of fear involved, but that is only half of the story. To the extent there is fear or anxiety, for many people it is fear of change that is uncontrolled and unaccompanied by long-term planning. They worry that our federal leaders are not working towards a migration policy that supports our economic and national security interests. Whatever the reason, I urge we tone down the rhetoric—on both sides. It is wrong for my friends on the left to call every immigration proposal anti-immigrant. And, I would remind my friends on the right that a great majority of unauthorized immigrants come here simply to find a better life—as did our ancestors. They are human beings—most with young families.

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135. *See id.*

136. *See* Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration Is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 647–48 (2011).

137. *See, e.g.,* PAT BUCHANAN, *SUICIDE OF A SUPERPOWER* (2011); PEW HISPANIC CTR., *U.S. POPULATION PROJECTIONS: 2005-2050*, at 1 (2008), available at <http://pewhispanic.org/files/reports/85.pdf>.

These state-proposed solutions only further complicate the current immigration crisis. While some members of Congress believe that statutorily excluding children born to unauthorized immigrant parents from the benefit of birthright citizenship will reduce the illegal immigration population and help to solve this nation's immigration problems, such action is likely unconstitutional and contrary to well-rooted American tradition. To address this nation's immigration crisis, the President and Congress should invest their time and energy to pass comprehensive immigration reform on the federal level.