

# IMMIGRATION AND THE VULNERABLE WORKER: WE BUILT THIS COUNTRY ON CHEAP LABOR

*Leila Higgins*\*

## I. INTRODUCTION

In early 2012, the Department of Labor took an unexpected step in support of immigrant workers, changing the way H-2B visas are issued to make it harder both to hire and to exploit immigrant workers.<sup>1</sup> The changes in regulation were the result of years of hard work by advocates for both Union workers, and immigrants.<sup>2</sup> However, by the end of the summer of 2012, the new regulations had been challenged by employers in several federal courts, and repealed by the Senate.<sup>3</sup> The employers resisted the immigration changes that would affect their bottom line and won; the advocates' work was undone.<sup>4</sup> This is not an isolated example of the power and influence employers have over the creation and enforcement of this country's immigration laws.<sup>5</sup> Not every instance of employer action,

---

\* Leila Higgins is a recent graduate of American University Washington College of Law, and former Recent Developments Editor for the *Labor and Employment Law Forum*. Though she currently works for the United States Citizenship and Immigration Service, the opinions expressed in this Note are wholly her own and may not be attributed in any way to the Federal Government. This article was written in its entirety prior to her joining USCIS.

<sup>1</sup> See Leila Higgins, *Comite de Apoyo a los Trabajadores Agricolas v. Solis and 20 C.F.R. § 655; 29 C.F.R. § 503 Final Rule Developments*, LABOR AND EMPLOYMENT LAW FORUM (2012), available at <http://aualaborlawforum.org/recent-developments/> (last visited Apr. 14, 2013).

<sup>2</sup> 20 C.F.R. § 655; 29 C.F.R. § 503; see also Jayesh Rathod & Adrienne Lockie, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*, AM. U. WASH. C. OF L.: FAC. SCHOLARSHIP & RES. (2010), available at [http://www.wcl.american.edu/clinical/documents/20100714\\_auwcl\\_ihrlc\\_picked\\_apart.pdf?rd=1](http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1) (documenting the experiences of hundreds of Mexican women as they traveled to the United States under temporary guestworker visas to participate in the Maryland crab industry).

<sup>3</sup> Daniel Costa, *Employer Criticisms of New Immigration Rules are not Credible*, THE HILL (Mar. 6, 2012), available at <http://thehill.com/blogs/congress-blog/economy-a-budget/214433-employer-criticisms-of-new-immigration-rules-are-not-credible> (last visited Apr. 12, 2013).

<sup>4</sup> See Costa, *supra* note 3.

<sup>5</sup> Prior to the Chinese Exclusion Acts and federal involvement in immigration, employers reached out to other nations that could provide cheap labor and sponsored massive immigration movements, which then led to inspired regulation. During World War II, employers appealed to the government to provide them with cheap labor from America's neighbors, arguing that their fruit was rotting in the fields without immigrant farm workers, creating the Bracero Program. After 1986, despite Congress' best

however, seeks to further disadvantage the already vulnerable immigrant worker population.<sup>6</sup> By appreciating the ability of employers to influence immigration law, advocates stand a much better chance of seeing change that can stand the test of time. Appreciating the power of forces that can collapse immigration reform efforts is particularly important now, as Congress begins to discuss and to implement a Comprehensive Immigration Reform package that, hopefully, will fix the errors of the past.<sup>7</sup>

Employers tend to prefer the more vulnerable employees,<sup>8</sup> those who will work for lower wages under cheaper conditions and for longer hours than empowered employees.<sup>9</sup> Despite the fact that immigrant workers, whether documented or not, are entitled by law to the same working standards as less vulnerable workers, industry practice often provides working conditions reflective of the laborers vulnerability.<sup>10</sup> Vulnerable

---

legislative efforts, employers undercut IRCA by reacting to the poorly executed sanctions program and appealing to their political representatives, arguing that IRCA was leaving their fields and factories untended. See Dianna Solis, John R. Emshwiller, & Alfredo Corchado, *Changing the Rules: New Immigration Law Brings Much Anxiety To U.S. Workplaces - Edict Against Hiring Illegals Creates Labor Shortages; Fake Papers Proliferate - A Lure for German Cowboys*, WALL ST. J., June 5, 1987, at A1 [hereinafter *Changing the Rules*].

<sup>6</sup> The employers who do advocate for the rights of their immigrant employees tend to be those closest to their workers in terms of vulnerability, as illustrated by the collective efforts of several migrant workers and their employers to pass Ag Jobs. The need for the “best and the brightest” that was articulated in 1965 has been reborn in discussions of the DREAM Act. Employers of highly skilled immigrants successfully appealed to Congress in 1965, negotiating a program that would allow them to more easily hire skilled workers from abroad.

<sup>7</sup> See Jordan Fabina, *Transcript: Bipartisan Framework for Comprehensive Immigration Reform*, ABC NEWS, Jan. 28, 2013, available at [http://www.abcnews.go.com/ABC\\_Univision/News/transcript-bipartisan-framework-comprehensive-immigration-reform/story?id=18330912#.UWtivbXBNAI](http://www.abcnews.go.com/ABC_Univision/News/transcript-bipartisan-framework-comprehensive-immigration-reform/story?id=18330912#.UWtivbXBNAI) (last visited Apr. 14, 2013) (asserting that up to 11 million undocumented workers live in the shadows because of the broken immigration system in the U.S.); see also *Fact Sheet: Fixing our Broken Immigration System so Everyone Plays by the Rules*, THE WHITE HOUSE (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> (last visited Apr. 14, 2013) (explaining that it is time to fix the immigration system by creating a fair and effective system that lives up to the ideals of our heritage).

<sup>8</sup> Listing in order from most vulnerable to least: undocumented aliens, documented workers attached to their employer (such as H-2B workers), temporary workers with a flexible visa, Green Card holders, and citizens. See Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1362 (2009).

<sup>9</sup> Empowerment can come from many sources be it unionization, an easily accessible private right of action, the ability to “vote with your feet” by easily moving between employers, or a choice in employment from either variety or fiscal stability.

<sup>10</sup> See Cunningham-Parmeter, *supra* note 8, at 1363 (citing Hoffman Plastic

immigrants also create a labor pool on which employers can draw to defeat union leverage tactics, such as striking, leaving the unions in a much weaker bargaining position.<sup>11</sup> As a result, unions often argue that an increase in immigrant labor will leave local workers unable to compete for jobs.<sup>12</sup> This fear is illustrated by the fact that the law governing union/employer relations, the National Labor Relations Act (“NLRA”), only grants rights to “employees,” a term which excludes labor fields in which temporary labor is commonly needed.<sup>13</sup> These exclusions, however, make certain immigrant groups even more vulnerable than they would be if they had full protections under the NLRA, making them the best bargain for an unscrupulous businessman and the greatest threat perceived by unions.<sup>14</sup> Some employers have even used the immigration system to avoid

---

Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002)). Some employers have demonstrated their preference for more vulnerable employees by refusing to assist those eligible for amnesty when Congress passed the IRCA by helping these employees prove their history of employment. See *Changing the Rules*, *supra* note 5, at A3.

<sup>11</sup> Labor unions have historically viewed immigrant laborers as an economic threat, since they are often willing to work under conditions that are less safe and for lower wages than those acceptable to unionized employees, creating a disincentive for employers to invest in safer working conditions for more permanent laborers. See Lorraine Schmall, *The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law: Article: ICE Effects: Federal Worksite Non-Enforcement of U.S. Immigration Laws*, 44 U.S.F. L. REV. 373, 376 (2009).

<sup>12</sup> See *Letter to the President: Executive Authority to grant administrative relief for DREAM Act beneficiaries*, NILC, 7 (May 28, 2012), available at <http://www.nilc.org/document.html?id=754> (last visited Apr. 14, 2013) (explaining that there is executive authority for many forms of administrative relief for beneficiaries of the DREAM Act) [hereinafter NILC].

<sup>13</sup> The NLRA defines non-employees as those working in agriculture, domestic service, family employees, independent contractors, supervisors, or employees under the Railway Labor Act. African Americans and other vulnerable groups have historically held these jobs which are now most commonly held by immigrants. See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431 (2009) (citing NLRA, § 2(3); 29 U.S.C. § 152(3) (2006)).

<sup>14</sup> This is a very simplified summary of a complicated political issue; scrupulous employers, while wanting to keep labor costs low, also want to obey the law and ensure their employees are safe but cannot compete with other manufacturers who are willing to cut costs by illegally hiring undocumented workers. Additionally, the nature of some work, such as agriculture, means that many employers cannot find Americans willing to do the work for a wage the employer can reasonably pay and so are dependent on immigrant labor. See *Immigration: Hearing before the H. Comm. on the Judiciary*, 88th Cong. (1964); Periodicvideos, *Immigrant Farm Workers*, C-SPAN (Sep. 24, 2010), available at <http://www.c-spanvideo.org/program/295639-1>; Interview by Michel Martin with Arturo Rodriguez, President, United Farm Workers (July 7, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128358334>.

paying undocumented workers or repress unionization efforts by reporting the workers to immigration officials.<sup>15</sup> On the other hand, scrupulous employers tend to advocate for an increase in lawful labor immigration to allow them to compete with unscrupulous employers.<sup>16</sup> Since lawful status reduces an employee's vulnerability, employers who advocate for increased status are valuable allies for pro-rights reformers.<sup>17</sup>

Common rhetoric used by employers to advocate for increased immigration across the centuries sounds very familiar today; workers in the United States are not willing to do the kind of labor that immigrants will do; increasing wages to induce Americans to work these jobs will harm the bottom line, putting employers out of business; immigrants are hard workers who benefit the economy by providing a base of affordable labor.<sup>18</sup>

---

<sup>15</sup> See NILC, *supra* note 12, at 3; see also *Flores v. Albertson's, Inc.*, 2004 U.S. Dist. LEXIS 29082, at \*1 (C.D. Cal. June 4, 2004) (finding that the employer misclassified janitorial staff as "contractors" to avoid California's wage-and-hours laws).

<sup>16</sup> See Phil Glaize, Testimony: *Protecting America's Harvest* before the House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and Border Security, at 3 (Sep. 24, 2010) available at <http://judiciary.house.gov/hearings/pdf/Glaize100924.pdf>. Immigration and Customs Enforcement ("ICE"), the agency tasked with investigation and deportation of undocumented immigrants, and the Department of Labor ("DOL") have committed to working together to prevent employers from using immigration enforcement to thwart labor enforcement because it is "essential to ensure proper wages and working conditions for all covered workers regardless of immigration status . . . to protect the employment rights of lawful U.S. workers, whether citizen or non-citizen, and to reduce the incentive for illegal migration to the United States." REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (Mar. 31, 2011), available at <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>.

<sup>17</sup> Perhaps the most well-known example of employers using immigration laws to subvert labor protections is the Supreme Court's ruling in *Hoffman Plastics*. See *Hoffman Plastic Compounds v. NLRB*, 122 S. Ct. 1275 (2002) (finding that the NLRB had over-stepped its authority in awarding back-pay to an undocumented worker who had been fired for engaging in union activities, since it would require the employer to violate IRCA by paying an unauthorized worker). After *Hoffman*, employers who discriminated against undocumented workers would be immune from the NLRA's most effective enforcement measure: back-pay for hours not worked because of the violation, because doing so would require the employer to break immigration law. This decision drastically increased the vulnerability of undocumented workers to discrimination and mistreatment on the job. Despite the efforts of DHS and DOL to avoid enabling employers to use the immigrations laws to subvert employment laws, many immigration raids have been conducted on businesses facing either formal or informal labor disputes. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 467, 391-93 (2004). Though improved in recent years, ICE's policy of declining to penalize employers who participate in the raids by self-reporting severely undermines enforcement of labor laws. See *Emerging Issues for Undocumented Workers*, *supra* note 17, at 393.

<sup>18</sup> See *Changing the Rules*, *supra* note 5.

Regardless of the empirical truth of these arguments, they are very effective in shaping laws and influencing enforcement. For example, the argument that higher paid (and, therefore, less vulnerable workers) will raise prices and impact an employers' bottom line is as old as time.<sup>19</sup> Indeed, employers have historically favored increased immigration, which allows them to lower production and labor costs without fear of retaliation from a unified or otherwise empowered work force.<sup>20</sup>

Although some groups of employers would like to see an increase in undocumented immigration, giving them a larger pool of the most vulnerable workers, those employers are not likely to publicly advocate for illegal immigration.<sup>21</sup> As a result, "immigration" has become a code word for undocumented immigrants, in addition to its use to describe temporary workers, students, refugees, and any other non-citizen present in the United States. With everyone using the same word, it can be difficult to differentiate between the goals different factions are trying to accomplish. This paper will therefore focus on the different degrees of vulnerability created by particular courses of action, rather than the language used to describe it.

This Note will discuss the movements that restrictionist movements later responded to, starting with the Burlingame Treaty.<sup>22</sup> This Note will also explore the next wave of immigration demand came which came during the labor shortages of World War II and the birth of the Bracero Program.<sup>23</sup> The 1965 Immigration and Nationality Act ("INA")<sup>24</sup> was inspired by a shift in priorities for the kinds of immigrants American industry needed.<sup>25</sup> The passage of the Immigration Reform and Control Act

---

<sup>19</sup> Daniel Cleveland, *Letter to J. Ross Browne: United States Minister to China*, in FOREIGN RELATIONS OF THE UNITED STATES: 1865-1869 531 (1868).

<sup>20</sup> See Schmall, *supra* note 11, at 376.

<sup>21</sup> Employers use tactics such as threats of deportation to keep wages unlawfully low, and so cut overhead costs. *Emerging Issues for Undocumented Workers*, *supra* note 17, at 389.

<sup>22</sup> The Burlingame Treaty was inspired by cross-country expansion, the Intercontinental railroad, and California's gold mines. See John Higham, *The Politics of Immigration Restriction*, 1 IMMIGR. & NAT'LITY L. REV. 1, 4 (1977) (noting that the Burlingame Treaty, in an effort to establish profitable trading opportunities in Asia, included groundbreaking measures that allowed Chinese citizens the right to free immigration and travel within the United States).

<sup>23</sup> Wayne D. Rasmussen, *A History of The Emergency Farm Labor Supply Program 1943-47*, U.S. DEP'T OF AGRIC., BUREAU OF AGRIC. ECON. (Sep. 1951) (exploring the Emergency Farm Labor Supply Program, also known as the Bracero Program, to provide for the temporary importation of workers from Mexico to Aid the American agricultural economy during a shortage of far labor workers during World War II).

<sup>24</sup> The Immigration and Nationality Act of 1965, Pub. L. No. 89-236 (1965) (replacing the national origins quota with a preference system that focused, instead, on immigrants' skills and family relationships with United States citizens and residents).

<sup>25</sup> The influence of McCarthyism, nationalism, and re-structured racism on the 1952

(“IRCA”)<sup>26</sup> in the 1980’s shows the influence of employers on legislation intended to regulate their practices. Finally, this Note will look forward to what combination of economic conditions and employer influence could spur another wave of legal admissions, allowing passage of the DREAM and Agricultural Opportunities and Securities (“Ag Jobs”) Acts as part of Comprehensive Immigration Reform.<sup>27</sup>

## II. THE PAST: REGULATION IS BORN

Businesses depend on cost-effective labor for economic success, which often translates to a dependence on immigrant or other vulnerable workers.<sup>28</sup> Prior to 1864, America’s cheap labor came largely from legalized slavery, but in free states and after passage of the 13th Amendment, American industry turned to the importation of voluntary labor.<sup>29</sup> After the Louisiana Purchase, America needed far more residents than mere procreation could supply, and business needed more workers than there were available locally.<sup>30</sup> Employers turned to China to find this massive force of vulnerable workers, who were only made more vulnerable by the Burlingame Treaty. This wave of admission into the United States gave way to restrictionist policies inundated with vitriolic rhetoric beginning with the Chinese Exclusion Acts and continuing on to the race-based quotas of the 1920s.<sup>31</sup> This section will examine what came before that firestorm. What fueled the admission of immigrants to our Eastern and Western shores?

---

INA and the 1964 Civil Rights movement are beyond the scope of this paper.

<sup>26</sup> Immigration Reform and Control Act, Pub. L. No. 99-603 (1986) (requiring employers to attest to the immigration status of their employees, making it a crime to knowingly hire or recruit unauthorized immigrants, and legalizing seasonal agricultural, illegal worker).

<sup>27</sup> The Development, Relief, and Education for Alien Minors Act, S. 1291 (Aug. 1, 2001) (providing conditional, permanent residency to immigrants of “good moral character” who arrived in the United States as minors, lived in the country continuously, and graduated from U.S. high schools).

<sup>28</sup> See House Committee Judiciary on Immigration, Citizenship, Refugees, Border Security & International Law, *Immigrant Farm Workers*, at 02:00-02:46, (Sep. 24, 2010), available at <http://www.c-spanvideo.org/program/295639-1> [hereinafter *Immigrant Farm Workers*].

<sup>29</sup> See Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431, 436 (2011).

<sup>30</sup> See HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS, 1790-1990 45 (1994). This need lives on in modern immigration law, allowing temporary employment visas where an employer can show that the necessary workers must be imported. See U.S.C. 1101 §§ H(2)(a), H(2)(b), H(1)(b).

<sup>31</sup> The Chinese Exclusion Act, 22 Stat. 61 (1882); see, e.g., Higham, *supra* note 22, at 6-15 (stating that race-based quotas were inspired by a fear that Chinese and other “minority” populations were expanding more quickly than the preferred Western European immigrants).

A. *Chinese Labor and the Burlingame Treaty*

Across the history of United States immigration law, industry has hungered for better, faster, and cheaper labor.<sup>32</sup> Perhaps the earliest rumblings that turned into voluntary immigration came from the California gold-rush and the transcontinental railroad in the mid-1800s.<sup>33</sup> At the same time as American industries were rapidly expanding across the continent, a population boom in a region of China that had a tradition of migration provided the supply of labor.<sup>34</sup> The discovery of gold in California provided work for the Chinese immigrants, recruited by Hawaiian sugar plantations and desiring to move on to other work after their contract was complete.<sup>35</sup> By the onset of the Civil War, a pro-immigration front was sweeping a nation that was expanding faster economically than by population.<sup>36</sup> Although the voice of restrictionists gained momentum in the 1850s, the onset of the Civil War diminished most opposition to immigration.<sup>37</sup>

Employers in the mining and railroad industries were able to use a contract labor system to both encourage Chinese immigration and to increase their own profits.<sup>38</sup> Employers sent recruiters to China, who would make false promises of return passage to entice laborers to make the journey across the Pacific and would negotiate terms which were far lower

---

<sup>32</sup> See Cleveland, *supra* note 19, at 531.

<sup>33</sup> See Higham, *supra* note 22, at 4-6. Both of these economic draws for immigration and internal migration led to a determination by some American labor groups that the Chinese laborers were an “invading hoard” that threatened their chances of success on the West Coast. See *Chae Chan Ping v. United States*, 130 U.S. 581, 595-96 (1889) (asserting that the Chinese provided a valuable service when they migrated to the U.S. and began working as domestic and outdoor workers).

<sup>34</sup> See Kim, *supra* note 30, at 47.

<sup>35</sup> LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 125 (1995).

<sup>36</sup> See Kim, *supra* note 30, at 52. In 1864, President Lincoln prompted Congress to pass a law that would bring in more cheap labor from abroad since the end of the Civil War and slavery left the economy in a state of transition. When he asked Congress to pass the “Coolie Trade Law” in 1862, he had observed that the practices of transporting Chinese from America to another port in the Americas bore significant resemblance to the practices used in transporting slaves from Africa. *Id.* at 49-50 (citing Executive Document No. 16, House of Representatives, 2d Sess., Thirty-Seventh Cong., 17); see also Cleveland, *supra* note 19, at 533, 541.

<sup>37</sup> COMM. ON THE JUDICIARY, *THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES*, 80th Cong. 1st Sess., at 49 (1950).

<sup>38</sup> The system allowed employers to contract with laborers to work at below-market wages for a fixed period of time, after which they would be free to seek other employment. See Douglas Cloutre, *Contract Labor System*, *ENCYCLOPEDIA OF IMMIGRATION* (Sep. 27, 2011), available at <http://immigration-online.org/448-contract-labor-system.html> (last visited Apr. 14, 2013).

than what workers in America would accept.<sup>39</sup> This forced non-contract laborers to lower their own requested wages to compete, greatly improving business profits.<sup>40</sup> Congress acknowledge the importance of cheap foreign labor to the expanding United States economy when it authorized employers to bind the services of immigrants for whom they had paid passage through passage of the Immigration Act of 1864.<sup>41</sup> Even President Abraham Lincoln supported this legislation as a means to address the labor shortage facing the country in the wake of the Civil War.<sup>42</sup> Additionally, in 1864, Congress passed a law not only to encourage immigration but to improve travel conditions for those immigrants.<sup>43</sup> It also protected employers by making the contracts under which foreign laborers promised to repay their way to the United States enforceable under United States law, thereby legalizing debt bondage of the Chinese.<sup>44</sup> The goal was to make it easier for employers, who were feeling the lack of labor lost during the Civil War, to get a return on their investments abroad.<sup>45</sup>

In 1868, the United States and China entered into the Burlingame Treaty, which allowed massive immigration of Chinese laborers to enter the United States.<sup>46</sup> This move was largely supported by the companies involved in building the transcontinental railroad, as there were not enough American workers willing and able to perform the necessary labor.<sup>47</sup> After the passage of the Burlingame Treaty, in 1869, employers began advertising in China and other countries for employment.<sup>48</sup> Several

---

<sup>39</sup> Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 *ASIAN L. J.* 181, 184 (1998) (finding Chinese immigrants were laborers desired for their manpower during the expansion of the United States, specifically the construction of the transcontinental railroad, but were targets of resentment and violence during recessions).

<sup>40</sup> See, e.g., Higham, *supra* note 22, at 4 (noting that tensions between laborers did not take hold until laborers could no longer easily become employers, thus creating more concrete classes and threatening the opportunities for laborers to improve their status).

<sup>41</sup> 1864 Immigration Act, ch. 246, 13 Stat. 385; Higham, *supra* note 22, at 5.

<sup>42</sup> See 1864 Immigration Act, ch. 246, 13 Stat. 385.

<sup>43</sup> COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, 80th Cong. 1st Sess., at 49 (1950).

<sup>44</sup> *Id.*

<sup>45</sup> Although the law was repealed that same year, it illustrates the impact employers had on federal approaches to immigration before the Chinese Exclusion act. See *id.*

<sup>46</sup> However, the primary drive had come from American merchants eager to secure cheap goods from China and access to the Chinese markets. See United States Department of State Office of the Historian, *The Burlingame-Seward Treaty, 1868*, available at <http://history.state.gov/milestones/1866-1898/Burlingame-SewardTreaty> (last visited July 12, 2012) [hereinafter *The Burlingame-Seward Treaty*]; see also Cleveland, *supra* note 19, at 533.

<sup>47</sup> See Kuo, *supra* note 39, at 184; Cloutre, *supra* note 38, at 1.

<sup>48</sup> See THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, *supra* note 37.

employers flooded the labor pool in the United States with cheap, vulnerable labor, thus forcing all workers, local or foreign, to negotiate work at lower wages.<sup>49</sup> The rate of immigration had indeed created an incredibly vulnerable class of laborers, so much so that “concern for the mistreatment of immigrants” was a focus in Congressional debates on the “involuntary servitude” clause of the Thirteenth Amendment,<sup>50</sup> the Anti-Peonage Act of 1867,<sup>51</sup> the Civil Rights Act of 1870,<sup>52</sup> and the Padrone Act of 1874.<sup>53</sup>

This wave of immigrant admission was quickly tempered by a cry for restriction.<sup>54</sup> Many of the contract laborers did the most dangerous tasks on the railroad,<sup>55</sup> giving rise to fears in some American laborers that the Chinese labor presence would lower their own wages and make their own working conditions less safe.<sup>56</sup> It became a widely held belief that, contract labor or not, Chinese workers would work harder and for less wages than other laborers.<sup>57</sup> The Burlingame treaty, itself, made Chinese workers more vulnerable by requiring that no Chinese could ever become United States citizens and, therefore, would never own land or be able to compete with many employers.<sup>58</sup> The California legislature used this provision to tax the

---

<sup>49</sup> The practice of recruiting foreign labor to drive down domestic wages was the alien contract labor law, which became effective on February 26, 1885. See THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, *supra* note 37.

<sup>50</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States . . .”).

<sup>51</sup> Anti-Peonage Act, 42 U.S.C. § 1994 (1867).

<sup>52</sup> The Enforcement Act, 16 Stat. 140 (1870) (prohibiting the discrimination based on race, color, or previous state of servitude against persons seeking to register to vote).

<sup>53</sup> The Padrone Statute, 18 U.S.C. § 446 (1874) (“prevent[ing] the practice of enslaving, buying, selling, or using Italian children.”); see also *Proportionality*, *supra* note 29, at 436-37.

<sup>54</sup> See *Burlingame-Seward Treaty, 1868*, *supra* note 46.

<sup>55</sup> See Office of the Historian, *Chinese Immigration and Chinese Exclusion Acts*, available at <http://history.state.gov/milestones/1866-1898/ChineseImmigration> (last visited June 30, 2013) [hereinafter *Chinese Immigration and Chinese Exclusion Acts*].

<sup>56</sup> See Cloutre, *supra* note 38, at 1; Kuo, *supra* note 39, at 184.

<sup>57</sup> At the same time, Americans and European immigrants were travelling west to seek their fortunes in California’s gold mines themselves. This uncontrolled flood of newcomers from across the country and across the ocean resulted in violent clashes when the miners saw their increased competition for the limited supply of gold. See Kim, *supra* note 30, at 47; Cleveland, *supra* note 19, at 533, 540; see also *Chinese Immigration and Chinese Exclusion Acts*, *supra* note 55.

<sup>58</sup> “Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in

Chinese without violating the United States Constitution by imposing taxes and land ownership laws based on eligibility for citizenship, rather than national origin or other constitutionally protected class.<sup>59</sup> Unable to compete with business that required land ownership, Chinese laborers were stuck working for others and paying higher taxes.

The Chinese workers were not completely powerless, however, especially when they could convince their employers to join in protests against discriminatory legislation. One such example is when both Chinese workers and their employers abandoned the mines in response to the incredibly high 1855 foreign miner's tax, which caused the revenues in mining counties to be cut by half.<sup>60</sup> The California legislature quickly repealed the tax, however, when employers objected that it was harming their profits, depriving them of the cheap labor on which they had come to rely.<sup>61</sup> The importance of immigration to employers is further illustrated by the fact that, despite the violence and discrimination against the Chinese in the latter half of the 19th century, immigration continued largely unabated.<sup>62</sup> The vitriol of the restrictionist movement was tempered by the voices of businessmen who wanted the cheap Chinese labor and goods.<sup>63</sup> Furthermore, the Senate repealed every restrictionist law in California that the Supreme Court did not declare unconstitutional when businesses objected to the laws' economic impact.<sup>64</sup> Writing at the height of this tension, a San Francisco lawyer noted that the "sudden removal [of all Chinese] would . . . paralyze many branches of industry . . . depriving them of the cheap labor by which they are sustained."<sup>65</sup>

---

China, nor upon the subjects of China in the United States." See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debate on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 55 n. 77 (1996) (citing Burlingame Treaty art. VI, 16 Stat. 739, 740 (1868)).

<sup>59</sup> The miners also turned to violence, throwing Chinese miners out of mining camps in mob actions, and creating anti-Chinese riots. See Kim, *supra* note 30, at 47. It became common practice among employers to encourage hostilities and divisiveness along racial lines to thwart unionization attempts. See Salzer, *supra* note 35, at 122 n. 3 (citing John Higham's detailed work which paralleled the waves of antiforeigner sentiments and economic recessions).

<sup>60</sup> Cleveland, *supra* note 19, at 531.

<sup>61</sup> The monthly tax, being very steep, was repealed after one year when Chinese mining camps were depopulated and tax collectors were thrown out. In 1856, Congress reduced the license to fifteen percent of the price and remained in place until ruled unconstitutional in 1870. The monthly license fee became fifty percent of California's income from all sources, providing some incentive for the government to maintain Chinese immigration. See Kim, *supra* note 30, at 47-48; see also Cleveland, *supra* note 19, at 533.

<sup>62</sup> Torok, *supra* note 58, at 64.

<sup>63</sup> See Cleveland, *supra* note 19, at 535.

<sup>64</sup> See *id.* at 533-34.

<sup>65</sup> The same lawyer also mentioned that one quarter of the state's revenue came from the Chinese immigrants. See Cleveland, *supra* note 19, at 531.

With the completion of the Transcontinental Railroad in 1869, the demand for cheap Chinese labor waned and hostilities towards the now unemployed Chinese labor pool increased.<sup>66</sup> At the same time, Chinese laborers had begun realizing the American dream, earning enough as laborers to become business owners themselves and muting the voices of their former employers against restriction.<sup>67</sup> Efforts to eliminate, or severely restrict, immigration of Chinese laborers stood in direct conflict with the Burlingame Treaty, which brought the discussion of immigration out of California's legislature and into the national spotlight.<sup>68</sup>

With employers no longer in need of new immigrants, the political scales began to tip away from immigration and especially away from Chinese immigration.<sup>69</sup> The nation's two main railroads both declared bankruptcy in the 1870s, leading to a nationwide recession.<sup>70</sup> The Panic of 1873 and another recession in 1893 unsettled the major employers of immigrant labor: gold mines and railroads.<sup>71</sup> With business owners no longer invested in immigration, congressmen from border-states and special interest groups prompted President Hayes to re-negotiate the treaty, which included a concession by China that the United States had the right to restrict immigration into its territories.<sup>72</sup> Although the railroads had recovered by 1882, congressmen elected during the Panic were still in

---

<sup>66</sup> By 1876, both Republican and Democratic politicians had adopted anti-Chinese talking points, and Congress approved the formation of a Special Committee on Chinese Immigration of the State of California to issue a report. The report, entitled "Chinese Immigration: Its Social, Moral, and Political Effect" was proposed and drafted by congressmen who also pushed for the creation of the Committee, and conducted the hearings in California. It characterized the Chinese as undesirable people, accused Chinese women of corrupting American youth, and requested that the President re-negotiate the Burlingame treaty. *See Kim, supra* note 30, at 58-59; *see also* Kuo, *supra* note 39, at 184 (citing VICTOR LOW, *THE UNIMPRESSIBLE RACE* 27 (1982)).

<sup>67</sup> *See* Cleveland, *supra* note 19, at 542.

<sup>68</sup> President Hayes vetoed a bill passed by Congress in 1879 attempting to limit the number of Chinese allowed on U.S.-bound ships to 15 passengers. *See Kim, supra* note 30, at 59-60.

<sup>69</sup> By 1870, the anti-Chinese movement had reached the Eastern Seaboard's press, with newspapers in Massachusetts calling for complete Chinese exclusion when Chinese began to appear in that state. *See Kim, supra* note 30, at 41 (citing STUART CREIGHTON MILLER, *UNWELCOME IMMIGRANT: AMERICAN IMAGE OF THE CHINESE, 1785-1882*" (1969)).

<sup>70</sup> James M. Swank, *The Great Cleveland Panic of 1893*, in PHILADELPHIA: AMERICAN IRON AND STEEL ASSOCIATION, *TARIFF TRACT* No. 4, 3 (1896).

<sup>71</sup> *Id.*

<sup>72</sup> Hayes dispatched the Agnell Commission to China in an attempt to meet the demands of restrictionist groups, but still maintain good relations with China by amending the Burlingame Treaty. *See Kim, supra* note 30, at 59-60; *American Experience, Rutherford B. Hayes: 19<sup>th</sup> President*, PBS, <http://www.pbs.org/wgbh/Americanexperience/features/biography/presidents-hayes/> (last visited Oct. 25, 2013).

office on a platform that appealed to restrictionist fervor.<sup>73</sup> The Chinese Exclusion Act of 1882,<sup>74</sup> restricting immigration of Chinese laborers for ten years,<sup>75</sup> was considered lenient enough to both comply with the modified Burlingame Treaty and to address the fears of a nation verging on depression.<sup>76</sup> The power of the railroads at the negotiating table, however, may be seen in the provision of the Chinese Exclusion Act allowing laborers, currently present in the United States, to remain rather than requiring all Chinese laborers to be removed.<sup>77</sup>

### B. California Post-China

Exclusionist sentiments did not stop with Chinese immigration; soon, all immigrants,<sup>78</sup> particularly those from the “Asiatic zone,” were facing the same hostilities encountered by Chinese laborers.<sup>79</sup> Like Chinese miners, American landowners initially welcomed Japanese farm laborers because of their willingness to work for low wages under harsh conditions. However, once that much-lauded work ethic led to Japanese land-ownership and direct competition with American farmers, the welcome of the Japanese immigrants was significantly chilled.<sup>80</sup> Nativist fears grew as Japanese wives began joining their husbands and, unlike the Chinese, having children who were United States citizens and who could then own land.<sup>81</sup> Facing restrictionist pressures,<sup>82</sup> President Roosevelt entered into a

---

<sup>73</sup> See Swank, *supra* note 70, at 3.

<sup>74</sup> The Chinese Exclusion Act of 1882, 8 U.S.C. § 261 (1882) (prohibiting the immigration of Chinese laborers until its repeal by the Magnuson Act in 1943).

<sup>75</sup> President Arthur vetoed the Chinese Exclusion Act, which sought a twenty year exclusion of Chinese laborers in 1882, due to its conflicts with the Burlingame Treaty. However, at his urging, Congress submitted a revised bill, which would only limit immigration for ten years. See Kim, *supra* note 30, at 59-60.

<sup>76</sup> See Kim, *supra* note 30, at 59 (noting that a nation-wide depression from 1893-1897 prompted violence against immigrants in all sectors, originating from all countries); see also Salyer, *supra* note 35, at 122.

<sup>77</sup> The Chinese Exclusion Act of 1882, 8 U.S.C. § 261 (1882).

<sup>78</sup> When stating “all immigrants,” this does not include immigrants from Mexico and Canada. See OSCAR M. TRELLES AND JAMES F. BAILEY, IMMIGRATION NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED, 1950-1978 43 (1979).

<sup>79</sup> See Salyer, *supra* note 35, at 126-27 (claiming that Indians were “taking the jobs of (whites) who are part of the real population of the country”).

<sup>80</sup> See Salyer, *supra* note 35, at 126-27.

<sup>81</sup> The Japanese population increased by 100,000 from 1900 to 1908. See Victoria Erhart, *Asiatic Exclusion League*, ENCYCLOPEDIA OF IMMIGRATION (June 21, 2011), available at <http://immigration-online.org/363-asiatic-exclusion-league.html> (last visited June 25, 2013); Kim, *supra* note 30, at 101; U.S. Dep’t of State Office of the Historian, *Japanese-American Relations at the Turn of the Century, 1900-1922*, available at <http://history.state.gov/milestones/1899-1913/JapaneseRelations> (last visited June 12, 2013).

<sup>82</sup> In 1906, the fearful fervor was felt when the Asiatic Exclusion League convinced

“Gentleman’s Agreement” with Japan, whereby the United States would accept Japanese immigrants, so long as Japan promised not to send any laborers.<sup>83</sup> This agreement fell apart when laborers from Japan continued to arrive, and the United States economy began to experience the Great Depression.<sup>84</sup>

The United States Chamber of Commerce objected to the more extreme demands of the restrictionist movement, arguing that outright prohibition or even severe restriction of immigration would starve the country of much-needed labor.<sup>85</sup> Other employer organizations lamented the loss of labor created by the 1921 restrictions, claiming that even the tiny quotas were not being met and women and children were replacing skilled laborers.<sup>86</sup>

Prior to the Chinese Exclusion, the arguments invoked by employers that kept labor restrictions at bay were largely based on the inadequacy of the United States workforce to meet the needs of a rapidly expanding

---

San Francisco to segregate Chinese, Japanese, and Korean schoolchildren, violating an 1895 U.S. treaty with Japan. Japan was able to combat the exclusionist forces longer than China, not because of employer influence but because of military might. The only thing more powerful than the politics advocating exclusion, it seems, was Japan’s military, which had just defeated Russia and was making the United States nervous. See Erhart, *supra* note 81, at 1.

<sup>83</sup> Although San Francisco also excluded children from Korea and China from its public schools, only Japan had the bargaining power to negotiate a different arrangement for its citizens in the United States. Japan had recently defeated Russia, in 1905, and paranoia that Japan was planning to invade the United States was pervasive in California. See Salyer, *supra* note 35, at 127. The agreement was designed to preserve Japanese dignity in U.S. immigration laws and to allow the government of the United States to assuage the fears of its citizens about a hostile racial take-over. It required the United States to accept all Japanese citizens who had been issued a passport by the Japanese government, so long as Japan would only issue passports to “non-laborers or returning laborers, residents, or settled agriculturalists.” See Kim, *supra* note 30, at 102; see also Salyer, *supra* note 35, at 128.

<sup>84</sup> The Asiatic Exclusion League relied on the concept of wage preservation and drew on the fears of an “immigrant hoard” that had successfully excluded the Chinese eighteen years earlier. See Erhart, *supra* note 81; see also Salyer, *supra* note 35, at 128 (noting that the League increased pressure on the government once it became apparent that the Gentleman’s Agreement did not prevent Japanese women, married to Japanese laborers by proxy, from entering the U.S.). This practice created the proliferation of Japanese families in United States would lead to more native-born Japanese who qualified for American Citizenship. *Japanese Immigration: U.S. Chamber of Commerce Considers Placing Country on European*, WALL ST. J., July 27, 1931, at 2.

<sup>85</sup> The Chamber also argued that immigration to the U.S. tended to increase commerce with the country of origin and that immigration was vital to the success of American investments abroad. See *Immigration and Commerce*, WALL ST. J., Jan. 16, 1907, at A1; see also *Industrial Relations: Employers’ Associations in the United States*, 8 Int’l Lab. L. Rev. 367, 377 (1923).

<sup>86</sup> *Immigration Problem Affecting Industry: Cut in Supply of Skilled Labor by Quota*, WALL ST. J. Oct. 25, 1922, at 4.

industry.<sup>87</sup> Although, at the time, there were local workers willing and able to do the hard agricultural, railroad, and mining work available, the country's population simply was not able to support the nation's rapid economic growth.<sup>88</sup> After World War I, the United States economy had become accustomed to "the abnormal[ly high] wage levels of war industry," which could only be maintained with the employment of vulnerable immigrant labor.<sup>89</sup> Post-World War I, industry underwent numerous changes in the United States, including the movement of local laborers into the higher paid positions for which they had been trained during the way, causing many employers to decry their new dependency on the few remaining, unskilled laborers.<sup>90</sup> Even after the 1921 Act was passed, employers continued to fight for expansionist reform, notifying Congress that labor-intensive industries, such as agriculture, construction, manufacturing, and transportation, would "suffer irreparable injury" without admission of immigrants.<sup>91</sup> Unfortunately for employers and immigrants, the World War I had left the nation unwilling to embroil itself in Europe's turmoil by leaving the gates open to immigration.<sup>92</sup>

Despite the federal government's fears of European involvement, employers in labor-intensive industries were advantaged by the fact that, prior to the Chinese Exclusion Act, immigration issues were generally deemed to be within the purview of the individual states. The few instances of federal involvement pre-World War I appeared to encourage immigration as a boon to society: for example, the 1864 immigration act subtitled "an act to encourage immigration" and the elimination of head taxes as unconstitutional.<sup>93</sup> Indeed, despite the clamoring of restrictionists

---

<sup>87</sup> See Cleveland, *supra* note 19, at 540.

<sup>88</sup> See Susan B. Carter and Richard Sutch, *Historical Perspectives on the Economic Consequences of Immigration into the United States*, in *THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE* 325 (Charles Hirschman, Philip Kasinitz, & Josh DeWind eds. 1999) [hereinafter Carter and Sutch].

<sup>89</sup> *Immigration Embargo*, WALL ST. J., FEB. 22, 1919, at 1.

<sup>90</sup> *Immigration Problems to Come Up Soon: Government Will Endeavor to Form Its Policy*, WALL STREET J., Jan 15, 1919, at 7 [hereinafter *Immigration Problems to Come Up Soon*].

<sup>91</sup> *Immigration Problems to Come Up Soon*, *supra* note 90; *Urges Selective Immigration: President Grace of Bethlehem Steel Thinks It Best Solution*, WALL ST. J., May 19, 1923, at 1.

<sup>92</sup> "After the First World War, the legislative power of the United States felt that it was indispensable for the protection and welfare of the Nation to restrict immigration to this country." Statement of the Committee for the Increase of the Spanish Immigration Quota in the United States, House Hearings 1965 at 431 (statement of Jose Castro, Public Relations Secretary, Committee for the Increase of the Spanish Immigration Quota in the United States).

<sup>93</sup> *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895) (holding poll taxes to be unconstitutional); 1864 Immigration Act Sess. 1, Chap. 246, 13 Stat. 385, 38th Congress.

against the economic impact of immigrants, nineteenth century employers were able to foster an incredible influx of vulnerable workers.<sup>94</sup> However, restrictionists began to gain power by the 1920s, and congressmen began to propose immigration restrictions, selling the idea to employers as an effort to ensure that “men could be brought in when needed and kept out when not.”<sup>95</sup> The Great Depression, however, quickly silenced the debate over restrictionist measures, as both industry and immigration were stunted.<sup>96</sup> To combat the growing unemployment rate in the United States, President Hoover began reducing immigration in 1930.<sup>97</sup> The high unemployment rate led to a surplus of local labor available for the labor-intensive industries. Yet even during this time of general surplus in local labor, the Federal Farm Board asked the House of Representatives to slow restrictions on Mexican labor, since “[i]n the Southwest, where small vegetable crops are grown, American labor cannot stand the work because of the stooping, bending, and crawling involved.”<sup>98</sup> This request did not have much impact, however, as immigration ultimately declined as the Depression progressed.<sup>99</sup>

### C. *The Bracero Program*

When the United States entered World War II, it experienced the twin economic problems of a booming industry and a rapidly depleting workforce.<sup>100</sup> Congress established the War Manpower Commission to allocate the country’s labor between agriculture, munitions, and skilled labor, while also accounting for the 400,000 members of the workforce drafted into selected service each month.<sup>101</sup> Even when all those who had been unemployed during the Great Depression were placed in these newly created jobs, the war-powered industry needed even more labor.<sup>102</sup> The

---

<sup>94</sup> See Cleveland, *supra* note 19, at 536.

<sup>95</sup> *Immigration Regulation: Congressman Johnson Seeks to Have Men Admitted When Needed*, WALL ST. J., Oct. 5, 1923, at 3.

<sup>96</sup> See *Immigration no More a Menace to Labor: Fewer Admitted Than in Any Time in Past*, WALL ST. J., Dec. 10, 1931, at 15; see also *Immigration Total at Civil War Level: Aggregate of 97,139 Aliens Admitted to United States*, WALL ST. J., Aug. 5, 1931, at 11.

<sup>97</sup> *Immigration Laws: President Hoover Gets Report on Tightening of Restrictions*, WALL ST. J., Sep. 10, 1930, at 3.

<sup>98</sup> *Mexican Labor Immigration*, WALL ST. J. Feb. 11, 1930, at 3.

<sup>99</sup> *Immigration Up Slightly*, WALL ST. J., May 2, 1932, at 5; *Immigration Falls: Both Quota and Non-Quota Totals Off Sharply from Previous Year*, WALL ST. J. Dec 22, 1932, at 9.

<sup>100</sup> Julia Henderson, *Foreign Labour in the United States during the War*, 52 INT’L LAB. L. REV. 609, 609-10 (1945).

<sup>101</sup> See SAMUEL ROSENMAN, 1942: PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 44 WAR MANPOWER COMMISSION 209 (1950).

<sup>102</sup> See *id.*

United States then turned to its neighbors who were facing high unemployment rates and entered into treaties designed to bring workers temporarily to the United States.<sup>103</sup> One such program was the Bracero Program which sought to bring labor to the United States from other countries through treaties, rather than domestic legislation.<sup>104</sup> The United States negotiated these treaties with the concerns of the labor movement, as well as concern for the general well-being of the workers, in mind.<sup>105</sup> These treaties required employers to pay for travel expenses, bond for the safe return of all workers, and provide housing, food, and medical care to agricultural workers.<sup>106</sup> Over 400,000 citizens of Mexico, the British West Indies, and Honduras worked for United States railroads, industrial plants, and agricultural enterprises.<sup>107</sup>

Despite the treaties the United States entered into during the 1930s, the decades of isolation and labor union influence in the United States were hard to overcome. The National Management-Labor Policy Committee, which included representatives of railroad and agricultural interests, might have possessed the power to determine where immigrant labor should be placed, but the Commission would not certify a need for foreign labor without the approval of the labor unions.<sup>108</sup> Unions, such as the United Auto Workers (“UAW”), resisted the importation of labor, claiming it would be unnecessary if the federal government and employers would remedy wages, hours, and working conditions, thus encouraging more Americans to take the available jobs.<sup>109</sup> The UAW was able to prevent the

---

<sup>103</sup> Mexico Non-Agricultural Workers, 57 STAT. 1353-57 (1943) (delineating remarks made by the Mexican ambassador in an agreement between the United States and Mexico regarding the recruitment of non-agricultural, Mexican workers

<sup>104</sup> *Admission of Mexican Farm Labor Authorized* (Sep. 15, 1942), 5.

<sup>105</sup> “The clauses in the international agreements guaranteeing that these workers would not be used to displace other workers or for the purpose of reducing rates of pay previously established were a signal victory for the organised labour [sic] movement.” Henderson, *supra* note 100, at 617.

<sup>106</sup> Mexico Non-Agricultural Workers, 57 Stat. 1353-57 (1943) (recording the remarks of the American Ambassador to the Mexican Minister of Foreign Affairs); The Bracero Program, Pub. L. No. 78, 65 STAT. 119 (Aug. 4, 1942), *available at* [library.uwb.edu/guides/usimmigration/1951\\_public\\_law\\_78.html](http://library.uwb.edu/guides/usimmigration/1951_public_law_78.html); Exec. Order No. 8802, 3 C.F.R. 957, (1941).

<sup>107</sup> “These industries all fell within the mandate given to the War Manpower Commission by the Congress to import natives of the Western Hemisphere for “war-essential” industries only.” Henderson, *supra* note 100, at 611, n.1.

<sup>108</sup> See Henderson, *supra* note 100, at 617.

<sup>109</sup> “The United Automobile Workers, which has maintained a solid front against the importation of foreign workers to the forges and foundries in Michigan, in 1944 resolved that: The cost of importing workers from other countries, the creating of housing facilities for them and the cost of transporting them back to their native countries after the war could more logically and more fairly be applied to raising existing wage standards in the foundries and thus attracting American workers.” Henderson, *supra* note 100, at 618.

importation of labor into their industry during WWII, but not all unions had the same success.<sup>110</sup> Agriculture appears to be the industry that carried the most weight on the employer side of this debate, since the first and last international agreements in place during WWII provided for the importation of agricultural workers.<sup>111</sup>

Toward the end of the war, as the demand for foreign laborers decreased, Congress began repatriating the workers, and by 1945, all but the agricultural workers had been removed from within the United States' borders.<sup>112</sup> By this time, it had become apparent that the labor system in place was not equipped to enforce the lofty protections of both the United States and foreign workers that the federal government stipulated to in the various treaties entered into during World War II.<sup>113</sup> Nevertheless, the agricultural industry still managed to convince Congress that it needed immigrant labor, and the Bracero Program survived through several renewal agreements until 1964.<sup>114</sup> The reach of agricultural employers was also apparent in the 1952 Immigration and Nationality Act ("INA") "Texas Proviso," which made "harboring" undocumented immigrants a crime but excluded employment from the definition of "harboring."<sup>115</sup> Indeed, the provision was later seen as legislative protection for the economic pull factors that perpetuated illegal immigration of the most vulnerable workers.<sup>116</sup>

In 1964, the Bracero Program was stopped after the plight of foreign workers was documented before Congress, and guest worker regulations for workers from Mexico and other countries began.<sup>117</sup> By 1964, it became

---

<sup>110</sup> Henderson, *supra* note 100, at 618.

<sup>111</sup> The agreements were inspired by "more than a year of agitation by southwestern agricultural interests to obtain Mexican workers to help in harvesting the record crops of sugarbeet and citrus fruit." *Id.* 611.

<sup>112</sup> *Id.* at 610.

<sup>113</sup> Contracts guaranteeing fair wages and safe conditions were not honored because compliance reports were collected by local offices and notoriously inconsistent, varying based on the "personal qualifications, the attitudes, and the integrity of field personnel." *Id.* at 616.

<sup>114</sup> The program attempted to ensure that immigrants would only be used for farm labor by limiting admission to "skilled agriculturalists," and not mere farm labor. TRELLES AND BAILEY, *supra* note 78, at 423-424.

<sup>115</sup> Testimony of Edward Kennedy during a Senate Session, 40:00 (C-Span, Mar. 29, 2006), available at [http://www.c-spanvideo.org/program/Senate\\_Session3673&start=2255](http://www.c-spanvideo.org/program/Senate_Session3673&start=2255) [hereinafter Edward Kennedy Testimony Mar. 29, 2006].

<sup>116</sup> Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFO. SOURCE (Sep. 2005), available at <http://www.migrationinformation.org/usfocus/display.cfm?ID=332> [*The Declining Enforcement of Employer Sanctions*]; see also Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 41:30.

<sup>117</sup> See Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 40:20 (stating that Public Law No. 78 was designed to import agricultural workers from Mexico and expired on December 31, 1964). After December 31, 1964, former Braceros would be able to immigrate under the INA. Raymond F. Farrell, *Report on the Commissioner of*

apparent that despite the legislative protections for immigrant agricultural workers, the Bracero Program was incredibly exploitative, and agricultural employers took advantage of the vulnerable position in which Bracero workers were placed.<sup>118</sup> Congress, instead, enacted a new program that ended legal immigration of seasonal agricultural workers but still allowed employers to hire undocumented workers without fear of repercussions, leading to a drastic increase in illegal immigration.<sup>119</sup>

### III. CURRENT LAW: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Although the 1965 Immigration and Nationality Act (INA), spearheaded by Senator Ted Kennedy, saw the end of the Bracero Program, the ever widening divide between United States and Mexican economic stability and an increasingly convoluted labor system continued to supply the cheap labor that American industry demanded.<sup>120</sup> The 1952 INA, which created the backbone for modern immigration law, was largely a codification of laws already existing at that time, sprinkled with a healthy bolstering of national security concerns.<sup>121</sup> United States Immigration

---

*Immigration and Naturalization*, ATT'Y GEN. ANN. REP. 394, 396 (1965).

<sup>118</sup> Under section 101(a)(15)(h) of the present act, we have allowed thousands of Mexicans and other foreign nationals to be imported into this country to work at temporary farm labor. These temporary farm laborers have been exploited by American farmers and their exploitation has led to a corresponding exploitation of American workers. The harvest of shame of this country is that we should have allowed such poor working conditions, poor wages, poor hours, poor health standards, and poor living conditions to exist for our own citizens, let alone foreign nationals." Shull, Leon. Statement to the House, Committee on the Judiciary. *To Amend the Immigration and Nationality Act and for Other Purposes*, Hearing, Mar. 4, 1965 (Serial 7) (accessed Aug. 5, 2013).

<sup>119</sup> "For the first time in a decade, the number of deportable aliens located exceeded 100,000. The 110,371 deportable aliens located by Service officers was a 27.5 percent increase over 1964. One factor in this increase was the greater number of Mexican nationals found in illegal status, an increase of 26.2 percent from 43,844 in 1964 to 55,349 in 1965. As in fiscal year 1964, Mexican nationals accounted for approximately 50 percent of the aliens located in illegal status." Farrell, *supra* note 117, at 405-406; see also Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 41:30. "Because there are still very persistent efforts to import farm labor even though Congress has expressed a desire to end this device for depressing the wages and working conditions of our domestic farmworkers, we urge adoption of an amendment to Public Law 414 to prohibit the importation of such workers." Paul Jennings Statement to the House, Committee on the Judiciary, *To Amend the Immigration and Nationality Act and for Other Purposes*, Hearing, Mar. 4, 1965 (Serial 7) (accessed Aug. 5, 2013).

<sup>120</sup> U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES" A DOCUMENTARY HISTORY 252 (Michael LeMay & Elliot Robert Barkan, eds. 1999).

<sup>121</sup> Kim, *supra* note 30, at 150.

Reform and Control Act (“IRCA”) was an effort by Congress to remedy the labor system, trying to meet employer needs while still discouraging employers from circumventing the system by imposing sanctions. The failure of the IRCA, thus, serves as a demonstration of the power of employers and a lesson for current reformers. Today, undocumented immigration remains high, though has reduced in recent years thanks to an increase in border security and worksite enforcement, as well as the lowered demands of employers in an economic recession.<sup>122</sup>

#### A. 1965 INA: Braceros Exchanged for Professionals

During World War II, America began making large strides in technological advancement.<sup>123</sup> The fields of engineering, medicine, and technology expanded quickly, and education could not keep up.<sup>124</sup> After the war, America’s high tech industry began to thrive, and a new consumer for immigrant labor was born. The 1965 INA was designed, for among other reasons, to make it easier to bring immigrants with special skills to the United States.<sup>125</sup>

Discussions of immigration reform in 1965 acknowledged the importance of the skilled professional immigrant to the success of America’s rapidly expanding industries.<sup>126</sup> Although blue-collar laborers were facing high unemployment rates, Congress recognized the immediate need for skilled workers and created the H-1B visa.<sup>127</sup> The unions did not have the same veto power that the United Auto Workers had during World War II and, thus, were only able to negotiate a requirement that the Secretary of Labor would certify the need for additional skilled immigrants.<sup>128</sup>

---

<sup>122</sup> A recent study shows that illegal immigration from Mexico has stopped and, possibly, reversed this year. Some credit President Obama’s strict, if quiet, enforcement of IRCA combined with the scarcity of work created by the economic downturn for the changing trend. See Jeffrey Passel, D’Vera Cohn, & Ana Gonzalez-Barrera, *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW HISPANIC CENTER 6 (Apr. 23, 2012), available at <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less> [hereinafter Passel, Cohn, & Gonzalez-Barrera].

<sup>123</sup> See 111 Cong. Rec. S11, 24456 (Sep. 20, 1965) (statement of Sen. Fong) [hereinafter 111 Cong. Rec. S11].

<sup>124</sup> See *id.* at 24460.

<sup>125</sup> The new law also sought to address the racism and discrimination that had been glaringly present since the Chinese Exclusion Acts were passed, that were a “standing affront to millions of our citizens and our friends overseas.” Ottinger, Richard L., Statement to the House, Committee on the Judiciary, *A Bill To Amend The Immigration and Nationality Act and For Other Purposes*, Mar. 4, 1965, 417 (Serial No. 7).

<sup>126</sup> 111 Cong. Rec. S11, 24460 (statement of Sen. Fong).

<sup>127</sup> 111 Cong. Rec. S11, 24461 (statement of Sen. Fong).

<sup>128</sup> Edward Kennedy Testimony Mar. 26, 2006, *supra* note 115.

In response to concerns about high unemployment rates,<sup>129</sup> advocates of the 1965 law argued that highly skilled immigrants created far more jobs than they occupied.<sup>130</sup> Despite the overall disapproval of the unions, some union members also came out in support of the admission of skilled immigrants, making speeches before Congress peppered with patriotism and the importance of immigrants to American culture.<sup>131</sup> This move coincided with an increase in international labor organization and a desire to ensure that skilled workers would not be made vulnerable to employer exploitation on arrival in the United States.<sup>132</sup>

Although preference was given to high tech workers for the H1-B visas, five times more agricultural and other unskilled workers were admitted into the country than skilled workers in 1964.<sup>133</sup> This was because these vulnerable, temporary workers were still in greater demand. Unfortunately, these unskilled laborers also did not benefit from the camaraderie shown for those in high tech positions. Local employees, in fields that vulnerable, immigrant labor was rapidly dominating, petitioned Congress to severely restrict immigration.<sup>134</sup> With the support of the unions, many of the provisions requested became law.<sup>135</sup> Other voices also

---

<sup>129</sup> “Since the United States is already in the position of being unable to employ all of its citizens and is forced to engage in an antipoverty war, it would be most unwise to aggravate that position by allowing an influx of a horde of immigrants.” United States Day Committee, Statement to the House, Committee on the Judiciary, *A Bill to Amend the Immigration and Nationality Act and For Other Purposes*, Mar. 8, 1965, 461 (Serial No. 7).

<sup>130</sup> See Ottinger, *supra* note 125, at 417.

<sup>131</sup> Paul Jennings, president of the International Union of Electrical, Radion & Machine Workers, AFL-CIO said that a great percentage of the workers his union represented were “sons and daughters of Immigrants to our great country. Many others are themselves immigrants who came here in response to the promise of freedom and opportunity for a better life which America holds out to all the world. Whether 1st generation, 2d, or 10th, all have made a lasting contribution to the rich culture, the abundance, the special qualities of greatness and dynamism which we call America.” Jennings, *supra* note 119, at 422.

<sup>132</sup> High tech and nursing industries carried the day when highly skilled workers were given first preference in the 1965 INA. See Farrell, *supra* note 117, at 394, 402; see also Jennings, *supra* note 119, at 422. The American Nurses’ Association pushed for review of credentials to ensure minimum professional qualifications that would safeguard both the interests of nurses already present from having to compete with a large, under-qualified labor pool. American Nurses’ Association, Statement to the House, Committee on the Judiciary, *To Amend the Immigration and Nationality Act and for Other Purposes*, Hearing, Mar. 4, 1965 (Serial 7) (accessed Aug. 5, 2013).

<sup>133</sup> Farrell, *supra* note 117, at 396.

<sup>134</sup> See *id.*; see also Jennings, *supra* note 119, at 423.

<sup>135</sup> See Jennings, *supra* note 119, at 423 (“We seek the addition of a requirement that the jobs be permanent-not seasonal--which are to be filled by admission of persons with special skills In short supply; that a shortage of such skills be declared only after it has been shown that workers are not available at the prevailing wage; and that the responsibility for making such a finding be that of the Secretary of Labor.”).

joined the debate, arguing against employers' insistence that immigrants were necessary because citizens were unwilling to perform the difficult manual labor. Opponents of the H1-B visas argued that either the employers or Congress should induce American workers to take back immigrant dominated jobs by providing better working conditions and wages.<sup>136</sup> Indeed, although the nation's immigration laws were more humanitarian and provided for the admission of multitudes of skilled immigrants, the tide of cheap labor was beginning to displace traditional low-wage workers which resulted in cultural and political backlash.<sup>137</sup>

*B. Learning from IRCA: The Importance of Employer Cooperation*

IRCA was the first immigration law that focused solely on the employment of immigrants and strove to protect *all* workers, whether citizens or not.<sup>138</sup> It was an attempt to address the problems created by Congress turning a blind eye to employer practices that both encouraged violations of United States' laws and made workers infinitely more vulnerable. The IRCA relied on three prongs for success: (1) the H-2A visa program to allow employers to lawfully obtain temporary agricultural labor and amnesty for some workers already present in the United States; (2) sanctions against employers who encouraged illegal immigration by hiring undocumented workers; and (3) the strengthening of border security to prevent unlawful crossings.<sup>139</sup> Non-citizens would not face sanctions for simply working in the United States without authorization, thus attempting to ensure that these workers would not be made more vulnerable by IRCA.<sup>140</sup> For the first time, United States citizens were subject to potentially large fines for breaking immigration laws and hiring undocumented workers, rather than the penalties being raised solely against the immigrants themselves.<sup>141</sup> To ensure that employers did not have an incentive to engage in discrimination to avoid potential liability, IRCA required employers to keep I-9 forms establishing eligibility to work in the

---

<sup>136</sup> Shull, *supra* note 118, at 436 ("It is time we denied entrance to any temporary farmworkers and insisted that the American farm community create standards, and if not, accept legislated standards that would make American workers glad to work on the American farm.").

<sup>137</sup> See Farrell, *supra* note 117, at 396; see also Jennings, *supra* note 119, at 423.

<sup>138</sup> *Review and Outlook: The Immigration Nightmare*, WALL ST. J., Nov. 10, 1986, at 11.

<sup>139</sup> See Ramano L. Mazzoli and Alan K. Simpson, *Enacting Immigration Reform, Again*, WASH. POST, Sep. 15, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401179.html>

<sup>140</sup> Michael J. Wishnie, *Prohibiting Employment of Unauthorized Immigrants*, 2007 U. CHI. LEGAL F. 193, 194 (2007) (explaining that sanctions for non-citizens under IRCA are based on fraud or misrepresentation of documentation, but not on the actual employment.).

<sup>141</sup> *Changing the Rules*, *supra* note 5, at 1.

United States for all employees, regardless of race, ethnicity, national origin, or any other factor.<sup>142</sup> The success of the entire system hinged on the INS being able to effectively execute the sanctions against employers to function as an effective deterrent. Despite the goals of IRCA to get at the root of undocumented immigration by targeting employers, the powerful interests of America's job creators prevailed, particularly when paired with clumsy handling by the enforcing agency; consequently, a law that looked very good on paper fell completely apart.<sup>143</sup>

The Texas Proviso flooded the labor pool with people who had no other route to jobs in the United States, while creating little disincentive for employers to encourage this illegal behavior.<sup>144</sup> Although an immigrant might face deportation and criminal charges if caught crossing the border, once he has braved these challenges, there was no provision preventing him from accepting one of the plentiful jobs for vulnerable workers. The 1965 INA only exacerbated this problem by making undocumented workers more vulnerable than ever before; employers could either fire undocumented workers with impunity or even have them deported if they tried to negotiate for better terms of employment.<sup>145</sup>

Once again, the restrictionist tide began to rise, but this time, in addition to shaping more favorable legislation for themselves, employees also appealed directly to their congressmen.<sup>146</sup> In 1973, leaders from the AFL-CIO and the National Association for the Advancement of Colored People ("NAACP") pushed to eliminate the Texas Proviso, which would make the employment of undocumented immigrants illegal, effectively raising the cost of hiring workers.<sup>147</sup> As a result of this push, the General Accounting Office ("GAO") began an investigation into the effectiveness of such a law in other countries and found that sanctions were largely ineffective because they were either too easy to evade or not strong enough to serve as a deterrent.<sup>148</sup> However, after 13 years, the political chemistry in

---

<sup>142</sup> Despite the non-discrimination provisions, "IRCA was widely criticized for having created an incentive to discriminate against prospective employees who "looked or sounded foreign," while failing to curb illegal immigration." Testimony of Sen. Orrin Hatch during a Senate Session, 06:53 (C-Span May 1, 1996), *available at* <http://www.c-spanvideo.org/program/SenateSession1680&start=24807>

<sup>143</sup> See *supra* note 140 and accompanying text.

<sup>144</sup> See Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 42:00.

<sup>145</sup> *Prohibiting Employment of Unauthorized Immigrants*, *supra* note 140; see also Solis et al., *supra* note 140, at 391-93.

<sup>146</sup> Interview with an immigration lawyer with over two decades experience (interview on file with the author).

<sup>147</sup> *The Declining Enforcement of Employer Sanctions*, *supra* note 116.

<sup>148</sup> "In 1982, the GAO responded with a report concluding that, in the 19 countries surveyed, sanctions were largely ineffective for two reasons: employers either were able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts; or the laws generally were not being effectively enforced because of strict legal constraints on investigations, noncommunication

Congress was finally right to create sanctions for employers who hired illegal immigrant, and IRCA was passed.<sup>149</sup> However, the success of the restrictionists against pro-immigration employers was not long-lived. After the passage of IRCA, Employers took issue with the difficulties they would now face: not only was it much harder to fill urgent vacancies with foreign professionals, but the new law apparently also prohibited and punished employers who refused to hire foreign employees.<sup>150</sup> These protests, however, did not bring about the downfall of IRCA.

The INS responded immediately to its new responsibilities, taking on hundreds of new attorneys to litigate employer sanctions cases, as well as examiners and investigators to conduct I-9 audits; the INS began enforcing the new I-9 requirements with vigor.<sup>151</sup> Despite a promising start, the INS has never properly enforced IRCA's employer sanctions.<sup>152</sup> What happened next is largely a matter of speculation, but the end result is clear; when the INS failed to pursue employer sanctions, IRCA failed.<sup>153</sup> Rather than focus on auditing employers' I-9 forms to issue sanctions from a detached administrative office, the INS engaged in highly publicized, dramatic workplace raids.<sup>154</sup> The American public was faced with images of poor, minority laborers being rounded up by an administrative agency, while their children cried in the background.<sup>155</sup> The distaste that the INS's enforcement of IRCA created in the United States citizenry resulted in a major scaling back of the INS's enforcement capabilities and a refocusing of the agency's limited resources on border security, minor I-9 infractions, and individual removal proceedings.<sup>156</sup>

According to one immigration attorney practicing at the time, when not conducting raids that served as publicity disasters, the INS instead focused on smaller sanctions, often directed at small, unsophisticated employers who did not understand the I-9 forms.<sup>157</sup> The sanctions were small enough to discourage hiring an attorney to adjudicate a claim, but they were large

---

between government agencies, lack of enforcement resolve, and lack of personnel." *Id.*

<sup>149</sup> Interview, *supra* note 146.

<sup>150</sup> See Lawrence Lataif, *Manager's Journal: Immigration Law May Alienate Your Foreign Professional Staff*, WALL ST. J., May 11, 1987, at 1; see also *supra* note 142 and accompanying text.

<sup>151</sup> Jeanne Saddler, *Businesses Face Big Fines for Breaking Immigration Law*, WALL ST. J., Feb. 10, 1989 at 1.

<sup>152</sup> Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 42:00.

<sup>153</sup> "Blunt enforcement tools (border security increases and limits on immigrant rights) have not quenched employers' thirst for immigrant workers." Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 42:30.

<sup>154</sup> See *supra* note 153 and accompanying text.

<sup>155</sup> Interview, *supra* note 146.

<sup>156</sup> See Matt Moffet, *The Gatekeepers: Immigration Service Has Mammoth Task, Minimal Resources --- Border Patrol in Southwest Lacks Manpower to Cope With Illegal Immigrants --- Koreans at the Rio Grande*, WALL ST. J., May 9, 1985 at 1.

<sup>157</sup> See Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115.

enough to inspire the employers to complain to their representatives in Congress.<sup>158</sup> Since the vast majority of those sanctioned did not even employ non-citizens, let alone unauthorized immigrants, the congressmen with the latest complaint from their constituents would simply ask the INS district director or the INS director in Washington, D.C. to focus the agency's efforts on another state.<sup>159</sup> There was no big amendment to IRCA nor was there an intensive budget cut. What existed was the voices of hundreds of employers annoyed by the INS's pinpricks and a public perception (earned or not) that the INS was hurting families and failing in their job to shut down the major offenders.<sup>160</sup>

The 1970 GAO study of similar programs in other countries became a prediction for IRCA in the United States - low levels of enforcement and poor inter-agency communication rendered IRCA ineffective at preventing illegal immigration.<sup>161</sup> Once it became clear to employers that the INS would not be enforcing IRCA in a meaningful way, they became less cautious about ensuring that immigrant workers had documentation, and the immigration rates that had fallen directly after 1986 and the "Reagan Recession," once again skyrocketed.<sup>162</sup> Since the collapse of IRCA, no other employment-based immigration reform programs have been able to rally the necessary political support.<sup>163</sup> Another reason the IRCA failed is its requirement that employers act "knowingly" in order to incur penalties.<sup>164</sup> Employers were able to negotiate for this factor in the final law and have prevailed in court where a mere examination of a document, without knowledge of whether it is fraudulent or not, defeats sanctions.<sup>165</sup>

---

<sup>158</sup> Interview, *supra* note 146.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> In 1994, the US Commission for Immigration Reform raised concerns about insufficient resources for enforcement of employer sanctions and other labor standards. See Bruce Brownell, *Illegal Immigration Continues Unabated By New Measures --- Mexicans Continue to Enter U.S for Work While Jobs Still Go Begging at Home*, WALL ST. J., June 9, 1988 at 1 [*Illegal Immigration Continues*].

<sup>162</sup> Interview, *supra* note 146. While this rise in immigration rates is related to many other factors, non-enforcement of the law improved employers' willingness to ignore it.

<sup>163</sup> Immigration and Customs Enforcement ("ICE"), the agency now tasked with enforcement of the employer sanctions, is chronically overburdened with enforcing over 400 statutes, and in-depth, resource-intensive investigations required for many of them. Other changes in immigration law have been related to national security interests or agency regulations. See 8 U.S.C. § 1324a(a)(1)(A); Schmall, *supra* note 11, at 378.

<sup>164</sup> *Prohibiting Employment of Unauthorized Immigrants*, *supra* note 140; see also *supra* note 1401 and accompanying text.

<sup>165</sup> See, e.g., *Collins Foods Int'l, Inc. v. U.S. Immigration and Naturalization Serv.*, 948 F.2d 549 (9th Cir. 1991) (holding that manager met threshold of rebuttable presumption against knowingly hiring an undocumented worker where manager checked employee's social security, but did not compare it to the examples provided by INS).

With the creation of “E-Verify,” an electronic database into which employers can enter a new hire’s information to check that they are properly authorized to work in the United States, it is even easier for employers to escape sanctions because it creates a rebuttable presumption that the employer did not “knowingly” hire an undocumented worker who passed through E-Verify.<sup>166</sup> Once an employee had passed through E-Verify, the employer can no longer be sanctioned for “knowingly” hiring an undocumented worker, even if the employer had provided the documents to the employee, without additional evidence of wrongdoing.<sup>167</sup>

The failure to enforce employer sanctions means that employers and consumers have benefited from low-cost goods, services, and cheap labor, and, at the same time, Congress was saved the trouble of making “politically difficult decisions about expanding legal, low-skilled immigration.”<sup>168</sup> Undocumented immigrants found work in every state, displacing traditional low-wage workers in industries such as construction, food services, and agriculture.<sup>169</sup> By 2006, it was clear that “businesses depend on undocumented workers to stay in business.”<sup>170</sup> Like Chinese and Japanese workers in the 1800s and Mexican workers in the 1950s, the most vulnerable immigrants can almost always find work in physically demanding, low-paying fields that less vulnerable workers are unwilling to do.<sup>171</sup> The Chamber of Commerce has made the same arguments about undocumented immigrants now as observers made about Chinese immigrants 150 years ago: “if you kick out 11 million people it will bring our economy to a screeching halt.”<sup>172</sup>

Despite its early setbacks, in recent years IRCA enforcement has been greatly, if quietly, increased. President Barack Obama has focused more on audits of employers than on workplace raids which, combined with a drastic downturn in the economy, resulted in the first negative growth in immigrant populations in decades.<sup>173</sup> Some unions have joined the effort, acknowledging that enforcement of fair labor standards requires that all workers, regardless of their legal status, be empowered to enforce the labor laws.<sup>174</sup>

---

<sup>166</sup> See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

<sup>167</sup> *Id.*

<sup>168</sup> Edward Kennedy Testimony Mar. 29, 2006, *supra* note 115, at 43:00.

<sup>169</sup> See *id.* at 43:20.

<sup>170</sup> *Id.* at 43:20.

<sup>171</sup> “The Iowa economy is hungry for immigrants who do work that is physically demanding and dangerous.” Testimony of Sen. Tom Harkin during Senate Session, 1:07:30 (C-Span Mar. 29, 2006), available at <http://www.c-spanvideo.org/program/SenateSession3673&start=2255> [hereinafter Testimony of Tom Harkin].

<sup>172</sup> Testimony of Tom Harkin, *supra* note 171, at 1:10:50 (quoting U.S. Chamber of Commerce).

<sup>173</sup> See Passel, Cohn, & Gonzalez-Barrera, *supra* note 122, at 6.

<sup>174</sup> See Vernon M. Briggs, “Immigration Policy and Organized Labor: A Never-

Now, the hunger for skilled professionals, which emerged in 1965, rumbles on. Congress adopted the H-1B visa in an effort to provide industry with the professionals that America was not producing.<sup>175</sup> Recently, efforts have been made to raise the H-1B visa cap to meet the needs of high tech industry.<sup>176</sup> The unprecedented economic growth in the information technology, hospitality, labor, and construction industries in 2006, much like the railroads of the 1850s and the wartime expansion of the 1940s, can no longer be sustained without immigrant workers.<sup>177</sup> What happens next is anyone's guess, but will most likely be a product of all that has come before.

#### IV. THE FUTURE: DON'T STOP DREAMING

The next big components of immigration reform are the DREAM<sup>178</sup> and Ag Jobs<sup>179</sup> acts. Resembling the logic that led to the passage of the 1965 INA, the DREAM Act is based primarily on humanitarian concerns and a desire to maintain the United States' competitiveness in skilled labor. The DREAM Act would grant a path to citizenship for those who came to the United States as children and who can benefit society as educated professionals and not as cheap labor. Although, like the 1965 efforts to encourage skilled immigration, passage of the DREAM Act faces little employer or union opposition, some reform movements are reluctant to focus on this highly educated demographic, lest it de-energize the immigration movement before less skilled workers can benefit. Despite their concerns regarding the impact on less skilled workers, both employers and unions appear to have become part of the discussions on Comprehensive Immigration Reform taking place right now; there is a focus on bringing the best and the brightest to the United States and on ensuring that new workers do not threaten the working conditions of current workers.<sup>180</sup>

---

Ceasing Issue," Cornell University ILR School, Briggs Public Testimonies, at 2 (May 24, 2007) Testimony before the Subcommittee on Immigration of the Judiciary Committee of the U.S. House of Representatives. Ithaca, NY, *available at* <http://digitalcommons.ilr.cornell.edu/briggstestimonies/25/>.

<sup>175</sup> Testimony of Edward Kennedy during Senate Session, 4:49:38 (C-Span Sep. 21, 2000), *available at* <http://www.c-spanvideo.org/program/SenateSession2538&start=17367> [hereinafter Edward Kennedy Testimony Sep. 21, 2000].

<sup>176</sup> *See id.*, at 4:56:50. (advocating for the increase of the H-1B visa fee to be used for improving training in IT field for U.S. citizens).

<sup>177</sup> *Id.* at 4:59:00.

<sup>178</sup> This bill was most recently seen in the House of Representatives as H. R. 1842 in 2010.

<sup>179</sup> This bill was most recently seen in the House of Representatives in 2009 as H.R. 2414.

<sup>180</sup> *See* Ashley Parker, *Immigration Talks Hit Snag Over Business and Labor Concerns*, THE CAUCUS: THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Mar. 22, 2013),

The Ag Jobs bill has also been making the congressional rounds for several years.<sup>181</sup> It proposes to assist some of the least skilled, undocumented immigrants and their employers by providing amnesty and a path to citizenship.<sup>182</sup> Discussions of the Ag Jobs bill before Congress are perhaps some of the most inspiring of the latest immigration reform efforts, demonstrating the respect that can emerge between employers vulnerable to even small market shifts and their equally vulnerable employees.<sup>183</sup>

There are numerous obstacles facing both the DREAM and Ag Jobs acts and most come from their “amnesty” provisions.<sup>184</sup> Criticism of IRCA, reflected in the current criticism of the DREAM Act and Ag Jobs, revolved around the ease of obtaining fraudulent documents and the injustice of granting “amnesty” to some workers while criminalizing the employment of others.<sup>185</sup> IRCA provisions similar to those proposed in the new legislation drew energetic opposition,<sup>186</sup> and opponents of both the DREAM Act and Ag Jobs have used the failure of IRCA, with its unpopular “amnesty” provisions, in an attempt to squash the legislation. Additionally, some opponents to adopting any amnesty in the reform legislation take issue with the possibility of granting rights to those who flout the country’s laws by even being present in the United States<sup>187</sup> Another recent development in the field of immigrant vulnerability that was challenged by employers and eventually defeated in Congress, may help in the analysis: H-2B regulations.

#### A. *Lessons from H-2B Reform: Employers Need Cheap Labor*

Recent developments in the H-2B visa program illustrate the influence of modern employers. It also showcases rhetoric, largely unchanged from its use in the 1860s, about the need for vulnerable labor. The discussion is the most recent warning to immigration reformers that new measures will fail when employers are not on board.

---

[http://theaucus.blogs.nytimes.com/2013/03/22/immigration-talks-hit-snag-over-business-and-labor-concerns/?\\_r=0](http://theaucus.blogs.nytimes.com/2013/03/22/immigration-talks-hit-snag-over-business-and-labor-concerns/?_r=0) (last visited Oct. 27, 2013).

<sup>181</sup> See *Summary of AgJOBS: The Agricultural Job Opportunities, Benefits and Security Act of 2007*, IMMIGRATION POLICY CENTER (Jan 1, 2008), <http://www.immigrationpolicy.org/just-facts/summary-agjobs-agricultural-job-opportunities-benefits-and-security-act-2007>.

<sup>182</sup> *Id.*

<sup>183</sup> See generally The House Committee Judiciary on Immigration, Citizenship, Refugees, Border Security & International Law, *Immigrant Farm Workers*, at 02:00-02:46, (C-Span, Sep. 24, 2010), available at <http://www.c-spanvideo.org/program/295639-1> [hereinafter *Immigrant Farm Workers*].

<sup>184</sup> See generally *Immigrant Farm Workers*, *supra* note 183.

<sup>185</sup> See *supra* note 2 and accompanying text.

<sup>186</sup> Deborah M. Levy, *Better Immigration Rules, Not More Patrols*, WALL ST. J., Jan. 29, 1986 at 1.

<sup>187</sup> Keith Cunningham-Parmeter, *supra* note 8, at 1363.

The H-2B visa program, much like the Bracero Program, is used for importing temporary, non-agricultural work where the Secretary of Labor has determined that no local workers in the area are willing and/or able to do the required work.<sup>188</sup> How that work shortage is determined has long been a point of contention between employers and unions, since importing cheap labor can displace local workers unable to sustain themselves on the low wages given to temporary workers.<sup>189</sup> These workers often live in dilapidated housing provided by the employer, receive little or no safety training or equipment, incur massive debt to get to the United States, and depend entirely on the success of a season in order to earn any wages.<sup>190</sup> In February 2012, the Department of Labor responded to these difficulties by issuing new regulations to raise the working standards of temporary foreign workers, which could reduce the incentive for employers to hire outside the United States, but as these regulations have only recently been adopted, the depth of their impact have yet to be determined.<sup>191</sup>

Much like their predecessors from the 1800s, many employers who cannot export their production to places with cheaper labor send recruiters to places with labor to spare, usually South and Central America.<sup>192</sup> Under previous regulations, there was no oversight of these recruiters, who, like recruiters of the 1800s, often charged laborers illegal headhunting fees and a premium on the visa application.<sup>193</sup> Workers were also responsible for their own travel expenses, which they typically could not afford without the aid of a loan shark.<sup>194</sup> Since H-2B visas bind workers to the employer who petitioned for them, if there is not enough work for the number of employees recruited, the workers have nothing to do for months at a time

---

<sup>188</sup> The employer can prove this by advertising for the jobs for a reasonable period of time, consulting relevant unions in the area, and establishing that the workers would be paid the “prevailing wage.” See Laura D. Francis, *DOL Issues Final Rule Adding Worker Protections to H-2B Program*, BLOOMBERG BNA (Feb. 14, 2012), available at [www.bna.com/dol-issues-final-n12884907869](http://www.bna.com/dol-issues-final-n12884907869) [hereinafter *DOL Issues Final Rule*].

<sup>189</sup> See generally *Immigrant Farm Workers*, supra note 183, at 02:00-02:46.

<sup>190</sup> Am. U. Washington College of L. Int’l Human Rights L. Clinic and Centro de los Derechos Del Migrante, Inc., *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* (2010), available at [http://www.wcl.american.edu/clinical/documents/20100714\\_auwcl\\_ihrcl\\_picked\\_apart.pdf?rd=1](http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrcl_picked_apart.pdf?rd=1) [hereinafter *Picked Apart*].

<sup>191</sup> The Department of Labor has to establish that allowing the employer to import foreign workers will neither displace U.S. workers, nor harm their wages or working conditions. See Dep’t of Labor Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 3058 (Feb. 21, 2012) (to be codified 20 C.F.R. pt. 655, 29 C.F.R. pt. 503), available at [http://op.bna.com/dlrcases.nsf/id/lfrs-8rcndy/\\$File/H-2B%20Final%20Rule.pdf](http://op.bna.com/dlrcases.nsf/id/lfrs-8rcndy/$File/H-2B%20Final%20Rule.pdf). A recent Inspector General report found that employers regularly lie about their recruitment efforts. See also Costa, supra note 3.

<sup>192</sup> See *Picked Apart*, supra note 190.

<sup>193</sup> *Id.* at 1.

<sup>194</sup> *Id.*

while their loans gain interest and their employers charge rent.<sup>195</sup> The workers are also much more vulnerable to the whims of the employer than local workers, since discharge leaves this employee with very little time to return home before becoming “undocumented”.<sup>196</sup>

In 2011, responding to overwhelming commentary on the proposed rule, the DOL issued regulations that require employers to reimburse employees for visa and travel fees and to pay, at minimum, three quarters of the wages promised, even when there is no work to be done.<sup>197</sup> This move would protect both migrant workers who are severely disadvantaged compared to unionized United States workers as well as employers.<sup>198</sup> It would also make United States workers more appealing, since the employers would not have to risk paying for work not done during a poor season. The new regulations also respond to the ongoing concern that imported labor would lower worker safety for an entire industry by requiring employers to pay for tools and equipment necessary to meet safety requirements.<sup>199</sup> However, since a federal judge in Florida has placed a preliminary injunction on the regulations pending a challenge by the Chamber of Commerce, these regulations have yet to be implemented.<sup>200</sup> Congress also responded to the pressure of the Chamber and employers by blocking the three-quarter wage provision until September 30, 2012.<sup>201</sup> Employers who depend on H-2B workers have been lobbying Congress to suspend or remove the new rules, arguing that it is too difficult to fill the job openings with local workers and that the additional cost of temporary labor will severely harm business.<sup>202</sup> They argue that, in addition to the hard economic conditions they already face, the new regulations would magnify impact of a bad season because they would have to pay wages for hours they did not benefit from.<sup>203</sup>

---

<sup>195</sup> *See id.* at 5.

<sup>196</sup> *Id.* at 5.

<sup>197</sup> *See* Temporary Employment of Foreign Workers in the United States, 20 C.F.R. § 655 (2012); 77 FR 10038 (Feb. 21, 2012) (to be codified a 29 C.F.R. Part 503) (2012)) (“Temporary Non-Agricultural Employment of H-2B Aliens in the United States”).

<sup>198</sup> Francis, *supra* note 188.

<sup>199</sup> Costa, *supra* note 3.

<sup>200</sup> *H-2B Final Rule*, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, (last visited June 19, 2012), <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm>; <http://www.dol.gov/whd/immigration/h2b.htm>.

<sup>201</sup> *DOL Changes Effective Date of 2012 H-2B Final Rule; Preliminary Injunction Granted*, EB-5 INVESTOR GREEN CARD (May 3, 2012), <http://www.eb-5investorgreencard.com/en/dol-changes-effective-date-of-2012-h-2b-final-rule-preliminary-injunction-granted/>.

<sup>202</sup> Costa, *supra* note 3.

<sup>203</sup> The Chamber of Commerce has objected to the ¾ wage requirement since work hours are often out of the employer’s control, such as bad weather in construction, or a poor harvest in the crab industry. *See* Costa, *supra* note 3; *supra* note 200; *see also* *DOL Changes Effective Date*, *supra* note 201.

*B. Ag Jobs: It's About More Than Just Employment*

The Ag Jobs Act<sup>204</sup> is a unique reform effort in immigration. It represents a collaboration between employers and the most vulnerable immigrants to reduce their susceptibility.<sup>205</sup> In addition to reforming the H-2A (agricultural guest-workers) visa program, the collaboration proposes to offer currently undocumented farm workers the chance to earn temporary legal status, thus providing employers with a stable workforce.<sup>206</sup> Such a reform would improve the vulnerability of about fifty-five (55) to seventy-five (75) percent of the farm worker workforce estimated to be undocumented.<sup>207</sup> The H-2A program currently operates similarly to H-2B; agricultural employers may hire temporary farm laborers if they can show that wages and working conditions of local workers will not be adversely impacted.<sup>208</sup> Ag Jobs would acknowledge the difficulty employers currently face in recruiting local labor by removing the requirement that employers first advertise in local labor markets before obtaining visas for foreign labor.<sup>209</sup>

The effort to pass Ag Jobs has been unique, in that agricultural workers are some of the most notoriously vulnerable immigrants but have found a way to join their employers in efforts seeking mutually-beneficial reform.<sup>210</sup> Both employers and immigrant workers have gone before Congress to illustrate the importance of low-wage immigrant workers for the success of the low-profit agriculture industry.<sup>211</sup> Modern employers, like those of the 1930s and 1950s, argue that they need immigrant labor

---

<sup>204</sup> S. 340/HR 371; H.R. 2414 (111th): AgJOBS Act of 2009, 111th Congress, 2009–2010. Text as of May 14, 2009 (Introduced), available at <http://www.govtrack.us/congress/bills/111/hr2414/text>.

<sup>205</sup> See generally *Immigrant Farm Workers*, supra note 189, at 02:00-02:46.

<sup>206</sup> Workers could get this status by “meeting a past-work requirement in US agriculture, undergoing security checks, and paying fees and fines. Participants then could earn permanent immigration status by meeting a future-work requirement of 3 to 5 additional years in U.S. agriculture, complying with immigration requirements, and paying fees and a fine.” *America Needs AgJOBS, not Harsh Guestworker Programs*, IMMIGRATION POLICY CENTER (last visited Jan 1, 2008), <http://www.immigrationpolicy.org/just-facts/america-needs-agjobs-not-harsh-guestworker-programs> [hereinafter *America Needs AgJobs*].

<sup>207</sup> *America Needs AgJobs*, supra note 206.

<sup>208</sup> See *id.*

<sup>209</sup> *Id.*

<sup>210</sup> See generally *Immigrant Farm Workers*, supra note 189, at 02:00-02:46.

<sup>211</sup> *Movements by migrant worker organizations, such as “Take Our Jobs” have illustrated that, despite high unemployment rates, local workers are not willing to fill agricultural jobs.* Michael Martin, “Tell Me More: ‘Take My Job!’ Campaign Markets Agricultural Labor,” National Public Radio, interview Arturo Rodriguez (July 7, 2010) transcript available at <http://www.npr.org/templates/story/story.php?storyId=128358334>.

because, despite high unemployment rates, difficult jobs, such as those in agriculture, remain unfilled.<sup>212</sup> Employers favoring Ag Jobs argue that strict enforcement of immigration laws would remove seventy percent of the workforce.<sup>213</sup> In fact, these arguments made by agricultural employers regarding the need for immigrant workers have remained the same since the days of the Bracero Program.<sup>214</sup> After the implementation of IRCA, farmers lamented that their livelihood was rotting in the fields because they could not find enough workers once undocumented immigration slowed.<sup>215</sup> Since these employers need immigrant labor, if it is too difficult for them to obtain that labor legally, they will often obtain it illegally.<sup>216</sup> Employers, therefore, advocate for immigration reform that makes it easier for immigrant laborers to enter and remain in the country as this reduces employer liability.

Unions, such as the AFL-CIO, have begun to see the benefit of recruiting membership in immigrant ranks.<sup>217</sup> Union membership has fallen significantly in recent years,<sup>218</sup> and traditionally unionized fields have become dominated by immigrant labor.<sup>219</sup> The traditional, exclusionary rhetoric of the unions alienates this workforce and reduces their willingness to join an established union.<sup>220</sup> The AFL-CIO hopes to encourage union membership and decrease vulnerability by advocating for increased legal immigration, lenient enforcement of immigration laws, and amnesty for undocumented workers.<sup>221</sup> However, the relationship between agricultural employers and workers seen in Ag Jobs demonstrates that, where employers and employees understand their dependence on one another,

---

<sup>212</sup> *Farm Workers and Employers Lobby*, GREENHOUSE PRODUCT NEWS (last visited June 19, 2012), <http://www.gpnmag.com/farm-workers-and-employers-lobby>.

<sup>213</sup> *Id.*

<sup>214</sup> *Changing the Rules*, *supra* note 5, at 1.

<sup>215</sup> *Id.*

<sup>216</sup> Testimony of Phil Glaize before the House Committee Judiciary on Immigration, Citizenship, Refugees, Border Security & International Law, at 45:30 (C-Span, Sep. 24, 2010), *available at* <http://www.c-spanvideo.org/program/295639-1> [Testimony of Phil Glaize].

<sup>217</sup> “AFL-CIO officials publicly explained that the organization was now ‘championing immigrant rights as a strategic move to make immigrants more enthusiastic about joining unions.’” Briggs, *supra* note 174, at 2.

<sup>218</sup> *Id.*

<sup>219</sup> *See id.*

<sup>220</sup> *Id.*

<sup>221</sup> “[P]recisely because immigration affects the size, skill composition and geographical distribution of the nation’s labor force, it also influences local, regional and national labor market conditions. Hence, organized labor can never ignore the public policies that determine immigration trends.” Briggs, *supra* note 174, at 1 (analyzing thoroughly the dichotomy between resisting immigration expansion and risking alienating a large part of the labor force, and so undermining its own goals).

they can unite to try to better their respective positions.<sup>222</sup>

The vitriolic rhetoric that has resisted admission of immigrants since the 1860s is alive and well in the halls of Congress today.<sup>223</sup> Despite the proof that no citizen wants the available agricultural jobs, congressmen argue that immigrants are taking American jobs.<sup>224</sup> Members of minority classes that were displaced by immigrants (sometimes over seventy years ago)<sup>225</sup> argue that any leniency in immigration law will further impoverish an already heavily unemployed class.<sup>226</sup> Indeed, representatives call undocumented workers “illegals” with the same disdain they used to refer to Chinese laborers as “coolies” in the 19<sup>th</sup> century.<sup>227</sup> Like the resistance to the 1965 INA and IRCA, opponents of Ag Jobs urge that these workers are criminals for entering the country illegally and that they should not be rewarded for their transgressions with amnesty.<sup>228</sup> These voices are the product of a complicated, yet every-changing, social and political stew. Perhaps patience, reason, a recovering economy, and electoral change are all that can defeat these restrictionist sentiments and bring about the passage of Ag Jobs.

### C. DHS Prosecutorial Discretion: Unilaterally DREAMing

Earlier this year, the Obama Administration announced a plan to grant deferred action<sup>229</sup> to undocumented immigrants, under the age of thirty, who had been brought to the country as children.<sup>230</sup> By applying for

<sup>222</sup> See, e.g., Testimony of Phil Glaize, *supra* note 216, at 44:30.

<sup>223</sup> See Testimony of Carol Swain, for the House Committee Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law (Sep. 24, 2010), available at <http://judiciary.house.gov/hearings/pdf/100924.pdf> [hereinafter Testimony Carol Swain].

<sup>224</sup> Testimony of Lamar Smith, for the House Committee Judiciary on Immigration, Citizenship, Refugees, Border Security & International Law, at 20:00 (C-Span, Sep. 24, 2010), available at <http://www.c-spanvideo.org/program/2956391> [hereinafter Testimony of Lamar Smith].

<sup>225</sup> *Urges Selective Immigration: President Grace of Bethlehem Steel Thinks It Best Solution*, WALL ST. J., May 19, 1923.

<sup>226</sup> See generally *Immigrant Farm Workers*, *supra* note 189, at 02:00-02:46.

<sup>227</sup> See Testimony of Carol Swain, *supra* note 230; Torok, *supra* note 58, at 73.

<sup>228</sup> See generally *Immigrant Farm Workers*, *supra* note 189, at 02:00-02:46.

<sup>229</sup> Deferred action being a form of prosecutorial discretion where the government agrees not to pursue removal proceedings, and the immigrant remains in whatever tenuous legal status they occupied at the time deferred action was granted. The government may open the case and begin proceedings again at any time, and no immigration or employment benefits are conferred.

<sup>230</sup> See Elsie Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, THE HUFFINGTON POST, June 15, 2012, [http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act\\_n\\_1599658.html](http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658.html); Janet Napolitano, *Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as*

Deferred Action, young, deportable people can become eligible for work permits.<sup>231</sup> Since the group affected must have either a high school level of education or military service and are traditionally more skilled labor, the decision does not attract the same vitriol from potentially displaced local workers as has H-2B and AgJobs.<sup>232</sup> It has, however, received the same criticism that Ag Jobs received for being an “amnesty,” despite the difference that it offers no path to citizenship.<sup>233</sup> Until Congress passes legislation permanently granting relief to this group of people, the DREAMers’ best option is to register as an undocumented immigrant with the United States Citizenship and Immigration Service (“USCIS”) and hope that they qualify for discretion, rather than removal.<sup>234</sup>

Many of the arguments made in favor of the DREAM Act are similar to those used in passing the 1965 INA.<sup>235</sup>

We have, in these tough economic times [ . . . ] about two million high-wage, high-skill jobs that are unfilled today because we don't have the talent to fill those jobs. And when we have all these smart, talented, young people, who ha[ve] the potential to fill those jobs and then be productive citizens and to pay taxes and to contribute to society, to deny that opportunity doesn't make sense. [ . . . ] [T]he Congressional Budget Office, [ . . . ] has estimated that over the next 10 years, if we educate these young people, if we allow them to go to college, this will actually reduce the deficit by a billion dollars because of their

---

*Children, Department of Homeland Security* (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>231</sup> Napolitano, *supra* note 230.

<sup>232</sup> See Testimony of Swain, *supra* note 230.

<sup>233</sup> Brian Naylor, *Democrats Push DREAM Act; Critics Call it Amnesty*, NATIONAL PUBLIC RADIO (Dec. 6, 2010), available at <http://www.npr.org/2010/12/06/131796206/democrats-push-dream-act-critics-call-it-amnesty>.

<sup>234</sup> See Foley, *supra* note 230.

<sup>235</sup> DREAMers are also unique in their “Americanness.” They are a sympathetic group who speak English, have no ties to their country of nationality, are no threat to national security, had no intent to enter the country illegally, and have benefitted from societal services like education and want to give back. Perhaps the appeal in helping the DREAMers obtain legal status lies more in their value as a politically palatable group of people who share the American Dream, than in a cold calculation of their benefit to employers. The 1965 INA also relied on an emotional component, riding on the wave of a Civil Rights movement that sought to make the U.S. fairer for everyone. The heart of the argument in favor of passing the DREAM act appears to be that denying these people legal status is, simply, “not fair.” However, an analysis of fairness and the political appeal of a group that has little bearing on Employer interest in the DREAMers is beyond the scope of this piece.

increased productivity.<sup>236</sup>

Opponents fear that granting such an “amnesty” will encourage more parents to bring their children to the United States in hopes that they can gain citizenship.<sup>237</sup> These opponents cite the current economic downturn and protest allowing those who have broken immigration laws to compete with lawful workers for the limited jobs available.<sup>238</sup> Meanwhile, proponents argue that it is self-defeating to deport those who only benefit American society, had no control over their illegal entry, have no ties in their country of origin, and in whom society has invested its educational, and other, resources.<sup>239</sup> DREAM, like the 1965 INA, may require a powerhouse like Senator Ted Kennedy and a nationwide civil rights movement to get past the vocal opponents of the DREAM Act. However, if the DREAMers can get past the ideological opposition to their cause, they may benefit from employing some of the tactics that have either proven successful, or almost proven successful for others: (1) work with unions to advocate for legal status for vulnerable workers;<sup>240</sup> (2) collaborate with employers who want highly educated workers to enable them to create more jobs;<sup>241</sup> and (3) change the discussion from one of fear about the effect of “illegals” competing with United States workers for jobs to one of what is best for the country.<sup>242</sup>

---

<sup>236</sup> See Michele Martin & Arne Duncan, *Arne Duncan: How Dream Act can Cut Deficit*, NAT'L PUB. RADIO (July 7, 2011), available at <http://www.npr.org/2011/07/07/137672099/arne-duncan-how-dream-act-can-reduce-deficit>.

<sup>237</sup> See Foley, *supra* note 230.

<sup>238</sup> “[T]he last decade was the largest 10 years of immigration in American history. About 13 million immigrants settled here, legally and illegally. We also admitted several hundred thousand guest workers over the same time period every year. Meanwhile, our economy lost 1 million jobs over that same decade. In 2008 and 2009 alone, 2.4 million new immigrants settled here, while 8.2 million jobs were lost in our economy. In this economic climate, it is pretty hard to make the case that immigration regulations should be relaxed to permit illegal workers to stay, especially when most of them would be vying for the very same jobs as many unemployed U.S. workers and where there is already an oversupply of labor.” Jessica M. Vaughn, Statement to the Subcommittee on Immigration Policy and Enforcement of the Committee of the Judiciary, *The Hinder the Administration's Legalization Temptation (Halt) Act*, H.R. 2497, July 26, 2011 (Serial 112-50), available at [http://judiciary.house.gov/hearings/printers/112th/112-50\\_67575.PDF](http://judiciary.house.gov/hearings/printers/112th/112-50_67575.PDF).

<sup>239</sup> See Napolitano, *supra* note 230.

<sup>240</sup> See *America Needs AgJobs*, *supra* note 212; see also The Immigration and Nationality Act of 1965, Pub. L. No. 89-236.

<sup>241</sup> See Ottinger, *supra* note 125, at 417.

<sup>242</sup> See The Burlingame-Seward Treaty, *supra* note 46.

*D. The 2012 Election Cycle:  
The Powerhouse Immigration Reform Needs?*

In the lead-up to the 2012 Presidential Election, President Obama and conservative members of Congress began to battle over the issue of immigration reform. The President had made campaign promises, during the 2008 election, to push for immigration reform. By the summer of 2011, the President faced significant pressure, particularly from the Latino community, to keep these promises.<sup>243</sup> Congress, however, had been unwilling to cooperate with any such efforts. Thus, the President exercised his power as head of the Executive Branch, instructing the enforcement agency, Immigration, Customs and Enforcement (“ICE”) and ICE’s parent agency, the Department of Homeland Security (“DHS”) to exercise prosecutorial discretion and issuing Deferred Action for those low-priority undocumented immigrants who would qualify under the DREAM Act.<sup>244</sup> What followed was an irrational debate about the propriety of this presidential decision, particularly from conservative members of Congress. Several commentators have largely blamed this irrational debate for the Republican Party’s loss in the 2012 Presidential Election.<sup>245</sup> As a result, the Republican Party has recently expressed a new willingness to consider immigration reform efforts and compromise on previously divisive issues, such as “amnesty” for some who entered the country illegally.<sup>246</sup> This new-found acceptance of illegal immigrants may be the key to passing effective, bi-partisan legislation.

---

<sup>243</sup> See *Executive Authority to grant administrative relief for DREAM Act beneficiaries*, NATIONAL IMMIGRATION LAW CENTER (May 28, 2012) [www.nilc.org/document.html?id=754](http://www.nilc.org/document.html?id=754); see also Cesar Vargas, *DREAM Act: Yes You Can, Mr. President*, THE HILL’S CONGRESS BLOG (May 31, 2012), <http://thehill.com/blogs/congress-blog/judicial/230347-dream-act-yes-you-can-mr-president>.

<sup>244</sup> This decision was justified by the fact that ICE only has the resources to deport 400,000 undocumented immigrants each year, though there are an estimated 11 million undocumented immigrants in the U.S. The decision to focus on those immigrants who were dangerous, and had made the decision to come to the U.S. unlawfully was presented as an effort to focus limited resources where they would most benefit society. See Napolitano, *supra* note 230; see also John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>245</sup> See Dana Bash and Tom Cohen, *Possible Compromise on Immigration Reform takes Shape*, CNN POLITICS (Jan. 28, 2013), available at <http://www.cnn.com/2013/01/28/politics/immigration-reform>.

<sup>246</sup> See *Senate Bipartisan Framework for Comprehensive Immigration Reform* CSPAN (Jan. 28, 2013), available at <http://www.c-span.org/uploaded/Files/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf> [hereinafter *Senate Bipartisan Framework*].

Discussions about “fixing” the immigration system now focus on security and the economy.<sup>247</sup> Three of the four pillars of a framework proposed by a bipartisan committee of senators are: “Attracting the World’s Best and Brightest,” “Strong Employment Verification,” and “Admitting New Workers While Protecting Worker’s Rights.”<sup>248</sup> The President has submitted his own proposal, focusing on workers and a lawful path to citizenship.<sup>249</sup> Both proposals focus on simplifying the system, making it easier for employers to abide by the law, and ensuring that those who enter the country can do so legally and as a benefit to the country.

As in 1965, the “Best and Brightest” of 2013 are those who will supposedly build the American economy and encourage innovation.<sup>250</sup> In 1965, the skilled worker was supposed to “create jobs” and bring skills that America’s institutes of higher education could not fully supply. Now, these skilled workers are originating in America’s graduate program but are unable to remain in the United States thanks to visa backlogs and a byzantine system that prevents students from immigrating permanently.<sup>251</sup> Both immigration reform proposals recognize the difficulty the current system places upon both employers and immigrants, as the government seeks to keep those immigrants trained within the country, while still offering a solution to streamline the process.

IRCA’s employment verification system, the I-9, has proven inadequate to the monumental task of preventing unauthorized workers from undercutting United States workers, which was the lynchpin of IRCA’s hoped-for success. The Bipartisan Committee’s efforts to reform the Employment Verification system appear to be another effort to address illegal immigration by cutting off the main attraction - jobs.<sup>252</sup> This provision focuses on ease of use and procedural protections, which appear to address IRCA’s failure to target those employers who are acting in bad faith but still make it easier for honest employers to abide by the law.<sup>253</sup> While the framework is not specific as to how this will be done, the

---

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Fact Sheet: Fixing Our Broken Immigration System so Everyone Plays by the Rules*, OFFICE OF THE PRESS SECRETARY (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> [hereinafter Office of the Press Secretary].

<sup>250</sup> *Id.*; see also *Hearing to Amend the Immigration and Nationality Act Before Subcomm. No. 1 of the H. Comm. On the Judiciary*, 89th Cong. 461 (1965).

<sup>251</sup> See e.g., Sarah Kliff, *The insanely confusing path to legal immigration, in one chart*, THE WASHINGTON POST: WONK BLOG (Jan. 29, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/29/the-path-to-legal-immigration-in-one-insanely-confusing-chart/>.

<sup>252</sup> See *supra* note 246 and accompanying text.

<sup>253</sup> See *id.*; see also Office of the Press Secretary, *supra* note 246; *infra* Part III(B).

wording focuses on fining employers who “knowingly hire” undocumented workers, indicating that Congress has learned something from IRCA’s collapse and the hazards of penalizing employers arbitrarily.<sup>254</sup>

The protection of workers’ rights, while allowing for the admission of new workers, appears to address the concerns temporary, seasonal, and unskilled employers have had regarding the H visa system as well as the concerns unions have always had with immigrant workers.<sup>255</sup> Perhaps this provision will be easier to shape now that some unions have begun to embrace immigrant workers and, so, may collaborate with Congress to ensure that effective programs are put in place to actually “ensure strong labor protections” and prevent the exploitation H workers currently face.<sup>256</sup>

Enforcement of labor laws for all workers impacted by the eleven million undocumented workers in the United States requires supervision by government agencies and a private right of action.<sup>257</sup> Vulnerable workers often cannot access a private right of actions without the assistance of trade unions, who can help workers either pay for individual lawsuits or enforce collectively bargained rights and minimum labor standards.<sup>258</sup>

## V. CONCLUSION

Perhaps the most important lesson learned from this journey through history is that, even with all the right alliances between workers and employers, there is enough room in the immigration debate for the nay-sayers to get a foothold. However, no wave lasts forever, and even those opposed to the 1965 INA eventually gave way. Hope may be gleaned from the fact that proponents of the DREAM act are using the same language that proved effective in 1965, “we [should] turn away from an irrational and irrelevant concern with the place of an immigrant’s birth, and turn instead to a meaningful concern with the contribution immigrants can make to this society.”<sup>259</sup> But above all else, the H-2B regulations and IRCA all teach reformers that no amount of good political fortune can protect an immigration law from violation when employers are worried about their bottom line. The 1965 INA and Ag Jobs show, however, that when employers interests are promoted in tandem with employee rights and a

---

<sup>254</sup> See *infra* Part III(B).

<sup>255</sup> See *infra* Part III(B).

<sup>256</sup> See Lessons from H-2B Reform, *supra* note 261, see also *Senate Bipartisan Framework*, *supra* note 252; OFFICE OF THE PRESS SECRETARY, *supra* note 255.

<sup>257</sup> See Cameron, *supra* note 13, at 451.

<sup>258</sup> *Id.* at 451 (“To deny undocumented workers access to trade unionism is to effectively deny them access to viable means of enforcing a wide variety of other substantive rights.”).

<sup>259</sup> *Hearing to Amend the Immigration and Nationality Act Before Subcomm. No. 1 of the H. Comm. On the Judiciary*, 89th Cong. 413 (1965) (statement of Robert F. Kennedy).

benevolent political climate, lasting change for the better can be achieved. Hopefully, as Congress and the President turn to the issue of Comprehensive Immigration Reform this year, they will keep these lessons in mind. Otherwise, we may just have to do it all again in another 30 years.