This article deals with the economic, legal, and constitutional issues presented in the immigration debate, with a focus on congressional enactments and important Supreme Court pronouncements, precedents, and decisions in the broad area of “immigration law.” The article contains a comparative analysis to a discussion of the “Commerce Clause,” and an in-depth discussion of the concept of plenary powers under the U.S. Constitution. These topics are considered as a possible indication that the immigration debate, although framed as an issue of resolution for the federal government through the Congress and the executive branch, unless resolved in the near future, may devolve into a myriad of individual state solutions and the responsibility of state and local governments. The article also presents important demographic and economic data in order to establish the proper context for the discussion of the highly volatile issue of illegal immigration.

“We do not care where they come from, we do not care what language they speak, but an illegal alien is not welcome in Hazleton!”

As the United States Congress continued to be mired in what seemed to be an interminable debate over a controversial proposal for “immigration ‘reform,’ on May 10, 2006, two men shot and killed a local resident, Derek Kichline, on a street in Hazleton, Pennsylvania.” Both

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2 Issadore, supra note 1, at 333.
assailants were found to be illegal aliens from the Dominican Republic.³
“The following day, [on May 11, 2006] a fourteen-year-old boy, who was
also an illegal alien, fired gunshots into a [widely-used] city playground.”⁴
Partly in response to these “two high-profile crimes,” on July 13, 2006, the
city of Hazleton enacted the Illegal Immigration Relief Act Ordinance.⁵
As enacted, the original ordinance (Number 10) provided:

Any entity or any parent, affiliate, subsidiary or agent of
any entity . . . that employs, retains, aids or abets illegal
aliens or illegal immigration into the United States,
whether directly or by or through any agent, ruse, guise,
device or means, no matter how indirect, and even if the
agent or entity might otherwise be exempted from this
section, or violates any provision of this Ordinance, shall
from the date of the violation or its discovery, whichever
shall be later, be denied and barred from approval of a
business permit, renewal of a business permit, any city
contract or grant as follows . . . .⁶

In addition, citing relevant federal law, Ordinance 2006-18 [City of
Hazleton Illegal Immigration Relief Act] and Ordinance 2006-13 [Tenant
Registration Ordinance] imposed fines on landlords who rented to illegal
immigrants and suspended licenses of companies that hired illegals.⁷

Soon after the Hazleton Ordinance was passed, several other cities
throughout the country enacted similar legislation.⁸

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³ Id.
⁴ Id.
⁵ Id.
⁶ Id. at 334 n.10 (quoting Hazleton, Pa., Ordinance 2006-10, § 4 (July 13, 2006),
⁷ Hazelton, Pa., Ordinance 2006-18, §§ 2E, 4A, 5A (Sept. 12, 2006), available at
law, 8 U.S.C. § 1324(a)(1)(A)(iii), which prohibits the “harboring of illegal aliens”);
Hazleton, Pa., Ordinance 2006-13, §§ 6(a), 7(b) (Aug. 15, 2006), available at
⁸ Issadore, supra note 1, at 334.
I. CONGRESSIONAL POWER OVER NATURALIZATION AND CITIZENSHIP

Congress wields enormous plenary powers over the admission, exclusion, or deportation of aliens.\(^9\) As a result, Congress may exclude aliens altogether, or prescribe the conditions under which an alien may enter the United States or remain in the country.\(^10\) An alien is “any person not a citizen or national of the United States.”\(^11\) Kleindienst v. Mandel\(^12\) is an interesting fact pattern exemplifying the application of Congress’s plenary power. In this case, the Attorney General denied a temporary visa to a Belgian journalist, identified as a Marxian theoretician, whom the Graduate Student Association at Stanford University had invited to participate in academic conferences and discussions on campus.\(^13\) “The alien had been found ineligible for admission under the Immigration and Nationality Act’s provision barring those who publish or ‘advocate the economic, international, and governmental doctrines of world communism.’”\(^14\) The Attorney General declined to waive ineligibility, and based the decision on the alien’s

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The purposes of the bill are to control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982.

The bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country. It also revises the procedures for the temporary entry of foreign agricultural workers under the H-2 program and provides permanent residence to certain aliens performing fieldwork with respect to perishable crops.


\(^10\) See U.S. CONST. art. I, § 8, cl. 4; Chadha, 462 U.S. at 940–01.


\(^12\) 408 U.S. 753 (1972).

\(^13\) Id. at 757–60.

\(^14\) Id. at 755 (quoting 8 U.S.C. § 212(a)(28)(D) (1952)).
unscheduled activities on a previous visit when a waiver had been granted.\textsuperscript{15} The Supreme Court held that Congress had the plenary power to exclude aliens or prescribe the conditions for their entry into this country, and had “delegated conditional exercise of this power to the Executive Branch.”\textsuperscript{16} When the Attorney General as the designee of the executive branch decides for a legitimate and bona fide reason not to grant a waiver, courts will not look behind that decision nor will courts weigh the decision against the First Amendment interests of those seeking to communicate with the alien.\textsuperscript{17}

II. EXCLUSION AND DEPORTATION

An alien who seeks admission to the United States generally does so only on terms as Congress prescribes and authorizes. Thus, whatever procedures Congress establishes become, in effect, due process—at least as far as the alien is concerned. The leading case is United States ex rel. Knauff v. Shaughnessy.\textsuperscript{18} In this case, an American war veteran had married, with the approval of the U.S. Commanding General in Germany, a German-born woman, who was employed by the European Command and whose record was “highly praised by her superiors.”\textsuperscript{19} However, when she sought to enter the United States under the War Brides Act,\textsuperscript{20} the Attorney General, under the authority of wartime security regulations, excluded her—without a hearing—upon a finding that she was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which the Attorney General had determined would be prejudicial to the public interest.\textsuperscript{21} The Supreme Court concluded that “the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate . . . this function to a responsible” officer of the executive department—in this case, the Attorney General.\textsuperscript{22} “The action of the executive officer under [a grant of] such authority is

\begin{itemize}
\item \textsuperscript{15} \textit{Id.} at 758–59.
\item \textsuperscript{16} \textit{Id.} at 769–79.
\item \textsuperscript{17} \textit{Id.} at 770.
\item \textsuperscript{18} 338 U.S. 537 (1950).
\item \textsuperscript{19} \textit{Id.} at 550 (Jackson, J., dissenting).
\item \textsuperscript{21} \textit{Knauff}, 338 U.S. at 539–40.
\item \textsuperscript{22} \textit{Id.} at 543.
\end{itemize}
The Court added: “Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” In writing for the Court, Justice Minton noted that Congress normally “supplies the conditions of the privilege of entry into the United States.” However, since “the power of exclusion of aliens is also inherent in the executive . . . [authority] of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country during a time of national emergency.” Justice Minton quoted with approval from *Lichter v. United States*:

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. . . . Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.

As noted in *Knauff*, however, a much different result might occur in the case of an expulsion or deportation of a resident alien, because that individual may have acquired specific due process rights. The U.S. Department of the Treasury defines a resident alien as follows:

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23 *Id.*

24 *Id.* (citing Ludecke v. Watkins, 335 U.S. 160 (1935); Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).

25 *Id.*

26 *Id.*

27 334 U.S. 742 (1948).


29 *Id.* at 537.

30 See *id.* at 544.
(b) Lawful permanent resident—(1) Green card test. An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.\(^{31}\)

In the case of a resident alien involved in a deportation proceeding, the alien does have a constitutional protection, as being “physically present” in the United States—either legally or illegally—and is thus a “person” within the meaning of the Fifth Amendment, entitled to certain procedural due process rights. For example, in *Kwong Hai Chew v. Colding*,\(^{32}\) the Supreme Court first distinguished the case from *Knauff*. In *Kwong Hai*, an alien who was a lawful permanent resident of the United States, but who had been absent from the United States while serving on a vessel of American registry, was denied permission to land at the termination of the voyage, on the ground that his admission would be prejudicial to the public interest.\(^{33}\) The issue presented before the Court was Kwong Hai’s “detention, without notice of any charge against him and without [the] opportunity to be heard in opposition.”\(^{34}\) Kwong Hai contended that his detention was not authorized and even “if the regulation does purport to authorize such detention, the regulation is invalid as an attempt to deprive him of his liberty without due process of law in violation of the Fifth Amendment.”\(^{35}\)

In an opinion by Justice Burton, eight members of the United States Supreme Court held that the provisions relating to the denial of a hearing to excludable persons, had conferred no authority upon the Attorney General to deny Kwong Hai notice of the charge against him and a hearing

\(^{31}\) 26 C.F.R. § 301.7701(b)–1 (2008).
\(^{32}\) 344 U.S. 590 (1953).
\(^{33}\) Id. at 592–95.
\(^{34}\) Id. at 595.
\(^{35}\) Id. at 596.
thereon, and that Kwong Hai had a constitutional right to both notice and a hearing on the issues.36

The Court first noted that the case of *Knauff v. Shaughnessy*37 was not on point.38 *Knauff* “relate[d] to the rights of an *alien entrant* and [does] not deal with the question of a *resident alien’s* right to be heard.”39 “For purposes of his constitutional right to due process,”40 the Court considered Kwong Hai’s “status to that of an alien continuously residing and physically present in the United States.”41 In making its determination, the Supreme Court noted:

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.42

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36 *Id.* at 598–99.
37 338 U.S. 537 (1950).
38 *Kwong Hai Chew*, 344 U.S. at 596.
39 *Id.*
40 *Id.*
41 *Id.* The Supreme Court carefully defined the important terms utilized in its decision-making:

In this opinion “exclusion” means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. “Expulsion” means forcing someone out of the United States who is actually within the United States or is treated as being so. “Deportation” means the moving of someone away from the United States, after his exclusion or expulsion.

*Id.* at 596 n.4.
42 *Id.* 596 n.5 (citations omitted).
The Court concluded that:

But this court has never held... that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in “due process of law” as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends.... Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.43

III. NATURALIZATION

The constitutional basis for citizenship is found in Section 1 of the Fourteenth Amendment, which states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”44 Congress exclusively possesses the power over naturalization questions.45

43 Id. at 597 n.6 (quoting The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903)).
44 U.S. CONST. amend. XIV, § 1.
45 As the Court noted in Holmgren v. United States:

Congress has [enacted legislation] regulating the naturalization of aliens, admitting them to citizenship in the United States, and has authorized such proceedings in the state, as well as [in] Federal, courts. The validity of such proceedings, by virtue of the power conferred by Congress, has been recognized from an early day.

(continued)
Naturalization is the formal process by which U.S. citizenship is conferred upon a foreign citizen or foreign national after that party fulfills the requirements established by Congress in the Immigration and Nationality Act (INA). According to the website of U.S. Citizenship and Immigration Services (USCIS), the general requirements for administrative naturalization include:

- A period of continuous residence and physical presence in the United States;
- Residence in a particular USCIS District prior to filing;
- An ability to read, write, and speak English;
- A knowledge and understanding of U.S. history and government;
- Good moral character;
- Attachment to the principles of the U.S. Constitution; and,
- Favorable disposition toward the United States.

The rights of native-born and naturalized citizens are generally held to be “of the same dignity and are coextensive.” For example, in *Schneider v. Rusk*, the United States Supreme Court ruled that section 352 of the Immigration and Nationality Act of 1952 was discriminatory and therefore violative of due process under the Fifth Amendment of the Constitution, since no restriction against the length of foreign residence applies to native-born citizens.

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47 Id.

48 Id.


50 The Supreme Court noted: “[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’” Id. at 168 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). Interestingly, *Bolling* was a companion case to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
A. Loss of Citizenship

Under Section I of the Fourteenth Amendment, Congress does not have the power to take away the citizenship of a citizen born or naturalized in the United States, except in extraordinary circumstances. The government bears a heavy burden to prove that the individual intended to relinquish his or her citizenship. Two important cases merit special attention.

In *Afroyim v. Rusk*, a naturalized citizen who had been denied a passport on the ground that he had lost his citizenship by voting in a foreign election, brought suit in the United States District Court for the Southern District of New York for a judgment declaring invalid section 401(e) of the Nationality Act of 1940, “which provides that a United States citizen shall ‘lose’ his citizenship if he votes ‘in a political election in a foreign state.’” The district court held that the statute was constitutional, and the United States Court of Appeals for the Second Circuit affirmed. On certiorari, the United States Supreme Court reversed. In an opinion by Justice Hugo Black, expressing the view of five members of the court, the Court held that the statute was unconstitutional because the Fourteenth Amendment prevents Congress from taking away citizenship without the citizen’s assent.

The Court noted:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free

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51 387 U.S. 253 (1967).
52 *Id.* at 254 (quoting 8 U.S.C. § 801 (1946)).
54 361 F.2d 102, 105 (2d Cir. 1966), *rev’d*, 387 U.S. 253 (1967).
55 387 U.S. at 268.
56 *Id.*
government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.\(^{57}\)

More than twenty years later in 1980, the United States Supreme Court decided the case of *Vance v. Terrazas*.\(^ {58}\) Terrazas was a citizen of both the United States and Mexico at birth, and obtained a certificate of Mexican citizenship after he swore allegiance to Mexico and expressly renounced his U.S. citizenship during the application process.\(^ {59}\) As a result, the U.S. State Department issued a certificate of loss of nationality.\(^ {60}\) Terrazas brought suit for a declaration of his U.S. nationality.\(^ {61}\) The district court found that Terrazas knowingly and voluntarily took an oath of allegiance to Mexico, thus voluntarily relinquishing his U.S. citizenship.\(^ {62}\) The court of appeals reversed, holding that “the Constitution required that proof be not merely by a preponderance of the evidence, but by clear, convincing and unequivocal evidence.”\(^ {63}\) The United States Supreme Court disagreed.\(^ {64}\)

The Court cited an important case in order to shed light on the determination of voluntariness. In *Nishikawa v. Dulles*,\(^ {65}\) an American-born citizen, temporarily in Japan, was drafted into the Japanese Army.\(^ {66}\)

\(^{57}\) *Id.* at 267–68 (emphasis added).

\(^{58}\) 444 U.S. 252 (1980).

\(^{59}\) *Id.* at 255.

\(^{60}\) *Id.* at 256.

\(^{61}\) *Id.*

\(^{62}\) *Id.* at 257.

\(^{63}\) *Id.* at 258 (internal quotation omitted).

\(^{64}\) *Id.* at 270.


\(^{66}\) *Id.* at 131.
The U.S. Government later claimed that, under section 401(c) of the Nationality Act of 1940, he had expatriated himself by serving in the armed forces of a foreign nation. The Government agreed that expatriation had not occurred if Nishikawa’s army service had been involuntary. Nishikawa contended that the Government had to prove that his service was voluntary, while the Government essentially argued that duress was an affirmative defense that Nishikawa was required to prove by overcoming the presumption of voluntariness. The Supreme Court held that the presumption was unavailable to the Government and required proof of an act of voluntary expatriation by “clear, convincing and unequivocal evidence.”

Congress stepped into the controversy and a revision of that Section of the Nationality Act soon followed—“its evident aim was to supplant the evidentiary standards prescribed by Nishikawa.” The provision “sets up rules of evidence under which the burden of proof to establish loss of citizenship by a preponderance of the evidence would rest upon the Government. The presumption of voluntariness under the proposed rules of evidence would be rebuttable—similarly—by a preponderance of the evidence.”

In deciding Terrazas, the United States Supreme Court disagreed with the court of appeals and stated:

We see no basis for invalidating the evidentiary prescriptions contained in [the Act]. Nishikawa was not rooted in the Constitution. The Court noted, moreover, that it was acting in the absence of legislative guidance. Nor do we agree with the court of appeals that, because under Afroyim Congress is constitutionally devoid of power to impose expatriation on a citizen, it is also without

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67 Id. at 133.
68 Id.
69 Id. at 133–34.
70 Id. at 135.
power to prescribe the evidentiary standards to govern expatriation proceedings. Although [the Act] had been law since 1961, Afroyim did not address or advert to that section; surely the Court would have said so had it intended to construe the Constitution to exclude expatriation proceedings from the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts. This power, rooted in the authority of Congress conferred by Art. 1, § 8, cl. 9, of the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained.73

In summary, the Court noted that “in proving expatriation, an expatriating act and the intent to relinquish citizenship must be proved by a preponderance of the evidence.”74 Concerning the issue of burden of proof, the Court also held that:

when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation. If he fails, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.75

Interestingly, Congress does have the authority to revoke the citizenship of persons who are not “born or naturalized in the United States”— for example, one born abroad to an American parent. In Rogers v. Bellei,76 the constitutionality of a section of the Immigration and Nationality Act, which provided that one who acquired U.S. citizenship by virtue of having been born abroad to at least one parent of American citizenship shall lose his citizenship unless he resides in this country continuously for five years between the ages of fourteen and twenty-

73 Terrazas, 444 U.S. at 265–66 (citations omitted).
74 Id. at 270.
75 Id.
76 401 U.S. 815 (1971).
eight. The district court held the section unconstitutional, citing both Afroyim v. Rusk and Schneider v. Rusk. On a direct appeal, the United States Supreme Court held that Congress had the power to impose the condition subsequent of continuous residence on Bellei, who did not meet the Fourteenth Amendment’s definition of a citizen born or naturalized in the United States, and that the exercise of the power was neither unreasonable, arbitrary, or unlawful.

Finally, a statute that provides for the revocation of naturalization that had been obtained unlawfully or by fraud has also been upheld by the United States Supreme Court.

B. The Constitutional Backdrop

The U.S. Constitution provides that Congress shall have the power to “establish a uniform Rule of Naturalization.” The authority of Congress

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77 Id. at 816–17. Section 301(a) of the Act, 8 U.S.C. § 1401(a), defines those persons who “shall be nationals and citizens of the United States at birth.” Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 235 (codified in 8 U.S.C. § 1401 (2006)). Paragraph (7) of Section 301(a) includes in that definition a person born abroad “of parents one of whom is an alien and the other a citizen of the United States” who has met specified conditions of residence in this country. Id. Section 301(b), however, provides that one who is a citizen at birth under Section 301(a)(7) shall lose his citizenship unless, after age fourteen and before age twenty-eight, he shall come to the United States and be physically present here continuously for at least five years. Id.

78 387 U.S. 253 (1967).


80 Direct appeal to the Supreme Court is the appropriate avenue of review of decisions of three-judge courts granting or denying an injunction. See 28 U.S.C. § 1253 (2006).

81 Bellei, 401 U.S. at 831.

82 See Schneiderman v. United States, 320 U.S. 118, 165 (1943) (Douglas, J., concurring) (“Citizenship can be granted only on the basis of the statutory right which Congress has created. But where it is granted and where all the express statutory conditions precedent are satisfied we should adhere to the view that the judgment of naturalization is final and conclusive except for fraud.” (citing Tutun v. United States, 270 U.S. 568 (1926))).

83 Adapted from Richard J. Hunter, Jr., A Study of Plenary Powers under the Constitution in the Context of the Current Immigration Debate (Apr. 5, 2008) (unpublished manuscript, on file with the North Atlantic Regional Business Law Association). This article deals specifically with the important sub-topic of an analysis of the doctrine of plenary powers.
in this area is termed plenary or absolute; that is, Congress has exclusive control over the admission, exclusion, and deportation of aliens.\textsuperscript{85} As a result, Congress may decide to exclude aliens altogether, or prescribe the conditions under which an alien may come into the country or remain in the United States.\textsuperscript{86} A plenary power or plenary authority is the complete or absolute power of a governing body.\textsuperscript{87} The term is derived from the Latin term \textit{plenus}, meaning “full.”\textsuperscript{88}

Under established principles of constitutional law, a plenary power is a power that has been granted to a body in absolute terms, with very few limitations on how that body may use the power.\textsuperscript{89} The assignment of a plenary power to one body—in this case the U.S. Congress—will ordinarily divest all other bodies from the right to exercise that power or exercise control over that area of law, unless assigned or delegated that power by the Congress.\textsuperscript{90}

\textsuperscript{84}U.S. CONST., art. I, § 8, cl. 4.
\textsuperscript{86}Id. (citing Lem Moon Sign v. United States, 158 U.S. 538, 547 (1894)).
\textsuperscript{87}BLACK’S LAW DICTIONARY 1193 (8th ed. 2004).
\textsuperscript{88}OXFORD LATIN DICTIONARY 1390 (P.G.W. Glare ed., 1997).
\textsuperscript{89}See Kleindienst, 408 U.S. at 766 (citing Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
\textsuperscript{90}See Issadore, supra note 1. The Issadore article is a timely review of the main issues surrounding the relationship between preemption, federal supremacy, and the concept of plenary powers.

The United States Supreme Court has expressly held that even though immigration is exclusively within the purview of the federal government, not every state enactment may be necessarily preempted because it deals in some way with immigration. See De Canas v. Bica, 424 U.S. 351, 355 (1976) (discussing whether every state enactment that deals with aliens is preempted by the Supremacy Clause of the U.S. Constitution and concluding that although immigration is exclusively federal power, not all state laws dealing with aliens are necessarily preempted). The “statute at issue [in De Canas] was not a regulation of immigration because it did not amount to a state ‘determination of who should or should not be admitted into the country.’” Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004) (discussing the reasoning for the Court’s holding in De Canas).

Generally speaking, a state law is preempted if: (1) Congress has manifested an express intent to preempt any state law; (2) Congress has intended completely to occupy the field in which the law attempts to regulate; or (3) the state law “stands as an obstacle to the
The plenary power of the U.S. Congress, or of a sovereign nation, allows such an entity to pass laws, levy taxes, wage wars, and hold in custody those who offend against their laws. While other legal doctrines, such as the rights of states and of individuals, have been held to limit the plenary power of Congress, the late Chief Justice William Rehnquist, concurring as an Associate Justice in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, a case involving the Commerce Clause, noted:

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest “fictions” of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, delegated authority to Congress to “regulate Commerce... among the several States...”

In fact, there may be significant constitutional limitations or variations on the application of a plenary power, some of which were initiated by the late

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accomplishment and execution of the full purposes and objectives of Congress.” See *De Canas*, 424 U.S. at 356–63.

91 The characteristics of sovereignty generally include:

Independence of political and economic institutions;

An effective governmental structure (including executive, legislative, and judicial branches);

A defined physical territory;

The capacity to enter into and conduct foreign relations; and

A population.


92 See id.; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824).


94 *Id.* at 307 (Rehnquist, J., concurring) (quoting U.S. CONST. art. I, § 8, cl. 3).
Chief Justice himself in the controversial area of law centering on the Commerce Clause. 95

1. An Analogy to Commerce Clause Analysis

As an indication of the reaches, and perhaps limitations, of federal power in a discussion of the issues surrounding illegal immigration, an important parallel example of an exercise of plenary power may be seen in the authority of the U.S. Congress under the Article I, Section 8, Clause 3, known as the Commerce Clause. As Daniel Webster stated in his argument in Gibbons v. Ogden: “[T]he prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law.” 96 Because Congress is granted this plenary power by the Constitution over interstate commerce, the Supreme Court has found that an individual state may not pass laws that affect interstate commerce, unless the U.S. Congress grants them explicit permission to do so. 97 In carrying out this authority, Congress has the power to regulate, the power to prohibit, as well as the power to encourage activities. 98

95 See, e.g., United States v. Lopez, 514 U.S. 549, 565–66 (1995) (holding that Congress has power under the Commerce Clause to regulate commercial activities “that substantially affect interstate commerce” but “[t]hat authority, though broad, does not include the authority to regulate each and every aspect of local schools”).


97 Id. at 236–37 (Johnson, J., concurring).

98 Even though the Commerce Clause was phrased in affirmative terms as a grant of regulatory power to Congress, the Supreme Court has interpreted the Clause to have an important “negative aspect,” referred to as the Dormant Commerce Clause, which essentially denies to the States “the power unjustifiably to discriminate against or burden the interstate flow of . . . commerce.” Conservation Force, Inc. v. Manning, 301 F.3d 985, 991 (9th Cir. 2002) (citing Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 98 (1994)). The jurisprudence surrounding the United States Supreme Court interpretation of the so-called “negative” or “dormant” Commerce Clause is itself based on the case of Gibbons v. Ogden and the viewpoint that the United States should be free of conflicting “commercial regulations, destructive to the harmony of the States,” Gibbons, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring); rather, that it be composed of states “that without certain residency requirements . . . ‘would cease to be the separate political community[ y] that history and the constitutional text make plain w[as] contemplated.’” Supreme Court of
In *Gibbons v. Ogden*, the United States Supreme Court enunciated a broad view of federal plenary powers and held that the term “commerce” is not limited to traffic and to the purchase and sale of commodities; rather, the term “describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” Over time, the United States Supreme Court has explained that the power of the United States Congress under the Commerce Clause allows it to enact legislation that:

- Regulates the channels of interstate commerce such as interstate roads, waterways, airways, and transmission facilities;
- Regulates the instrumentalities of interstate commerce and persons and things in interstate commerce;

The instrumentalities of interstate commerce may include the people, machines, and other things that carry things in commerce. Houston E. & W. Tex. Ry. v. United States (The Shreveport Case), 234 U.S. 342, 351 (1914). The Supreme Court has also ruled that Congress’ power over interstate commerce extends to all other operations having “a close and substantial relation” to interstate commerce. *Id.*

The power of Congress has been interpreted to give it the authority to exclude from interstate commerce goods harmful to interstate commerce itself, such as diseased animals that might infect other animals; commercial items generally, such as lottery tickets, Champion v. Ames, 188 U.S. 321 (1903); or goods produced under substandard conditions, *Darby Lumber*, 312 U.S. 100. Congress may also exclude from interstate commerce certain (continued)
• Regulates activities that have a substantial effect on interstate commerce,\textsuperscript{104} often referred to as the “affectation doctrine.”\textsuperscript{105}

Yet, since its important decision in \textit{NLRB v. Jones & Laughlin Steel Corp.},\textsuperscript{106} which significantly expanded the authority of the federal government under the Commerce Clause, the United States Supreme Court has made it clear that while “Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted”\textsuperscript{107}—such latitude would not remain completely unchecked. Indeed, the Court has noted that “even under our

noncommercial items such as \textit{persons} fleeing prosecution or persons kidnapping others. See \textit{Gooch v. United States}, 297 U.S. 124 (1936).

\textsuperscript{104} See \textit{Lopez}, 514 U.S. at 558–59 (citations omitted). This power involves intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.” \textit{N.L.R.B. v. Jones & Laughlin Steel Corp.}, 301 U.S. 1, 37 (1937). For example, a factory that produces goods within a state may have its working conditions regulated by Congress if its goods \textit{compete with} goods produced in other states because substandard working conditions may destroy competition, thus having an effect in other states, \textit{Darby Lumber}, 312 U.S. at 115; a factory that produces goods to be \textit{sold both locally (intrastate) and interstate} may have all of its working conditions regulated by Congress, \textit{Maryland v. Wirtz}, 392 U.S. 183, 190–91 (1968); a motel that \textit{serves interstate travelers} may be barred from engaging in racial discrimination because such discrimination may deter persons from traveling, thus having an effect in other states, \textit{Heart of Atlanta Motel, Inc.}, 379 U.S. at 261–62; a restaurant that \textit{purchases supplies from other states} may be barred from racial discrimination because such discrimination may affect the quantity of the restaurant’s business, \textit{Katzenbach v. McClung}, 379 U.S. 294, 300–01 (1964). The Commerce Clause has been the means that Congress has chosen to regulate and eradicate many forms of racial discrimination on the basis that the activity regulated in \textit{aggregate} could have an effect on other states. For a discussion of the “aggregate theory,” see \textit{Wickard v. Filburn}, 317 U.S. 111 (1942) (although the amount of wheat sold by an individual farmer was trivial, when \textit{taken together} with many other farmers similarly situated, it could have an effect on interstate commerce) and \textit{N.L.R.B. v. Fainblatt}, 306 U.S. 601 (1939).


\textsuperscript{106} \textit{301 U.S. 1}.

modern, expansive interpretation of the Commerce Clause, Congress’ regulatory power is not without effective bounds.\footnote{Id. at 608 (citing Lopez, 514 U.S. at 557). As will be seen, both Morrison and Lopez loom as most critical in the “limiting rationale” of the Rehnquist Court.}

In recent years, and most especially under the leadership of Chief Justice William Rehnquist, the United States Supreme Court has taken a close look at its Commerce Clause jurisprudence and has retreated from a broad and expansive reading of the “affectation doctrine.” The Supreme Court has made it clear that the power of Congress to regulate commerce, although broad, does have limits so as not to “obliterate the distinction between what is national and what is local.”\footnote{Jones & Laughlin Steel, 301 U.S. at 37.} The Supreme Court has thus applied this limiting distinction to non-economic activities or to activities that have traditionally been regulated by the states in the area of family law, criminal law enforcement, and education under a state’s broad police power—the power of a state to regulate behavior and enforce order within its territory, often framed in terms of public welfare, security, morality, and safety.\footnote{See, e.g., Balent v. City of Wilkes-Barre, 669 A.2d 309, 314 (Pa. 1995).}

As important as was Gibbons v. Ogden in elucidating the powers under the Commerce Clause, the seminal case which exemplified the change in view of the United States Supreme Court under the leadership of Chief Justice Rehnquist was United States v. Lopez,\footnote{514 U.S. 549.} which was the first major case since the Great Depression to limit Congress’ power under the Commerce Clause.\footnote{Id. at 557.} Alfonso Lopez, Jr. had carried a handgun and cartridges near a high school—Edison High—in San Antonio, Texas.\footnote{Id. at 551.} Lopez had been charged with violating the Gun-Free School Zones Act of 1990.\footnote{Id. (citing 18 U.S.C. § 922(q) (1994)).} Lopez maintained that the federal government had no authority to regulate the possession of firearms in a school zone and that the federal law under which Lopez was convicted was unconstitutional as a violation of the Commerce Clause.\footnote{Id. at 552.} In defending the constitutionality of the statute, the government relied upon a traditional, post-Jones & Laughlin
Steel analysis and argued that possession of a firearm in a school zone leads to violent crime, affecting the general economic condition by potentially limiting travel in the area. The government also suggested that the presence of firearms in a school zone would prevent people from learning effectively due to the constant fear of violent crime—all leading to a weaker economy. Thus, the government contended that the possession of a firearm at a school fell under the reaches of the Commerce Clause of the United States Constitution, under the broad “affectation doctrine.” The United States Supreme Court disagreed, rejecting such an application of the Commerce Clause under the broad “affectation doctrine.” It ruled that the Act itself was unconstitutional because possession of a gun is a criminal act and not an economic act. The Court held that, at a very minimum, the activity sought to be regulated must itself be economic in nature. Carrying or possessing a gun near a school did not meet this criterion.

In writing for the Court, Chief Justice Rehnquist dismissed the government’s argument, reasoning that if Congress could regulate something so far removed from commerce as the possession of a gun, then it could regulate anything; and since the Constitution clearly creates Congress as a body with enumerated, i.e., limited, powers, this could not be so. Otherwise, the Court declared that it would be “hard pressed to posit any activity by an individual that Congress is without power to regulate.”

The Chief Justice wrote:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort

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116 Id. at 563–64.
117 Id. at 564.
118 Id.
119 Id. at 567–68.
120 See id. at 567.
121 See id.
122 Id.
123 Id. at 567–68.
124 Id. at 564 (emphasis added).
retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.\textsuperscript{125}

A second case decided by the Rehnquist Court merits attention. In an effort to curb violence against women, Congress had specifically found that gender-motivated violence had a serious and deleterious impact on both victims and their families and had cost the nations billions of dollars in health care costs and lost productivity.\textsuperscript{126} As a result, Congress had enacted the Violence Against Women Act (VAWA) that authorized victims of gender-related violence to sue attackers for damages.\textsuperscript{127} A defendant in a suit filed pursuant to the VAWA argued that Congress lacked the power to enact this civil remedy provision because the underlying predicate act, violence against women, does not involve interstate commerce.\textsuperscript{128} While the \textit{Lopez} Court reiterated that Congress may regulate (1) use of the channels of interstate commerce, (2) the

\begin{footnotesize}
\textsuperscript{125} \textit{Id.} at 567–68 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).
\textsuperscript{127} 42 U.S.C. § 13981(c) declares:

\begin{quote}
A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
\end{quote}

42 U.S.C. § 13981(c) (2000). Section 13981 defines a gender-motivated crime as a “crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” \textit{Id.} § 13981(d)(1).
\textsuperscript{128} See \textit{Morrison}, 529 U.S. at 604.
\end{footnotesize}
“instrumentalities” (for example, vehicles) used in interstate commerce, and (3) activities that substantially affect interstate commerce, because VAWA’s civil remedy concededly did not regulate the first or second categories, in United States v. Morrison, the Supreme Court would analyze its constitutionality under the third prong.\textsuperscript{129} In so doing, the Court once again rejected the government’s contention.\textsuperscript{130}

In deciding Morrison, the Supreme Court once again noted that the Constitution distinguishes between national and local interests and that the police power is a power that generally belongs to the states.\textsuperscript{131} The Court ruled that Congress had no authority to regulate non-economic, “criminal conduct based solely on the conduct’s aggregate effect on interstate commerce.”\textsuperscript{132} The Court explained that economic activities that directly or indirectly affect interstate commerce must be distinguished because of “the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.”\textsuperscript{133} Referring to Justice Kennedy’s concurrence in Lopez, the Court said: “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur.”\textsuperscript{134} The majority further quoted from Lopez: “[I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”\textsuperscript{135} In his concurring opinion, Justice Thomas expressed the concern that “Congress [was] appropriating state police powers under the guise of regulating commerce.”\textsuperscript{136} The majority said that the scope of

\textsuperscript{129} Id. at 608–09.
\textsuperscript{130} Id. at 617.
\textsuperscript{131} Id. at 617–18.
\textsuperscript{132} Id. at 617 (emphasis added). The provision of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, was held unconstitutional as exceeding congressional power under the Commerce Clause and under Section 5 of the Fourteenth Amendment to the Constitution. Id. at 627.
\textsuperscript{133} Id. at 615.
\textsuperscript{134} Id. at 611 (quoting United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring)).
\textsuperscript{135} Id. at 613 (quoting Lopez, 514 U.S. at 564).
\textsuperscript{136} Id. at 627 (Thomas, J., concurring).
interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote.”\textsuperscript{137} The majority concluded that upholding the VAWA on the basis of the Commerce Clause “in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”\textsuperscript{138}

With these comparative considerations in mind, and with reference to the fact that while illegal immigration has been generally considered constitutionally to be the object of federal responsibility, subject to the doctrine of preemption, it is certainly true that in a practical sense, illegal immigration encompasses both national and local considerations. Thus, what are the implications of the constitutional debate in the area of illegal immigration? Will the Supreme Court similarly play a critical role in the formulation of public policy concerning naturalization and citizenship as it did in the development, expansion, and later retrenchment from an expansive view of the Commerce Clause? With the continued failure of the Congress to enact appropriate comprehensive or remedial legislation, might the Supreme Court not afford more power over immigration to state and local governments or will such power simply devolve of its own accord?

\textbf{C. The Illegal Immigration Debate}

\textit{1. Background}

Illegal immigration to the United States refers to foreign nationals voluntarily entering and then staying in the country in violation of U.S. immigration and nationality laws. Without any doubt, it is one of the most controversial issues confronting economists, policy makers, politicians, and immigration activists. The United States has traditionally imposed

\textsuperscript{137} Id. at 608 (citing Lopez, 514 U.S. at 557).

\textsuperscript{138} Id. at 608, 617–18 (citing Lopez, 514 U.S. at 557). Some commentators have argued, however, that “the principal question before the Court in [both Morrison and Lopez] was not whether the activity in question was ‘economic’ or ‘non-economic,’ but rather whether the [important] principle of federalism should operate as an affirmative check on the power of Congress to enforce the Commerce Clause.” See Wilson Ray Huhn, The Constitutional Jurisprudence of Sandra Day O’Connor: A Refusal to “Foreclose the Unanticipated,” 39 Akron L. Rev. 373, 413 (2006).
restrictions on immigration because of national security concerns and the promotion of the socio-economic welfare of its citizens, legal residents, and institutions. Unfortunately, the debate on immigration, perhaps exemplified by the comments of Mayor Barletta, has become more divisive because of faulty or incomplete data, ideological biases, and the use of normative analysis.

One source of conflict is the disagreement among the different sides about whether illegal immigration is a humanitarian, legal, or economic issue. “Since 1970, more than [thirty] million legal and illegal immigrants have settled in the [United States], representing more than one-third of all people ever to come to America’s shores.” The foreign population in 2002 stood at approximately 33.1 million—or 11.5 percent of the total population of the United States. The U.S. Census Bureau projects that in less than fifty years, immigration will push the population of America to more than 400 million from its current level of 288 to 300 million people.

2. Demographic Information

The following has been adapted from a popular site for information on legal and illegal immigration into the United States, ImmigrationCounters.com:143

141 Id.
142 Id.
143 See Immigration Counters, http://www.immigrationcounters.com (last visited June 10, 2009). As found on their website:

ImmigrationCounters.com provides the key numbers resulting from illegal immigration in the United States. Using the latest government and private sources, research and analysis trending data is factored at their individual rates of increase. Topic related books and links are provided for you to become more informed about illegal immigration in America.

Id.
• The popular phrase “10–11M undocumented workers in the country” is both misleading and false. “That figure fails to factor in the ‘chain migration’\textsuperscript{144} of unemployed dependent family members (wives, grandparents, children, girlfriends, and others), the remaining unemployed, those incarcerated,\textsuperscript{145} transients, fugitives, and others who are uncounted and “undocumented.”\textsuperscript{146}
• Because of the nature of illegal immigration, only the roughest of estimates are possible.
• “Illegal immigration generally falls into one of two categories: those individuals who entered the country illegally and those individuals who were admitted legally as visitors or on temporary work status and [who have nonetheless] overstayed their visa.”\textsuperscript{147} The legal status of non-citizens is not routinely ascertained in censuses or surveys with sample sizes sufficient for making accurate national population estimates. An alien registration program at the Immigration and Naturalization Service or INS, requiring all resident aliens to report their status on an annual basis, was [actually] discontinued by Congress in 1981. It is unrealistic to expect the Census Bureau

\textsuperscript{144} For a description and critique of the concept of “chain migration,” see generally NumbersUSA, Chain Migration, http://www.numbersusa.com/content/learn/rewards/reducing-legal-immigration.html (last visited June 10, 2009).
\textsuperscript{146} The Center for Immigration Studies reports that “communities of recently arrived legal immigrants help create immigration networks used by illegal aliens and serve as incubators for illegal immigration, providing jobs, housing, and entree to America for illegal relatives and fellow countrymen.” Ctr. for Immigration Studies, Illegal Immigration, http://www.cis.org/Illegal (last visited June 10, 2009) (noting further that “[t]he two ‘magnets’ attract illegal aliens are jobs and family connections”).
\textsuperscript{147} See infra app. A.
to locate the majority of illegal immigrants in the country, nor is it realistic to expect illegal immigrants to fill out census forms” on a voluntary basis.\footnote{148}

Despite these limitations, the U.S. Census Bureau indicated that the illegal immigration population in the United States was about eight million.\footnote{149} Extrapolating from this number, Immigration Counters estimates that the illegal-alien population “grew by about half a million a year in the 1990s.”\footnote{150} “This estimate [was] derived from a draft report given to the House of Representatives Immigration Subcommittee by the [INS] that estimated the illegal population was 3.5 million in 1990.”\footnote{151} Thus, “[f]or the illegal population to have reached [eight] million by 2000, the net increase had to be 400,000 to 500,000 per year during the 1990s. The Census Bureau currently estimates a net increase of 500,000 illegal immigrants annually and a current population of about 10.5 million.”\footnote{152} To many observers who are students of the immigration controversy, “this number represents one of the lower estimates and is disputed” by others in the field.\footnote{153} For example, Immigration Counters places the figure at around twenty million illegal immigrants in the United States.\footnote{154}

A report authored by the Pew Hispanic Center, titled \textit{The Size and Characteristics of the Unauthorized Migrant Population in the U.S.},\footnote{155} projected about 11.1 million illegal aliens in 2005 and 11.5 to 12 million as of March 2006.\footnote{156} The report indicated that as of 2005, illegal immigrants have a total of about 3.1 million children who were born in the United

\footnote{149} \textit{Id.}
\footnote{150} \textit{Id.}
\footnote{151} \textit{Id.}
\footnote{152} \textit{Id.} (emphasis added).
\footnote{153} \textit{Id.}
\footnote{154} \textit{Id.}
\footnote{156} \textit{Id.} at i.
States and who are now U.S. citizens;\textsuperscript{157} “other sources place this number at [five] million.”\textsuperscript{158} Note the following:

- On the high end of the spectrum are some private groups that randomly select single sources of data, such as an interview with a border patrol agent or with one elected official. Those sources have routinely placed the numbers of illegals around [thirty] million.

- [E]stimates from the Department of Homeland Security (DHS) of 700,000 per year who enter illegally (includes children) or are visa over-stay fugitives. \textit{The Pew Hispanic Center} estimates 700,000–800,000 per year. \textsuperscript{159}

- The Congressional Budget Office (CBO) projects [700,000 to 900,000] [i]llegal [i]migrants entering annually and [seventy] million in the next [twenty] years.\textsuperscript{160}

The war on terrorism has increased illegal immigration concerns, as “[i]t is estimated that approximately 78,000 illegal aliens from countries who are of special concern [to the United States] due to the war on

\textsuperscript{157} \textit{Id.} at ii.

\textsuperscript{158} Immigration Counters, supra note 148. This paper does not deal with the question of citizenship of the child or children of illegal aliens. The Fourteenth Amendment to the United States Constitution has been interpreted by the United States Supreme Court in \textit{United States v. Wong Kim Ark} to grant citizenship to nearly every child born in the United States \textit{regardless of the citizenship of the parents}, with the exception of the children of diplomats and children born to enemy forces in hostile occupation of the United States. 169 U.S. 649, 702 (1898).


terrorism.” The U.S. Immigration Support adds some interesting (and perhaps alarming) perspectives to the discussion:

In 1999 [for example], the USCIS estimates that 968,000 new illegal aliens settled in the [United States]. This number was offset by 210,000 illegal aliens who either died or returned home on their own; 63,000 who were removed by the USCIS; and 183,000 illegal aliens who were given green cards as part of the normal “legal” immigration process. One of the most important findings of the USCIS report is the intimate link between legal and illegal immigration. The USCIS estimates that it gave out 1.5 million green cards to illegal aliens in the 1990s. This was not due to amnesty legislation, but rather reflects how the legal immigration process embraces illegal immigration and encourages it through legal exemptions. According to the USCIS, only 412,000 illegal aliens were removed during the decade.

3. Causes of Illegal Immigration

Economists classify the causes of illegal immigration into five main generic categories:

1. Global Population Pressure

The world population is currently estimated at about 6.06 billion. This represents approximately a 367 percent increase from its 1900 level. For example, Mexico, the source-country of most of the illegal immigration to the United States, has experienced a population growth from around thirteen to fourteen million in 1900 to more than 100 million in 2005. Generally, the population growth of developing countries has

162 Id.
164 See id.
surpassed the capacity of these countries to provide for the basic needs of the population.\textsuperscript{166} Migration (legal or illegal) by the “working age” population of developing countries to the industrialized countries is a means of escaping the economic dysfunctions associated with rapid population growth. The United Nations estimates that the world population will grow at an annual rate of 1.3 percent.\textsuperscript{167} This indicates that unless the Millennium Development Goals (MDG) are substantially achieved,\textsuperscript{168} illegal immigration will continue to rise because of the population growth in developing countries.

2. Trade Liberalization

Trade liberalization policies of the Mexican government before and after the North American Free Trade Agreement (NAFTA),\textsuperscript{169} for example, cuts in subsidies to farmers and increased foreign competition in the agricultural sector, created serious economic dislocations in the rural

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\textsuperscript{166} Immigration Counters, supra note 148.

\textsuperscript{167} POPULATION DIV., supra note 163, at 1.

\textsuperscript{168} According to the website of the United Nations, the eight Millennium Development Goals break down into twenty quantifiable targets that are then measured by fifty-four indicators:

\begin{itemize}
  \item Goal 1: Eradicate extreme poverty and hunger;
  \item Goal 2: Achieve universal primary education;
  \item Goal 3: Promote gender equality and empower women;
  \item Goal 4: Reduce child mortality;
  \item Goal 5: Improve maternal health;
  \item Goal 6: Combat HIV/AIDS, malaria and other diseases;
  \item Goal 7: Ensure environmental sustainability;
  \item Goal 8: Develop a Global Partnership for Development.
\end{itemize}


This triggered a massive exodus of peasants—two million, by some estimates—from rural areas to Mexican cities and eventually to the United States in search of jobs.171

3. Global Disparity in Living Standards

Many economists believe that changes in the number of illegal immigrants to the United States is a function of the difference between the minimum wage in the most industrialized sector of the source country and the United States minimum wage.172 For example, let $M$ be the number of illegal immigrants attempting to enter the U.S. from Mexico. Let $W_{mx}$ stand for the real minimum wage in the most industrialized sector of the Mexican economy. Let $W^v$ be the real minimum wage in the U.S. measured in pesos. We define $v = W^v - W_{mx}$ and postulate that

$$ \frac{\Delta M}{M} = \varphi(v, x, g) \quad (1) $$

where $x$ is an index of all the social and cultural factors influencing illegal immigration (e.g. desire for family reunion, lifestyle, etc.). $g$ is the probability of apprehension. We assume that the function $\varphi$ has the following properties:

(i) $\varphi(0,0,0) = 0$  \hspace{1em} (ii) $\varphi' > 0$ for all $v, x$ and $g$

(iii)$\varphi'' > 0$ for all $x, v$ and $g$.

$\frac{\Delta M}{M}$ is the percentage change in the number of potential illegal immigrants. Equation (i) suggests that in the long-run, the number of illegal immigrants from Mexico will depend on social and cultural factors, the difference in real wages, and the effectiveness of border enforcement.

4. Illegal Employers

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There are any numbers of laws prohibiting businesses from knowingly hiring illegal immigrants. However, since these laws are rarely enforced or the possible sanctions are sufficiently mild, businesses will attempt to reduce production costs by hiring underpaid illegals in order to maximize profits. In the process, businesses will evaluate the probability of work-site inspections and the level of punitive sanctions for violations of immigration laws against expected profit by hiring illegal immigrants.

5. Wars, Natural Disasters, and Political Refugees

The civil war in Columbia, political and economic refugees from Cuba and Haiti, and the various natural disasters in Central America have certainly contributed to the illegal immigration problem. The United States and most countries in the West have also placed restrictions on asylum seekers from developing countries.

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175 See id.


177 According to the Statute of the Office of the United Nations High Commissioner for Refugees enacted in 1950, a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, unwilling to return to it.

4. Economics of Illegal Immigration

The effects of illegal immigration on the United States may be analyzed by considering its impact on the economy, the demographic transition, the culture, and the environment over the long-run. The National Research Council has estimated that the net cost of immigration to the United States ranges from $11 billion to $22 billion per year. \(^{179}\) Ironically, while most governmental expenditures for immigration-related services come from state and local revenues, most taxes paid by immigrants actually find their way into the federal treasury. \(^{180}\) The state of California alone estimates that the net cost to the state of providing core “government services to illegal immigrants approached $3 billion during a single fiscal year.” \(^{181}\) One reason for the “deficit is caused by [the] low level of tax payments made by immigrants.” \(^{182}\) Most immigrants are “disproportionately low-skilled and thus earn low wages, and a higher rate of consumption of government services, both because of their relative poverty and their higher fertility.” \(^{183}\) Immigrants comprise approximately

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\(^{178}\) The National Research Council is a part of the National Academies, which in addition is comprised of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. See Nat’l Research Council Home Page, http://www.nationalacademies.org/nrc (last visited June 10, 2009). They are private, nonprofit institutions that “provide science, technology and health policy advice under a congressional charter.” Id. The National Research Council was organized by the National Academy of Sciences in 1916 to associate the broad community of science and technology with the Academy’s purposes of further knowledge and advising the federal government. See id.


\(^{180}\) Kouri, supra note 179.

\(^{181}\) Id.

\(^{182}\) Id.

\(^{183}\) Id. The Center for Immigration Studies estimates that there are 750,000 annual births to immigrant women. Ctr. for Immigration Studies, Executive Summary, http://www.cis.org/articles/2003/SprawlExSumm82603.html (last visited Jan. 16, 2009).
fourteen percent of America’s workforce—yet they account for thirty percent of high school dropouts in the general population.\textsuperscript{184} The Center for Immigration Studies notes that immigrants are sixty percent more likely to be employed in low skilled occupations than are native born workers.\textsuperscript{185} While immigrant households increased their representation in the United States population by sixty-eight percent, their share of the total “poor population” has increased by 123 percent.\textsuperscript{186}

If we assume that most illegal immigrants from Mexico and Latin America are unskilled workers, then the influx of illegal immigrants will increase the domestic supply of unskilled labor, \textit{ceteris paribus}, causing a decrease in the equilibrium wage rate for unskilled American workers. In fact, in the United States, most of the unskilled workers are members of minority groups.\textsuperscript{187} Professor George J. Borjas, Richard B. Freeman, and Lawrence F. Katz of Harvard University estimated that in a two decade span, there was a 4.6 percent reduction in the wage rate of unskilled workers due to illegal immigration.\textsuperscript{188} While there may be a controversy whether illegal immigration is a net benefit or net cost to the economy, one fact seems indisputable: illegal immigrants pay sales taxes, state, local, and federal income taxes, social security taxes (for those immigrants with false identifications), and property taxes indirectly through rental payments. In fact, by some estimates, illegal immigrants contribute about $7 billion annually to Medicare and social security from which they will not draw any payments in the future.\textsuperscript{189} Because some hospitals, schools, and other

\textsuperscript{184}Randy Capps et al., \textit{A Profile of the Low Wage Immigrant Workforce}, IMMIGRANT FAMs. & WORKERS: FACTS AND PERSPECTIVES, NOV. 2003, at Brief 4.

\textsuperscript{185}Katherine Gazella, \textit{Study: Immigrants Lower Some Wages}, ST. PETERSBURG TIMES, Jan. 21, 1998, at 6E.


\textsuperscript{188}See George J. Borjas et al., \textit{How Much Do Immigration and Trade Affect Labor Market Outcomes?}, in 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 65–66 (William C. Brainard & George L. Perry eds., 1997).

public service providers generally do not identify users by their legal status, the extent of the use of public services by illegal immigrants is highly speculative.

5. An Economic Analysis: A Model of Border Enforcement

Suppose the host country produces an aggregate output $Q$ by a neoclassical production function $F$, using two inputs, unskilled labor $L_u$ and skilled labor $L_s$

$$Q = F(L_u, L_s) \quad (2)$$

The labor force $L = L_u + L_s$. We make the following assumptions about $F$.

1. $F$ is linear homogenous of degree 1. This implies that we can write equation (2) as

$$Q = L_s f\left(\frac{L_u}{L_s}\right) \quad (3)$$

where $f\left(\frac{L_u}{L_s}\right) = F\left(\frac{L_u}{L_s}, 1\right)$ and $u = \frac{L_u}{L_s}$ is the employment of unskilled labor per unit of skilled labor.

2. $f'(u) > 0$; $f''(u) < 0$ for all values of $u$. The marginal product of unskilled labor is positive but it diminishes with higher and higher $u$.

3. $f'(0) = \infty$; $f'(\infty) = 0$

As $u$ approaches zero, the marginal product of unskilled labor becomes very large and as $u$ becomes very large, the marginal product of labor approaches zero.

4. $f(0) = 0$; $f(\infty) = \infty$

Without any unskilled labor, aggregate output per unit of skilled labor is zero. If $u$ increases without limit, any level of aggregate output per unit of skilled labor can be achieved.

We assume that virtually all the illegal immigrants are unskilled workers.

More specifically, suppose that $L_u = L_n + I$, where $L_n$ is the supply of native unskilled workers and $I$ is the number of illegal immigrants present in the host country.

If \( M_t \) is the total number of migrants attempting illegal immigration in period \( t \), and if \( A_t \) is the number of them apprehended, then

\[ I_t = M_t - A_t. \]

Following Ethier, we shall assume the probability of apprehension depends on the level of effort put into border enforcement. We write

\[ g(E) = \text{Probability of apprehension} \quad (4) \]

\( E \) represents the level of effort put into border enforcement in the host country.

The function \( g(E) \) has the following properties:

(i) \( g(0) = 0 \)
(ii) \( g' > 0 \)
(iii) \( g'' \leq 0 \)
(iv) \( 0 < g < 1 \)

Consider the decision of a potential illegal immigrant. Suppose his reservation real wage in the source country is \( W^* \). Let \( k > 0 \) be the cost (in terms of real wage) of illegal attempt to migrate to the host country. Furthermore, let \( \tilde{W} \) be the expected wage if he successfully migrates illegally to the host country.

Assuming that the illegal immigrants are risk neutral, arbitrage condition will ensure that

\[ \left( W^* - k \right) g(E) + \left( 1 - g(E) \right) \tilde{W} = W^* \]

or \( \tilde{W} = W^* + \left( \frac{g(E)}{1 - g(E)} \right) k \)

Equation (5) illustrates that the expected real wage in the host country depends on the level of effort put into border enforcement. We see that as \( E \) increases, \( W \) increases. We assume that for the sub-labor market in which illegal immigrants operate, the market does not clear for institutional reasons. However, the market for the skilled labor clears. So we write

\[ f'(u) = W \quad (6) \]

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\[ \tilde{W} = \gamma W \quad ; \quad \gamma > 0 \]  
\[ \text{and} \quad \mu = f(u) - uf'(u) \]  

Similar to Ethier,\(^\text{191}\) we investigate whether illegal immigration affects national income. We define national income as

\[ Y = \gamma WL_n + \mu L_s - E \]  

Totally differentiating (9) we get

\[ dY = WL_n d\gamma - dE \]
\[ = \gamma WL_n \frac{d\gamma}{\gamma} - \frac{dE}{E}.E \]  

Equation (10) states that national income will increase if and only if

\[ \left( \frac{\gamma WL_n}{E} \right) \frac{d\gamma}{\gamma} > \frac{dE}{E} \]  

In other words, national income will rise if and only if the percentage increase in the wage rate for unskilled native workers (due to border enforcement effort) is greater than the percentage increase in the cost of the border enforcement effort. The optimal level of border enforcement in the host country is determined by the equality between the marginal social benefit and the marginal social cost of the border enforcement effort.

\[ D. \quad \text{Some Brief Commentary and Tentative Conclusions} \]

Contrast the sentiments of Hazleton, Pennsylvania Mayor Barletta with the following quotation from the American poet Emma Lazarus:

\begin{quote}
Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me.\(^\text{192}\)
\end{quote}

\(^{191}\) Id.

As can be demonstrated, the problems associated with both legal and illegal immigration are multifaceted and involve political, demographic, economic—and legal and constitutional—determinants. The problem is not exclusively any one of these factors. According to a seminal report issued by the General Accounting Office (GAO) in 1982, most countries use a combination of policy options to deal with the problem of illegal immigration, including:

- Employer sanctions legislation;
- Border enforcement and internal interdiction measures; and
- Amnesty provisions for selected illegal immigrants.

As long as illegal immigrants continue to earn roughly one-tenth of an American counterpart worker, and for so long as American businesses are willing to hire cheap labor from abroad (with few businesses ever punished and a viable system of verification of new hires’ work eligibility virtually non-existent), the problem will continue and will in fact worsen. It has been demonstrated that on the legal front, the federal government, through Congress, indeed wields enormous plenary powers over the admission, exclusion, and deportation of aliens. As a result, Congress may exclude aliens altogether, or prescribe the conditions under which an alien may enter the United States or remain in the country. However, the current immigration debate indicates that the federal government may be powerless to actually deal with the root causes of the immigration problem in a systematized and organized fashion and that, in a larger sense, the legal system—or at least federal courts—is not effectively designed to resolve an issue of such magnitude and controversy. If the objective of public policy is to deter illegal immigration, then the optimal policy may be a carefully constructed combination of the options noted above by the GAO. In retrospect, the Immigration Reform and Control Act (IRCA) of 1986 was an attempt, albeit an imperfect one, by Congress to effect a


\[194\] See id.

combination of the three policy options. Under the IRCA, over 2.25 million illegal workers were granted full legal status.\textsuperscript{196} In 2009, America is facing the same or perhaps even a worse problem with illegal immigration. Was this a failure of public policy?

The executive and legislative branches of the United States government must step up to the plate and attempt to make sense out of the resulting chaos. Courts are not equipped to be the “decisive branch” concerning questions relating to illegal immigration. The process of bringing some order to the current debate seemed to achieve a major milestone in May 2007 when a “tentative agreement” was announced that might have resulted in a major overhaul of the immigration quagmire.\textsuperscript{197}

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\textsuperscript{197} Robert Pear & Jim Rutenberg, Senators in Bipartisan Deal on Broad Immigration Bill, N.Y. Times, May 18, 2007, at A1. Initial details of the compromise legislation revealed the following elements:

\begin{itemize}
\item \textit{U.S.-Mexico Border Security}: Construction of 370 miles of fencing and 200 miles of vehicle barriers; placement of seventy ground-based radar and camera towers; deployment of four unmanned aerial vehicles.
\item \textit{Border Patrol}: Hiring of 18,000 Border Patrol Agents with additional field and investigative agent; deployment of “resources to detain up to 27,500 aliens per day on an annual basis”; ending of the practice of “catch and release”;
\item \textit{Worksite Enforcement}: Requiring employers to electronically verify new hires within eighteen months and all existing employees within three years.
\end{itemize}

Jed Babbin, Details Revealed of Senate Comprromise Bill, HumanEvents.com, May 17, 2007, available at http://www.humanevents.com/article.php?id=20772. Benchmarks above must be met before the following can occur:

\begin{itemize}
\item \textit{Guest Worker Program}: Creating a program for 400,000 to 600,000 temporary workers per year to fill jobs for which American workers cannot be found. These workers can be admitted for two years and can be renewed twice, provided they spend one year outside the United States between admissions;
\item \textit{Legalization of Illegal Immigrants}: Allowing illegal immigrants to work in the United States while applying for a renewable four-year “Z”
\end{itemize}

(continued)
However, the agreement subsequently fell apart under a barrage of criticism from both the “left” and the “right” on the American political spectrum.\textsuperscript{198}

While it is certainly true that Congress constitutionally may be charged with effecting solutions to the current immigration morass, actions like those taken in Hazleton and elsewhere may resurface and even escalate despite any assertion of preemption or the preeminence of federal authority in the area. As an indication that states may not be simply waiting for a magical “federal solution,” the \textit{New York Times} reported that “[i]n 2007, 1,562 bills related to illegal immigration were introduced nationwide and 240 were enacted in [forty-six] states, triple the number that passed in 2006.”\textsuperscript{199} Thus, states, localities, and the federal governments must work together to create a sound and workable immigration policy in the future. Whether the Supreme Court will permit this devolution of power is another question. Time will tell if a rational solution to the problem will be achieved.

\footnotesize
\begin{itemize}
    
    \item visa. Visa holders could apply for green cards but would have to pay fines. Head of household would have to return to the home country to file an application.

\textit{Id.} \textsuperscript{198} Pear & Rutenberg, \textit{supra} note 197.

\textsuperscript{199} Damien Cave, \textit{Local Officials Adopt New, Harder Tactics on Illegal Immigrants}, \textit{N.Y. Times}, June 9, 2008, at A1 (reporting on a study by the National Conference of State Legislatures).
\end{itemize}
**APPENDIX A**

Legal Immigration to the United States by Decade and Region, 1941–2000

<table>
<thead>
<tr>
<th>Decade</th>
<th>Number</th>
<th>Europe</th>
<th>Asia</th>
<th>America</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1941–1950</td>
<td>1.0</td>
<td>60.0%</td>
<td>3.6%</td>
<td>34.3%</td>
<td>2.1%</td>
</tr>
<tr>
<td>1951–1960</td>
<td>2.5</td>
<td>52.7%</td>
<td>6.1%</td>
<td>39.7%</td>
<td>1.5%</td>
</tr>
<tr>
<td>1961–1970</td>
<td>3.3</td>
<td>33.8%</td>
<td>12.9%</td>
<td>51.7%</td>
<td>1.6%</td>
</tr>
<tr>
<td>1971–1980</td>
<td>4.5</td>
<td>17.8%</td>
<td>35.3%</td>
<td>44.1%</td>
<td>2.8%</td>
</tr>
<tr>
<td>1981–1990</td>
<td>7.3</td>
<td>10.4%</td>
<td>37.3%</td>
<td>49.3%</td>
<td>3.0%</td>
</tr>
<tr>
<td>1991–2000</td>
<td>9.1</td>
<td>45.9%</td>
<td>30.7%</td>
<td>49.3%</td>
<td>5.0%</td>
</tr>
</tbody>
</table>

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