

THE CONSTITUTIONAL LIMITS OF SUPPLY AND DEMAND: WHY A SUCCESSFUL GUEST WORKER PROGRAM MUST INCLUDE A PATH TO CITIZENSHIP

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The United States is a proud nation of immigrants, with a short memory. As the country's need for immigrant labor continues unabated, legislative reaction to these labor demands is myopic. It is undisputed that the American desire for cheap labor incentivizes the migration of unskilled and undocumented guest workers. As long as market demand for this labor continues unabated, the United States will have a large undocumented immigrant population residing within its borders. The legislative response is mostly punitive. A real danger exists, however, that draconian immigration laws will result in the inevitable formation of a permanent underclass within our country. The United States Constitution simply does not permit such a result.

Beginning with the Fourteenth Amendment, and its incorporation of birthright citizenship, Congress formed a specific constitutional intent to reject laws that promote the creation of an underclass in American society. In this way, birthright citizenship became a bulwark of immigrants' rights; the status of noncitizen parents cannot deprive their native born children of the full benefits of United States citizenship. Moving forward from this principle, the parameters of legislation pertaining to guest workers becomes especially complex. Congress must reconcile the United States' demands for immigrant unskilled and low-skilled labor with a strong countervailing anti-immigrant bias.

Demand for immigrant labor is not unique to the United States. Looking abroad to other guest worker programs provides great insight into what comprises "success" in this area. This Article examines the Canadian guest worker program in detail. Long held up as a model program, Canada has attempted to regulate its guest worker population through partnerships with supply countries, regulations of employers, and restrictions on guest worker movement. While these laws have reduced labor exploitation, they do so by isolating these workers to such a degree that their liberty interests are implicated. This isolation, unsurprisingly, leads to very high return rates by the guest

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workers to their home countries. If the sole benchmark of success is complete repatriation of all guest workers, however, then the constitutional price for such legislation is too steep.

On the other hand, if isolation of guest workers is not constitutionally permissible, then Congress must take a hard look at what is driving the anti-immigrant rhetoric—the fear of unchecked, undocumented migration from Latin America and specifically Mexico. Indeed, the Senate’s proposed Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 devotes large resources to increased border security to contain the perceived threat. However, close study reveals that Mexican migration is already waning. The perception of mounting hordes of undocumented immigrants within the United States is simply wrong.

Therefore, the only practical solution is to develop a guest worker program that combines the best aspects of the Canadian program, regulations that prevent the exploitation of guest workers, with the ideals of birthright citizenship, which means a path to permanent residency and citizenship. It is a small concession that the United States should make to satisfy its demand for low-cost, unskilled labor. Without this solution, politicians will continue to exploit the deep emotions associated with illegal immigration. Congress will continue to enact punitive legislation that does not staunch the flow of immigrants into the United States. Constitutional principles will be eviscerated in exchange for short-term political gain.

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INTRODUCTION

The United States is a proud nation of immigrants, with a short memory. As the country's need for immigrant labor continues unabated, legislative reaction to these labor demands is myopic. It is undisputed that the American desire for cheap labor incentivizes the migration of unskilled and undocumented guest workers. As studies of this population show, the accessibility of a cheaper workforce leads to greater profits by American employers due to a reduction in overhead.¹ Simultaneously, however, labor conditions are substandard for both the undocumented workforce and United States citizens who are employed in this type of manual labor.² As long as market demand for this labor continues, the United States will have a large undocumented immigrant population residing within its borders. The legislative response is mostly punitive.³ A real danger exists, however, that draconian immigration laws will result in the inevitable formation of a permanent underclass within our country. The United States Constitution simply does not permit such a result.

The discussion begins with the Fourteenth Amendment. Birthright citizenship has come under much criticism by anti-immigrant opponents who allege that its parameters encourage scheming undocumented immigrants to enter the United States, bear a citizen-child, and then use that child to force a path to lawful status in this country.⁴ These citizen-children are derided with

1. Cheap labor, in turn, reaps greater profits for American employers. See S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 1-2 (2d ed. 2013) ("The current H-2 program, which provides temporary farmworkers and non-farm laborers for a variety of U.S. industries, is rife with labor and human rights violations committed by employers who prey on a highly vulnerable workforce. It harms the interests of U.S. workers, as well, by undercutting wages and working conditions for those who labor at the lowest rungs of the economic ladder. This program should not be expanded or used as a model for immigration reform.").

2. *Id.*

3. See ESCONDIDO, CAL., ORDINANCE 2006-38R (2006) (establishing penalties for harboring of illegal aliens), *invalidated by* *Garrett v. Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006); see also HAZLETON, PA., ORDINANCE 2006-18 (2006) (making it "unlawful for any business entity to . . . hire . . . or continue to employ" unlawful workers, permitting any complaints on such basis, and requiring property managers to obtain proof of legal citizenship or residency prior to occupancy), *amended by* HAZLETON, PA., ORDINANCE NO. 2006-40 (2006) and HAZLETON, PA., ORDINANCE NO. 2007-6 (2007), *invalidated by* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007); FARMERS BRANCH, TEX., ORDINANCE 2903 (2007) (requiring property managers to obtain submission "of citizenship or eligible immigration status" for all tenants before "entering into any lease or rental arrangement"), *invalidated by* *Villas at Parkside Partners v. Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008). Several state statutes deny aliens the types of employment believed to be closely tied to the political functions of government. See CAL. GOV'T CODE § 1031 (West 2009) (applying to peace officers); see also N.Y. EXEC. LAW § 215 (McKinney 2007) (applying to state troopers); N.Y. EDUC. LAW § 3001 (McKinney 2002) (applying to public school teachers).

4. See Adrian Carrasquillo, *Paul Ryan: Beware of 'Anchor Babies,'* MSNBC (May 2,

the label of “anchor babies” and much worse.⁵ Indeed, a repeal of birthright citizenship has not been completely dismissed by some legislators, who see it as an important step to enforcing United States borders.⁶ Criticism of birthright citizenship does not end there. Some scholars argue that its application is irrational and even unjust.⁷

These criticisms, however, patently ignore a basic truth of American political culture—our legislators are able to pass, with relative ease, discriminatory laws based on improper motives, running the gamut from racist attitudes to simple isolationism.⁸ In short, birthright citizenship saves our

2013), <http://tv.msnbc.com/2013/05/02/paul-ryan-beware-of-anchor-babies/> (commenting on Representative Paul Ryan’s derogatory reference to immigrant children as “anchor babies” during town hall meeting). Citizen-children have also been referred to as jackpot babies and terror babies. *See, e.g., Anderson Cooper Stuns GOP Rep. on ‘Terror Babies’: ‘They Did Not Tell Me You Were Going To Grill Me,’* HUFFINGTONPOST.COM (Aug. 11, 2010), http://www.huffingtonpost.com/2010/08/11/anderson-cooper-stuns-gop_n_678650.html (referencing “terror babies” as a term used to describe a baby born in the United States to immigrants, playing up the negative stereotype that all immigrants are terrorists); Frosty Wooldridge, *Anchor Babies Away: Enormous Cost of Jackpot Babies to Taxpayers*, EXAMINER.COM (May 18, 2009), <http://www.examiner.com/article/anchor-babies-away-enormous-cost-of-jackpot-babies-to-taxpayers>; *Jackpot Baby Definition*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=jackpot%20baby&defid=5049077> (last visited July 2, 2013) (defining jackpot baby as a “[s]lang term used to describe a baby that was both planned and conceived abroad then delivered on U.S. soil solely for the parental desires of becoming U.S. citizens indirectly by way of an abused loop-hole in the system”).

5. *Anderson Cooper Stuns GOP Rep.*, *supra* note 4.

6. *House Republicans Introduce Bill to Repeal Birthright Citizenship Amendment*, FOXNEWS.COM (Jan. 6, 2011), <http://www.foxnews.com/politics/2011/01/06/house-republicans-introduce-repeal-birthright-citizenship-amendment/> (“Reps. Steve King of Iowa, Gary Miller of California and Rob Woodall and Phil Gingrey, both of Georgia, said the current practice of extending U.S. citizenship to so-called ‘anchor babies’ is a ‘misapplication’ of the . . . [Fourteenth] Amendment. ‘Passage of this bill will ensure that immigration law breakers are not rewarded, will close the door to future waves of extended family chain migration, and will help to bring an end to the global “birth tourism” industry,’ King said.”).

7. JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* 59-60 (2010) (“[I]t is hard to imagine any single principle that so fails basic intuitions about justice than that which would confine one’s life to an arbitrarily small circumference based on the nation-state within which one’s place of birth happens to be located. There have been numerous persuasive moral arguments against birthright citizenship—from John Locke to Joseph Carens—all making the point that a requirement of individual freedom is the ability to make contracts and not birth the basis of obligations, including citizenship.”).

8. Some such laws passed easily in the legislature and enjoyed support until they were subsequently repealed. *See, e.g.,* Chinese Exclusion Act, ch. 1015, 25 Stat. 476 (1888) (suspending Chinese immigration for ten years), *repealed by* Chinese Exclusion Repeal Act, ch. 344, 57 Stat. 600 (1943); *see also* Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (1924) (establishing racial quota system that allocated immigration from each foreign land to its share of existing U.S. population, effectively barring Japanese immigration), *repealed by* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101-1537 (2012)). Other laws easily passed the legislature only to be invalidated by a reviewing court. *See, e.g.,* *Arizona v. United States*, 132 S. Ct. 2492, 2501, 2503, 2505, 2507

country from its worst impulses when it comes to immigration. By vesting immigrants' American-born children with citizenship, and the attendant constitutional protections, the United States is able to maintain its reputation as a desirable place to emigrate no matter the political dialogue. This outcome is objectively desirable because immigrants bring many talents that the United States economy desires, including cheaper labor.⁹

Similarly, as Congress takes its first steps toward comprehensive immigration reform, the principles behind birthright citizenship should be considered when crafting new laws regulating the presence of guest workers. It is unrealistic that Congress can develop and execute a program that shuttles in

(2012) (invalidating S.B. 1070, 49 Leg., 2d Reg. Sess. (Ariz. 2010), which required legal immigrants to carry registration documents at all times, allowed state police to arrest individuals based on any suspicion of being an illegal immigrant, and made it a misdemeanor for unauthorized aliens to seek or engage in work in Arizona); *Plyler v. Doe*, 457 U.S. 202, 205 & n.1, 230 (1982) (invalidating TEX. EDUC. CODE ANN. § 21.031 (West 1981), which barred children of undocumented aliens from attending public schools); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 & n.1, 115-16 (1976) (invalidating the Civil Service Commission's interpretation of 5 C.F.R. § 338.101 that barred lawfully admitted resident aliens and other noncitizens from federal competitive civil service positions); *In re Griffiths*, 413 U.S. 717, 718 (1973) (invalidating Practice Book Conn. § 8, subd. 1 (1963), which excluded aliens from practicing law); *Sugarman v. Dougall*, 413 U.S. 634, 635, 646 (1973) (invalidating N.Y. CIV. SERV. LAW § 53(1), which excluded aliens from permanent positions in competitive class of state civil service); *Oyama v. California*, 332 U.S. 633, 636, 640 (1948) (invalidating California's Alien Land Law, 1 Cal. Gen. Laws Act 261 (Deering 1944, 1945 Supp.), which prohibited aliens that were "ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 413-14, 421 (1948) (invalidating CAL. FISH & GAME CODE § 990 (West 1945), which barred issuance of commercial fishing licenses to noncitizens). Several municipalities have also attempted to use discriminatory housing ordinances as methods of enforcing immigration beliefs. *See supra* note 3.

9. *See* Tamar Jacoby, *A Price Tag in the Billions*, N.Y. TIMES (Apr. 17, 2012), <http://www.nytimes.com/roomfordebate/2011/08/17/could-farms-survive-without-illegal-labor/without-immigrant-labor-the-economy-would-crumble> (arguing that if unauthorized farm workers were expelled from the U.S., American labor-intensive agriculture would collapse); *see also* MARGARET STOCK, NAT'L FOUND. FOR AM. POLICY, NFAP POLICY BRIEF: THE COST TO AMERICANS AND AMERICA OF ENDING BIRTHRIGHT CITIZENSHIP 12 (2012), available at <http://www.nfap.com/pdf/NFAPPolicyBrief.BirthrightCitizenship.March2012.pdf> (explaining that American children of undocumented immigrants are successful Americans in that they have enlisted in the U.S. military, become business owners, and served in political office); Eduardo Porter, *Immigration and American Jobs*, N.Y. TIMES (Oct. 19, 2012), <http://economix.blogs.nytimes.com/2012/10/19/immigration-and-american-jobs/> (stating that immigrant workers contribute to productivity growth in America and produce domestic jobs based on their willingness to work for lower wages); Bruce Murray, *The Economics of Immigration: An Economic Perspective on Immigration—Both Legal and Illegal—and the Prospects for Reform*, ANALYSIS ONLINE, http://www.analysisonline.org/site/oaarticle_display.asp?issue_id=1&news_id=140001394&sec_id=140002434 (last visited Oct. 11, 2013) ("Immigrants have become embedded in the U.S. workforce and are vital to certain industries such as farming, construction and the service sector. Immigrants constitute almost 40 percent of the workers in the farming, forestry and fishing industries. About 20 percent of the construction industry is powered by foreign labor, and the service industry is about 21 percent.").

these workers, isolates them from American society, then immediately deports them once their labor is no longer required. As such, it is inevitable that these guest workers will form ties in the United States. If retributive immigration laws do not allow some form of assimilation for those workers who do not or will not return to their home country, then the formation of an underclass is equally inevitable. This Article will examine guest worker programs through the lens of birthright citizenship.

Part I of this Article discusses the origin of birthright citizenship and the principles behind its passage.

Part II of this Article focuses on the perceived success of the Canadian guest worker program, including the practices that bring the program its international accolades and the practices that are simply not effective.

Part III of this Article will demonstrate why the United States must reconcile its demand for unskilled workers with the ideals of birthright citizenship by examining the fear of unchecked Mexican migration, which is contradicted by immigration statistics, against the Hong Kong guest worker program, which has devolved into involuntary servitude.

I. BIRTHRIGHT CITIZENSHIP PREVENTS THE FORMATION OF AN UNDERCLASS IN THE UNITED STATES COMPRISED OF FREED SLAVES

As our nation embarks on a serious discussion of federal immigration law, context is necessary, especially when it comes to guest worker provisions. For this, we must turn to the legislative considerations behind the Fourteenth Amendment, the seminal constitutional right enacted in response to forced migration. Prior to 1819, the United States had a limited immigration policy, where officials limited their oversight to simply counting newly arriving immigrants at ports of entry.¹⁰ The treatment of immigrants often intersected with the treatment of persons forcibly migrated as slaves.¹¹ Differing state laws regarding the legality of slavery culminated in 1856 with the decision by the United States Supreme Court in *Scott v. Sandford* (the *Dred Scott* decision).¹²

At its core, the *Dred Scott* decision answered the constitutional question of whether a freed slave was considered a citizen by the United States Constitution.¹³ The answer was not immediately obvious because the

10. Sara C. Barnhart, Note, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of "The Pursuit of Happiness,"* 42 GA. L. REV. 525, 537 (2008).

11. *See id.* at 534.

12. *Scott v. Sandford*, 60 U.S. 393 (1856).

13. *Id.* at 403 ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.").

Constitution still contained original language relegating slaves to second-class status:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.¹⁴

Accordingly, the Supreme Court held that Mr. Scott was not a citizen and therefore, could be legally deprived of all constitutional rights and privileges, including citizenship.¹⁵ The Court's decision was not the final word on the subject. Five years later, the Civil War began and near its conclusion, Congress proposed the Thirteenth Amendment abolishing slavery and involuntary servitude.¹⁶

During Reconstruction, newly freed slaves were in need of civil rights legislation to protect them against violence and opposition to their freedom in the South.¹⁷ Resistance against the federal emancipation led to competing state

14. U.S. CONST. art. I, § 2 (establishing, as a result of slavery, African Americans as three-fifths of a white man), *amended by* U.S. CONST. amend. XIV, § 2.

15. *Scott*, 60 U.S. at 404-05 (“The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”).

16. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). This amendment was subsequently ratified by 27 of the 36 states, and enacted on December 18, 1865 by the Secretary of State. *Id.*

17. See CONG. GLOBE, 39th Cong., 2nd Sess. 1376 (1867) (showing table of freedmen murders in Texas in 1866); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (explaining that the purpose of the civil rights bill under consideration was to “destroy . . . discrimination[]], and to carry into effect the [Thirteenth] amendment”). The legislative history of the Fourteenth Amendment also demonstrated, among other things, that discriminatory enforcement of States’ criminal laws was a matter of great concern for the drafters. See *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting) (“In the introductory remarks to its Report to Congress, the Joint Committee on Reconstruction, which reported out the Joint Resolution proposing the Fourteenth Amendment, specifically noted: ‘This deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.’” (alteration in original) (quoting H.R.J. REP. NO. 30, pt. XVII (1866))); *id.* at 346-47 (“Witnesses who testified before the Committee presented accounts of criminal acts of violence against black persons that were not prosecuted despite evidence as to the identity of the perpetrators.”); *id.* at 347 n.2 (listing various statements made before Congress that described said non-prosecuted incidents of violence against black persons); CONG. GLOBE, 39th Cong., 1st Sess. 129, 184, 211-12, 421, 497, 522, 569, 594, 1365, 1376, 1413, 1679, 1755, 1863 (1865-66)

legislation that effectively deprived freed slaves of all rights granted to them under the Thirteenth Amendment.¹⁸ “Black Codes” were enacted by states to preserve a racial caste system that completely disenfranchised the African immigrants and their native born children.¹⁹ For example, the Black Code of St. Landry’s Parish, Louisiana, provided:

[E]very Negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said Negro. But said employer or former owner may permit said Negro to hire his own time by special permission in writing, which permission shall not extend over seven days at any one time.²⁰

In response, Congress passed the Civil Rights Act of 1866 (the “1866 Act”).²¹ During the Senate debate, the need for a relevant constitutional amendment dominated discussion.²² Interestingly, the initial draft did not contain a provision on birthright citizenship. Section 1 merely declared:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³

The concept of birthright citizenship was first proposed by Senator Benjamin F. Wade from Ohio who incorporated an unusually broad definition of citizenship.²⁴ Wade sought to amend section 1 by removing “citizen” and

(referencing Civil Rights Bill of 1866 as a bill to protect all persons in the United States in their civil rights and furnish the means of their vindication).

18. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866); see *infra* note 19.

19. The Black Codes “prevented the colored man going from home . . . did not allow him to buy or to sell, or to make contracts . . . did not allow him to own property . . . did not allow him to enforce rights . . . did not allow him to be educated.” CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull).

20. S. EXEC. DOC. 39-2, at 93-94 (1865).

21. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Asserting that the 1866 Act’s citizenship provision was representative of the law as the Reconstruction Congress understood it, Senator Lyman Trumbull, the 1866 Act’s sponsor, explained to the Illinois Assembly on the matter:

It was the generally received opinion that after the adoption of the Constitutional Amendment abolishing Slavery, all native born persons were citizens. If not citizens, what were they? . . . The [Civil Rights Act’s] words declaring ‘all persons born in the United States, and not subject to any foreign Power, to be citizens’ were only declaratory of what the law already was.

Senator Trumbull’s Address to the Illinois Legislature—the Civil Rights Bill, N.Y. TIMES, Jan. 21, 1867, at 1.

22. Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 795-97 (1997).

23. CONG. GLOBE, 39th Cong., 1st Sess. 2764 (1866).

24. *Id.* at 2768; cf. Patrick J. Charles, *Decoding the Fourteenth Amendment’s Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211, 225 (2012) (“Indeed, during the 1866 Civil Rights Act debates congressional members often spoke of birthright citizenship in broad terms, including Trumbull.”). In fact, citizenship was mentioned only by Rep. Thaddeus Stevens, the amendment’s sponsor, after it was returned to the House. Garrett Epps, *The Citizenship*

substituting language that barred states from abridging “the privileges or immunities of persons born in the United States or naturalized by the laws thereof.”²⁵ Senator Wade’s intent was to draft section 1 so that it reflected the language of the 1866 Act.²⁶ This definition of citizenship, however, conflicted with the legislative history of the 1866 Act, particularly the grant of citizenship to persons who were only “temporarily resident or who were outside the allegiance of the United States.”²⁷ Wade’s reasoning was that it was “better to put this question beyond all doubt and all cavil by a very simple process.”²⁸

Senator Jacob Howard of Michigan authored the text that became the final version of the Citizenship Clause of the Fourteenth Amendment.²⁹ By incorporating the language, “All persons born in the United States *and subject to the jurisdiction thereof* are citizens of the United States and of the States wherein they reside,” Senator Howard asserted the amendment was a reflection of existing federal law:

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.³⁰

The intent behind the words, “and subject to the jurisdiction thereof,” is the subject of modern day debate.³¹ Some scholars maintain that Senator Howard did not mean to convey automatic citizenship to every child born on United

Clause: A “Legislative History,” 60 AM. U. L. REV. 331, 353 n.83 (2010). Stevens stated:

The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States.

CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (remarks of Rep. Stevens).

25. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

26. Wade “always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States.” *Id.*

27. Charles, *supra* note 24, at 226.

28. CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866).

29. Charles Wood, *Losing Control of America’s Future—the Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 509 (1999).

30. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).

31. See, e.g., Ashley E. Mendoza, Note, *Anchors Aweigh: Redefining Birthright Citizenship in the 21st Century*, 13 J.L. & FAM. STUD. 203, 205 (2011) (explaining that although the Citizenship Clause of the Fourteenth Amendment appears straightforward, “the debate is centered on the phrase ‘subject to the jurisdiction thereof’ and the Supreme Court’s interpretations of this language”); see also Kelly Gindele, *The Birthright of Citizenship as to Children Born of Illegal Immigrants in the United States: What Did the Drafters of the Fourteenth Amendment Intend?*, 34 N. KY. L. REV. 367, 368-70 (2007).

States soil but whose parents were noncitizens.³² Others assert that Howard only meant to exclude those children born to family of visiting government officials.³³ What appears certain, however, is that the main concern over automatic citizenship through birth was that it be withheld from residents who pledged allegiance to a foreign power.³⁴

During the debate over the 1866 Act, its sponsor, Senator Lyman Trumbull of Illinois, “explained that his goal was ‘to make citizens of everybody born in the United States who owe allegiance to the United States.’”³⁵ Trumbull further clarified:

I thought that might perhaps be the best form in which to put the amendment at one time, ‘That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;’ but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.³⁶

As for the words “subject to the jurisdiction,” Trumbull explained, “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means.”³⁷

32. See JON FEERE, CTR. FOR IMMIGR. STUDIES, BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: A GLOBAL COMPARISON 8 (2010), available at <http://www.cis.org/sites/cis.org/files/articles/2010/birthright.pdf> (explaining that Senator Howard’s statement could be interpreted as either: “(1) ‘This will not, of course, include persons born in the United States who are foreigners, aliens, [or those] who belong to the families of ambassadors or foreign ministers . . . ; . . . or; (2) This will not, of course, include persons born in the United States who are foreigners [or] aliens who belong to the families of ambassadors or foreign ministers’” (alterations in original)).

33. See *id.* at 7 (“Opposition to granting citizenship to individuals subject to a foreign power was strong throughout the Senate.”); see also CONG. GLOBE, 39th Cong., 1st Sess. 571-73 (1866) (statements of Sen. John B. Henderson, Sen. Lyman Trumbull, and Sen. Reverdy Johnson). On these grounds, some scholars argue “that the framers of the Citizenship Clause had no intention of establishing a universal rule of automatic birthright citizenship.” FEERE, *supra* note 32, at 7; see also Gindele, *supra* note 31, at 375.

34. See William M. Stevens, Comment, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment’s Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 368 (2008) (“Although the language of the Citizenship Clause derives from the text of the 1866 Civil Rights Act, the wording is not identical. The 1866 Act provides, ‘all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.’ The wording of the 1866 Act makes clear the framers’ intent: the 1866 Act did not extend birthright citizenship to children born to foreign nationals present in the United States on a temporary basis and still citizens of another country.”) (footnotes omitted).

35. FEERE, *supra* note 32, at 7 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Sen. Trumbull)).

36. *Id.*

37. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (statement of Sen. Trumbull). Senator Trumbull further clarified how this clause might apply to American Indians: “It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other

Attempts to limit the scope of birthright citizenship led some Reconstruction legislators to describe the allegiance requirement as one that a newborn child could never satisfy.³⁸ Therefore, the child's allegiance must necessarily be derived from his or her parents, a requirement that noncitizens could never meet.³⁹ For example, Senator Reverdy Johnson of Maryland "explained that parents must be 'subject to the authority' of the United States" for their children to be deemed U.S. citizens:

Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power . . . shall be considered as citizens of the United States. . . . [T]he amendment says that citizenship may depend on birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, *born of parents who at the time were subject to the authority of the United States.*⁴⁰

Modern application rejects this restrictive definition.⁴¹ While some anti-immigrant critics argue this interpretation prevents the conferral of birthright citizenship to children born of undocumented immigrants,⁴² many of the Reconstruction Senators that voted against the Fourteenth Amendment did so because they understood it to confer automatic citizenship to every person born on United States soil.⁴³

Government that he is 'subject to the jurisdiction of the United States.'" *Id.*

38. See FEERE, *supra* note 32, at 8 ("If the question of 'jurisdiction' boils down to one of allegiance, and under U.S. jurisprudence allegiance is a voluntary association, on what basis can a newborn child be found to have chosen an allegiance to his parent's country over allegiance to the United States, or vice versa?") (citing CONG. GLOBE, 39th Cong., 1st Sess. 2893 (statement of Sen. Trumbull)).

39. See CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson); see also FEERE, *supra* note 32, at 8-9 ("It was understood by the authors of the 14th Amendment that jurisdiction as to the child would be imputed from the status of the parents.").

40. FEERE, *supra* note 32, at 9 (alterations in original); see also CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson).

41. E.g., Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 HOUS. J. INT'L L. 147, 149 (2011).

42. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 247 (2008).

43. See JAMES C. HO ET AL., IMMIGR. POL'Y CTR., *MADE IN AMERICA: MYTHS AND FACTS ABOUT BIRTHRIGHT CITIZENSHIP* 8-9 (2009), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf> [hereinafter MYTHS AND FACTS ABOUT BIRTHRIGHT CITIZENSHIP].

For example, Senator Edgar Cowan of Pennsylvania voted against the amendment because he feared that granting citizenship to children of foreigners of different races (such as Chinese in California and Gypsies in his home state) would deprive states of the ability to remove them. CONG. GLOBE, 39th Cong., 1st Sess. 2890-91 (1866) (statement of Sen. Cowan); see also CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Conness) ("[With] respect to the children begotten of Chinese parents in California, . . . it is proposed to declare that they shall be citizens . . . I am in favor of doing so."); CONG. GLOBE, 39TH CONG., 1ST SESS. 2892 (1866) (statement of Sen. Conness) ("We are entirely ready to accept the provision proposed in this constitutional amendment, that the children

With ratification on July 9, 1868, the Fourteenth Amendment overruled the *Dred Scott* decision⁴⁴ and created automatic birthright citizenship, regardless of the immigration status of the parents: “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.”⁴⁵ Further, the debate over the correct interpretation of “subject to jurisdiction” was addressed in 1898 by the United States Supreme Court in *United States v. Wong Kim Ark*.⁴⁶ Wong Kim Ark was born in San Francisco to noncitizen Chinese parents.⁴⁷ After traveling temporarily to China, he was denied admission into the United States.⁴⁸ Notwithstanding Wong Kim Ark’s American birth, the government argued he was not a citizen under the Chinese Exclusion Acts.⁴⁹ The Court disagreed, holding that any child born in the United States, even to unauthorized “alien” parents, is granted citizenship under the Fourteenth Amendment.⁵⁰ In this way, “inalienable rights are not put up for vote,”⁵¹ and the Supreme Court explained that the Fourteenth Amendment “conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”⁵² Accordingly, if Congress intended to repeal the existing definition of birthright citizenship, it must amend the Constitution.⁵³

Jus soli guarantees that any child born in the territorial United States is automatically a citizen, regardless of the citizenship status of the parents.⁵⁴ Establishing *jus soli* as a constitutional principle, the Fourteenth Amendment textually guaranteed equality to native-born citizens regardless of creed, color, or origin.⁵⁵ It also guaranteed that these constitutional rights, privileges, and

born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.”); James C. Ho, *Defining “American” Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 370-71 (2006) [hereinafter *Original Understanding of the 14th Amendment*] (explaining that in response to Senator Cowan’s fears, Senator John Conness of California countered that the United States was entirely ready to bestow to the children of foreigners the equal protection of the law and access to basic civil rights).

44. *Scott v. Sanford*, 60 U.S. 393, 403, 406 (1856) (holding it constitutionally permissible to deprive free and enslaved African Americans of the right to citizenship).

45. U.S. CONST. amend. XIV, § 1.

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

47. *Id.* at 652.

48. *Id.* at 653.

49. *Id.* at 650 (quoting the District Attorney opposing the writ).

50. *Id.* at 702.

51. Petree, *supra* note 41, at 167.

52. *Wong Kim Ark*, 169 U.S. at 703.

53. *See id.* at 674-75, 678, 703.

54. *See id.* at 666-67. Alternatively, citizenship can be based on an individual’s parentage, known as *jus sanguinis*, or citizenship by descent. *See* MYTHS & FACTS ABOUT BIRTHRIGHT CITIZENSHIP, *supra* note 43, at 4.

55. *See Original Understanding of the 14th Amendment*, *supra* note 43, at 369; *see also Wong Kim Ark*, 169 U.S. at 678.

immunities could not be withdrawn by a simple popular vote, thereby insulating them from political whim.⁵⁶

Thus, a broad outline begins to form of a conscious legislative *and* constitutional rejection of laws that promote the creation of an underclass in American society. Indeed, birthright citizenship is a bulwark of immigrants' rights; the status of noncitizen parents cannot deprive their native born children of the full benefits of United States citizenship. What those benefits were, of course, evolved over the decades. Despite Fourteenth Amendment protection, laws discriminating against nonwhite citizens flourished, from the Black Codes to the California Alien Land Law, which essentially prohibited gifts of real estate to their American minor children, to modern laws such as the recently invalidated municipal housing restrictions, which barred undocumented immigrants from renting property even if they were parents of American children.⁵⁷ Nonetheless, citizens were insulated from what their immigrant parents were not—congressional laws of exclusion, or deportation, from the United States.⁵⁸ With this in mind, the parameters of legislation pertaining to guest workers becomes especially complex.

II. GUEST WORKER PROGRAMS ARE FRAUGHT WITH LEGISLATIVE PERILS AS DEMONSTRATED BY THE CANADIAN “SUCCESS” STORY

A successful guest worker program is best described as a system where the temporary workers return to their country of origin when their labor skills are no longer required.⁵⁹ The guest workers' migration back to their home countries alleviates a number of anti-immigration concerns, such as the influx of low-skilled immigrants and the alleged drain on government-provided social benefits.⁶⁰

56. See MYTHS & FACTS ABOUT BIRTHRIGHT CITIZENSHIP, *supra* note 43, at 19.

57. See *supra* notes 3, 8 and accompanying text.

58. See *supra* note 8.

59. See PHILIP MARTIN, INT'L LABOUR ORG., TOWARDS EFFECTIVE TEMPORARY WORKER PROGRAMS: ISSUES AND CHALLENGES IN INDUSTRIAL COUNTRIES 28, 32 (2007), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201427.pdf (explaining that a successful guest worker program must involve “subsidies to encourage temporary workers to return to their countries of origin as their contracts require and provide funds for economic development”); see also ALEX NOWRASTEH, CATO INST., HOW TO MAKE GUEST WORKER VISAS WORK 7-8 (2013), available at http://www.cato.org/sites/cato.org/files/pubs/pdf/pa719_1.pdf (arguing that a key component of a successful guest worker program is to ensure workers temporarily work then return to their home country).

60. STEVEN A. CAMAROTA, CTR. IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 7, 11 (2004), available at <http://www.cis.org/sites/cis.org/files/articles/2004/fiscal.pdf> (explaining that the “main problem with legalization is that illegals would . . . become unskilled legal immigrants [and] . . . create much larger fiscal costs than unskilled illegal aliens,” and that the “public’s anger over illegal immigration stems from the belief that illegals are a drain on taxpayers”);

A. Fixing a Dysfunctional Guest Worker Program through the Border Security, Economic Opportunity, and Immigration Modernization Act

The United States is attempting to address the problems with our immigration laws through the Border Security, Economic Opportunity, and Immigration Modernization Act (the 2013 Act).⁶¹ The 2013 Act addresses the country's demands for guest worker labor, and the corresponding desire of guest workers for legal status within the United States, through two avenues: (1) the Blue Card,⁶² described as an agricultural card program; and (2) the W Non-Immigrant Visa.⁶³

see also David Abraham, *American Jobs but Not the American Dream*, N.Y. TIMES, Jan. 9, 2004, at A19 (arguing that foreign workers are not good "guests" because they seldom want to leave their host country).

61. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (as passed by Senate, June 27, 2013).

62. *Id.* § 2211(a). Undocumented farm workers who have made a substantial prior commitment to agricultural work in the United States are eligible for the Blue Card if they apply within one year, or alternatively, seek an eighteen-month extension, which may be available. *Id.* § 2211(b)(3). A substantial prior commitment is statutorily described as having "performed agricultural employment in the United States for not fewer than 575 hours or 100 work days during the 2-year period ending on December 31, 2012." *Id.* § 2211(a)(1)(A). A spouse or child of a qualifying applicant may also seek Blue Card status. *Id.* § 2211(a)(1)(B). The applicant must pass a criminal background check and will be considered ineligible if convicted of, among other crimes, an aggravated felony, a felony, three or more misdemeanors, offenses under foreign law, unlawfully voting in the United States, or other grounds. *Id.* § 2101 (to be codified at 8 U.S.C. § 245C(b)(3)(A)). Applicants who are sixteen years of age or older must pay a processing fee. *Id.* § 2211(b)(9)(A)(i). Applicants who are twenty-one years of age or older must pay the processing fee and a \$100 penalty. *Id.* § 2211(b)(9)(C)(i).

63. *Id.* § 4702. The W-Visa has two categories of workers: (1) low skilled and (2) agricultural. *Id.* § 4703. The lesser-skilled, nonseasonal, nonagricultural category includes employment in hospitality, janitorial, retail, construction, among others. *Id.* § 4703(a). Twenty thousand visas will be available for low-skilled workers beginning on April 1, 2015. *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(g)(1)(A)(i), (B)). Available visas would then rise to 35,000 in 2016, to 55,000 in 2017, and to 75,000 in 2018. *Id.* (to be codified at § 220(g)(1)(A)(ii)-(v)). After that, "the number of visas would fluctuate, depending on unemployment rates, job openings, employer demand and data collected by a newly created federal bureau." *See* Erica Werner, *Business, Labor Get Deal On Worker Program*, ASSOCIATED PRESS (Mar. 30, 2013), available at <http://bigstory.ap.org/article/business-labor-close-deal-immigration-bill-0>. The number of available visas, however, would never rise above 200,000 or dip below 20,000 in any given year. S. 744 § 4703(a) (to be codified at 8 U.S.C. § 220(g)(2)(D)). Further, one-third of all visas per year would be reserved for small businesses. *Id.* (to be codified at 8 U.S.C. § 220(h)(3)).

The agricultural category will be comprised of visas based on at-will employment (W-3 visas) and visas based on contract (W-2 visas). This replaces the current H-2A program. *Id.* §§ 2232(a) (to be codified at 8 U.S.C. § 218A(e)(3)(B)(2)(I)), 2233. "A certified alien is eligible to be admitted to the United States as a W-nonimmigrant if hired by a registered employer for employment in a registered position in a location that is not an excluded geographic location." *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(b)(1)). The number of agricultural nonimmigrant visas will be limited to 112,333 per year for four years. *Id.* § 2232(a) (to be codified at 8 U.S.C. § 218A(c)(A)(i)). "Any unused visas in a quarter [will]

Undocumented farm workers who have made a substantial prior commitment to agricultural work in the United States are eligible for the Blue Card if they apply within one year, or alternatively, seek an eighteen-month extension, which may be available.⁶⁴ The Blue Card program provides a pathway to lawful permanent residence for the applicant,⁶⁵ and his or her spouse and children,⁶⁶ upon the payment of a \$400 fine.⁶⁷ To further disincentivize undocumented migration, a noncitizen who is granted a Blue Card will not be eligible for any federal means-tested public benefit.⁶⁸ Eight years after the regulations are published, Blue Card status will terminate, thus providing an incentive to the noncitizen to adjust to permanent resident status.⁶⁹ Agricultural guest workers who fulfill future work requirements in the United States who consistently pay taxes,⁷⁰ and are free of convictions for serious crime will be eligible to adjust to legal permanent resident status.⁷¹ The Blue Card program provides a form of amnesty for those undocumented agricultural guest workers who currently reside within the United States and as such, is

be added to the allocation for the subsequent quarter of the same fiscal year.” *Id.* (to be codified at 8 U.S.C. § 218A(c)(1)(B)). “A certified alien may be granted W nonimmigrant status for an initial period of three years” and “may renew his or her status for additional 3-year periods.” *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(c)(4)). A nonimmigrant agricultural worker who has been admitted for two consecutive periods “is ineligible to renew the alien’s nonimmigrant agricultural worker status until such alien (i) returns to a residence outside the United States” for at least three months. *Id.* § 2232(a) (to be codified at 8 U.S.C. § 218A(d)(2)(B)). W-Visa holders “may travel outside the United States and be readmitted. . . . Such travel may not extend the period of authorized admission of . . . [the] non-immigrant.” *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(c)(6)). “A spouse or child of a nonimmigrant agricultural worker [will] not be entitled” to a W-Visa or “any immigration status by virtue of the relationship of such spouse or child to such worker.” *Id.* § 2232(a) (to be codified at 8 U.S.C. § 218A(d)(6)(A)). However, a spouse or child of a W nonimmigrant may be admitted into the United States during the period of the W nonimmigrant’s admission. *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(b)(2)).

64. *Id.* § 2211(a)-(b).

65. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(a)).

66. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(c)).

67. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(a)(5)).

68. *Id.* § 2211(c)(3).

69. *Id.* § 2211(b)(8). An extension of blue card status may not be granted by the Secretary of Homeland Security until renewed national security and law enforcement clearances have been completed for the applicant. *Id.* at § 2211(b)(7).

70. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(b)(4)).

71. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(a)-(b)). Spouses and minor children will receive derivative status. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(c)(1)-(3)). Work requirements for adjustment to LPR status include “not less than 100 work days of agricultural employment [over] 5 years” within the eight-year period beginning on the date of passage of the 2013 Act. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(a)(1)(A)). Alternatively, the agricultural guest worker must have “performed not less than 150 work days of agricultural employment during each of 3 years” during the five-year period immediately following passage of the 2013 Act. *Id.* § 2212(a) (to be codified at 8 U.S.C. § 245F(a)(1)(B)).

controversial.⁷²

The W Non-Immigrant Visa is yet another attempt by Congress to permit entry of guest workers during times of labor shortages, yet very pointedly requires them to leave if their labor is no longer required.⁷³ A guest worker will lose the W-Visa after sixty days if: (1) following the “completion of his or her contract with a designated agricultural employer, [the worker] is not employed in agricultural employment by a designated agricultural employer”; or (2) the worker is an “at-will” employee and “is not continuously employed by a designated agricultural employer in agricultural employment.”⁷⁴

Unlike other employer-based visa preferences, the W-Visa will be data driven, using statistics compiled by the newly created Bureau of Immigration & Labor Market Research (the Bureau).⁷⁵ Experts in “economics, labor markets, demographics,” and other specialties will staff the Bureau.⁷⁶ It will “publish [labor] shortage lists by occupation and make annual recommendations . . . to Congress” on annual W-Visa caps,⁷⁷ as well as how to improve employment-based immigration.⁷⁸ Notably, the number of W-Visas for agricultural workers is capped at 112,333 annually for four years.⁷⁹

72. E.g. Jim DeMint & Robert Rector, Editorial, *What Amnesty for Illegal Immigrants Will Cost America*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/opinions/amnesty-for-illegal-immigrants-will-cost-america/2013/05/06/e5d19afc-b661-11e2-b94c-b684dda07add_story.html (“The economist Milton Friedman warned that the United States cannot have open borders and an extensive welfare state. He was right, and his reasoning extends to amnesty for the more than 11 million unlawful immigrants in this country. In addition to being unfair to those who follow the law and encouraging more unlawful immigration in the future, amnesty has a substantial price tag.”).

73. S. 744 § 4703(a) (to be codified at 8 U.S.C. § 220(g)(3)-(4)). A guest worker may not be unemployed for more than sixty consecutive days, and must depart if he or she is unable to obtain employment. *Id.* (to be codified at 8 U.S.C. § 220(c)(5)). “A ‘safety valve’ would allow employers to exceed the cap if they can show need and pay premium wages, but any additional workers brought in would be subtracted from the following year’s cap.” Werner, *supra* note 63 (describing the “W” Visa program).

74. S. 744 § 2232(a) (to be codified at 8 U.S.C. § 218A(d)(3)(A)). However, the Secretary may waive this requirement if the lapse in employment was due to injury or a natural disaster. *Id.* (to be codified at 8 U.S.C. § 218A(d)(3)(C)).

75. *Id.* § 4701(b).

76. *Id.* § 4701(g). These experts will “identify labor shortages and make recommendations, among other things, on the impact of immigration on labor markets as well as the methods of recruitment of U.S. workers into lesser-skilled, non-seasonal jobs.” Jackie Tortora, *5 Things You Need to Know About the Immigration Agreement*, AFL-CIO (Apr. 1, 2013), <http://www.aflcio.org/Blog/Political-Action-Legislation/5-Things-You-Need-to-Know-About-the-Immigration-Agreement>; see also S. 744 § 4701(d), (g). Twenty million dollars is appropriated to the Bureau. *Id.* § 4701(j)(1).

77. Tortora, *supra* note 76; see also S. 744 § 4701(d)(5), (f).

78. S. 744 § 4701(d)(7); see also Tortora, *supra* note 76.

79. S. 744 § 2232(a) (to be codified at 8 U.S.C. § 218A(c)(1)(A)(i)). “Any unused visas in a quarter [will] be added to the allocation for the subsequent quarter of the same fiscal year.” *Id.* (to be codified at 8 U.S.C. § 218A(c)(1)(B)). The Secretary of Homeland Security “may increase or decrease, as appropriate, the worldwide level of visas” after considering specific factors. *Id.* (to be codified at 8 U.S.C. § 218A(c)(2)(A)). Factors may

Of course, according to many legislators, a hallmark of an ideal guest worker program would include guest workers voluntarily leaving at the end of their services, without having formed any meaningful ties to the United States.⁸⁰ By this benchmark, a low percentage of overstay rates reflects a successful guest worker program.⁸¹ The Canadian guest worker program is often lauded for these exact characteristics and indeed, many of the 2013 Act provisions appear to mimic it.⁸² Notably, Canada also bestows citizenship on those born within its borders.⁸³ Yet, despite the platitudes, serious flaws exist within the Canadian guest worker system.

B. The Canadian “Success” Story

To alleviate its worker shortage problems, Canada has executed Memorandums of Understanding (MOUs) with Mexico and several Caribbean countries to legalize the entry of temporary guest workers.⁸⁴ This program is referred to as the Commonwealth Caribbean & Mexican Agricultural Seasonal

include:

(i) a demonstrated shortage of agricultural workers; (ii) the level of unemployment and underemployment of agricultural workers during the preceding fiscal year; (iii) the number of applications for blue card status; (iv) the number of blue card visa applications approved; (v) the number of nonimmigrant agricultural workers sought by employers during the preceding fiscal year; (vi) the estimated number of United States workers, including blue card workers, who worked in agriculture during the preceding fiscal year; (vii) the number of nonimmigrant agricultural workers issued a visa in the most recent fiscal year who remain in the United States in compliance with the terms of such visa; (viii) the number of United States workers who accepted jobs offered by employers using the Electronic Job Registry during the preceding fiscal year; (ix) any growth or contraction of the United States agricultural industry that has increased or decreased the demand for agricultural workers; and (x) any changes in the real wages paid to agricultural workers in the United States as an indication of a shortage or surplus of agricultural labor.

Id.

80. In this manner, amnesty programs would no longer be necessary as the guest workers would not overstay their visas. See Tim Fernholz, *Only Way for Immigration Reform to Work? A Guest Worker Program*, NATIONALJOURNAL.COM (Feb. 4, 2013), <http://www.nationaljournal.com/thenextamerica/workforce/only-way-for-immigration-reform-to-work-a-guest-worker-program-20130204>.

81. See *id.*

82. Canada’s seasonal guest-worker program brings 20,000 workers to the country each year. See Philip Martin & Gottfried Zürcher, *Managing Migration: The Global Challenge*, 63 POPULATION BULL. 3, 8 (Mar. 2008), available at <http://www.prb.org/pdf08/63.1migration.pdf>.

83. FEERE, *supra* note 32, at 2.

84. Jamaica was the first country to sign an agreement with Canada. See Adrian A. Smith, *Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers*, 20 CAN. J.L. & SOC’Y 95, 98 n.6 (2005). Trinidad and Tobago and Barbados followed in 1967. *Id.* In 1974, they were then followed by Mexico and Canada. *Id.*; see also Consulado General de Mex. en Toronto, *Canada-Mexico Seasonal Agricultural Workers Program* (Jan. 14, 2014), <http://consulmex.sre.gob.mx/toronto/index.php/en/agricultural-workers-program>. In 1976, Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines also joined. Smith, *supra*, at 98 n.6.

Workers Program (CSAWP). Canada recruits seasonal workers from a number of “supply” countries, including Antigua and Barbuda, Austria, Barbados,⁸⁵ the Dominican Republic, Grenada, Jamaica, Mexico, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.⁸⁶ Guatemala also participates in the CSAWP through the International Organization for Migration Office of Guatemala.⁸⁷

Immigration is achieved through employment contracts⁸⁸ between growers, workers, and government agents of supply countries.⁸⁹ MOUs between Canada and the participating countries are unique in that they are classified as “intergovernmental administrative arrangements,” instead of international treaties.⁹⁰ The MOUs have no legal effect.⁹¹

Under the MOUs, the goals of the CSAWP are twofold: to “serve the mutual interests” of Canada and the supply countries; as well as to “facilitate the movement of seasonal agricultural workers into” Canada, as long as that need exists.⁹² The Canadian province in which guest workers arrive must determine those aspects of the CSAWP that benefit the parties, monitor worker

85. Gov’t of Barbados, Ministry of Labor, *Canadian Seasonal Agricultural Workers Programme*, https://labour.gov.bb/neb_overseas_employ_prog_agricultural (last visited July 2, 2013).

86. CESIFO, *Recruitment of Seasonal Workers 4*, available at <http://www.cesifo-group.de/ifoHome/facts/DICE/Labour-Market-and-Migration/Migration/Labour-Migration/rec-seas-work/fileBinary/rec-seas-work.pdf> (last visited July 2, 2013).

87. MINPET: *Interactive Map of Temporary Employment Programs for Migrant Workers*, ORG. OF AM. STATES, <http://www.sedi.oas.org/ddse/mide/minpet/countries.aspx?c=CAN> (last visited July 2, 2013); see also *Seasonal Agricultural Workers Program, Guatemala-Canada*, INT’L ORG. FOR MIGRATION I (2008), http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/countries/docs/guatemalan_seasonal_workers_summary08.pdf.

88. See, e.g., *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico—2014*, EMP. & SOCIAL DEV. CAN. (last modified April 4, 2014), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpcc2014.pdf, [hereinafter *Agreement for the Employment in Canada*].

89. VEENA VERMA, N.S.-INST., CANADA’S [sic] SEASONAL AGRICULTURAL WORKERS PROGRAM AS A MODEL OF BEST PRACTICES IN MIGRANT WORKER PARTICIPATION IN THE BENEFITS OF ECONOMIC GLOBALIZATION 3 (2003), available at <http://www.nsi-ins.ca/wp-content/uploads/2012/11/2002-The-Mexican-and-Caribbean-Seasonal-Agricultural-Workers-Program-Regulatory-and-Policy-Framework-Executive-Summary.pdf>.

90. *Id.* at 5.

91. RUPA CHANDA, UNDP, *LOW-SKILLED WORKERS AND BILATERAL, REGIONAL, AND UNILATERAL INITIATIVES: LESSONS FOR THE GATS MODE 4 NEGOTIATIONS AND OTHER AGREEMENTS* 14 (2008) (“In terms of its legal status, this is an intergovernmental administrative arrangement which does not have the status of an international treaty and where consultative processes are to be used to resolve any issues among the parties.”).

92. *Id.* The increasing role of agricultural private sector interests (otherwise known as “FARMS”) in policymaking, however, is causing tension in the relationship between the Canadian government and supply countries. Cf. VERMA, *supra* note 89, at 4, 7. FARMS’s influence role is also diminishing the “government-to-government” nature of the CSAWP. See *id.* at 4.

movement, and prevent local labor displacement.⁹³ In 2010, Mexico and Canada signed an updated 2010-2012 Canada-Mexico Joint Action Plan, an agreement similar to a MOU, to reinstate their commitment to the CSAWP.⁹⁴

Canada regulates its guest workers through a complex system of federal “legislation, regulations, manuals, and guidelines administered by [various] government departments and agencies.”⁹⁵ At the federal level, all guest worker programs are implemented within the framework of the Immigration Refugee and Protection Regulations.⁹⁶ Because this statutory language provides minimal guidance for its implementation, the majority of the standards for the CSAWP are found in publicly available materials or implemented through provincial law.⁹⁷ Within each province, various agencies enforce labor and employment rights.⁹⁸ In other words, while the federal law governs the entry and removal of guest workers in Canada, employment and social rights are established through provincial laws.⁹⁹ As a result, the provinces routinely take steps to regulate labor practices regarding foreign workers.¹⁰⁰ For example, in 2010, the province of Ontario implemented the Employment Protection for Foreign Nationals Act, which “[prohibits employers and recruiters] from passing recruitment fees along to live-in caregivers.”¹⁰¹ In another example, the province of Alberta and the Philippines signed a labor agreement in 2008 to ease labor shortages and improve the flow of workers from the Philippines into

93. CHANDA, *supra* note 91, at 14.

94. Canada-Mexico Joint Action Plan 3 (May 27, 2010), available at <http://embamex.sre.gob.mx/Canada/images/mexico-jap.pdf>.

95. Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL’Y J. 95, 105 (2012).

96. See Immigr. & Refugee Prot. Reg., SOR/2002-227 (Can.), available at <http://laws.justice.gc.ca/PDF/SOR-2002-227.pdf>.

97. See MAXWELL BREM, N.S.-INST., *MIGRANT WORKERS IN CANADA: A REVIEW OF THE CANADIAN SEASONAL AGRICULTURAL WORKERS PROGRAM 5* (2006), available at <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2006-Migrant-Workers-in-Canada-A-review-of-the-Canadian-Seasonal-Agricultural-Workers-Program.pdf> (listing human rights and workplace safety among the relevant areas covered by provincial laws); see also Fudge, *supra* note 95, at 105 (“[The Temporary Foreign Workers Program] is governed by a complex and flexible network of legislation, regulations, manuals, and guidelines . . .”).

98. The province of Ontario, for instance, involves three ministries: the Ministry of Labor, the Ministry of Health and Long-Term Care, and the Ministry of Agriculture, Food, and Rural Affairs. BREM, *supra* note 97, at 5.

99. Nolan Rappaport, *Canada’s Season Agricultural Worker Program is Encouraging Mexican Farm Workers to Go to Canada Instead of to the United States*, ILW.COM (Jan. 16, 2013), <http://discuss.ilw.com/content.php?1164-Article-Canada-s-Season-Agricultural-Worker-Program-Is-Encouraging-Mexican-Farm-Workers-To-Go-To-Canada-Instead-Of-To-The-United-States-by-Nolan-Rappaport>.

100. See Gov’t of Canada, *Backgrounders—Improvements to the Temporary Foreign Worker Program*, CITIZENSHIP & IMMIGR. CAN (Aug. 18, 2010), <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp>.

101. *Id.*

Alberta.¹⁰²

The CSAWP requires each supply country of agricultural workers to have a government representative in Canada to assist guest workers with problems.¹⁰³ Further, the CSAWP also requires Canada to have an existing relationship with the worker's home country and the country's embassy in Canada to be eligible for temporary employment.¹⁰⁴ Allegedly because both the Canadian and the workers' home government oversee the program, the potential for exploitation of the agricultural guest workers decreases.¹⁰⁵ Nonetheless, CSAWP participants are routinely assigned to work on farms that they do not select, while performing work they cannot refuse at risk of deportation.¹⁰⁶ As discussed in the following sections, these workers are legally segregated, and thus prohibited, from social contact with nonemployer Canadian citizens, labor abuses are routine despite alleged home country oversight, and legal protection for these workers is loosely enforced.

1. The Canadian Approach to Managed Migration of Temporary Workers

Agricultural guest "workers cannot obtain Canadian citizenship or permanent resident status by participating in the CSAWP."¹⁰⁷ Canada "only provides for temporary migration."¹⁰⁸ Further, Canada requires its agricultural workers to "return to their home countries at the end of their employment."¹⁰⁹

102. *Id.* Canada's other guest worker programs include non-farming industries such as caregivers and construction workers. Martin & Zürcher, *supra* note 82, at 8.

103. Susan Mann, *Seasonal Agricultural Workers Treated Well Says Program Spokesman*, BETTER FARMING (Sept. 21, 2012), <http://www.betterfarming.com/online-news/seasonal-agricultural-workers-treated-well-says-program-spokesman-11078>. This differs from other non-CSAWP Canadian guest worker programs. *Id.*

104. *Id.* Notably, there is evidence that temporary workers under other Canadian programs do not enjoy the same rights. *See id.*

105. Sanam Yasseri, *Out of the Shadows: A Call to End the Exploitation of Non-Agricultural Migrant Workers by Reforming the U.S. H-2B Guest Worker Program*, 15 SW. J. INT'L L. 361, 373 (2009).

106. *See, e.g.*, Jenna L. Hennebry & Kerry Preibisch, *A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program*, 50 INT'L MIGRATION 19, 32 (2010).

107. ISABEL STUDER ET AL., COMM'N FOR LABOR COOPERATION, MIGRANT WORKERS' RIGHTS IN NORTH AMERICA 20 (2010), available at <http://www.naalc.org/UserFiles/File/CLC-Migrant%20Workers%20-%20English.pdf>. As one commentator stated, however, "[e]mployers must ensure provincial health coverage and enrol[sic] workers in the provincial workplace safety insurance program." BREM, *supra* note 97, at 4.

108. STUDER, *supra* note 107, at 20. Unlike the CSAWP, workers arriving under the live-in caregiver Program are eligible for Canadian permanent residency. Fudge, *supra* note 95, at 107. A live-in caregiver can apply for permanent resident status in two ways: "(1) 24 months of authorized full-time employment; or (2) a total of 3,900 hours of authorized full-time employment." STUDER, *supra* note 107, at 22. Canada only gives live-in caregivers four years from their date of arrival to satisfy employment requirements. *Id.*

109. STUDER, *supra* note 107, at 20.

The CSAWP allows these guest workers to legally enter Canada for short-term employment on fruit and vegetable farms, typically between one-and-a-half to eight months.¹¹⁰ On average, Canada admits about 20,000 seasonal workers annually under the CSAWP.¹¹¹ There is a minimum term of employment of 240 hours in six weeks and a maximum length of eight months, including a fourteen-day probationary period.¹¹² Agricultural guest workers are assigned to an employer and cannot legally work for another without approval from the Human Resources & Skills Development Canada (HRSDC) and the supply country's government agent.¹¹³

It is estimated that around seventy percent of guest workers return to the same farms each year, usually at the request of employers.¹¹⁴ This is termed the "naming" process.¹¹⁵ Arguably, this aspect of the CSAWP promotes stability within the guest worker program by minimizing the transient nature of agricultural employment.¹¹⁶ Employers are allowed "to select their workers on the basis of nationality and gender rather than work experience, skill-set or training."¹¹⁷ Consequently this practice allegedly generates "benefits for production in a number of ways, such as enabling employers to create competition between [guest] workers."¹¹⁸ As some commentators have noted "[i]t also creates competition among labour supply countries who vie to increase their number of job placements in Canada" by providing the most productive guest workers.¹¹⁷

During the MOU periods, agricultural guest workers are treated equally

110. CESIFO, *supra* note 86; see also UNITED FOOD & COM. WORKERS UNION CAN., THE STATUS OF MIGRANT FARM WORKERS IN CANADA 5-6 (2006-2007), available at <http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf> [hereinafter UFCW].

111. Martin & Zürcher, *supra* note 82, at 8. In all guest worker categories, including agricultural, Canadian companies employ nearly 340,000 workers per year, an amount exceeding Canada's annual intake of permanent newcomers. Ken Georgetti, *Temporary Foreign Worker Program: Conservative Government Must Fix What It Broke*, THESTAR.COM, (Apr. 16, 2013), http://www.thestar.com/opinion/commentary/2013/04/16/temporary_foreign_worker_program_conservative_government_must_fix_what_it_broke.html. Between 2007 and 2011, statistics reflect that thirty percent of all new jobs in Canada went to guest workers. *Id.* As one commentator stated: "If employers need migrant workers to do jobs year after year, then let's admit it is not a temporary situation." *Id.*

112. *Agreement for the Employment in Canada*, *supra* note 88, at § I.

113. *Id.* § VIII. The HDSRC evaluates applications for international workers and provides opinions on the impact of those contracts on the Canadian labor market known as Labor Market Opinions (LMOs). John W. Boscarion et al., *Canada*, 44 INT'L LAW. 613, 624-25 (2010) (citing Immigration & Refugee Protection Regulations, 203(3)(a)-(f), SOR/2002-227 (Can.)).

114. STUDER, *supra* note 107, at 19.

115. VERMA, *supra* note 89, at 6.

116. *Id.*

117. See Hennebry & Preibisch, *supra* note 106, at 25.

118. *Id.*

117. *Id.*

under the law as Canadian workers in similar positions, receiving similar medical and employment insurance coverage.¹¹⁸ Moreover, while in Canada, guest workers must live on their employers' property, in accommodations provided by employers.¹¹⁹

Overall, the CSAWP is praised for a number of "good practices" as demonstrated in a study conducted on behalf of the North-South Institute.¹²⁰ The Canadian framework helps the government control migration of foreign labor, which in turn minimizes the exploitation of labor.¹²¹ The North-South Institute concluded, "[m]anaged migration reduces the risk of illegal migration."¹²² The MOUs, operational guidelines, and the employment agreements help provide benchmarks for evaluation by assessing what is truly benefiting the interests of workers and employers.¹²³ The employment agreements allow workers and employers to be made aware of the terms and conditions of employment before employment begins.¹²⁴ The employment agreements also provide additional rights for workers, such as meal breaks, that workers would not otherwise receive under provincial laws.¹²⁵ Regional and international annual review meetings allegedly "provide a reliable forum for issues to be" handled on behalf of guest workers.¹²⁶ These practices work "to create a program that is responsive to all interests" and builds relations among the stakeholders.¹²⁷

2. Shortcomings in the Canadian Model

While the CSAWP is deemed a successful working model with respect to guest workers, criticisms do exist.¹²⁸ The most troubling is the intentional isolation of agricultural guest workers so that there is no formation of significant ties with Canada, thereby ensuring that repatriation remains a threat for these workers.¹²⁹ As such, recruitment policies for agricultural workers give preference to individuals with dependents, even though visa restrictions do not

118. Consulado General de Mex. en Toronto, *supra* note 84.

119. *See Agreement for the Employment in Canada*, *supra* note 88, at § IX.

120. VERMA, *supra* note 89, at 15-16.

121. *Id.* at 16.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*; *see also Agreement for the Employment in Canada*, *supra* note 88, at § II.

126. VERMA, *supra* note 89, at 16-17 (stating that "[t]he constructive role of the government agents in providing information to workers" also contributes to the program's success, and highlighting "one consulate [that] provided a comprehensive orientation for workers includ[ing] some training about the nature of the program").

127. *Id.* at 16.

128. *See, e.g., Hennebry & Preibisch*, *supra* note 106, at 19.

129. *Id.* at 25.

allow their families to accompany them.¹³⁰ Thus, a disincentive is created for permanent residence in Canada by selecting guest workers who have more reasons to return home than to stay in Canada.¹³¹ Further, “employers can exercise considerable control over workers’ movements and social life through the imposition of farm rules that bar workers from leaving the grower’s property or restrict the entry of visitors.”¹³² Employers go so far as to encourage guest workers to forego social activities in their off hours to prevent the formation of nonemployment ties to Canada.¹³³

Another criticism alleges that exploitation of agricultural guest workers is not completely prevented. While technically, the CSAWP provides for a transfer process, allowing workers to move to other farms as opposed to repatriation if problems arise with an employer, the process itself has many flaws.¹³⁴ Specifically, the current procedures for completing transfers are burdensome, and “there is no central coordinating body.”¹³⁵ To transfer, employees must independently obtain written consent by the local HRSDC office and the government agent.¹³⁶ Consequently, workers seldom transfer to a different employer.¹³⁷

Moreover, guest workers in Canada routinely encounter unanticipated costs while seeking employment.¹³⁸ Prior to participating in the CSAWP, Mexican workers “must make five or more trips to Mexico City” seasonally for interviews, medical examinations, and a variety of other compliance requirements imposed by the Canadian government.¹³⁹ As one commentator noted, “[a]lthough the Mexican government provides a small subsidy to help new workers cover [these] expenses, the workers themselves pay most of the costs.”¹⁴⁰ Consequently, many workers “are already in debt [when] they arrive in Canada.”¹⁴¹ Canada then imposes additional deductions on guest workers’ wages to reimburse employers for partial travel expenses and visa fees.¹⁴²

130. *Id.*

131. *Id.*

132. BREM, *supra* note 97, at 11.

133. *Id.*

134. *Id.* at 7.

135. *Id.*

136. *Id.*; see also *Agreement for the Employment in Canada*, *supra* note 88, at § XI; VERMA, *supra* note 89, at 6-7.

137. BREM, *supra* note 97, at 7.

138. *Id.* at 6.

139. *Id.*

140. *Id.*

141. *Id.*

142. See *Hiring Seasonal Agricultural Workers: Requirements*, EMP. & SOCIAL DEV. CAN. (Feb. 18, 2014), http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml [hereinafter *Requirements*]; see also VERMA, *supra* note 89, at 11 (“[W]orkers from Mexico and certain Caribbean states have deductions for non-employment related insurance coverage.”).

Yet another flaw is that some guest workers are *not* covered by Canadian employment and labor laws—“[p]rovincial labor laws generally exclude farm workers from many provisions governing hours of work, vacation pay, and overtime.”¹⁴³ Those guest workers who are covered are often either unwilling or unable to enforce rights granted by the Canadian government.¹⁴⁴ No formal system exists in the law or in employment agreements to ensure the performance of obligations under the labor contracts, including wage levels and work conditions.¹⁴⁵ Similarly, there is no grievance process for adjudicating disputes.¹⁴⁶ The only protection truly given is that HRSDC will attempt to examine the job offer to ensure compliance with the requirements of wages and working conditions, but the frequency of those examinations is unregulated and more importantly, unmandated.¹⁴⁷ Indeed, the only option available to guest workers to enforce their employment agreements is through their government representatives who are charged with monitoring work conditions.¹⁴⁸ Government agents from the countries of origin, however, are not necessarily protective of their countries’ workers.¹⁴⁹ The agent’s priority is to place as many workers in Canada as possible.¹⁵⁰ If guest workers “cause problems,” government agents fear that farm owners may opt to hire workers from another, more compliant country.¹⁵¹ Further, some consulates, like that of Mexico, have inadequate resources to adequately oversee the number of their country’s workers who participate in the program.¹⁵²

Another labor abuse is that many guest workers “report being underpaid, or being [burdened] with surprise fees for recruitment or accommodation.”¹⁵³ For example, in 2009, a union group discovered several dozen Latin American construction workers who were dramatically underpaid.¹⁵⁴ Some hourly wages were “as little as C\$3.56 [Canadian] an hour to dig a tunnel for a rail link

143. See UFCW, *supra* note 110, at 5.

144. Fudge, *supra* note 95, at 108, 114. Workers are typically “unfamiliar with the Canadian legal system and [frequently] do not speak English.” *Id.* at 114. Guest workers have also “experienced difficulty in receiving overtime pay, and they have no effective political or legal recourse for pursuing their rights.” *Id.* at 115.

145. VERMA, *supra* note 89, at 8-9; see also BREM, *supra* note 97, at 12.

146. BREM, *supra* note 97, at 12.

147. Hennebry & Preibisch, *supra* note 106, at 31.

148. BREM, *supra* note 97, at 12.

149. HEATHER GIBB, N.S.-INST., FARMWORKERS FROM AFAR: RESULTS FROM AN INTERNATIONAL STUDY OF SEASONAL FARMWORKERS FROM MEXICO AND THE CARIBBEAN WORKING ON ONTARIO FARMS 11 (2006), available at <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2006-Farmworkers-from-Afar.pdf>.

150. *Id.*; see also VERMA, *supra* note 89, at 8-9.

151. GIBB, *supra* note 149, at 11.

152. VERMA, *supra* note 89, at 17.

153. Philip Lewis, *The Crisis & Canada's Guest Workers*, GDP BLOG (Jan. 26, 2010), <http://gdp.nfb.ca/blog/English/the-crisis-canada%E2%80%99s-guest-workers/>.

154. *Canada's Guest Workers: Not Such a Warm Welcome*, ECONOMIST (Nov. 22, 2007), <http://www.economist.com/node/10177080> [hereinafter *Not Such a Warm Welcome*].

between Vancouver and [its] airport.”¹⁵⁵ Even CSAWP-mandated benefits may be meager.¹⁵⁶ The employment agreements stipulate that after five hours of consecutive work, the employer must only provide a thirty-minute meal break, which is supplemented by two other ten-minute rest periods in the day.¹⁵⁷ “The Agreements call for one day of rest after six consecutive work days[,] but employers may ask workers to defer their rest day during peak agricultural periods for up to six more days.”¹⁵⁸

In the context of workers’ compensation, agricultural workers are extremely reluctant to make claims based on fear of employer retaliation.¹⁵⁹ The “naming” process, where employers are authorized to request certain workers for employment, provides a form of job security, but it also acts as a “disincentive for a worker to raise complaints for fear of the employer not ‘naming’ [him or her] for the next [agricultural] season.”¹⁶⁰ The incentive for reporting violations decreases even more when no punishment of violators occurs beyond the bare enforcement of the employment contract. For example, in 2006, two international engineering corporations, SELI Inc. and SNC Lavalin, initially paid Latin American workers approximately \$3.57 per hour to build the Canada Line SkyTrain.¹⁶¹ Compared to European workers, the Latin American guest workers were paid ninety-two percent less.¹⁶² After a court order, the companies were required to pay an estimated \$2.4 million to compensate the workers for the salary and expense differences, but nothing more.¹⁶³ Similarly, in June 2010, a guest worker employed by Denny’s sought compensation for his flight to Canada, as stipulated in his contract, and recruitment fees illegally charged.¹⁶⁴ When the guest worker refused Denny’s settlement offer, he was fired.¹⁶⁵

Finally, there does not appear to be any effective, consistent enforcement of labor law regulations. While safety violations are common, Canadian companies have not been required to pay any fines, outside of a legal judgment,

155. *Id.*

156. *See, e.g.*, BREM, *supra* note 97, at 9.

157. *Id.*

158. *Id.*

159. Fudge, *supra* note 95, at 114-15.

160. VERMA, *supra* note 89, at 6. Moreover, the employment agreements “allow[] employers to repatriate workers for non-compliance, refusal to work, or any other sufficient reason.” *Id.* at 7 (internal quotation marks omitted). “The repatriation provisions are interpreted at the discretion of the employer and the government agent, and there is no formal right of appeal.” *Id.*

161. Krystle Alarcon, *Imported Workers Fight Back*, THETYEE.CA (Jan. 8, 2013), <http://theyee.ca/News/2013/01/08/Imported-Workers-Fight-Back/>.

162. *Id.*

163. *Id.*

164. Krystle Alarcon, *Law Leaves Migrant Workers Dangling Precariously*, THETYEE.CA (Jan. 9, 2013), <http://theyee.ca/News/2013/01/09/Migrant-Worker-Laws/> [hereinafter *Workers Dangling Precariously*].

165. *Id.*

for labor violations.¹⁶⁶ Canada does not ban these employers from participation in the CSAWP.¹⁶⁷ In fact, no Canadian company has ever been prohibited from applying to the CSAWP after breaking labor laws.¹⁶⁸ Even if bans were used as punishment, the current CSAWP policy lifts them after two years.¹⁶⁹

3. Canada's Low Skilled Pilot Project (Pilot Project for Occupations Requiring Lower Levels of Formal Training) Cuts Back on CSAWP Protections

Interestingly, since 2011, Canada has begun using another, less regulated, strictly temporary, guest worker program as an entrant category for agricultural workers.¹⁷⁰ The Low Skilled Pilot Project (the LSPP)—later renamed the Pilot Project for Occupations Requiring Lower Levels of Formal Training—was originally created to respond to employer demand for low-skilled oil and gas and construction workers.¹⁷¹ Canada “introduced an agricultural stream to the LSPP . . . to harmonize the [C]SAWP and LSPP,” and to permit farms that produce commodities to make use of guest workers under the CSAWP.¹⁷² Two-year work permits are issued under the program, capable of one two-year

166. Krystle Alarcon, *Will Tories Fix Temp Foreign Worker Program?*, THEYEE.CA (Jan. 10, 2013), <http://theyee.ca/News/2013/01/10/Fix-Temp-Foreign-Worker-Program/>. More than one commentator has noted that “safety training [for Canadian guest workers] is inconsistent and based on employer discretion.” VERMA, *supra* note 89, at 12. “Fewer than half of [seasonal] workers . . . receive[] adequate training in the handling of machinery or agricultural chemicals, and many [are] not given protective clothing or equipment to wear.” BREM, *supra* note 97, at 10. Workers have previously “complained of being sent into fields shortly after or during pesticide spraying.” *Id.* Workers often fear punishment if they choose to object either to their employers or to their government agent. *Id.* Moreover, “[a]griculture is one of the most dangerous occupations in Canada, accounting for several times the rate of work-related injuries and deaths than many other industries.” *Id.* Only recently, however, did agricultural workers become covered under the Occupational Health & Safety Act in Ontario. *Id.* “On April 27, 2007 . . . two Chinese migrant workers employed by Sinopec Shanghai Engineering Canada [were] killed when a tank’s structure fell on them.” Krystle Alarcon, *The Invisibles: Migrant Workers in Canada*, THEYEE.COM (Jan. 7, 2013), <http://theyee.ca/News/2013/01/07/Canada-Migrant-Workers/>. After repeatedly denying the charges, the company eventually pled guilty to three safety violations on October 10, 2012. *Id.*

167. *See, e.g.*, Alarcon, *Will Tories Fix Temp Foreign Worker Program?*, *supra* note 166.

168. *Id.*

169. Alarcon, *Workers Dangling Precariously*, *supra* note 164.

170. Fudge, *supra* note 95, at 116.

171. *Id.* The program makes use of foreign workers in semi-skilled worker occupations (denoted as National Occupation Classification, or NOC, skill types C and D). *Pilot Project for Workers with Lower Levels of Formal Training*, GOV'T OF CAN., <http://www.cic.gc.ca/english/work/low-skill.asp> (last modified Jan. 3, 2014).

172. Fudge, *supra* note 95, at 116; *see also* Ofelia Becerril Quintana, *A New Era of Seasonal Mexican Migration to Canada*, FOCAL (June 2011), <http://www.focal.ca/en/publications/focalpoint/467-june-2011-ofelia-becerril-quintana-en>.

renewal; the worker must then leave Canada for four years.¹⁷³ There is not a path to citizenship.¹⁷⁴ While a guest worker's nonimmigrant status may change, he might never gain Canadian citizenship.¹⁷⁵

Unlike the CSAWP, the provincial governments determine which employers are eligible to obtain access to low-skill workers for this program.¹⁷⁶ Under this program, Canadian employers are not obligated to provide housing for the worker.¹⁷⁷ Unlike the protections conferred by the CSAWP, these workers lack institutional support, and because they are only temporary workers, the ability to enforce their labor rights is severely restricted.¹⁷⁸ Moreover, these workers have minimal job security and restricted labor mobility to ensure, once again, their social isolation.¹⁷⁹ Unlike the CSAWP, the LSPP imposes fewer obligations on employers with respect to living and working conditions for guest workers.¹⁸⁰ "Once in Canada . . . there is virtually no monitoring of [the workers'] pay or work conditions, leaving them" vulnerable to exploitation.¹⁸¹

Unsurprisingly, Canadian employers have immediately embraced the LSPP's looser parameters. In Quebec, workers from Guatemala recruited under the LSPP are brought in to supplant Mexican workers recruited under the more regulated CSAWP.¹⁸² Notably, some commentators feel that the replacement coincided with greater efforts by Mexican workers to unionize.¹⁸³ While the Mexican government acts as a gatekeeper for Canadian guest workers, Canadian employers can negotiate directly with Guatemalan workers, in essence depriving Guatemalans of any protections that their government or Canada would have conferred under the CSWAP.¹⁸⁴ For example, a LSPP Guatemalan worker who has been expelled from a farm may not return to Canada, but a CSWAP Mexican worker who is expelled would be able to reapply the following year.¹⁸⁵

As demonstrated, the Canadian LSPP represents a step back in the

173. Fudge, *supra* note 95, at 118 (citing Regulations Amending the Immigration & Refugee Act Protection Reg. (Temporary Foreign Workers), SOR/2010-172, s1, amending IRPR, s. 183(1), s.2(1) amending IRPR, s.203(3) by adding (g)(i) (Can.)).

174. Becerril Quintana, *supra* note 172.

175. *Id.*

176. Fudge, *supra* note 95, at 120.

177. Becerril Quintana, *supra* note 172.

178. Fudge, *supra* note 95, at 120.

179. *Id.*

180. See UFCW, *supra* note 110, at 13.

181. *Not Such a Warm Welcome*, *supra* note 154.

182. See Mayra Roffe Gutman & Annie Lapalme, *Cheap Labour: Seasonal Agricultural Workers in Quebec*, FOCAL (Nov. 2010), <http://www.focal.ca/en/publications/focalpoint/352-november-2010-mayra-roffe-gutman-and-annie-lapalme-en>.

183. *Id.*

184. *Id.*

185. *Id.*

protections granted to guest workers. These workers are particularly vulnerable to employer exploitation.

C. The 2013 Act Versus the CSAWP Model

Overall, the success of repatriation under the CSAWP appears largely dependent on isolating the agricultural guest worker in two important ways: (1) the restriction of the guest worker's movements to the employer's premises alone; and (2) the inability of the guest worker to bring his or her spouse and children to Canada for the duration of employment.¹⁸⁶ In the absence of any meaningful ties to Canada, the guest worker returns home. Yet, this segregation creates a second-class status for a large population within Canadian borders. Repatriation is achieved at a resounding cost to the civil liberties of the guest worker, an outcome that the United States Constitution does not allow.¹⁸⁷

Current United States immigration laws and the 2013 Act do not impose such segregation, but then, the presence of a large undocumented population does exist now, and has existed historically for decades.¹⁸⁸ Nonetheless, the 2013 Act mirrors the CSAWP in several other ways. The W-Visa imposes requirements on prospective employers to ensure equality of wage scales. Wages will be the same amount "paid by the employer to [all] other [individuals] with similar experience and qualifications" for the specific employment, or "the prevailing wage level for the occupational classification . . . in the . . . area of employment," whichever is greater.¹⁸⁹ The newly created Bureau of Immigration & Labor Market Research will determine the prevailing wage rate based on salaries usually paid in the applicable labor market.¹⁹⁰ An employer will be prohibited from making different job offers to guest workers than those extended to American citizens.¹⁹¹ State and federal employment laws apply to W-Visa workers so long as other United States workers would be covered.¹⁹² Similarly to the CSAWP, the 2013 Act does attempt to minimize

186. See BREM, *supra* note 97, at 4; Rappaport, *supra* note 99.

187. See *supra* note 8 and accompanying text.

188. The Pew Hispanic Center estimates the number of undocumented immigrants within the United States to be approximately 11.1 million. *A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized*, Pew Hispanic Ctr. 2 (2013), available at http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf.

189. S. 744, 113th Cong. § 4211 (2013); Tortora, *supra* note 76.

190. See S. 744 § 4701 ("There is established a Bureau of Immigration and Labor Market Research as an independent statistical agency within U.S. Citizenship and Immigration Services"); see also Werner, *supra* note 63 (the new Bureau will function as "an objective monitor of the market").

191. See S. 744 § 2232(a) (to be codified at 8 U.S.C. § 218A(f)(4)) ("An employer may not seek a nonimmigrant agricultural worker for agricultural employment unless the employer offers such employment to any equally or better qualified United States worker...").

192. See Tortora, *supra* note 76; see also S. 744 § 2232(a) (to be codified at 8 U.S.C. § 220(g)(1)).

exploitation of guest workers by requiring the same legal protections granted to citizen workers. Conversely, these provisions protect American workers by preventing an alternate supply of cheap labor.

To participate in the W-Visa program, an employer must be a designated registered employer.¹⁹³ To achieve this status, an employer must submit an application with the following information: (1) the estimated number of workers they will seek to employ each year;¹⁹⁴ (2) anticipated dates of employment;¹⁹⁵ (3) “[e]vidence of contracts or written disclosures of employment terms and conditions” that have been “provided to the nonimmigrant agricultural workers, or a sample of such contract or disclosure for unnamed workers;”¹⁹⁶ and (4) “evidence of offers of employment made to United States workers.”¹⁹⁷ The latter two requirements are reminiscent of the contracts required by the CSWAP.¹⁹⁸ Here, however, there is no coordination with supply countries as is required by the CSWAP. After payment of a fee, approved applications provide registered status for employers for three years, subject to renewal.¹⁹⁹ To register, employers must also submit an annual report demonstrating that the employer has provided the wages and working conditions promised to employees.²⁰⁰ W-Visas will not be available to employers who have hurt American worker opportunities either by laying off citizen-workers in the past 90 days, or because of a strike or lockout.²⁰¹

Similar to the CSAWP, if the state workers’ compensation law does not cover the employment, the registered employer must provide, at no cost to the agricultural guest worker, insurance covering related injury and disease.²⁰² The 2013 Act provides that:

A contract agricultural [guest] worker who completes at least 27 months under his or her contract with the same designated agricultural employer shall be reimbursed by that employer for the cost of the worker’s transportation and subsistence from the place of employment to the place from which the worker came from abroad to work for the employer.²⁰³

The 2013 Act also requires that a designated agricultural employer offer to provide a guest worker with housing that satisfies applicable federal or local

193. *Id.* (to be codified at 8 U.S.C. § 220(b)(1)).

194. *Id.* (to be codified at 8 U.S.C. § 220(a)(2)(B)(i)).

195. *Id.* (to be codified at 8 U.S.C. § 220(a)(2)(B)(iii)).

196. *Id.* (to be codified at 8 U.S.C. § 220(a)(2)(B)(iv)).

197. *Id.* (to be codified at 8 U.S.C. § 220(a)(2)(B)(vii)). “The Secretary may refer an application . . . to the Fraud Detection and National Security Directorate of U.S. Citizenship and Immigration Services if there is evidence of fraud for potential investigation.” *Id.* § 4703 (internal quotation marks omitted) (to be codified at 8 U.S.C. § 220(d)(2)).

198. *See supra* notes 107-21.

199. S. 744 § 4703 (to be codified at 8 U.S.C. § 220(e)(1)(E)).

200. *Id.* (to be codified at 8 U.S.C. § 220(d)(7)).

201. *Id.* (to be codified at 8 U.S.C. § 220(e)(1)(B)(xiii)-(ix)); Tortora, *supra* note 76.

202. S. 744 § 2232(a) (to be codified at 8 U.S.C. § 218A(e)(4)(C)(i)).

203. *Id.* (to be codified at 8 U.S.C. § 218A(e)(4)(J)(i)).

standards.²⁰⁴ Alternatively, the employer may provide a reasonable housing allowance.²⁰⁵ Notably, there are no corresponding requirements that limit an agricultural guest worker's movements. Further, the spouse or child of an agricultural guest worker holding a W-Visa will be granted admission to the United States, but will not be accorded derivative status.²⁰⁶

Unlike the CSAWP, the 2013 Act provides a mechanism to punish registered employers who violate its provisions.²⁰⁷ A penalty will be imposed that may include fines and the disqualification of the employer from future enrollment for a period of not more than three years.²⁰⁸ An employer may also be permanently barred from the W-Visa program.²⁰⁹

However, the 2013 Act suffers from some of the same infirmities associated with the CSAWP. Exploitation of guest workers is probable. Previous efforts by Congress to achieve immigration reform have usually targeted migration of undocumented immigrants.²¹⁰ Those efforts led to the creation of E-Verify and other methods of labor enforcement.²¹¹ Nonetheless, undocumented immigrants are still hired at severely reduced wages, for working conditions that are patently unsafe.²¹² For example, in the aftermath of the 2008 Postville, Iowa meatpacking plant immigration raid, it was discovered that undocumented immigrants were subject to extreme working conditions, including the sexual assault of female employees by supervisors and underage employees working "17-hour shifts, six days a week without overtime pay."²¹³ But these immigrants still come to the United States. They form communities around their employer, then are subject to brutal crackdowns once it becomes politically expedient to do so.²¹⁴ As demonstrated by Canadian immigration

204. *Id.* (to be codified at 8 U.S.C. § 218A(e)(4)(G)).

205. *Id.* (to be codified at 8 U.S.C. § 218A(e)(4)(G)(iv)).

206. *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(b)(2)); *see also id.* § 2232(a) (to be codified at 8 U.S.C. § 218A(d)(6)(A)).

207. *See* BREM, *supra* note 97, at 12; *see also* VERMA, *supra* note 89, at 8-9.

208. S. 744 § 4703(a) (to be codified at 8 U.S.C. § 220(d)(3)(B)(i)).

209. *Id.* § 4703(a) (to be codified at 8 U.S.C. § 220(d)(3)(B)(ii)).

210. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; *see also* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

211. *See* *What Is E-Verify?*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/e-verify/what-e-verify> (last updated Jan. 31, 2014) ("E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility.").

212. *See* Marielena Hincapié, *What Shameful Postville, Iowa Immigration Raid Teaches Five Years Later*, HUFFINGTON POST: POL. (May 13, 2013), http://www.huffingtonpost.com/marielena-hincapie/what-shameful-postville-i_b_3260518.html ("For weeks and months [after 389 immigrants were rounded up], the public learned of the abuses of workers at the plant.").

213. *Id.*

214. *See id.* ("The immigration system proved no fairer, as families were separated and individuals were released from the cattle barn wearing electronic homing bracelets to fight

laws, once unskilled labor becomes too difficult, they are summarily disposed of. While it is a relief that the 2013 Act does not attempt to impose the internment-camp like isolation on agricultural guest workers, it is heavily dependent on border security to prevent undocumented workers from presenting themselves to employers as cheap labor.²¹⁵ If the border is not sealed, as some legislators advocate, even though the reality is improbable, then the undocumented population is sure to grow once again.²¹⁶ While an important start, the 2013 Act fails to reconcile this country's need for guest worker labor with a necessary accommodation: an attainable path for these immigrants towards permanent residency and eventually citizenship. Until this occurs, the undocumented population will continue to exist and legislative "amnesty" will certainly be necessary again.

III. RECONCILING AMERICAN DEMAND FOR GUEST WORKERS WITH THE CONSTITUTIONAL IDEALS OF BIRTHRIGHT CITIZENSHIP

The outcry against an amnesty program reflects a polarized American political climate visibly resisting demographic changes in the population. Welcome or not, the face of the average American is looking more Latino than Caucasian.²¹⁷ As the United States moves closer to becoming a Hispanic minority-majority nation, coupled with the growing political clout of Hispanics, immigration rhetoric tends to focus on the migration patterns of Mexican nationals.²¹⁸ The shared border with Mexico places it and its migrants at the

their deportation cases in immigration court.”).

215. S. 744, 113th Cong. §§ 3(a)(2), 4(a) (2013) (provisions relating to increased border security).

216. See Julia Preston & Ashley Parker, *Bill to Expand U.S. Database to Verify Hires*, N.Y. TIMES, June 26, 2013, at A1 (“No matter how many miles of fence we build and how many agents we station on the border, I truly believe people will come to this country illegally as long as they believe America offers a better life and a better job,” [Senator Rob] Portman[, Republican from Ohio,] said on the Senate floor.”).

217. Hope Yen, *Rise of Latino Population Blurs U.S. Racial Lines*, ASSOCIATED PRESS (Mar. 17, 2013) available at http://bostonherald.com/news_opinion/national/2013/03/rise_of_latino_population_blurs_us_racial_lines (“A historic decline in the number of U.S. whites and the fast growth of Latinos are blurring traditional black-white color lines, testing the limits of civil rights laws and reshaping political alliances as ‘whiteness’ begins to lose its numerical dominance.”).

218. See MARC R. ROSENBLUM ET AL., CONG. RESEARCH SERV., R42560, MEXICAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 1 (2012), available at <http://www.fas.org/sgp/crs/row/R42560.pdf>; see also Rob Paral, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role*, 1 IMMIGR. POL’Y FOCUS 1, 4 (2002), available at http://www.robparal.com/downloads/Mexican_immigrant_workers.pdf (“The impact of Mexican immigration on the United States has been a major focus of policymakers and the public for well over a decade now.”); Colleen McCain Nelson, *U.S. Immigration Overhaul Tests Mexican Partnership*, WALL ST. J., May 3, 2013, at A8, available at <http://online.wsj.com/article/SB10001424127887323628004578460870826592476.html> (discussing President Obama’s recent trip to Mexico City to speak with Mexicans about U.S. immigration law providing a

figurative center of the American immigration debate.²¹⁹ Critics assert that there is unfettered and undocumented migration of Latin American immigrants, especially from Mexico.²²⁰ Acting on these concerns, Congress authorized the construction of a wall between the United States and Mexico, ostensibly to secure the border.²²¹ Anti-immigration groups further assert that undocumented Latino immigrants are inherently criminal,²²² either due to affiliations with Mexican drug cartels or petty crime such as destruction of property. Unsurprisingly, the truth of migration patterns is much more complex.

A. Migration Patterns from Mexico Rise and Fall in Concert with Economic Opportunity

If, as the statistics reflect, migration from Mexico has slowed to the point where the population present within the United States is effectively static, then what is driving the strident calls for increased border security? The answer is most likely based in anti-immigrant fervor, especially when the immigrant is Latino. The specter of a Hispanic minority-majority nation is uncomfortable to many non-Hispanics. Politicians who seek political advantage by encouraging anti-immigrant rhetoric often seize upon this discomfort.

Studies show that since 2006, Mexican migration into the United States has declined; in fact, recent data shows the “rate of unauthorized migration fluctuating near zero.”²²³ One study published by the Congressional Research

pathway to citizenship).

219. ROSENBLUM ET AL., *supra* note 218, at 1.

220. See R. Cort Kirkwood, *Illegal Aliens a Drain on U.S. Taxpayers, Report Says*, THE NEW AMERICAN.COM (Aug. 13, 2012), <http://www.thenewamerican.com/usnews/immigration/item/12431-illegal-aliens-a-drain-on-us-taxpayers-report-says> (arguing that Mexico is largest source of illegal immigrants and that Mexican government encourages such activity); see also Michael Snyder, *10 Things That Will Happen If Barack Obama Continues To Systematically Legalize Illegal Immigration*, END OF THE AMERICAN DREAM.COM (June 17, 2012), <http://endoftheamericandream.com/archives/10-things-that-will-happen-if-barack-obama-continues-to-systematically-legalize-illegal-immigration> (explaining that America’s gang activity continues to grow based on a large percentage of gang members from Mexico entering the United States); *US Mexico Border Fence and Patrol Operations*, FED’N FOR AM. IMMIGR. REFORM (2013), <http://www.fairus.org/issue/us-mexico-border-fence-and-patrol-operations> (arguing that illegal entry of aliens from Mexico continues to represent a national security threat).

221. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

222. See Roger Loeffler, Letter to the Editor, *Illegal Immigrants Are Criminals*, CHI. TRIB. (Mar. 19, 2010), http://articles.chicagotribune.com/2010-03-19/opinion/chi-100319loeffler_briefs_1_criminals-reign-alien; see also Jaynee Germond, *Illegal Means Criminal*, JAYNEE GERMOND FOR US CONGRESS (Sept. 27, 2009), <http://jayneegermondforcongress.blogspot.com/2009/09/illegal-means-criminal.html>; *Illegal Immigration Is a Crime*, FED’N FOR AM. IMMIGR. REFORM (2013), <http://www.fairus.org/issue/illegal-immigration-is-a-crime>.

223. ROSENBLUM ET AL., *supra* note 218, at 11; see also JEFFREY PASSEL ET AL., PEW HISPANIC CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS 6 (2012), available at http://www.pewhispanic.org/files/2012/04/Mexican-migrants-report_

Service suggests that more undocumented Mexican citizens are currently leaving the United States than arriving.²²⁴ The Pew Research Center reported that “from 2005 to 2010, a total of 1.4 million Mexicans immigrated to the United States,” less than half of the three million who had done so between 1995 and 2000.²²⁵ Meanwhile, “the number of Mexicans and their children who moved from the U.S. to Mexico between 2005 and 2010 rose to 1.4 million, roughly double the number who had done so in the five-year period a decade before.”²²⁶ As the Pew Hispanic Center noted, “the trend lines within this latest five-year period suggest that return flow to Mexico probably exceeded the inflow from Mexico during the past year or two.”²²⁷ Moreover, an increasing number of deported Mexican immigrants have no plans to return to the United States.²²⁸ Additionally, the Pew Hispanic Center found that “[a]ccording to a survey by Mexican authorities of repatriated immigrants, 20% of labor migrants in 2010 said they would not return to the United States, compared with only 7% in 2005.”²²⁹

For the most part, the decrease in Mexican migration can be attributed to a number of factors. Some of those factors are heightened United States border security, as well as stricter interior enforcement, which caused the rise in deportations.²³⁰ Recently enacted state laws intending to reduce unauthorized immigration have also made it more dangerous for undocumented Mexicans to cross the border.²³¹ Often referred to as the “Arizona effect,”²³² these laws act in concert to penalize unauthorized immigration, from the passage of Arizona State Bill 1070 in April 2010 to various anti-immigrant laws in other states,²³³

final.pdf.

224. ROSENBLUM ET AL., *supra* note 218, at 11; *see also* PASSEL ET AL., *supra* note 223, at 7-8.

225. *See* PASSEL ET AL., *supra* note 223, at 7.

226. *Id.* at 7-8.

227. *Id.* at 8.

228. *Id.* at 9.

229. *Id.*

230. ROSENBLUM ET AL., *supra* note 218, at 12.

231. Jeffrey S. Passel & D’Vera Cohn, *Why Wave of Mexican Immigration Stopped*, CNN (Apr. 26, 2012), <http://www.cnn.com/2012/04/26/opinion/passel-cohn-mexican-immigration>. Various states have unsuccessfully attempted to pass laws mirroring the provisions found in Arizona State Bill 1070; *see* H.B. 7089, 2011 Leg., 113th Reg. Sess. (Fla. 2011) (died pending review); H.B. 1969, 97th Gen. Assemb., 2011-2012 Reg. Sess. (Ill. 2011) (left pending in committee); H.B. 4305, 96th Leg., 2011-2012 Reg. Sess. (Mich. 2011) (bill introduced); H.B. 343, Gen. Assemb., 2011-2012 Sess. (N.C. 2011) (filed on 03/14/2011; referred to Judiciary Subcommittee on 03/15/2011); S.B. 98, 129th Gen. Assemb., 2011-2012 Reg. Sess. (Ohio 2011) (bill introduced); H.B. 17, 82d Leg., 2011 Reg. Sess. (Tex. 2011) (left pending in committee).

232. BBVA, *MIGRATION OUTLOOK: MEXICO 2* (Adolfo Albo et al. eds., 2012), *available at* http://www.bbvaesearch.com/KETD/fbin/mult/1207_MigrationOutlookMexico_Jul12_tcm348-344007.pdf.

233. *Id.* at 7; S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *invalidated in part by* *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down several provisions of the

including Tennessee²³⁴ on June 28, 2010, Indiana²³⁵ on May 10, 2011, Georgia²³⁶ on May 13, 2011, Alabama²³⁷ on June 9, 2011, South Carolina²³⁸ on June 27, 2011, and Utah on March 3, 2011.²³⁹ As a result, “apprehensions of Mexicans trying to cross the border illegally have plummeted in recent years—from more than 1 million in 2005 to 286,000 in 2011.”²⁴⁰ Apprehensions of unauthorized immigrants by Customs and Border Protection “are now at their lowest level since 1971.”²⁴¹

Apart from increased security, there are also socioeconomic reasons for the declining Mexican migration trend. First, there are growing dangers associated with illegal border crossings, including frequent “abuse[] of migrants by smugglers and transnational criminal organizations.”²⁴² Second, some commentators credit expanding economic opportunity in Mexico for the declining numbers.²⁴³ Deported immigrants have succeeded in attaining gainful employment upon their return to Mexico. Approximately 67% “belong to the economically active population,” and 70% of this sub-category are employed within the first three months of their return.²⁴⁴

A third reason is decreasing fertility rates among the Mexican population. According to the Congressional Research Service, Mexico’s fertility rate has experienced a long-term decline falling “from an average of 7.2 children per

statute, including: (1) requirement that aliens carry registration documents at all times; (2) authorization for state police to arrest without a warrant individuals based on any suspicion of them committing an offense that makes them removable; and (3) criminalizing as a misdemeanor unauthorized aliens seeking or engaging in work in Arizona).

234. H.B. 670, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010) (enacted).

235. S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), *invalidated in part by* *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013).

236. H.B. 87, 151st Gen. Assemb., 2011 Reg. Sess. (Ga. 2011), *invalidated in part by* *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012).

237. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011), *invalidated in part by* *United States v. Alabama*, 691 F.3d 1269, 1280-81 (11th Cir. 2012), *cert. denied*, 2013 WL 210698 (U.S. Apr. 29, 2013); *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1241-42 (11th Cir. 2012).

238. S. 20 (Act 69), 119th Gen. Assemb., 2011-2012 Reg. Sess. (S.C. 2011), *invalidated in part by* *United States v. South Carolina*, 906 F. Supp. 2d 463, 474 (D.S.C. 2012).

239. H.B. 497, 59th Leg., 2011 Gen. Sess. (Utah 2011), *invalidated in part by* *Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401 CW, 2011 WL 7143098 (D. Utah May 11, 2011).

240. PASSEL ET AL., *supra* note 223, at 9.

241. *Id.*

242. ROSENBLUM ET AL., *supra* note 218, at 12; *see also* PASSEL ET AL., *supra* note 223, at 6.

243. ROSENBLUM ET AL., *supra* note 218, at 12.

244. BBVA, *supra* note 232, at 4 (explaining that within six months of return, approximately ninety percent of the subcategory had found at least one job and almost all of the returning immigrants find jobs in less than a year).

woman in 1960 to about 2.2” in 2012.²⁴⁵ Put simply, a decreasing population means the labor market in Mexico will be less competitive.²⁴⁶ Mexico is also educating its workforce, making significant educational improvements in secondary school education and college attendance.²⁴⁷ Improved educational opportunities place good jobs in Mexico within the reach of young Mexicans while simultaneously decreasing the appeal of low-skilled jobs available in the United States.²⁴⁸

Finally, many cite the reduction in migration from Mexico to the United States as primarily based on economic factors.²⁴⁹ When the United States entered the 2006-2007 economic crisis, migration from Mexico dropped.²⁵⁰ In particular, the collapse of the United States housing market led to the loss of many construction-based jobs, which historically employ a large percentage of Mexican immigrant workers.²⁵¹ Since 2010, Mexico has experienced a stronger recovery than the United States, according to the Instituto Nacional de

245. ROSENBLUM ET AL., *supra* note 218, at 12; *see also* PASSEL ET AL., *supra* note 223, at 6, 10; Philip E. Wolgin & Ann Garcia, *What Changes in Mexico Mean for U.S. Immigration Policy*, CTR. FOR AM. PROGRESS (Aug. 8, 2011), <http://www.americanprogress.org/issues/immigration/news/2011/08/08/10203/what-changes-in-mexico-mean-for-u-s-immigration-policy/>.

246. Brett Boor et al., *New Trends in Mexican Immigration: Root Causes and Policy Prescriptions*, 3 INST. FOR GLOBAL AND INT’L STUD. 1, 4 (2012).

247. *Id.* at 5 (explaining that beginning in the 1970s, school enrollment has steadily improved, with a recent spike occurring in the 1990s); *id.* (“Today, [effectively] all children participate in primary education and almost 90% enroll in secondary schools.”); *id.* (“Several Mexican states, such as Jalisco and Chiapas, have also seen the number of bachelor’s and professional degree holders double over the last decade.”).

248. *Id.* at 5.

249. *See, e.g.*, Francisco Alba, *Mexico: A Crucial Crossroads*, MIGRATION POL’Y INST. (Feb. 25, 2010), <http://www.migrationpolicy.org/article/mexico-crucial-crossroads/>; *see also* ROBERTO SURO & RENE ZENTENO, TOMAS RIVERA POL’Y INST., MEXICAN MIGRATION MONITOR, OVERVIEW: MEXICAN MIGRATION BEYOND THE DOWNTURN AND DEPORTATIONS 2-4 (2012), *available at* http://www.migrationmonitor.com/wp-content/uploads/2012/10/MigrationMonitor_part1.pdf; Francisco Alba, *Mexico: The New Migration Narrative*, MIGRATION POL’Y INST., (Apr. 24, 2013), <http://www.migrationpolicy.org/article/mexico-new-migration-narrative/> [hereinafter *The New Migration Narrative*].

250. DANIEL CHIQUIAR & ALEJANDRINA SALCEDO, MIGRATION POL’Y INST., MEXICAN MIGRATION TO THE UNITED STATES: UNDERLYING ECONOMIC FACTORS AND POSSIBLE SCENARIOS FOR FUTURE FLOWS 3 (2013), *available at* <http://www.migrationpolicy.org/pubs/RMSG-MexicoFlows.pdf>.

251. Boor et al., *supra* note 246, at 8 (citing Conor Dougherty & Miriam Jordan, *Recession Hits Immigrants Hard: Survey Shows First Decline in Foreign-Born U.S. Residents in Nearly 40 Years*, WALL ST. J. (Sept. 23, 2009), <http://online.wsj.com/article/SB125356996157829123.html>); *see also* CHIQUIAR, *supra* note 250, at 1 (arguing that the recession led to a collapse in the construction industry which more intensively uses Mexican labor); Demetrios G. Papademetriou, *Migration Meets Slow Growth*, FINANCE & DEVELOPMENT, Sept. 2012, at 18, 18 *available at* <http://www.imf.org/external/pubs/ft/fandd/2012/09/pdf/papademe.pdf> (discussing the impact of unemployment on immigration); ROSENBLUM ET AL., note 221, at 16 (“The Mexican-born labor force is concentrated in industries characterized by low-skilled employment, such as construction . . .”).

Estadística y Geografía (INEGI).²⁵² INEGI found that “the Mexican GDP grew by 5.5% in 2010 and 3.9% in 2011, well above the rates in the U.S. for those two years.”²⁵³

Therefore the specter of an unchecked Mexican wave of undocumented migration appears completely misplaced. The statistics do not support it. The rhetoric of itinerant, anti-immigrant politicians must be ignored as our country embarks on a real attempt at immigration reform. Ineffective laws will do little more than foster the creation of an underclass. This outcome cannot be permitted.

B. Immigration Laws Should Be Crafted in Line with the Constitutional Premise Behind Birthright Citizenship

Immigration laws are especially vulnerable to political winds because the United States Supreme Court seldom places constitutional boundaries in this area of federal legislation.²⁵⁴ The Court intentionally defers to Congress’s plenary power because immigration laws sit at the center of multiple government concerns: foreign policy, national security and sovereignty.²⁵⁵ As repeatedly discussed in immigration case law, due process protection under the United States Constitution is “[w]hatever the procedure authorized by Congress is”²⁵⁶ Without citizenship, immigrants do not enjoy any rights, including many constitutional protections, that Congress is not willing to give. In this

252. PASSEL ET AL., *supra* note 223, at 31; *see also Acerca del INEGI*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, <http://www.inegi.org.mx/inegi/acercade/default.aspx> (last visited May 29, 2013) (explaining that as created on January 25, 1983, by presidential decree, the INEGI consolidated the Mexican government’s Directorate General of Statistics, Directorate General of Geography, Directorate General for Political Informatics, and Directorate of Integration and Information Analysis); *id.* (explaining that INEGI credits itself with modernizing the gathering, processing, and dissemination of statistical and geographical information about Mexico’s land, people, and economy).

253. PASSEL ET AL., *supra* note 223, at 31. *But see* BBVA, *supra* note 232, at 8 (explaining that, on the other hand, some believe Mexico’s economy has only contributed minimally to the decrease in migration).

254. *See* *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (imposing constitutional limits on indefinite detentions of noncitizens); *INS v. Chadha*, 462 U.S. 919, 951-54 (1983) (imposing constitutional limits on legislation violating Article I powers in the context of deportation); *Shaughnessy v. U.S. ex rel Mezei*, 345 U.S. 206, 212 (1953) (quoting *U.S. ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)) (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.”); *U.S. ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (finding no violation of rights in denying an alien entry to the United States without due process); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889) (deferring to the plenary power of Congress due to sovereignty and political department concerns).

255. *Chae Chan Ping*, 130 U.S. at 606-07.

256. *Shaughnessy*, 338 U.S. at 544 (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

context, political rhetoric takes on a dangerous glint.

Yet, despite this deference to plenary power, guest worker immigration laws strike at the heart of a constitutional ideal on which the modern Supreme Court has refused to defer to Congress—preventing the development of an underclass in the United States.²⁵⁷ By adopting birthright citizenship in the Fourteenth Amendment, Congress incorporated a form of social responsibility within the United States Constitution that must reach immigration laws.²⁵⁸

The Fourteenth Amendment addressed one of the seminal immigration concerns—slavery. Forced migration created a class of residents, African slaves, who were not born in the United States, but were brought to alleviate labor shortages.²⁵⁹ Upon emancipation, the unequal constitutional protections endured by freed slaves continued through the Black Codes and Jim Crow laws, even though their children were born on American soil, and thus were indisputably American citizens.²⁶⁰ When separate but equal legislation was finally declared unconstitutional, the Supreme Court specifically cited the fear of a growing underclass in American society to justify the abolishment of those laws.²⁶¹ While current immigration laws address voluntary migration, for the

257. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (“The Texas sodomy statute subjects homosexuals to ‘a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with’ the Equal Protection Clause.” (quoting *Plyler v. Doe*, 457 U.S. at 239 (Powell, J., concurring))); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 469 (1988) (“The intent of the Fourteenth Amendment was to abolish caste legislation. When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated.”); *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982) (“The situation raises the specter of a permanent caste of undocumented aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.”); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

258. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Jacob Howard); CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Benjamin Wade).

259. See Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122-23 (1995) (discussing that preceding history of immigrant laborers shows various instances of industrialists looking for cheap exploitable labor); Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 276-77, 287 (2009) (discussing slavery as forced immigration, and advocating for immigration law and policy to reflect the historical implications of compulsory immigration).

260. See CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull) (advocating for the Freedman’s Bureau and arguing that to fulfill the promise of abolishing slavery the government should also get rid of other state-enforced discriminations and ensure civil rights and education for black citizens).

261. See *Brown*, 347 U.S. at 494 (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status

most part, the constitutional prohibition of second-class status is equally relevant. Historically, the United States has always looked for cheaper sources of unskilled labor.²⁶² Today, that labor comes in the form of immigrants, mostly undocumented and predominantly Latino.²⁶³ Despite concentrated attempts at closing United States' borders through increased security, migration to provide that unskilled labor persists.²⁶⁴ Once on our soil, these migrants are owed basic constitutional protections, including immigration legislation that will not relegate them to second-class status.²⁶⁵

in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

262. See PHILIP MARTIN, CTR. FOR IMMIGR. STUD., *ILLEGAL IMMIGRATION AND THE COLONIZATION OF THE AMERICAN LABOR MARKET* (1986), available at <http://www.cis.org/AmericanLaborMarket%2526Immigration> (discussing how American business owners frequently depend on immigrant workers and believe that “cheap labor” will always be available); see also Freddy Funes, Note, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past the Chinese Exclusion Case*, 11 SCHOLAR 341, 345 (2009) (“[T]he United States will allow aliens to immigrate when necessary to obtain cheap labor for the production of certain cheap goods.”); Garcia, *supra* note 262, at 127-28 (discussing that preceding history of immigrant laborers shows various instances of industrialists looking for cheap exploitable labor).

263. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 597 (2008) (“Day laborers are almost entirely male, with a median age of thirty-three, predominantly Latino (and from Mexico), and overwhelmingly unauthorized.”); Hein de Haas & Simona Vezzoli, *Time to Temper the Faith: Comparing the Migration and Development Experiences of Mexico and Morocco*, MIGRATION POL’Y INST. (July 29, 2010), <http://www.migrationpolicy.org/article/time-temper-faith-comparing-migration-and-development-experiences-mexico-and-morocco/> (explaining that Mexico is the main source “of predominantly low-skilled migrant labor in the United States”); see also ABEL VALENZUELA JR. ET AL., NAT’L DAY LABOR STUDY, ON THE CORNER: DAY LABOR IN THE UNITED STATES iii (2006), available at http://www.sscnet.ucla.edu/issf/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf (“The day-labor workforce in the United States is predominantly immigrant and Latino.”).

264. See Simon Tu, *Globalization and the American Income Gap: Assessing the Impact of Liberal Economics and Immigration on Inequality*, 4 MCNAIR SCHOLARS RES. J. 47, 47 (2008), available at http://scholarworks.boisestate.edu/cgi/viewcontent.cgi?article=1023&context=mcnair_journal (“Despite efforts to enhance border security, however, international migrants continue to pour into the U.S. . . .”); see also Philip Martin, *Mexico-U.S. Migration*, in NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 441, 457 (Gary Clyde Hufbauer et al. eds., 2005), available at http://www.iie.com/publications/chapters_preview/332/08iie3349.pdf; TOM BARRY, CTR. FOR INT’L POL’Y, INTERNATIONAL POLICY REPORT: POLICY ON THE EDGE: FAILURES OF BORDER SECURITY AND NEW DIRECTIONS FOR BORDER CONTROL 1 (2011), available at http://www.ciponline.org/images/uploads/Barry_IPR_Policy_Edge_Border_Control_0611.pdf (arguing that border security is hampered by failed immigration and drug policy).

265. See *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (explaining that “aliens unlawfully present” are protected by the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (“It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment.”); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (explaining that aliens

Without this approach, a form of indentured servitude results, as demonstrated by the guest worker program in Hong Kong. Classified as a Special Administrative Region (SAR) of the People's Republic of China (PRC),²⁶⁶ Hong Kong is governed under the principle of "one country, two systems."²⁶⁷ China has agreed to give the region a high degree of autonomy, with the exception of governmental interests in defense and foreign affairs.²⁶⁸ Because Hong Kong is not an independent sovereignty, it does not possess its own citizenship status.²⁶⁹ With the exception of Chinese citizens and certain Chinese nationals, persons present in Hong Kong "[have] the right of abode in Hong Kong only."²⁷⁰ Accordingly, Hong Kong's immigration laws are based upon the concept of "permanent residency."²⁷¹ Permanent residence allows persons not born in the territory to gain the right of abode there.²⁷² It is conditioned on prior "ordinary residence" in Hong Kong.²⁷³ Foreigners who "ordinarily reside" in Hong Kong for seven years are allowed to apply for permanent residency.²⁷⁴ Under the law of Hong Kong, "ordinary residence" does not include people who have landed unlawfully, breached their limit of stay, or who are refugees, people in immigration detention, foreign contract workers under importation of labor schemes, or "outside" domestic helpers.²⁷⁵

Hong Kong's response to market demands for cheaper labor has a familiar history. A growing demand for domestic help who spoke English and rising

are entitled to compensation if their land is taken by eminent domain, through the Just Compensation Clause of the Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments . . ."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . ."); see also *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (imposing constitutional limits on indefinite detentions of noncitizens).

266. *Hong Kong Profile*, BBC NEWS: ASIA, <http://www.bbc.co.uk/news/world-asia-pacific-16517764> (last visited Oct. 2, 2012); see also U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2010: CHINA 98 (2011), available at 2011 WL 1537590 [hereinafter HUMAN RIGHTS PRACTICES IN CHINA].

267. HUMAN RIGHTS PRACTICES IN CHINA at 110, *supra* note 266.

268. *Id.* at 98.

269. XIANGGANG JIBEN FA art. 24 (H.K.), available at http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html.

270. *Id.*

271. See, e.g., *Facts on Hong Kong Permanent Residency*, PHILIPPINE DAILY INQUIRER (Oct. 2, 2011), <http://globalnation.inquirer.net/14345/facts-on-hong-kong-permanent-residency>.

272. *Id.*

273. *Id.*

274. *Id.*

275. Immigration Ordinance, (2003) Cap. 115, § 2 Subsection 4 (H.K.), available at <http://www.hkllii.hk/eng/hk/legis/ord/115/s2.html>.

local workers' salaries spurred the Hong Kong government to import labor from the Philippines.²⁷⁶ Acting in concert with the bar to permanent residency, and more likely as a direct result of it, Hong Kong's labor laws do not properly protect guest workers.²⁷⁷ For example, domestic guest workers are excluded from standard minimum wage requirements; instead, the workers' contracts only require a monthly wage of \$519.²⁷⁸ If that monthly minimum wage is paid, then assuming a six-day workweek comprised of sixteen-hour days, the guest workers' salary averages to about a dollar an hour.²⁷⁹ Prior to arrival in Hong Kong, domestic guest workers are not informed of minimum wage requirements or shown employment contracts.²⁸⁰ In fact, typically the first time a worker is given her contract is when she boards the aircraft headed to Hong Kong.²⁸¹ Due to lax or nonexistent oversight of these workers, Hong Kong employers are able to impose onerous working conditions with impunity.²⁸²

276. *The Lesson of Hong Kong's Maids*, WALL ST. J. ASIA (Mar. 26, 2013), <http://online.wsj.com/article/SB10001424127887324789504578382100145610908.html>; see also *id.* (reporting that families who employ foreign maids strongly resist any changes to the domestic helper visa, including a policy revision that would allow the maids to acquire permanent residency and therefore potentially find other employment); Manipon Aida Jean, *Reading Filipina Migrant Workers in Hong Kong: Tracing a Feminist and Cultural Politics of Transformation* 18 (Oct. 30, 2004) (M.Phil. thesis, Lingnan University) (explaining market and social factors that increased demand for Filipina domestic workers over local women in Hong Kong).

277. See, e.g., Carol G. S. Tan, Comment, *Why Rights Are Not Enjoyed: The Case of Foreign Domestic Helpers*, 30 HONG KONG L.J. 354, 356-57 (2000).

278. Meagan Fitzpatrick, *Hong Kong's Foreign 'Helpers' Fight for Equality*, CBC NEWS (Mar. 11, 2013), <http://www.cbc.ca/news/world/story/2013/03/07/fitzpatrick-hong-kong-domestic-workers.html>.

279. *Id.*; see also ASIAN MIGRANT CTR., UNDERPAYMENT 2: THE CONTINUING SYSTEMATIC EXTORTION OF INDONESIAN MIGRANT WORKERS IN HONG KONG, http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-jakarta/documents/publication/wcms_116888.pdf (last visited May 30, 2014); *Migrant Workers Rally Over Hong Kong Working Conditions*, JAKARTA GLOBE (Dec. 16, 2012), <http://www.thejakartaglobe.com/archive/migrant-workers-rally-over-hong-kong-working-conditions> ("United Filipinos chairperson Dolores Balladares said the minimum monthly wage for foreign domestic workers had increased by just HK\$60 (US\$7.7) in the past 13 years to HK\$3,920, far from keeping up with the rising cost of living."); Ridwan Max Sijabat, *Hong Kong No Longer Friendly for RI Migrant Workers*, THE JAKARTA POST, Sept. 4, 2012, at 4 (reporting that the Indonesian government plans to stop sending informal workers to Hong Kong due to the poor treatment of domestic foreign workers).

280. Tan, *supra* note 277, at 355-56 (explaining that, alternatively, workers or helpers sign their contracts prior to entry without an explanation of its contents).

281. *Id.*

282. *Id.* at 356-58 (explaining that upon arrival in Hong Kong, some guest workers are defrauded by their employers); see also *id.* at 356 (explaining that one scheme has an employer instructing the guest worker to sign either blank receipts or blank sheets of paper, which the employer later dates and amends by entering a minimum wage salary and explaining that "[t]he signed receipts make it difficult" for the guest worker to later "prove [] that she has not been paid or has not been paid in full"); Dan Gatmaytan, *Death and the Maid: Work, Violence, and the Filipina in the International Labor Market*, 20 HARV. WOMEN'S L.J. 229, 244 n.115 (1997) (citing Lian Nemenzo-Hernandez, *Philippines-Labour:*

These domestic guest workers are usually deprived of time off for several months.²⁸³ As a result, “there are few opportunities to meet other [guest workers] and compare” experiences, such as the amount of salaries, working conditions, or to take advantage of services from counseling and advice centers.²⁸⁴ Moreover, guest workers’ wages are usually withheld for six or seven months to pay off “agency fees.”²⁸⁵ As is the case in Canada, domestic guest workers comply with harsh employment conditions to retain their jobs and avoid deportation.²⁸⁶ Worse than in Canada, however, if a domestic worker in Hong Kong is found in unauthorized employment, legal sanctions against the employee are more certain to follow than the prosecution of the offending employers.²⁸⁷

Because Hong Kong has legally forbidden guest workers to attain permanent legal status, the sole incentive is to maximize their exploitation, not fold them into society. Hong Kong guest workers are no more than indentured servants, and in the worst cases, are living in an environment closer to enslavement. Recent political rhetoric would set United States immigration policy on the same path—a path that directly contradicts the mandate of birthright citizenship and the Fourteenth Amendment.

CONCLUSION

Birthright citizenship prevents the withdrawal of constitutional protections from guest workers. In its absence, it is easier, legislatively and judicially, to pass laws that exempt these workers from labor equality, safety requirements, and social benefits such as access to public education. Apart from public policy concerns, the constitutional ideals of birthright citizenship save us from the

Maid Abuse, Made in Hong Kong, INTER PRESS SERV., Aug. 12, 1994) (writing that there have been frequent suicides among the approximately 130,000 Filipina domestic guest workers in Hong Kong and that though “[i]n 1994, the Asian Migrant Center received 67 complaints from domestic helpers, more than 20% of which involved physical and sexual assaults,” “[m]any incidents are not reported because the Filipinas fear humiliation, retaliation, and repatriation.”); ABOUT PATHFINDERS: THE CHALLENGE, <http://www.pathfinders.org.hk/public/about/the-challenge/> (last visited Mar. 27, 2013) (explaining that if a guest worker becomes pregnant, employers often unlawfully terminate their work contracts); Meagan Fitzpatrick, *Hong Kong’s Abused Foreign Workers Trying to Break Silence*, CBC NEWS (Mar. 12, 2013), <http://www.cbc.ca/news/world/hong-kong-s-abused-foreign-workers-trying-to-break-silence-1.1376072> (reporting that the Hong Kong Federation of Asian Domestic Workers Union has reported that sexual harassment of guest workers is “rampant”); *id.* (reporting that many employers install video cameras in bedrooms and bathrooms to monitor guest workers).

283. Tan, *supra* note 277, at 356.

284. *Id.*

285. *Id.* at 356-67; *see also* Sijabat, *supra* note 279; ASIAN MIGRANT CTR., *supra* note 279.

286. Tan, *supra* note 277, at 357-58.

287. *Id.* at 358.

worst version of ourselves. Unchecked, anti-immigrant rhetoric would lead to a guest worker system amounting to no more than indentured servitude. This outcome was explicitly rejected by the United States Constitution upon the passage of the Reconstruction Amendments.

As evidenced by the Canadian guest worker program, a high repatriation rate comes at a great cost to the fundamental right of liberty. Canadian agricultural guest workers are socially isolated and legally prevented from interaction with Canadians. Labor exploitation still exists even with an active legislative intent to reduce worker abuse. Without such an interest, guest worker exploitation becomes even more rampant as demonstrated by the Hong Kong program.

It is undisputed that the United States has a demand for the low-skilled and unskilled labor that guest workers supply. Because the Fourteenth Amendment prohibits the creation of a second-class status, the legislative reaction to guest workers must encompass a path to lawful permanent residency followed by citizenship. Without it, a permanent underclass comprised of guest workers is inevitable.