

**NATION OF IMMIGRANTS, NATION OF LAWS:
AGRICULTURE AS THE ACHILLES HEEL OF
ENFORCEMENT-ONLY IMMIGRATION
LEGISLATION**

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“...we must remain both a nation of immigrants and a nation of laws.”

President Barack Obama, April 23, 2010

INTRODUCTION 176

I. HISTORICAL BACKGROUND 179

 A. The Plenary Power Doctrine: Immigration as a Federal Concern 179

 B. Tacit Approval of Unauthorized Immigration during the Twentieth Century 182

 C. IRCA: Growing Federal Concern over Unauthorized Immigration 183

 i. Civil and Criminal Penalties for Knowing Hire of Undocumented Immigrants 184

 ii. Legalization and Guest Worker Programs 185

II. AGRICULTURE’S DEPENDENCE ON UNAUTHORIZED IMMIGRANTS 187

 A. Immediate Replacement with U.S. Citizens and Work-Authorized Immigrants 189

 B. The Guest Worker Program 193

 i. Structural Problems 193

 ii. Human Rights Abuses 195

 C. Mechanization 196

III. STATE LEGISLATURES AND IMMIGRATION POLICY 196

IV: AGRICULTURE AS THE ACHILLES HEEL OF STATE-

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BASED ENFORCEMENT LEGISLATION	199
CONCLUSION.....	205

INTRODUCTION

President Obama's statement, made at a naturalization ceremony for members of the armed forces, highlights the current conflict between the nation's immigration law and reality as reflected by the roughly 10.8 million individuals who currently reside in the United States without proper authorization.¹ Despite a long line of cases suggesting that immigration is an executive and congressional concern, contemporary frustration with the federal government's repeated failure to overhaul the troubled immigration system has prompted states to enact their own immigration regulations.² These efforts peaked in 2011, when legislatures in all fifty states considered a total of 1,607 immigration-related bills and resolutions.³

Encouraged by Arizona's enactment of the "Support Our Law Enforcement and Safe Neighborhoods Act" in 2010, state legislators across the country embarked on a quest to decrease the number of undocumented immigrants present in the United States. A survey of state immigration statutes enacted in 2011 reveals that state legislators have sought to bring the reality of extralegal migration in line with the mandate of the federal Immigration and Nationality Act ("INA") through a variety of tactics. Such enforcement efforts include imposing state penalties on employers who fail to verify employment eligibility, requiring law enforcement officers conducting a lawful stop to determine the individual's immigration status, prohibiting the harboring of undocumented aliens, and making an alien's failure to carry a

¹ President Barack Obama, Remarks at Naturalization Ceremony for Active-Duty Service Members (Apr. 23, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members>; ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES JANUARY 2010, DEP'T OF HOMELAND SEC. (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

² *State Laws Related to Immigration and Immigrants*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 22, 2012), <http://www.ncsl.org/Portals/1/documents/immig/2007Immigrationfinal.pdf>.

³ *Id.*

registration document a state offense.⁴

Proponents of the above enforcement tactics, such as Kansas Secretary of State Kris Kobach and former Massachusetts Governor Mitt Romney, argue that statutes which restrict the ability of undocumented immigrants to work, drive, receive charity, and associate with United States citizens and authorized immigrants will encourage immigrants to “self-deport,” thereby reducing the number of undocumented immigrants living in the United States.⁵ It is uncertain whether state legislation that seeks to enforce federal immigration policy will successfully discourage individuals from entering the United States in violation of the law.⁶ In the short term, however, it is troubling to consider the devastation that “self-deportation,” effected by state-based, anti-immigrant legislation, will wreak on the agricultural sector of our economy. Although current estimates suggest that slightly over 16 percent of the nation’s total workforce is undocumented, such individuals represent between 50 and 70 percent of all agricultural laborers in the United States.⁷ The agricultural industry is therefore dependent on undocumented laborers.⁸ State-based efforts to restrain unlawful immigration that do not account for agriculture’s reliance on undocumented immigrants threaten to cripple the industry.

⁴ 2011 *Immigration-Related Laws and Resolutions in the States* (Jan.1-Dec.7, 2011), NAT’L CONF. OF ST. LEGISLATURES (Feb. 22, 2012), <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx>.

⁵ Julia Preston, *Romney’s Plan for ‘Self Deportation’ Has Conservative Support*, N.Y. TIMES (Jan. 24, 2012), <http://thecaucus.blogs.nytimes.com/2012/01/24/romneys-plan-for-self-deportation-has-conservative-support>.

⁶ See generally María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina’s Legal System*, 15 IND. INT’L & COMP. L. REV. 301, 301 (2005) (Undocumented workers “occupy a key place in the U.S. economy”); Rob Paral, *Essential Workers: Immigrants are a Needed Supplement to the Native-Born Labor Force*, IMMIGR. POL’Y CENTER (Mar. 2005), available at <http://www.immigrationpolicy.org/special-reports/essential-workers-immigrants-are-needed-supplement-native-born-labor-force>.

⁷ Jeanne Batalova & Alicia Lee, *Frequently Raised Statistics on Immigration and Immigrants in the United States*, MIGRATION INFORMATION SOURCE (Mar. 2012), <http://www.migrationinformation.org/USfocus/display.cfm?ID=886>; *The American Specialty Agriculture Act: Hearing on H.R. 2847 Before the H.R. Comm. on the Judiciary and the S. Comm. on Immigration Policy and Enforcement*, 112th Cong. (2011) (testimony of Robert A. Williams). Robert A. Williams is the Director of Florida Legal Services’ Migrant Farmworker Justice Project.

⁸ *Id.*; see also Aaron Smith, *Farm Workers: Take Our Jobs, Please!*, CNNMONEY (July 10, 2010, 1:14 PM ET), http://money.cnn.com/2010/07/07/news/economy/farm_worker_jobs/index.htm.

This Note explores the policies and economic developments that have led to the agricultural sector's reliance on unauthorized labor and highlights the drastic consequences that will result from legislation that attempts a rapid, wholesale removal of unauthorized laborers from the nation's fields without providing a viable alternative. This Note argues that anti-immigrant enforcement legislation is not the solution to the "problem" posed by unauthorized immigration.⁹ Rather, an effective immigration policy must ensure that agriculturalists have access to an adequate number of experienced, efficient laborers, and that the rights of those individuals are protected.

This Note proceeds in five stages. Part I traces the historical background of immigration policy in the United States. This Part remarks upon the traditional rule that the federal government, and not the states, is responsible for regulating immigration policy and discusses the failure of the 1986 Immigration Reform and Control Act to reverse burgeoning extralegal immigration. Part II considers the agricultural sector's reliance on undocumented immigrants. Part III discusses the relationship between state legislatures and immigration policy, with a focus on the factors that have spurred current efforts to re-craft immigration policy at the state level. Part IV argues that state-based immigration enforcement legislation threatens to undermine the vitality of the U.S. agricultural industry by effecting the wholesale removal of farm laborers without providing for a viable alternative source of labor. This Note concludes in Part V by suggesting that immigration policy should remain in the hands of the federal government, and argues for the adoption of comprehensive legislation to ensure the continued existence of an adequate number of agricultural workers while comprehensive immigration reform is brought to life.

⁹ Carter Yang, *White House Weighs Legalization of Mexicans*, ABC NEWS (July 16, 2001), <http://abcnews.go.com/Politics/story?id=121486&page=1#.T1Pkd4euduM>. George Bush, speaking at a naturalization ceremony on Ellis Island on July 10, 2001, said "immigration is not a problem to be solved. It is a sign of a confident and successful nation." *Id.*

I. HISTORICAL BACKGROUND

A. The Plenary Power Doctrine: Immigration as a Federal Concern

Early in the nation's history, state and local governments were responsible for passing legislation regulating the "transborder movement of persons."¹⁰ An underlying theme of early state-based immigration legislation was the exclusion of undesirables, such as convicts and the poor.¹¹ Immediately following the Revolution, the Congress of the Confederation recommended that the states "pass proper laws for preventing the transportation of convicted male-factors from foreign countries into the United States."¹² Several states responded to this call. After the passage of the federal Constitution, more states re-enacted and revised such legislation.¹³ In contrast to the swift action taken by state governments, the federal government "was slow to take action to exclude foreign convicts."¹⁴ Congress did not respond until 1875, when the first federal statute relating to European immigration prohibited the immigration of convicts.¹⁵

Since 1889, however, immigration regulation has been considered the exclusive province of the federal government. Although the Constitution does not explicitly grant Congress the power to control immigration, the plenary power doctrine, derived from principles of international law and sovereignty, holds that the federal government has near total control of immigration law and policy.¹⁶ In *Chae Chin Ping v. United States*, ("The Chinese Exclusion Case") the Supreme Court held that the federal government has the power to regulate immigration, as "jurisdiction over its own territory . . . is an incident of every independent nation."¹⁷ Writing for a unanimous Court, Justice Field stated that the power to control immigration is an important incident of national sovereignty, as a government unable to exclude foreigners

¹⁰ Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

¹¹ *Id.* at 1841-59.

¹² *Id.* at 1842.

¹³ *Id.* at 1843.

¹⁴ *Id.*

¹⁵ *Id.* at 1844.

¹⁶ *Chae Chin Ping v. United States*, 130 U.S. 581, 604-05, 609 (1889).

¹⁷ *Id.* at 603.

“would be to that extent subject to the control of another power.”¹⁸ Three years later, in *Nishimura Ekiu v. United States*, the Court stated that Congress’ inherent power to regulate immigration was an incident of the Constitution’s delegation of foreign affairs to the political branches of the government.¹⁹ As in *The Chinese Exclusion Case*, the Court relied on principles of international law to support the conclusion that only the federal government could regulate immigration:

it is a maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.²⁰

The supremacy envisioned by the plenary power doctrine permits the federal government to regulate the conduct of aliens present in the United States.²¹ During World War II, California enacted a statute prohibiting the issuance of a fishing license to any “alien Japanese.”²² Later, the statute was amended to read “any person ineligible to citizenship,” a category which included Japanese nationals living in the United States.²³ Takahashi, a long-time fisherman who had been a resident of California since 1907, brought suit to compel the California Fish and Game Commission to issue him a license.²⁴ The Supreme Court granted certiorari “to review this question of importance in the fields of federal-state relationships and of constitutionally protected individual equality and liberty.”²⁵ The Court concluded that

[t]he Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers . . . State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with

¹⁸ *Id.* at 604.

¹⁹ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

²⁰ *Id.*

²¹ *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 419 (1948).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

2012] *NATION OF LAWS, NATION OF IMMIGRANTS* 181

this constitutionally derived federal power to regulate immigration.²⁶

In accordance with the Court's holding in *Takahashi*, states are prohibited from enacting legislation which seeks to regulate the conduct of aliens before naturalization. Although the Court declined to specifically limit its holding to lawfully admitted aliens, *Takahashi's* insistence on the dominance of federal control over all aspects of immigration suggests that state efforts to regulate the conduct of any class of alien before naturalization would be unconstitutional.

An alternative justification for federal control of immigration policy is the doctrine of field preemption. Field preemption exists when Congress has so blatantly manifested an intent to regulate a particular matter that, even in the absence of a federal rule on the subject, any state regulation thereof is preempted.²⁷ The Court has explicitly relied on the doctrine of field preemption to strike down state immigration laws. In *Hines v. Davidowitz*, a Pennsylvania law required aliens to pay a fee, register with the state, and carry a state-issued registration card at all times.²⁸ The Supreme Court cited the "supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization, and deportation," and held that

when the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute.²⁹

Citing its concern that state-based immigration policy could hamper the uncontested federal power to conduct foreign affairs, the Court stated that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."³⁰

As states increasingly craft legislation that conflicts with the Supreme Court's requirement that the federal government regulate the conduct of aliens living in the United States, such doctrines have moved to the forefront of the debate over the future of U.S. immigration

²⁶ *Id.*

²⁷ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992).

²⁸ *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).

²⁹ *Id.*

³⁰ *Id.*

policy.³¹ The plenary power and field preemption doctrines suggest that current state efforts to enact comprehensive immigration schemes regulating the conduct and treatment of foreign nationals residing in the United States will be struck down by the Supreme Court of the United States.³²

B. Tacit Approval of Unauthorized Immigration during the Twentieth Century

During the twentieth century, the United States “tolerated a high degree of illegality and tacitly permitted widespread illegal employment in agriculture and other low skilled sectors of the economy.”³³ Despite occasional stringent enforcement of the nation’s immigration laws, “chronic and intentional under-enforcement of immigration law [was] de facto federal policy for over a century.”³⁴ Indeed, in 2008, the Department of Homeland Security reported removing less than 3 percent of all undocumented immigrants in the United States, a figure that is smaller than the number of new undocumented immigrants who entered the country in any recent year.³⁵

Scholars trace the origins of this policy to the agricultural industry’s need for more labor than could be found in the United States.³⁶ At the beginning of the twentieth century, agriculturalists in the Southwest turned to Mexican laborers to fill jobs created by advances in agricultural production, including irrigation and the invention of

³¹ *Takahashi*, 334 U.S. at 419.

³² This hypothesis is supported by the Supreme Court’s most recent foray into the immigration quagmire. On June 25, 2012, the Supreme Court issued a decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). The Court determined that three sections of Arizona’s controversial S.B. 1070, enacted in 2010 to address the effects of unlawful immigration, were unconstitutional as preempted by federal law. The Court struck down the statute’s imposition of state penalties for failure to carry an alien registration document, criminal penalties for violations of IRCA’s mandate that only authorized individuals be employed in the United States, and authorization for police officers to arrest any individual on probable cause that the individual has committed “any public offense” which makes him or her removable from the United States.

³³ *Id.*

³⁴ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2049 (2008).

³⁵ Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 151 (2010) (“[t]he U.S. government has historically enforced the immigration laws in ways that provide employers with a ready-supply of low-wage labor.”).

³⁶ Motomura, *supra* note 34, at 2049.

refrigerated railroad cars.³⁷ The federal government made little attempt to ensure that such workers had legal status, instead focusing enforcement efforts on Chinese immigrants who arrived via Mexico as a way of skirting the Chinese Exclusion Act.³⁸ The federal government's enforcement efforts during this period reflected great discretion for the needs of employers, who appeared to prefer Mexican workers without permanent legal status to U.S. citizens.³⁹ Such immigrants were considered a "flexible, disposable workforce, ready to work when needed but, as compared to Europeans, more easily sent home when they were not."⁴⁰ Thus, during the early part of the twentieth century, the need for an inexpensive and flexible labor force created a de facto policy of lenient immigration enforcement and tolerance for extra-legal immigration.⁴¹ The legacy of that policy endures today.

C. IRCA: Growing Federal Concern over Unauthorized Immigration

Following the enactment of the Immigration Act of 1965, the number of authorized and unauthorized immigrants entering the United States each year burgeoned.⁴² The Act increased the number of legal immigrants allowed to enter the United States each year and eliminated racial and ethnic quotas, effectuating a 100 percent increase in the annual flow of legal immigrants to the country.⁴³ Despite the creation of legal avenues of immigration, unauthorized immigration also increased during this period: one million unauthorized immigrants were apprehended each year between 1960 and 1970, indicating that the "prevailing immigration system of the nation. . .[was] being widely

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2050.

⁴¹ *Id.* at 2051.

⁴² Vernon M. Briggs, Jr., *Report of the Select Commission on Immigration and Refugee Policy: A Critique*, TEX. BUS. REV. 56(1), 11 (1982), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1035&context=hrpubs&sei-redirect=1#search=%221981%20select%20committee%20immigration%22>.

⁴³ *Id.*; see also MARC R. ROSENBLUM, THE REGIONAL MIGRATION STUDY GROUP, IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM 9 (2011), <http://www.migrationpolicy.org/pubs/RMSG-post-9-11policy.pdf> ("[n]otably, Congress explicitly rejected proposals in the 1950s to make it illegal to hire or employ unauthorized immigrants.").

circumvented.”⁴⁴ Recognizing that the rapid increase indicated a need to examine the existing immigration system, Congress created the Select Commission on Immigration and Refugee Policy in 1978.⁴⁵ The Commission concluded that unauthorized immigration was a public financial burden, and “called for the ‘initiation of strong, new efforts’ to control illegal immigration.”⁴⁶ In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”) in response to concerns about escalating immigration.⁴⁷ IRCA offered two new tools to control undocumented immigration.

i. Civil and Criminal Penalties for Knowing Hire of Undocumented Immigrants

IRCA made it “unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”⁴⁸ The law established the I-9 system, under which employers were required to establish a prospective worker’s identity and employment eligibility by checking one or two documents from a list of acceptable identity documents.⁴⁹ Employers were required to sign the form, affirming that the documents appeared genuine and to belong to the worker.⁵⁰ Employers who violated the law were to be subject to civil fines for initial offenses; an employer found to engage in a pattern or practice of violations could be fined up to \$3,000 for each unauthorized alien found to be employed, imprisoned for up to six months, or both.⁵¹

⁴⁴ Briggs, *supra* note 42.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 13.

⁴⁷ Kristen McCabe and Doris Meissner, *Immigration and the United States: Recession Affects Flows, Prospects for Reform*, MIGRATION POLICY INSTITUTE (January 2010), <http://www.migrationinformation.org/usfocus/display.cfm?ID=766>.

⁴⁸ 8 U.S.C. § 1324a(a)(1)(A) (West 2012).

⁴⁹ See generally Kevin Jernegan, *Eligible to Work? Experiments in Verifying Work Authorization*, MIGRATION POLICY INSTITUTE 2 (Nov. 2005), <http://www.migrationpolicy.org/ITFI/Insight-8-Jernegan.pdf>.

⁵⁰ See U.S. Dep’t of Homeland Security, U.S. Citizenship and Immigration Services, *The Form I-9 Process in a Nutshell*, OFFICE OF BUSINESS LIAISON 5-6 (Oct. 7, 2005), <http://www.cs.ny.gov/personnelcouncil/pdf/The%20I-9%20Process%20in%20a%20Nutshell%20USCIS%20Bulletin.pdf>.

⁵¹ 8 U.S.C. § 1324a (West 2012).

2012] *NATION OF LAWS, NATION OF IMMIGRANTS* 185

IRCA's prohibition on the employment of undocumented immigrants proved ineffective in reducing the number of undocumented immigrants in the United States. When IRCA was enacted, there were approximately 3.2 million undocumented immigrants in the United States.⁵² By 1996, that number had grown to five million; by 2007 (the first year in which every state considered immigration legislation), between 9.3 and 20 million undocumented immigrants lived in the United States.⁵³ Despite IRCA's imposition of criminal penalties on those who hired undocumented workers, the employment of such laborers remained beneficial for both employers and employees: "[e]mployers who disregard the statute can hire workers willing to work long hours for low wages on an as-needed basis, and undocumented immigrants have the opportunity to receive income that, in many situations, far exceeds what they could earn in their home countries."⁵⁴ IRCA's failure was furthered by the ease with which workers could obtain false documents, and the fact that employers had an incentive to accept such documents, as doing so allowed them to circumvent IRCA's *mens rea* requirement.⁵⁵ As recognized by the Commission on Immigration Reform in its 1994 Report to Congress, IRCA's collateral failure was ethnic discrimination by employers: 5 percent of employers admitted refusing to hire job applicants whose appearance or accent led the employer to suspect that the individual was unauthorized, and 9 percent of employers said that because of IRCA they began to hire only native born U.S. citizens or refused to hire individuals with temporary work eligibility documents.⁵⁶

ii. Legalization and Guest Worker Programs

IRCA included two provisions of crucial importance to agriculturalists reliant on unauthorized laborers. The legalization or amnesty program permitted seasonal agricultural workers ("SAWs") to

⁵² Richard A. Johnson, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 251 (2007) (citing Ruth Ellen Wasem, Cong. Research Serv., RS21938, UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986, at 3 (2004), available at <http://fpc.state.gov/documents/organization/39561.pdf>).

⁵³ *Id.*

⁵⁴ *Id.* at 253.

⁵⁵ *Id.*

⁵⁶ U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility*, EXECUTIVE SUMMARY (1994), <http://www.utexas.edu/lbj/uscir/exesum94.html>.

apply for permanent resident status.⁵⁷ Persons who had been SAWs for at least 90 days during the 12 month period ending May 1, 1986, were eligible for temporary permanent residence status and were permitted to apply for legal permanent residence status one or two years later.⁵⁸

“Seasonal Agricultural Worker” was defined as those who performed “field work” relating to “planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities.” There were extended definitions of “field work,” “fruits,” “vegetables,” “critical and unpredictable labor demands,” “agricultural lands,” “horticultural specialties,” and “other perishable commodities.” There was much controversy and litigation over what crops were included.⁵⁹

In total, 1.3 million undocumented workers applied for the SAW program; 997,429 of those workers were eventually approved for permanent residency status.⁶⁰

The second important provision for agriculturalists was IRCA’s modification of the existing guest worker program. IRCA divided the existing H-2 temporary worker classification into two classes.⁶¹ H-2A visas were available for temporary agricultural workers and H-2B for temporary non-agricultural workers.⁶² IRCA’s guest worker program proved an ineffective method of creating a legally authorized agricultural workforce. Employers wishing to sponsor an agricultural worker under the new H-2A program were required to show that the work was temporary or seasonal.⁶³ “Temporary” was defined as not

⁵⁷ RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 9:23 (2d. ed. 2011).

⁵⁸ 8 U.S.C. 1160 (1986).

⁵⁹ STEEL, *supra* note 57.

⁶⁰ Pia M. Orrenius and Madeline Zavodony, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from the Immigration Reform and Control Act (IRCA)*, 40 *DEMOGRAPHY* 3, 437,439 (2003); VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST* 183 (1992);

see also Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress*, *N.Y. TIMES* (May 23, 2006), <http://www.nytimes.com/2006/05/23/washington/23amnesty.html?pagewanted=all> (stating “immigration officials approved more than 90 percent of the 1.3 million amnesty applications for a specialized program for agricultural workers, even though they had identified possible fraud in nearly a third of those applications.”).

⁶¹ LAURA LOCKARD, *Toward Safer Fields: Using Awpa’s Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 507, 545, n. 136 (2004).

⁶² *Id.*

⁶³ *Id.*

2012] *NATION OF LAWS, NATION OF IMMIGRANTS* 187

more than one year, although the regulations allowed for an extension beyond one year in a case of unforeseen circumstances.⁶⁴ Employers were also required to show that there were not “sufficiently able, willing, and qualified [United States] workers available” to perform the work and that employing a temporary worker would not adversely affect the wages or working conditions of similarly-employed U.S. citizens or work-authorized immigrants.⁶⁵

Ultimately, IRCA failed to substantially reduce the number of unauthorized immigrants living in the United States and entering the country each year.⁶⁶ In 1994, the Commission on Immigration Reform called on the federal government to take steps to mitigate the impact of unlawful immigration on states and local communities, specifically through efforts to reduce illegal entries.⁶⁷ The Commission recommended that Congress appropriate more resources for preventing illegal entry, as it determined that it was more effective and more cost efficient to prevent illegal entries than to deport individuals who entered the United States in violation of the law.⁶⁸

II. AGRICULTURE’S DEPENDENCE ON UNAUTHORIZED IMMIGRANTS

Nearly a century of tacit approval of unauthorized immigration has resulted in the fact that unauthorized workers now play a critical role in the U.S. agricultural industry. The industry is “dependent” on labor performed by unauthorized immigrants, as an estimated 50 to 75 percent or 1.1 million of all farm workers are undocumented.⁶⁹ Removing these

⁶⁴ 20 C.F.R. § 655.170 (1986).

⁶⁵ 20 C.F.R. § 655.100 (1986).

⁶⁶ Orrenius and Zavodony, *supra* note 60, at 434. “The law may have reduced undocumented immigration, particularly in the short run, by making it more difficult for undocumented immigrants to cross the border and find work in the United States. However, there are several reasons why the law instead might have spurred undocumented immigration.” In a study reliant on data on border apprehensions as a “proxy for the number of people who illegally entered the United States,” researchers found that “IRCA failed to discourage undocumented immigration in the long run.” *Id.* at 448.

⁶⁷ U.S. COMM’N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY, EXECUTIVE SUMMARY (1994), <http://www.utexas.edu/lbj/uscir/exesum94.html>. The Commission also noted that the federal government has a responsibility to mitigate the impacts of unlawful immigration on states and localities, particularly through renewed efforts to reduce illegal entries. *Id.*

⁶⁸ *Id.*

⁶⁹ Testimony of Robert A. Williams, *supra* note 7 at 84.; *see also* Jesse McKinley and

workers from the national economic equation without creating a new source of agricultural labor would result in national losses of five to nine billion dollars annually in the agricultural sector alone.⁷⁰

The dependence of the United States on unauthorized immigration is fueled in part by the fact that the nation has an “unstable agricultural labor market that requires constant replenishment with new workers from abroad.”⁷¹ Instability results from the inherent hardship of making a living from farm work and, accordingly, the fact that only laborers without other options remain in the agricultural industry.⁷² This is not a new problem: in 1986, the Committee on Agricultural Workers determined that

the goal of controlling illegal immigration would be best served by the development of a more structured and stable domestic agricultural labor market with increasingly productive workers. . . such a system would . . . address the needs of seasonal farmworkers through higher earnings, and the needs of agricultural employers through increased productivity and decreased uncertainty over labor supply.⁷³

Although the industry comprises only 1 percent of the nation’s gross domestic product, agriculture plays a key role in the national economy.⁷⁴ Every agricultural job affects three or four others, “from people who make and sell fertilizer and farm machinery to those who

Julia Preston, *Farmers Oppose G.O.P. Bill on Immigration*, N.Y. TIMES (July 30, 2011), <http://www.nytimes.com/2011/07/31/us/politics/31verify.html?pagewanted=all>.

⁷⁰ News Transcript, U.S. Department of Agriculture (USDA) and American Farm Bureau Federal (AFBF) Media Conference Call on the Need for Comprehensive Immigration Reform (May 25, 2011), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2011/05/0222.xml&contentidonly=true>.

⁷¹ Testimony of Robert A. Williams, *supra* note 7; *see also* Linda Calvin and Philip Martin, *Labor-Intensive U.S. Fruit and Vegetable Industry Competes in a Global Market*, AMBER WAVES (Dec. 2010), <http://webarchives.cdlib.org/sw1vh5dg3r/http://ers.usda.gov/AmberWaves/December10/Features/LaborIntensive.htm>. “The supply of farmworkers for the U.S. produce industry depends on a constant influx of new, foreign-born labor attracted by wages above those in the workers’ countries of origin.”

⁷² Testimony of Robert A. Williams, *supra* note 7.

⁷³ *Id.* at 4; (quoting Report of the Commission on Agricultural Workers). When it enacted IRCA, Congress authorized a Commission on Agricultural Workers to study the effects of the act on the agricultural industry and to make recommendations for the future. *Id.*

⁷⁴ Stacy McCland, *Immigration Reform and Agriculture: What We Really Want, What We Really Need, and What Will Happen If They Leave?*, 10 BARRY L. REV. 63, 74 (2008).

work in trucking, food processing, grocery stores, and restaurants.”⁷⁵ Tamar Jacoby, President of ImmigrationWorks USA, argues that the expulsion of unauthorized farm workers would not just mean a small increase in prices at the grocery store. Rather, eliminating this labor source would cause the collapse of labor-intensive agriculture in the United States, thereby forcing the nation to import meat, dairy, fruits, and vegetables from other countries.⁷⁶ Without a sufficient number of laborers, agricultural production will become the next sector to be outsourced.⁷⁷

A. Immediate Replacement with U.S. Citizens and Work-Authorized Immigrants

Agriculture remains dependent on labor performed by unauthorized immigrants because of the lack of viable alternatives. Proponents of restrictionist state-based enforcement legislation suggest that removing undocumented immigrants from the nation’s fields will make agricultural jobs available for unemployed U.S. citizens and work-authorized immigrants. Anecdotal evidence suggests that even high unemployment rates are unlikely to push such workers into taking and maintaining agricultural jobs.⁷⁸ For those eligible to receive unemployment benefits, agricultural work—and the accompanying hard

⁷⁵ Tamar Jacoby, *A Price Tag in the Billions*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/roomfordebate/2011/08/17/could-farms-survive-without-illegal-labor/without-immigrant-labor-the-economy-would-crumble>.

⁷⁶ *Id.* (Expelling unauthorized farm workers from the United States would result in “not just more expensive produce, but the collapse of American labor-intensive agriculture. Instead of milk from a nearby dairy, the only kind available would come from abroad, and it would be irradiated or powdered. Meat would come from Brazil, shellfish from Thailand, fruits and vegetables from New Zealand. . .”); accord Calvin and Martin, *supra* note 71 (“[s]ome production of labor-intensive crops may shift to countries with lower labor costs.”); See also Forrest Laws, *Immigration ‘Reforms’ Could Cost Farmers, Consumers*, DELTA FARM PRESS, (Oct. 16, 2006, 7:59am), <http://deltafarmpress.com/immigration-reforms-could-cost-farmers-consumers>.

⁷⁷ *United Farmworkers wants YOU. . . to Come take their Jobs?*, REFORM IMMIGRATION FOR AMERICA, <http://reformimmigrationforamerica.org/blog/blog/united-farm-workers-wants-you%E2%80%A6-to-come-take-their-jobs/> (last visited Mar. 2, 2012).

⁷⁸ *Id.* (“Salinas [California] farm labor contractor Paul Powell had not heard about the ‘Take Our Jobs’ campaign Wednesday, but said he doubted that most unemployed Californians would be up to the challenge. ‘There may be a lot of folks who show up and don’t stay for more than a day or two,’ Powell said. ‘They don’t realize how hard the work is. Field work is not easy.’”).

labor and harsh conditions—is not financially rewarding.⁷⁹ In Alabama, unemployed individuals can receive benefits of up to \$265 a week, while a forty-hour, minimum wage job nets the worker \$290.⁸⁰ Location also poses a problem: while agricultural jobs are often in rural areas, urban areas currently face higher levels of unemployment.⁸¹

Furthermore, an insufficient number of U.S. citizens and legal workers have adequate training to effectively perform agricultural jobs. “Agriculture,” says Demetrius Papademetriou, founder of the Migration Policy Institute, “is a sector and an industry. . .that a long time ago, going back to the 1940s and probably before that was abandoned. . .to foreign workers.”⁸² Given this exodus, “it is not possible to replace the million unauthorized workers who currently work in agriculture with legal U.S. workers.”⁸³ “The reality is that right now there are simply not enough trained and willing American agricultural workers to get these jobs done.”⁸⁴

Comparatively low wages, harsh weather conditions, backbreaking physical labor, and the often seasonal nature of such work make agricultural jobs unappealing to individuals authorized to work in the United States.⁸⁵ The United Farm Workers’ “Take Our Jobs” campaign suggests that attempts to hire unemployed U.S. citizens and legal immigrants is an impractical way of filling the labor gap created by the wholesale removal of undocumented immigrants.⁸⁶ The campaign, a

⁷⁹ Daily Kos Staff, *Kicking out Immigrants Isn’t Working Well for Alabama*, DAILY KOS (Oct. 27, 2011, 12:28 PM PDT), <http://www.dailykos.com/story/2011/10/27/1030669/-Kicking-out-immigrants-isn-t-working-well-for-Alabama>.

⁸⁰ *Id.*

⁸¹ Jay Reeves and Alicia A. Caldwell, *After Alabama Laws, Few Americans Taking Immigrants’ Work*, THE HUFFINGTON POST (Oct. 21, 2011 12:58 AM ET), available at http://www.huffingtonpost.com/2011/10/21/after-alabama-immigration-law-few-americans-taking-immigrants-work_n_1023635.html.

⁸² *Id.*

⁸³ *Immigration Update, September 23, 2011*, UNITED FARM WORKERS (Sept. 23, 2011), http://www.ufw.org/_board.php?mode=view&b_code=ir_news&b_no=11198.

⁸⁴ Benjamin Shute, *A New Generation of Farmers*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/roomfordebate/2011/08/17/could-farms-survive-without-illegal-labor>. “Alabama needs immigrant labor, because too many native-born citizens lack the skill, the stamina, and the wiliness to work in the fields- even in a time of steep unemployment.” *Id.*; see also Editorial, *It’s What They Asked For*, N.Y. TIMES (Oct. 19, 2011), <http://www.nytimes.com/2011/10/20/opinion/its-what-they-asked-for.html>.

⁸⁵ Calvin and Martin, *supra* note 71.

⁸⁶ See generally UNITED FARM WORKERS, <http://takeourjobs.org/> (last visited Mar. 8, 2012).

2012] *NATION OF LAWS, NATION OF IMMIGRANTS* 191

particularly graphic depiction of the aversion of many authorized workers to farm work, was instituted as a way of encouraging citizens and legal residents to replace immigrants in the fields.⁸⁷ The Campaign relies on advertisement and recruitment efforts to attract legal workers, including encouraging members of Congress to refer unemployed constituents to vacant farm worker positions in locations across the country.⁸⁸ In the beginning of the summer 2011 season, 8,600 authorized workers expressed an interest in becoming agricultural laborers.⁸⁹ By September, only seven U.S. citizens involved in the Campaign still held agricultural job.⁹⁰ The abject failure of the “Take Our Jobs” campaign demonstrates that, even when given the opportunity, U.S. citizens and work-authorized aliens are unwilling to take agricultural jobs.

Georgia’s experience following the passage of the Illegal Immigration Reform and Enforcement Act of 2011 (“IIREA”) and the concomitant exodus of unauthorized farm laborers is illustrative.⁹¹ Governor Nathan Deal proposed replacing the undocumented laborers who fled Georgia’s fields in the wake of the IIREA with 2,000 individuals on probation.⁹² Critics of Governor Deal’s plan expressed

⁸⁷ *Id.*; see also McKinley and Preston, *supra* note 69. An analogous initiative established by the Florida Fruit and Vegetable Association (“the Association”) monitors hiring by citrus growers, who by law must offer jobs to authorized workers before attempting to hire temporary workers through the H-2A program. Mike Carlton, director of labor relations for the Association, said that of the 344 authorized workers who came forward to fill 1,800 pickers’ jobs, only eight were still working at the end of the two-month growing season. *Id.*

⁸⁸ *Fields of Tears*, THE ECONOMIST (Dec. 16, 2010), <http://www.economist.com/node/17722932>. Workers attracted through the ‘Take Our Jobs’ campaign “made demands that seem bizarre to farmworkers, such as high pay, health and pension benefits, relocation allowances and other things associated with normal American jobs.” *Id.*; see also Aaron Smith, *Farm Workers: Take Our Jobs, Please!* CNNMONEY (July 10, 2010, 1:14 PM ET), http://money.cnn.com/2010/07/07/news/economy/farm_worker_jobs/index.htm.

⁸⁹ *Field of Tears*, *supra* note 88.

⁹⁰ *Id.*

⁹¹ Doug Mataconis, *Georgia’s New Immigration Law Leading to Crops Rotting in Farmers’ Fields*, OUTSIDE THE BELTWAY (June 22, 2011), <http://www.outsidethebeltway.com/georgias-new-immigration-law-leading-to-crops-rotting-in-farmers-fields/>.

⁹² News Release, GA. DEP’T OF CORR., *Georgia Farms Offer Jobs to Probationers* (June 16, 2011), <http://www.dcor.state.ga.us/NewsRoom/PressReleases/110616c.html>; see also Catherine E. Shoichet, *Georgia governor: Probationers could fill farm jobs*, CNN POLITICS (June 14, 2011), http://articles.cnn.com/2011-06-14/politics/georgia.farm.workers.immigration_1_immigration-law-georgia-governor-labor-shortages?_s=PM:POLITICS.

doubt that probationers, who cannot be forced into specific jobs by state corrections officials, would accept the strenuous physical conditions of a farm job when unemployment benefits remained available.⁹³ Others argued that probationers, unversed in the skills necessary to efficiently harvest crops, were less efficient pickers and therefore not true substitutes for the undocumented migrant workers who declined to come to Georgia after the passage of the IIREA.⁹⁴ Furthermore, Governor Deal's plan raises concerns about the relationship between labor and meaningful rehabilitation. Carl Wicklund, executive director of the American Probation and Parole Association, argues that because agricultural positions are largely temporary, "they may not be the best way to go for probationers seeking to get back on their feet, avoid becoming repeat offenders and find full-time jobs and benefits."⁹⁵ Thus, while novel, the Deal Plan is problematic as a long-term solution to agricultural labor shortages.

If individual states are to take on the mantle of domestic immigration regulation, legislators must seriously consider the labor needs of the agricultural sector of the economy. Plans for attracting replacement agricultural workers cannot be an afterthought, as they were in Alabama, where talks about a replacement source of labor were not made until after the passage of the restrictive ATCPA and resultant mass exodus of laborers.⁹⁶ Labor provided by undocumented immigrants is a critical thread in the national agricultural tapestry. Reform efforts that ignore this basic fact threaten to undermine the industry's vitality.

⁹³ *Georgia Scours Probation Rolls For Farm Labor; D.C. Begins To Look At Federal Solutions*, PEACHPUNDIT.COM (June 15, 2011, 17:00 PM), <http://www.peachpundit.com/2011/06/15/georgia-scours-probation-rolls-for-farm-labor-d-c-begins-to-look-at-federal-solutions/>.

⁹⁴ Editorial, *Probation Workers Not Keeping Pace Down on the Farm*, THE NEWNAN TIMES- HERALD (June 23, 2011), <http://www.times-herald.com/opinion/Probation-workers—not-keeping-pace—down-on-the-farms—1723999>.

⁹⁵ Margaret Newkirk, *Ga. Criminals Sub for Immigrant Farm Workers*, BLOOMBERG (June 15, 2011), <http://www.bloomberg.com/news/2011-06-15/georgia-criminals-sub-for-immigrant-farm-workers.html>; see also Jeremy Redmon, *State survey: 11,080 farm jobs unfilled: Governor suggest putting people on criminal probation to work*, THE ATLANTA JOURNAL-CONSTITUTION (June 15, 2011), <http://www.ajc.com/news/news/local-govt-politics/state-survey-11080-farm-jobs-unfilled/nQwPH/>.

⁹⁶ Martin Swant, *Alabama Farmers Doubt Proposals for Help with Labor Shortage From Immigration Law*, AL.COM (Oct. 21, 2011), http://blog.al.com/businessnews/2011/10/alabama_farmers_doubt_proposal.html.

B. The Guest Worker Program

i. Structural Problems

The current guest worker program is poorly suited to recruit an adequate number of agricultural laborers. The guest worker program fails to accommodate the exigencies of agricultural labor, where workers often show up the day a job starts, work until the job is done, and then move on. In contrast, farmers who want to hire guest workers must file an application for a temporary labor certification at least forty-five days before the date that the laborer will start work.⁹⁷ This requirement is burdensome for farmers, who are hard-pressed to determine the exact amount of labor necessary at a given point or in a given year because of inconsistencies in crop yields and harvest times.⁹⁸

Guest-worker programs are simply too stiff to fit with the dynamic U.S. market. . . [o]ur strength is that our economy is fluid. . . [i]f we need labor all of a sudden in New Orleans, the workers just show up. Once you rely on a guest-worker program, you have a huge amount of reliance on government bureaucracy.⁹⁹

The program permits workers to be hired on a temporary basis only. This makes it entirely impractical for subsections of the agricultural sector that require a skilled workforce all year long, such as the dairy, livestock, poultry, and ginning industries, to rely on the guest worker program as a source of labor.¹⁰⁰ Regularly taking time to train new employees, and then waiting while their skills reach the level of more experienced workers threatens to harm productivity.¹⁰¹

⁹⁷ See 20 C.F.R. 655.130(b) (2012).

⁹⁸ Jeremy Redmon and Daniel Malloy, *Report: Farm Labor Shortages May Cost Georgia Economy \$391 Million*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 4, 2011), <http://www.ajc.com/news/georgia-politics-elections/report-farm-labor-shortages-1194039.html>. Georgia state representative Matt Ramsey stated that, while “existing federal visa programs. . . provide a legal avenue for the agriculture industry to import as much migrant labor as necessary to supplement their domestic workforce” those programs are ‘bureaucratically and administratively cumbersome’ and in need of improvement.” *Id.*

⁹⁹ Nathan Thornburgh-Vass, *Can a Guest Worker Program Work?*, TIME (May 24, 2007), <http://www.time.com/time/magazine/article/0,9171,1625191,00.html>.

¹⁰⁰ *Georgia Recruiting Ag States to Help Improve Guest Worker Program*, MSBUSINESS.COM (Feb. 6, 2012), <http://msbusiness.com/businessblog/2012/02/06/georgia-urges-other-ag-states-to-help-get-workable-guest-worker-program/>; see also NPR Staff, *E-Verify Rattles Nerves in America’s Dairyland*, NPR.ORG (Aug. 31, 2011), <http://www.npr.org/2011/08/31/140086117/e-verify-rattles-nerves-in-americas-dairyland>.

¹⁰¹ *Hearing Before the Subcomm. on Immigration Policy and Enforcement, H. Comm. on the Judiciary*, 112th Cong. (2011) (Congresswoman Zoe Lofgren of California stating

Furthermore, the program is prohibitively expensive, especially for small farmers. In addition to paying wages, farmers are required to provide free housing for workers who cannot reasonably be expected to return home each night and to pay travel costs to and from the worker's home country.¹⁰² The program's effectiveness is further undermined by popular perceptions: hiring unauthorized workers is simply easier than working through a "labyrinthine . . . process," described as "too expensive . . . too litigious . . . [and] too bureaucratic."¹⁰³

Statistics provide a striking indictment of the program: today, IRCA's H-2a program accounts for only about 3 percent total agricultural workforce.¹⁰⁴ The current program does not recognize "current workforce demographics," as it makes only 200,000 visas available annually.¹⁰⁵ In contrast, undocumented workers fill roughly six million jobs in the United States, "many of which are in the agricultural and service sectors no longer being filled by native-born workers."¹⁰⁶ The present guest worker program is thus an inappropriate vehicle for solving the labor shortage sparked by restrictionist state-based immigration policies.

"please don't tell me the solution is the H2A reform. Don't tell me that the solution to this problem is to deport 1.5 million experienced farm workers who are already doing this important work just to replace them with millions of new temporary guest workers which would have to come and go every single year. This would be a massive and terribly expensive undertaking and is simply just never going to work.").

¹⁰² 20 C.F.R. 655.122(d) (2012).

¹⁰³ Alicia A. Caldwell, *Ag Industry Faces Labor Woes in Immigration Debate*, CBSNEWS.COM (June 4, 2011), <http://cbsnews.com/news/article/ag-industry-faces-labor-woes-immigration-debate>; see also Written Testimony of Bruce Goldstein, House Judiciary Comm., Subcomm. on Immigration Policy and Enforcement, 112th Cong. (Apr. 13, 2011), <http://judiciary.house.gov/hearings/pdf/Goldstein04132011.pdf> (Bruce Goldstein is the President of Farmworker Justice.).

¹⁰⁴ *The H-2A Temporary Agricultural Guestworker Program*, FARMWORKER JUSTICE (2012) (the program provides approximately "80,000 of an estimated 2-2.5 million agricultural workers" each year); see also *Immigration: A Better Farm Worker Fix*, L.A. TIMES (May 9, 2011), <http://farmworkersforum.wordpress.com/2011/05/09/immigration-a-better-farm-worker-fix/> ("[T]he H-2A program provides only about 3% of the total agricultural workforce, according to Western Growers, a trade association that represents farmers in California and Arizona.").

¹⁰⁵ *Immigration: A Better Farmworker Fix*, *supra* note 104.

¹⁰⁶ Marisa Silenzi Cianciarulo, *Can't Live with 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, NEXUS, 13 NEXUS 13, 21 (2008).

ii. Human Rights Abuses

The H-2A program faces criticism for human rights abuses so endemic that the Southern Poverty Law Center has analogized it to slavery.¹⁰⁷ While Congress has afforded human rights protections to migrant and seasonal agricultural workers, such protections have not been extended to guest workers.¹⁰⁸ Guest workers are highly vulnerable to abuse because each worker's immigration status is tied to his or her employer. Because reporting abuses could result in the guest worker being sent home, the "balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker's rights are nullified."¹⁰⁹ Workers are further discouraged from reporting exploitative conditions by the threat of blacklisting, in which a complaining worker's name is placed on a list to ensure that he or she will not be rehired in the future.¹¹⁰ Fear of retaliation is a deeply-rooted problem and a major contributor to systemic human rights abuses.¹¹¹ Together with the practical difficulties of expanding the guest worker to a national scale and devising a flexible system that accounts for the exigencies of agriculture, the human rights abuses endemic in the current guest worker system suggest that the program must be completely overhauled before policy makers should consider it a true alternative to the agricultural industry's reliance on undocumented laborers.

¹⁰⁷ Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, THE SOUTHERN POVERTY LAW CENTER 1 (2007), <http://www.gpn.org/splcenter.org.SPLCguestworker.pdf>.

¹⁰⁸ The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(b) (1983); *see also* Goldstein, *supra* note 103 ("Further compounding this vulnerability, many guest workers arrive deeply in debt, having paid enormous recruiters' fees for the opportunity to work in the United States, often under very misleading descriptions. Depending on their country of origin, workers pay anywhere from hundreds to thousands of dollars. In addition, workers are sometimes required to leave collateral, such as a property deed, with recruiters to ensure that workers will complete their contract.").

¹⁰⁹ Bauer, *supra* note 107, at 15.

¹¹⁰ *Id.* at 16. The North Carolina Growers Association blacklist is an example of one such list that has been widely publicized. The "1997 NCGA Ineligible for Rehire Report" consisted of more than 1,000 names of undesirable former guest-workers. *Id.*

¹¹¹ *Id.* at 17.

C. Mechanization

To date, mechanization is an impractical substitute for human agricultural labor. Even where technology can be effectively employed, human judgment and dexterity are necessary to ensure a complete harvest and thus maximum profits.¹¹² “A machine cannot easily mimic the judgment and dexterity of experienced farmworkers, particularly when crops do not mature evenly, and workers must determine what can be harvested during multiple passes through fields and orchards.”¹¹³ Individual crops present specific challenges: strawberries, for example, can only be harvested by hand, as commercial mechanical harvesters are not currently available.¹¹⁴ Although oranges for processing can be harvested mechanically, the necessary machinery costs over a million dollars, a sum that is prohibitive for small farmers.¹¹⁵ Like strawberries, oranges for the fresh market must be harvested by hand because mechanical harvesters damage the fruit’s skin and make it unmarketable.¹¹⁶ It seems unlikely that mechanical harvesters will soon be able to replace unauthorized laborer’s in the nation’s fields, as developing such a system “often depends on breakthroughs in three areas: machinery, varieties, and agricultural practices.”¹¹⁷ Mechanization therefore cannot be instantly adopted as a substitute for the millions of undocumented laborers who currently toil in the nation’s fields.

III. STATE LEGISLATURES AND IMMIGRATION POLICY

In the nation’s early years, states stepped forward to fill a void unregulated by the federal government; today, state legislation aims to enforce laws created by a federal government that hesitates to effectively enforce them. Lawmakers’ frustration with the federal government’s inability to revamp immigration policies is evident from the marked increase in sub-federal immigration legislation from 2007

¹¹² Megan McArdle, *Illegal Immigrants Might Be Undocumented, But They’re Not Unskilled*, THE ATLANTIC (July 6, 2011), <http://www.theatlantic.com/business/archive/2011/07/illegal-immigrants-might-be-undocumented-but-theyre-not-unskilled/241510/>.

¹¹³ Calvin and Martin, *supra* note 71 at 29.

¹¹⁴ *Id* at 28.

¹¹⁵ *Id* at 30.

¹¹⁶ *Id* at 26.

¹¹⁷ *Id* at 29.

2012] *NATION OF LAWS, NATION OF IMMIGRANTS* 197

onward.¹¹⁸ Today, “immigration is one of the most pressing issues facing state legislatures, and state policy makers have received little to no help from the federal government” in crafting better immigration control policies.¹¹⁹

Such legislation is arguably motivated by security and economic concerns.¹²⁰ Violence, drug cartels, and human smuggling are of particular concern for states on the southern border; security concerns are cited as a reason for stringent state-based immigration enforcement.¹²¹ In an interview with the National Conference of State Legislatures, Arizona Governor Jan Brewer complained of the education, healthcare, and incarceration costs imposed on the state by undocumented immigrants, concluding that the state could not afford such a burden.¹²² Brewer argues that “Arizona has been more than patient waiting for Washington to secure the border. . . [d]ecades of federal inaction and misguided policy have created a dangerous and unacceptable situation.”¹²³

¹¹⁸ Ryan Terrance Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1861 (2011).

¹¹⁹ National Conference of State Legislatures, *States Continue to Step up to the Plate on Immigration Issues*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 9, 2011), <http://www.ncsl.org/press-room/states-continue-to-step-up-to-the-plate-on-immigra.aspx>.

¹²⁰ Interview by Nat'l Conference of State Legislatures with Rich Crandall, State Senator, Az., in San Antonio, Tex. (Aug. 8-11, 2011), available at <http://www.ncsl.org/default.aspx?TabId=23572>; see also Julia Preston, *Immigration Decreases, but Tensions Remain High*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/us/illegal-migration-from-mexico-falls-but-local-fears-persist.html?_r=1&hp. (statement by Arizona Governor Jan Brewer that “[f]or years, Washington has stood idly by, letting our borders grow more porous and more dangerous.” While the overall number of undocumented immigrants crossing the United States-Mexico border decreased in 2011, “federal and local officials said they now faced smaller numbers of more determined and potentially more dangerous crossers, including migrants carrying illegal drugs.”).

¹²¹ Interview by Nat'l Conference of State Legislatures with Leticia Van de Putte, State Senator, Tex., in San Antonio, Tex. (Aug. 8-11, 2011), available at <http://www.ncsl.org/default.aspx?TabId=23572>; see also Nicholas Riccardi, *Arizona Passes Strict Illegal Immigration Act*, L.A. TIMES (Apr. 13, 2010), <http://articles.latimes.com/2010/apr/13/nation/la-na-arizona-immigration14-2010apr14>.

¹²² Jeanette Torres, *Supreme Court Set to Hear Challenge to Arizona's Immigration Law*, ABC NEWS RADIO (Apr. 25, 2012), <http://abcnewsradioonline.com/national-news/supreme-court-set-to-hear-challenge-to-arizonas-immigration.html>.

¹²³ Robert Barnes, *Supreme Court to Hear Challenge to Arizona's Immigration Law*, WASH. POST. (Dec. 12, 2011), <http://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-of-arizonas-restrictive-immigration->

State officials also cite fiscal concerns as evidence of the need for more stringent immigration laws. Although undocumented immigrants pay income, payroll, and sales taxes—thereby contributing to local, state, and federal governments—some policy makers argue that such individuals create a fiscal burden borne by individual states.¹²⁴ While some experts suggest that undocumented immigrants have a small net impact on the U.S. economy, advocates of state-based immigration enforcement tout the economic difficulties purportedly created by undocumented immigrants as a driving force behind such legislation.¹²⁵ State Representative Mike Ball of Alabama contends that there is a connection between the state's high unemployment rate and the high number of undocumented immigrants residing there. Representative Ball believes that that aggressive immigration legislation will “level the playing field” between ‘undereducated,’ unemployed Alabamans and undocumented immigrants, who do not “have to pay workman’s comp insurance” or “employee tax.”¹²⁶ Ball asserts that tough immigration laws are the answer to Alabama’s “huge poverty problem” and high rate of unemployment, as such measures will create jobs for U.S. citizens and authorized aliens.¹²⁷

While Arizona’s efforts to regulate immigration have captured national and international headlines, copycat laws passed in Georgia and Alabama are arguably the harshest to date and serve to crystallize the symbiotic relationship between agriculture, undocumented workers, and state law. Agriculture is the largest industry in both of those states, netting annual profits of slightly over five billion dollars in Georgia and

law/2011/12/12/gIQA4UYepO_story.html.

¹²⁴ Gordon H. Hanson, “The Economics and Policy of Illegal Immigration in the United States.” MIGRATION POLICY INSTITUTE, 10 (Dec. 2009), <http://irps.ucsd.edu/assets/037/11124.pdf>; Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 460-61 (2008). Kobach argues that although the fiscal burden at the federal level is significant—more than \$10 billion annually—the lion’s share hits state budgets: *Id.*

¹²⁵ Hanson, *supra* note 124, at 1; Arian Campo-Flores, *Alabama Gets Tough on Illegal Immigrants*, WALL ST. J. (June 10, 2011), <http://online.wsj.com/article/SB10001424052702304392704576375540410159236.html>.

Alabama State Representative Micky Hammon stated that “[e]veryone’s in a financial bind right now,” and undocumented immigrants are “taking a toll on our state revenue.” *Id.*

¹²⁶ *Alabama’s Immigration Law: Assessing the Economic, Social Impact*, PBS NEWSHOUR, (Public Broadcasting Service Oct.13, 2011), available at http://www.pbs.org/newshour/bb/law/july-dec11/alimmigration_10-13.html.

¹²⁷ *Id.*

slightly under five billion dollars in Alabama.¹²⁸

Georgia enacted the “Illegal Immigration Reform and Enforcement Act” (“IIREA”) in April of 2011. The law requires public and private employers with more than ten employees to use the federal employment eligibility verification system, provides law enforcement officials with the authority to enforce federal immigration laws, and allows law enforcement officials to question criminal suspects about their immigration status.¹²⁹

The situation in Alabama is strikingly similar. Passed in April of 2011, the Alabama Taxpayer and Citizen Protection Act (“ATCPA”) maintains that “illegal immigration is causing economic hardship and lawlessness in this state.”¹³⁰ The ATCPA prohibits employers who seek any incentive or benefit from the state from hiring undocumented workers and mandates the use of E-Verify.¹³¹ The act further prohibits property owners from renting to undocumented immigrants, requires school districts to verify the immigration status of enrolled students, and criminalizes behavior relating to “[c]oncealing, harboring, [or] shielding unauthorized aliens.”¹³²

IV: AGRICULTURE AS THE ACHILLES HEEL OF STATE-BASED ENFORCEMENT LEGISLATION

Because agriculture is a critical industry in Georgia and Alabama, events in those states following the passage of state-based immigration regulation illustrate the calamitous relationship between such legislation and the agricultural industry’s dependence on undocumented workers.

¹²⁸ Newkirk, *supra*, note 95. (“Farming is a \$5.1 billion industry in Georgia, according to its Agriculture Department.”); Ga. Dep’t of Corr., *supra* note 92; Daniel Robinson, “Welcome,” U.S. DEP’T. OF AG. FARM SERVICES AGENCY (Sept. 26, 2012), <http://www.fsa.usda.gov/FSA/stateoffapp?mystate=al&area=home&subject=landing&topic=landing>.

¹²⁹ GA. CODE ANN., § 36-60-6(a) (West 2011); GA. CODE ANN., § 36-60-6(j) (West 2011).

¹³⁰ ALA. CODE § 31-13-2 (West 2011).

¹³¹ ALA. CODE § 31-13-9 (West 2011).

¹³² ALA. CODE § 31-13-13 (West 2011). In August of 2012, the 11th Circuit determined that this provision of the ATCPA was conflict preempted by federal immigration law, as it undermined Congress’ intent to allow the Executive Branch discretion in immigration matters. *United States v. Alabama*, 691 F.3d 1269, 1288 (11th Cir. 2012). The Court’s decision does little to staunch the anti-immigrant motive and effect of the now-defunct provisions.

In Georgia, 46 percent of the state's farmers reported a labor shortage after the passage of the IIREA, sparking a ripple effect that resulted in a \$106.5 million loss in other goods and services.¹³³ According to a state survey, over 11,000 agricultural jobs went unfilled during the summer 2011 growing season.¹³⁴ Without legislative action, the shortage is likely to continue, resulting in an estimated \$300 million in losses to the state's agricultural sector as a whole.¹³⁵

Public reaction to the ATCPA was swift and strong in Alabama's immigrant communities. State Senator Bill Beasley stated that the law amounted to telling "Hispanics [that] we don't want you in Alabama."¹³⁶ In the aftermath of the enactment of the law, "many frightened Hispanics [hid] in their homes or fled" the state.¹³⁷ Agriculture Commissioner John McMillan admitted that the law had "unintended consequences," and that "workers began leaving the state immediately."¹³⁸ The exodus of immigrant workers, both documented and undocumented, meant that crops like blueberries, tomatoes, and squash that can only be harvested by hand were left "rotting in the fields."¹³⁹ The Alabama Farmers Federation estimates that the immigration law will have a \$63 million impact on agriculture.¹⁴⁰ Commissioner McMillan expressed doubt that the law's effects would be limited to a single growing season, and advised farmers not to plant

¹³³ Campo-Flores, *supra* note 125; Redmon and Malloy, *supra* note 98.

¹³⁴ Ga. Dep't of Corr., *supra* note 92. This figure represents roughly 14 percent of the agricultural jobs filled annually in the state. *Id.*; see also Redmon and Malloy, *supra* note 98. The state's economy will lose a projected 3,260 more jobs as a result of labor shortages in the agricultural sector. *Id.*

¹³⁵ Redmon and Malloy, *supra* note 98; see also Mary Bauer, *Comprehensive Immigration Reform Must Be Priority for Nation*, SOUTHERN POVERTY LAW CENTER (July 29, 2011),

<http://www.splcenter.org/get-informed/news/immigration-reform-is-an-economic-issue>.

¹³⁶ Ctr. for Am. Progress Immigration Team, *Not-So-Sweet Home Alabama: What People Are Saying About the State's New Immigration Law*, CTR. FOR AM. PROGRESS (Nov. 21, 2011), http://www.americanprogress.org/issues/2011/10/alabama_law_quotes.html.

¹³⁷ Jay Reeves, *Alabama Hispanics Halt Work to Protest Tough, New Immigration Law*, MSNBC.COM (Oct. 12, 2011, 4:06 PM), http://www.msnbc.msn.com/id/44879612/ns/us_news-life/t/alabama-hispanics-halt-work-protest-tough-new-immigration-law/#.Txxom6Wud-c.

¹³⁸ Challen Stephens, *Alabama Farmers Losing Immigrant Labor, See Produce Rotting in the Fields*, AL.COM (Sept. 26, 2011, 4:05 PM), http://blog.al.com/breaking/2011/09/alabama_farmers_losing_immigra.html.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

labor-intensive crops next year.¹⁴¹

Experiences in Georgia and Alabama illustrate the agricultural industry's reliance on undocumented workers, and suggest that state-based attempts to reform national immigration policy by enacting anti-immigrant legislation could prove disastrous to the agricultural industry. At present, the undocumented individuals that work the nation's fields are not simply *a* source of cheap labor—as suggested by the failure of the “Take Our Jobs” campaign and the problems inherent in the guest worker program, such laborers are the *only* readily available source. Among the industries that rely on undocumented laborers, agriculture is unique because of the high percentage of undocumented workers that comprise the total workforce and the lack of viable alternatives. It is clear that “[l]osing those workers would be devastating” to the agricultural industry: “American farms would go under, America would be less secure, and we would see a mass offshoring of jobs, including all of the upstream and downstream American jobs supported by agriculture.”¹⁴² Necessary reforms to the present immigration system must recognize the centrality of undocumented workers to the agricultural sector of the U.S. economy and ensure that the human rights of those individuals are protected.

Enforcement-only measures enacted on a state-by-state basis are a troubling method of attempting to restore the rule of law to the reality of contemporary migration to the United States. Such measures threaten to destroy the present ability of agricultural workers to migrate from state to state as work ebbs and flows in different places. Take, for example, the disparate treatment of undocumented workers imposed by California, Arizona, and Utah. In 2011, California enacted the Employment Acceleration Act, which prohibited state and local governments from requiring employers to use E-Verify.¹⁴³ In contrast, the Legal Arizona Workers Act mandates that all employers use the E-Verify system, and encourages citizens to report violations of the prohibition on hiring undocumented workers.¹⁴⁴ Utah adopted a

¹⁴¹ *Id.*

¹⁴² *Immigration Policy and Enforcement: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong., *supra* note 101.

¹⁴³ Bernice Yueng, *State Poised to Restrict use of E-Verify Database*, CALIFORNIA WATCH (Sept. 16, 2011), <http://californiawatch.org/dailyreport/state-poised-restrict-use-e-verify-database-12631>.

¹⁴⁴ Att’y Gen. of Ariz., *Frequently Asked Questions (FAQ) about the Arizona Legal Workers Act*, <http://www.azag.gov/LegalAZWorkersAct/> (last visited Mar. 8, 2011).

legislative package that, like California, recognizes the importance of undocumented workers to the state's economy. While Utah seeks to enforce the federal prohibition on hiring undocumented workers, it provides an alternative source of labor by creating a guest worker program operated at the state level.¹⁴⁵ Thus, after the enactment of immigration legislation in Arizona and Utah, an undocumented laborer willing to harvest avocados in California, apples in Utah, and cantaloupe in Arizona, would be able to work in California, required to obtain a special permit to work in Utah, and unable to work in Arizona.¹⁴⁶ Immigration policies that vary from state to state threaten to create a glut of workers in some states and a dearth in others, despite the fact that the need for workers may be identical.

Sustainable agriculture requires a sustainable immigration policy. In the long-term, policy makers must consider an overhaul of the system used to admit workers and others into the country. IRCA's failure suggests that unworkable visa programs created a cycle of rampant disregard for the immigration system and the ultimate entrenchment of individuals who have entered the country in violation of the law. Instead, the federal government should endeavor to put in place a visa system which takes into account the agricultural sector's need for immigrant laborers, and, in recognition of that need, endeavors to compensate those individuals for their service by affording them legal status, stability, and protection from overreaching employers.

Attempts to maintain a subclass of agricultural workers or some temporary form of visa tying laborers to farm work in general or to specific farmers must be dissuaded. While Utah's innovative guest worker program is attractive because it serves both the interests of

¹⁴⁵ Utah Illegal Immigration Enforcement Act, Utah Code Ann. § 63G-12-201 (West 2011). The Utah act includes a state-based guest worker program. Individuals who currently live in Utah, are over the age of eighteen, or have the permission of a parent or guardian if younger than eighteen, and provide documentation of a contract for hire are eligible to apply for a guest worker permit. Utah Code Ann. § 63G-12-205. Workers who entered the United States without inspection must pay a fee of \$2,500; those who entered the United States legally but have since fallen out of status are required to pay \$1,000. Utah Code Ann. § 63G-12-207. Members of the guest worker's immediate family currently residing in Utah are eligible to apply for an immediate family permit. Utah Code Ann. § 63G-12-206. The law also mandates that guest workers "in good faith use best efforts to become proficient in the English language." Utah Code Ann. § 63G-12-209.

¹⁴⁶ Noah Bond, *Utah Bill Would Punish Businesses Who Hire Undocumented Workers*, ABC4.COM (May 27, 2011), http://www.abc4.com/content/news/state/story/Utah-bill-would-punish-businesses-who-hire/M6Xc8ac5-ki_E7z_VET_Wg.csp.

farmers and agricultural workers by allowing present laborers to continue working, analogous state-based efforts should at best be considered a stop-gap measure in the absence of comprehensive immigration reform, and not a true solution to the immigration quagmire.¹⁴⁷ The ‘Utah solution’ is not a long-term solution to current conflict between immigration law and the nation’s reliance on undocumented agricultural workers. Like the troubled federal H-2a program, Utah’s program provides workers with temporary status that is tied to the employer, thereby prompting human rights abuses like those described above.¹⁴⁸ The Utah program provides legal status only for individuals living or working in the state prior to May 10, 2011.¹⁴⁹ If successful, this program will thereby ensure an adequate number of laborers in the short term.¹⁵⁰ However, it makes no provision for what will happen should the number of workers who fit that criteria suddenly shrink.¹⁵¹ Furthermore, Utah’s two-year work permit is temporary in nature, thus furthering the instability already endemic in the agricultural

¹⁴⁷ Utah Illegal Immigration Enforcement Act, § 63G-12-201 (West 2011). On its face, the Utah program appears attentive to worker’s rights as members of a worker’s immediate family are also granted temporary legal status, and employers must provide basic health insurance coverage.

¹⁴⁸ § 63G-12-205 (West 2011).

¹⁴⁹ *Id.*

¹⁵⁰ On June 15, 2012, the Obama administration announced a federal short-term alternative to comprehensive immigration reform: the Deferred Action for Child Arrivals (“DACA”) program. Secretary of Homeland Security Janet Napolitano issued a memoranda to the USCIS and USCPB directing that prosecutorial discretion should be exercised in favor of young immigrants under the age of 31 who arrived in the U.S. before the age of 16 and submit an application demonstrating residency, education, and conduct requirements beginning on August 15, 2012. *Memoranda for David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection: Exercising Prosecutorial Discretion for Individuals who Came to the United States as Children*, DEPARTMENT OF HOMELAND SECURITY (June 15, 2012), <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>. While the effects of this policy remain to be seen, DACA’s chief accomplishment is offering temporary status and work permits to qualifying individuals. DACA does not offer a path to residency or citizenship, and it is unclear what status individuals who receive such status will be afforded at the end of the two year period during which prosecutorial discretion will be recognized. Alejandro Mayorkas, *Deferred Action for Childhood Arrivals: Who Can Be Considered?* THE WHITE HOUSE BLOG (Aug. 15, 2012 11:55 AM), <http://www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered>. Like the Utah Plan, DACA is perhaps no more than a Band-Aid on the gaping wound that is U.S. immigration policy in the twenty-first century. While innovative temporary solutions to Congress’ failure to enact comprehensive immigration reform, both programs regrettably fail to afford such individuals full rights or a path to permanent legal status and to address wider policy concerns.

¹⁵¹ § 63G-12-205 (West 2011).

sector.¹⁵²

Resolving the conflict between immigration law and reality requires recognition of the fact that individuals who lack legal status play a crucial role in the agricultural sector of the U.S. economy. Following this basic recognition, the federal government must determine how best to handle this large group of people. Given the hardships involved in obtaining substitute farmworkers, wholesale removal of such individuals from the nation's fields is impractical. The importance of agricultural workers to the national economy necessitates that the federal government take steps to afford these individuals some form of legal status that will simultaneously enable them to continue working and offer protection for basic human rights.

State-based efforts to encourage undocumented immigrants to self-deport threaten to create labor shortages that will prove ruinous to the agricultural sector of the United States economy. In the short term, the federal government must implement an amnesty program, akin to the special agricultural worker program created by IRCA in 1986, to compensate long-time agricultural workers for their service by affording them legal status.¹⁵³ Such a program would prevent a labor interruption, as the individuals already present in the United States who possess the necessary skill set and are accustomed to the demands of agricultural work would be permitted to remain. In return for retaining a sufficient labor force, agricultural employers should be subject to strict federal oversight to ensure that they adhere to labor standards.

It is undisputed that passing comprehensive immigration reform will require a complex political tango marked by cooperation on both sides of the aisle. In enacting legislation for the benefit of present agricultural workers, conservative elements of Congress could be placated by placing restrictions on the program requiring that workers pay a fine as retribution for skirting the immigration laws and, perhaps, requiring that applicants undertake best efforts to learn English and

¹⁵² Utah Illegal Immigration Enforcement Act, Utah Code Ann. § 63G-12-207. The Utah program allows for renewal of a work permit, provided that the applicant demonstrates “best efforts to become proficient in” English. Utah Code Ann. § 63G-12-209.

¹⁵³ See Motomura, *supra* note 34 at 8 (arguing that “[t]olerance of a substantial undocumented population may even be a rational admissions scheme. Inviting immigrants outside the law and then periodically legalizing those with strong work histories—an approach that relies heavily on a flexible notion of unlawful presence—may be more accurate and efficient than trying to identify ex ante who the best economic contributors will be.”).

civics, akin to that currently imposed on applicants for naturalization. Laborers who chose to pay the fine and who met residency, work, and civics requirements should be afforded legal permanent residency. Affording now-undocumented farm workers full membership in U.S. society would simultaneously ensure the existence of an adequate workforce in the immediate future and that the labor rights of such individuals are protected.

Perhaps most critically, the United States must reconsider its attitude towards undocumented farmworkers. Recent experiences in Georgia and Alabama prove that when these laborers decide not to show up for work, crops rot in the fields. U.S. policy must reflect the fact that notions of immigration laborers as “disposable” and “easily sent home” when not immediately needed are antiquated and must be abandoned.¹⁵⁴

CONCLUSION

Anti-immigrant legislation that seeks to push undocumented immigrants across state and national borders threatens to create a labor shortage that could cripple the nation’s agricultural industry. “[R]estrictive immigration policies threaten the viability of agricultural subsectors that remain heavily dependent on farm labor, especially fruit, tree nuts, vegetables, and horticulture.”¹⁵⁵ The mere threat of such legislation was enough to intimidate laborers from showing up at cotton ginning time in Oklahoma; in Georgia, even before the IIREA was signed into law, workers concerned about coming to the state went elsewhere and were absent at harvest time.¹⁵⁶ Experience has shown that United States citizens and work-authorized immigrants are unwilling to take agricultural jobs, that complete mechanization of the agricultural industry is untenable, and that the current guest worker program is ill

¹⁵⁴ *Id.* at 7.

¹⁵⁵ William Kandel, *Hired Farmworkers a Major Input For Some U.S. Farm Sectors*, AMBER WAVES (Apr. 2008), <http://webarchives.cdlib.org/sw1vh5dg3r/http://ers.usda.gov/AmberWaves/April08/Features/HiredFarm.htm>.

¹⁵⁶ Associated Press, *Anti-illegal Immigration Law Affecting Agricultural Sector*, TULSA WORLD (Nov. 4, 2007), http://www.tulsaworld.com/news/article.aspx?subjectID=12&articleID=071104_1_LAWT037824; NPR Staff, *Cost Of Georgia’s Immigration Laws Passed To Farms*, NAT’L PUB. RADIO (July 2, 2011), <http://www.npr.org/2011/07/02/137572612/cost-of-georgias-immigration-laws-passed-to-farms>.

sued to provide a sufficient number of laborers. Accordingly, at present, there is no alternative source of agricultural labor to replace the undocumented immigrants who work the nation's fields and no alternative method for continuing agricultural production in the absence of such individuals.

Restrictionist immigration laws that seek to compel self-deportation, characterized by rhetoric eerily reminiscent of the "nativist agitation" that propelled U.S. immigration policy in the early twentieth century, are a troubling method of resolving the conflict between our immigration law and the reality of large-scale migration outside the law.¹⁵⁷ Such legislation fails to recognize the fact that, at present, the undocumented workers who work the nation's fields are the only available source of willing, skilled agricultural labor. The rapid, wholesale removal of such individuals without provision for their replacement will trigger a domino effect of economic consequences, thereby threatening the future of agriculture in the United States. State-based immigration legislation is not the future of U.S. immigration policy—rather, such efforts should be seen as a plea for the federal government's attention to the complex reality of immigration policy and the enactment of comprehensive immigration reform on the national level.¹⁵⁸

¹⁵⁷ ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* 278 (1994).

¹⁵⁸ Less than a year after enacting one of the nation's harshest immigration restriction laws, Georgia began to encourage other states to push Congress to modernize and improve the guest worker program. See *Georgia Recruiting Ag States to Help Improve Guest Worker Program*, MSBUSINESS.COM, (Feb. 6, 2012), <http://msbusiness.com/businessblog/2012/02/06/georgia-urges-other-ag-states-to-help-get-workable-guest-worker-program/>.