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# Nation of Immigrants, Nation of Laws: Agriculture as the Achilles Heel of Enforcement-Only Immigration Legislation

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

*“...we must remain both a nation of immigrants and a nation of laws.”*  
President Barack Obama, April 23, 2010

## **I. Introduction**

President Obama’s statement, made at a naturalization ceremony for members of the armed forces,<sup>1</sup> 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.<sup>2</sup> Despite a long line of cases suggesting that immigration regulation 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.<sup>3</sup> 2007 marked the first time that all fifty states introduced immigration-related legislation.<sup>4</sup> The trend continued in recent years: in 2011 alone, forty-four state legislatures considered a total of 1,538 immigration-related bills and resolutions.<sup>5</sup>

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, including imposing state penalties on employers who fail to

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<sup>1</sup> Barack Obama, President, U.S., Remarks by the President at Naturalization Ceremony for Active-Duty Service Members (April 23, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members>.

<sup>2</sup> DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES JANUARY 2010 (2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

<sup>3</sup> Nat’l Conference of State Legislatures, *State Laws Related to Immigration and Immigrants* (Feb. 22, 2012), [http://www.ncsl.org/default.aspx?tabid=19897#Previous\\_Reports\\_](http://www.ncsl.org/default.aspx?tabid=19897#Previous_Reports_)

<sup>4</sup> Id.

<sup>5</sup> Id.

verify employment eligibility, requiring law enforcement officers conducting a lawful stop to determine the individual's immigration status, prohibiting the harboring of unlawful aliens, and making an alien's failure to carry a registration document a state offense.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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 five percent of the nation's total workforce is undocumented, such individuals represent between fifty and seventy percent of all agricultural laborers in the United States.<sup>9</sup> The agricultural industry is therefore dependent on undocumented laborers.<sup>10</sup> State based efforts to restrain unlawful immigration that do not account for agriculture's reliance on undocumented immigrants threaten to cripple the industry.

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<sup>6</sup> Id.

<sup>7</sup> Julia Preseton, *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>.

<sup>8</sup> 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") and Rob Paral, Immigr. Pol'y Center, *Essential Workers: Immigrants are a Needed Supplement to the Native-Born Labor Force* (Mar. 2005), available at [http://www.aifl.org/ipc/policy\\_reports\\_2005\\_essentialworkers.asp](http://www.aifl.org/ipc/policy_reports_2005_essentialworkers.asp).

<sup>9</sup> Jeanne Batalova and Aaron Terrazas, *Frequently Raised Statistics on Immigration and Immigrants in the United States*, (Dec. 2010), <http://www.migrationinformation.org/feature/display.cfm?ID=818#10>.

<sup>10</sup> Testimony of Robert A. Williams: Hearing on H.R. 2847 U.S. House of Representatives Com Before the House Judiciary Comm., Subcomm. On Imm. Policy and Enforcement, 112<sup>th</sup> Cong. (2011). Robert A. Williams is the Director of Florida Legal Services' Migrant Farmworker Justice Project. See also Aaron Smith, *Farm Workers:*

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"<sup>11</sup> posed by unauthorized immigration. 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 1986 Immigration Reform and Control Act's failure to reverse burgeoning extralegal immigration. Part II 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 III considers the agricultural sector's reliance on undocumented immigrants. 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 labor source. 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

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*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](http://money.cnn.com/2010/07/07/news/economy/farm_worker_jobs/index.htm).

<sup>11</sup>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."

continued existence of an adequate number of agricultural workers while comprehensive immigration reform is brought to life.

## **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.”<sup>12</sup> An underlying theme of early state-based immigration legislation was the exclusion of undesirables, such as convicts and the poor.<sup>13</sup> 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.”<sup>14</sup> Several states responded to this call. After the passage of the federal Constitution, more states re-enacted and revised such legislation.<sup>15</sup> In contrast to the swift action taken by state governments, the federal government “was slow to take action to exclude foreign convicts.”<sup>16</sup> Congress did not respond until 1875, when the first federal statute relating to European immigration prohibited the immigration of convicts.<sup>17</sup>

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

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<sup>12</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1834 (1993).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1842.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

immigration law and policy.<sup>18</sup> 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.”<sup>19</sup> 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 “would be to that extent subject to the control of another power.”<sup>20</sup> 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. 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.<sup>21</sup>

The federal supremacy envisioned by the plenary power doctrine extends to regulation of the conduct of aliens present in the United States.<sup>22</sup> During World War II, California enacted a statute prohibiting the issuance of a fishing license to any “alien Japanese.”<sup>23</sup> Later, the statute was amended to read “any person inadmissible for citizenship,” a category which included Japanese nationals living in the United States.<sup>24</sup> Takahashi, a resident of California since 1907 and a long-time fisherman, brought suit to compel the California Fish and Game Commission to issue him a license.<sup>25</sup> The Supreme Court granted certiorari “to review this question of

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<sup>18</sup> Id.

<sup>19</sup> *Chae Chin Ping v. United States*, 130 U.S. 581, 683 (1889).

<sup>20</sup> Id.

<sup>21</sup> *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

<sup>22</sup> *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1948).

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

importance in the fields of federal-state relationships and of constitutionally protected individual equality and liberty."<sup>26</sup> 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 this constitutionally derived federal power to regulate immigration.<sup>27</sup>

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 pre-emption. Field pre-emption 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 pre-empted.<sup>28</sup> 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.<sup>29</sup> 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

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<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115, 112 S. Ct. 2374, 2392, 120 L. Ed. 2d 73 (1992).

<sup>29</sup> *Hines v. Davidowitz*, 312 U.S. 52, 62-3 (1941).

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.”<sup>30</sup>

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.”<sup>31</sup>

As states increasingly craft immigration regulations that conflict 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 policy.<sup>32</sup> 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.<sup>33</sup>

## **B. Tacit Approval of Unauthorized Immigration during the 20<sup>th</sup> Century<sup>34</sup>**

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Takahashi, 334 U.S. at 419.

<sup>33</sup> 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 U.S., 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.

<sup>34</sup> Marc R. Rosenblum, *Immigration Policy Since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform*, THE REGIONAL MIGRATION STUDY GROUP 9 (August 2011), <http://www.migrationpolicy.org/pubs/RMSG-post-9-11policy.pdf>.

During the 20<sup>th</sup> century, the U.S. “tolerated a high degree of illegality and tacitly permitted widespread illegal employment in agriculture and other low skilled sectors of the economy.”<sup>35</sup> While on occasion the federal government enforced immigration law in a way that was both “visible and severe,” “chronic and intentional under enforcement of immigration law [was] de facto federal policy for over a century.”<sup>36</sup> Indeed, in 2008 the Department of Homeland Security reported removing less than three 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.<sup>37</sup>

Scholars trace the origins of this policy to the agricultural industry’s need for more labor than could be found in the United States. At the beginning of the 20<sup>th</sup> century, agriculturalists in the Southwest turned to Mexican laborers to fill jobs created by advances in agricultural production, including irrigation and the invention of refrigerated railroad cars.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.”<sup>41</sup> Thus, during the early part of the 20<sup>th</sup> century, the need for an

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<sup>35</sup> Id.

<sup>36</sup> Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2049 (2008)

<sup>37</sup> Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 Geo. Immigr. L.J. 147, 151 (2010). “The U.S. government has historically enforced the immigration laws in ways that provide employers with a ready-supply of low-wage labor.”

<sup>38</sup> Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2049 (2008)

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

inexpensive and flexible labor force created a de facto policy of lenient immigration enforcement and tolerance for extra-legal immigration that endures today.<sup>42</sup>

### **A. IRCA: Growing Federal Concern over Unauthorized Immigration**

Following the enactment of the Immigration Act of 1965, the nation experienced a rapid increase in authorized and unauthorized immigration.<sup>43</sup> The Act increased the number of legal immigrants allowed to enter the U.S. each year and eliminated racial and ethnic quotas, effectuating a one-hundred percent increase in the annual flow of legal immigrants to the United States.<sup>44</sup> 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 circumvented.”<sup>45</sup> 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.<sup>46</sup> The commission concluded that unauthorized immigration was a public financial burden, and “called for the initiation of strong, new efforts to control illegal immigration.”<sup>47</sup> In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”) in response to concerns about burgeoning immigration.<sup>48</sup> IRCA offered two new tools to control undocumented immigration.

#### **a. Civil and Criminal Penalties for Knowing Hire of Undocumented Immigrants**

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<sup>42</sup> Id.

<sup>43</sup> Rosenblum, *supra* note 36, at 9.

<sup>44</sup> Id. “Notably, Congress explicitly rejected proposals in the 1950s to make it illegal to hire or employ unauthorized immigrants.”

<sup>45</sup> Vernon M. Briggs, Jr. *Report of the Select Commission on Immigration and Refugee Policy: A Critique*, TEXAS BUSINESS REVIEW 11 (Jan.Feb. 1982) available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1035&context=hrpubs&sei-redir=1#search=%221981%20select%20committee%20immigration%22>.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Gordon H. Hanson, “The Economics and Policy of Illegal Immigration in the United States.” MIGRATION POLICY INSTITUTE, 9 (Dec. 2009), <http://irps.ucsd.edu/assets/037/11124.pdf>.

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.”<sup>49</sup> 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.<sup>50</sup> Employers were required to sign the form, affirming that the documents appeared genuine and to belong to the worker.<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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

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<sup>49</sup> 8 U.S.C. § 1324a(a)(1)(A).

<sup>50</sup> Kevin Jernegan, *Eligible to Work? Experiments in Verifying Work Authorization* MIGRATION POLICY INSTITUTE 2 (Nov. 2005), <http://www.migrationpolicy.org/ITFIAF/Insight-8-Jernegan.pdf>.

<sup>51</sup> U.S. Dep’t of Homeland Security, U.S. Citizenship and Immigration Services, *The Form I-9 Process in a Nutshell* 1 (Oct. 7, 2005), <http://www.uscis.gov/files/article/EIB102.pdf>.

<sup>52</sup> 8 U.S.C.A. § 1324a (West).

<sup>53</sup> 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).

<sup>54</sup> *Id.*

countries.”<sup>55</sup> IRCA’s failure was furthered by the ease with which workers could obtain false documents, and the fact that employers had incentive to accept such documents, as doing so allowed them to circumvent IRCA’s *mens rea* requirement.<sup>56</sup> As recognized by the Commission on Immigration Reform in its 1994 Report to Congress, IRCA’s collateral failure was ethnic discrimination by employers: five percent of employers admitted refusing to hire job applicants whose appearance or accent led the employer to suspect that the individual was unauthorized, and nine 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.<sup>57</sup>

#### **b. Legalization and Guest Worker Programs**

IRCA included two provisions of crucial importance to agriculturalists reliant on unauthorized laborers. The legalization or amnesty program permitted temporary agricultural workers (“SAWs”) to apply for permanent resident status.<sup>58</sup> 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.<sup>59</sup> “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.<sup>60</sup>

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<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> U.S. Comm’n on Immigration Reform, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY, EXECUTIVE SUMMARY (1994), <http://www.utexas.edu/lbj/uscir/exesum94.html>.

<sup>58</sup> RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 9:23 (2011).

<sup>59</sup> Pia M. Orrenius and Madeline Zavodony, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 DEMOGRAPHY, 439 (Aug. 2003).

<sup>60</sup> Steel, *supra* note 56.

In total, 1.3 million undocumented workers applied for the SAW program;<sup>61</sup> 997, 429 of those workers were eventually approved for permanent residency status.<sup>62</sup>

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. H-2A visas were available for temporary agricultural workers and H-2B for temporary non-agricultural workers.<sup>63</sup> 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.<sup>64</sup> "Temporary" was defined as not more than one year, although the regulations allowed for an extension beyond one year in case of unforeseen circumstances.<sup>65</sup> Employers were also required to show that there were not "sufficient, able, willing, and qualified U.S. workers available to perform the work,"<sup>66</sup> 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.<sup>67</sup>

Ultimately, IRCA failed to substantially reduce the number of unauthorized immigrants living in the United States and entering the country each year.<sup>68</sup> In 1994, the Commission on

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<sup>61</sup> Gonzalez Baker, *supra* note 46, at 10. *See also* Orrenius and Zavodony, *supra* note 58, at 439.

<sup>62</sup> VERNON M. BRIGGS, *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 "[i]mmigration officials approved more than 90% 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."

<sup>63</sup> Gonzalez Baker, *supra* note 46, at 10.

<sup>64</sup> *Id.*

<sup>65</sup> 20 C.F.R. § 655.170 (1986).

<sup>66</sup> 20 C.F.R. § 655.100 (1986).

<sup>67</sup> 20 C.F.R. § 655.100 (1986).

<sup>68</sup> Orrenius and Zavodony, *supra* note 57, at 448. "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

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.<sup>69</sup> 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 U.S. in violation of the law.<sup>70</sup>

## 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,<sup>71</sup> as an estimated fifty to seventy-five percent<sup>72</sup> or 1.1<sup>73</sup> million of all farm workers are undocumented. Removing these 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<sup>74</sup>

U.S. dependence on unauthorized immigration is fueled in part by the fact that the United States has an “unstable agricultural labor market that requires constant replenishment with new

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people who illegally entered the United States,” researchers found that “IRCA failed to discourage undocumented immigration in the long run.”

<sup>69</sup> 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.

<sup>70</sup> *Id.*

<sup>71</sup> Testimony of Robert A. Williams: Hearing on H.R. 2847 U.S. House of Representatives Com Before the House Judiciary Comm., Subcomm. On Imm. Policy and Enforcement, 112<sup>th</sup> Cong. (2011).

<sup>72</sup> *Id.* See also Jesse McKinley and 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>. Eighty-five percent of farm workers are immigrants, and up to 70% of them are undocumented. Smith, *supra* note 10.

<sup>73</sup> Williams, *supra* note 97.

<sup>74</sup> News Transcript, U.S. Department of Agriculture (USDA) and American Farm Bureau Federal (AFBF) Medial 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>.

workers from abroad.”<sup>75</sup> Instability is fueled by the inherent hardship of making a living from farm work, resulting in the fact that only laborers without other options remain in the agricultural industry.<sup>76</sup> 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.<sup>77</sup>

Although the industry comprises only one percent of the nation’s gross domestic product, agriculture plays a key role in the national economy.<sup>78</sup> Every agricultural job affects three or four others, “from people who make and sell fertilizer and farm machinery to those who work in trucking, food processing, grocery stores, and restaurants.”<sup>79</sup> 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 U.S., thereby forcing the nation to import meat, dairy, fruits and vegetables from other countries.<sup>80</sup> Without sufficient numbers of laborers, agricultural production will become the next sector to be outsourced.<sup>81</sup>

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<sup>75</sup> Williams, *supra* note 97. 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://www.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.”

<sup>76</sup> Williams, *supra* note 97.

<sup>77</sup> Id. 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.

<sup>78</sup> 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).

<sup>79</sup> Tamar Jacoby, *A Price Tag In the Billions*, N.Y. TIMES, Aug. 17, 2011, (In Room for Debate column) <http://www.nytimes.com/roomfordebate/2011/08/17/could-farms-survive-without-illegal-labor>.

<sup>80</sup> Id. Accord Linda Calvin and Philip Martin, *Labor-Intensive U.S. Fruit and Vegetable Industry Competes in a Global Market*, AMBER WAVES, Dec. 2010, <http://www.ers.usda.gov/AmberWaves/december10/Features/LaborIntensive.htm>. “Some production of labor-intensive crops may shift to countries with lower labor costs.” See also Forrest Laws, *Immigration ‘Reforms’ Could*

## 1. 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.<sup>82</sup> For those eligible to receive unemployment benefits, agricultural work—and the accompanying hard labor and harsh conditions—is not financially rewarding.<sup>83</sup> In Alabama, unemployed individuals can receive benefits of up to \$265 a week, while a forty-hour, minimum wage job nets the worker \$290.<sup>84</sup> Location also poses a problem: while agricultural jobs are often in rural areas, urban areas currently face higher levels of unemployment.<sup>85</sup>

Furthermore, an insufficient number of U.S. citizens and legal worker 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."<sup>86</sup> Given this exodus, "it is not possible to replace the million unauthorized workers who currently work in

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*Cost Farmers, Consumers*, DELTA FARM PRESS, (Oct. 16, 2006 7:59am), <http://deltafarmpress.com/immigration-reforms-could-cost-farmers-consumers>.

<sup>81</sup> Jacoby, *supra* note 93.

<sup>82</sup> *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 March 2, 2012) ("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.")

<sup>83</sup> 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>.

<sup>84</sup> *Id.*

<sup>85</sup> Reeves and Caldwell, *supra* note 80.

<sup>86</sup> *Id.*

agriculture with legal U.S. workers.”<sup>87</sup> “The reality is that there are simply not enough trained and willing American agricultural workers to get the job done.”<sup>88</sup>

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.<sup>89</sup> The United Farm Workers’ “Take Our Jobs” campaign suggests that attempts to hire unemployed United States citizens and legal immigrants is an impractical way of filling the labor gap created by the wholesale removal of undocumented immigrants. The campaign is a particularly graphic depiction of the aversion of many authorized workers to farm work. The campaign was instituted as a way of encouraging citizens and legal residents to replace immigrants in the fields.<sup>90</sup> 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.<sup>91</sup> In early summer of 2011, 8,600 people expressed an interest in working in the fields.<sup>92</sup> By September, only seven United States citizens continued to perform agricultural labor. The abject

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<sup>87</sup> Testimony of Robert A. Williams: Hearing on H.R. 2847 U.S. House of Representatives Com Before the House Judiciary Comm., Subcomm. On Imm. Policy and Enforcement, 112<sup>th</sup> Cong. (2011).

<sup>88</sup> 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.” See also *Editorial, It’s What They Asked For*; N.Y. TIMES, October 19, 2011, <http://www.nytimes.com/2011/10/20/opinion/its-what-they-asked-for.html>.

<sup>89</sup> Linda Calvin and Philip Martin, *Labor-Intensive U.S. Fruit and Vegetable Industry Competes in a Global Market*, AMBER WAVES, Dec. 2010, <http://www.ers.usda.gov/AmberWaves/december10/Features/LaborIntensive.htm>.

<sup>90</sup> UNITED FARM WORKERS, <http://takeourjobs.org/> (last visited March 8, 2012). See also McKinley and Preston, *supra* note 99. (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 Carleton, 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.)

<sup>91</sup> *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. 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](http://money.cnn.com/2010/07/07/news/economy/farm_worker_jobs/index.htm).

<sup>92</sup> *Id.*

failure of the “Take Our Jobs” campaign demonstrates that, even when given the opportunity, United States 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.<sup>93</sup> 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.<sup>94</sup> Critics of Governor Deal’s plan expressed 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.<sup>95</sup> 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<sup>96</sup> 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.”<sup>97</sup> Thus, while novel, the Deal Plan is problematic as a long-term solution to agricultural labor shortages.

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<sup>93</sup> 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/>.

<sup>94</sup> 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>).

<sup>95</sup> *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/>

<sup>96</sup> 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\\_](http://www.times-herald.com/opinion/Probation-workers---not-keeping-pace---down-on-the-farms---1723999_)

<sup>97</sup> Newkirk, *supra* note 86.

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.<sup>98</sup> 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.

## **2. 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.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup>

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<sup>98</sup> 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](http://blog.al.com/businessnews/2011/10/alabama_farmers_doubt_proposal.html).

<sup>99</sup> 20 C.F.R. 655.130(b) (year).

<sup>100</sup> Redman and Malloy, *supra* note 114. 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."

<sup>101</sup> 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>.

The program permits workers to be hired on a temporary basis only. This makes it entirely impractical for subsections of the agricultural sector, like the dairy, livestock, poultry, and ginning industries, that require a skilled workforce all year long.<sup>102</sup> Regularly taking time to train new employees, and then waiting while their skills reach the level of more experienced threatens to harm productivity.<sup>103</sup> 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.<sup>104</sup> Farmers' perceptions of the current guest worker program also undermine its effectiveness. Hiring unauthorized workers is simply easier than working through a "labyrinthine...process,"<sup>105</sup> described as "too expensive...too litigious...[and] too bureaucratic."<sup>106</sup>

Statistics provide a striking indictment of the program: today, IRCA's H-2a program accounts for a negligible three percent<sup>107</sup> of the total agricultural workforce.<sup>108</sup> The current

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<sup>102</sup> NPR Staff, *E-Verify Rattles Nerves in America's Dairyland*, NATIONAL PUBLIC RADIO, August 31, 2011, <http://www.npr.org/2011/08/31/140086117/e-verify-rattles-nerves-in-americas-dairyland>, Msbusiness.com, *Georgia Recruiting Ag States to Help Improve Guest Worker Program*, (Feb. 6, 2012), <http://msbusiness.com/businessblog/2012/02/06/georgia-urges-other-ag-states-to-help-get-workable-guest-worker-program/>.

<sup>103</sup> Hearing Before the Subcommittee on Immigration Policy and Enforcement, H. Comm. On the Judiciary, 112<sup>th</sup> Congress, (2011) (Congresswoman Zoe Lofgren of California stating "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.")

<sup>104</sup> 655.122(d) (year).

<sup>105</sup> 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\\_](http://cbsnews.com/news/article/ag-industry-faces-labor-woes-immigration-debate_)

<sup>106</sup> Id. See also Written Testimony of Bruce Goldstein, House Judiciary Comm., Subcomm. On Imm. Policy and Enforcement, 112 Cong. (April 13, 2011), available at <http://judiciary.house.gov/hearings/pdf/Goldstein04132011.pdf> (Bruce Goldstein is the President of Farmworker Justice.)

<sup>107</sup> Goldstein, *supra* note 128; Hanson, *supra* note 45, at 4.

<sup>108</sup> Los Angeles Times, *Immigration: A Better Farm Worker Fix*, LOS ANGELES TIMES, May 9, 2011, <http://mobile.latimes.com/p.p?a=rp&postId=261008&m=b&sessionToken=&postUserId=7>.

program does not recognize “current workforce demographics,”<sup>109</sup> as it makes only 200,000 visas available annually. In contrast, undocumented workers fill roughly six million jobs in the United States, “many of which are in the agricultural and service sectors and are no longer being filled by native-born workers.”<sup>110</sup> In Georgia, where agriculture is the largest industry, only 20 farms participate in the H-2A program.<sup>111</sup> The present guest worker program is thus an inappropriate vehicle for solving the labor shortage sparked by restrictionist state-based immigration policies.

## 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.<sup>112</sup> While Congress has afforded human rights protections to migrant and seasonal agricultural workers, such protections have not been extended to guest workers.<sup>113</sup> 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

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<sup>109</sup> Id.

<sup>110</sup> Marisa Silenzi Cianciarulo, *Can't Live with 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, NEXUS, 13 NEXUS 13, 22 (2008).

<sup>111</sup> NPR Staff, *Ga.'s New Immigration Law Sparks Farmers' Fears*, NATIONAL PUBLIC RADIO (June 23, 2011), <http://www.npr.org/2011/06/23/137369275/ga-s-new-immigration-law-sparks-farmers-fears>.

<sup>112</sup> 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>.

<sup>113</sup> 29 U.S.C. 1855(b) The Migrant and Seasonal Agricultural Worker Protection Act. (year) See also Written Testimony of Bruce Goldstein, House Judiciary Comm., Subcomm. On Imm. Policy and Enforcement, 112 Cong. (April 13, 2011), available at <http://judiciary.house.gov/hearings/pdf/Goldstein04132011.pdf> Bruce Goldstein is the President of Farmworker Justice. “Further compounding this vulnerability, many guestworkers 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.”)

worker's rights are nullified."<sup>114</sup> 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 re-hired in the future.<sup>115</sup> Fear of retaliation is described as a deeply rooted problem, and a major contributor to systemic human rights abuses.<sup>116</sup>

Together with the practical difficulties of expanding the guest worker to a national scale and divining 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 drastically changed before policy makers should consider it a true alternative to the agricultural industry's reliance on undocumented laborers.

### **3. 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.<sup>117</sup> "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."<sup>118</sup> Individual crops present specific challenges: strawberries, for example, can only be harvested by hand, as commercial mechanical harvesters are not currently available.<sup>119</sup>

Although oranges for processing can be harvested mechanically, the necessary machinery costs

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<sup>114</sup> Bauer, *supra* note 129, at 15.

<sup>115</sup> Bauer, *supra* note 129, at 172. 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 guestworkers.

<sup>116</sup> Bauer, *supra* note 129, at 17.

<sup>117</sup> 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/>.

<sup>118</sup> Calvin and Martin, *supra* note 108.

<sup>119</sup> *Id.*

over a million dollars, a sum that is prohibitive for small farmers.<sup>120</sup> Like strawberries, oranges for the fresh market must be harvested by hand, because mechanical harvesters damage the fruit's skin and make it unmarketable.<sup>121</sup> "Developing a viable mechanized harvesting system often depends on breakthroughs in three areas: machinery, varieties, and agricultural practices."<sup>122</sup> 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 onward.<sup>123</sup> 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.<sup>124</sup>

Arguably, security and economic concerns are the driving motives behind such legislation.<sup>125</sup> Violence, drug cartels, and human smuggling are of particular concern for states

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<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Ryan Terrance Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1861 (2011).

<sup>124</sup> 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>.

<sup>125</sup> 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, March 10, 2012, [http://www.nytimes.com/2012/03/11/us/illegal-migration-from-mexico-falls-but-local-fears-persist.html?\\_r=1&hp](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."

on the southern border, and security concerns are cited as a reason for stringent state-based immigration enforcement.<sup>126</sup> 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<sup>127</sup>—thereby contributing to local, state, and federal governments—some state policy makers argue that such individuals create a fiscal burden, the “lion’s share” of which is borne by individual states.<sup>128</sup> While some experts suggest that undocumented immigrants have a small net impact on the U.S. economy,<sup>129</sup> advocates of state-based immigration enforcement tout the economic difficulties purportedly created by undocumented immigrants as a driving force behind such legislation.<sup>130</sup> 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.<sup>131</sup> “Arizona has been more than patient waiting for Washington to secure the border,” Brewer said. “Decades of federal inaction and misguided policy have created a dangerous and unacceptable situation...”<sup>132</sup> State Representative Mike Ball of Alabama correlated the state's high unemployment rate with high numbers of undocumented immigrants, arguing that

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<sup>126</sup> 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>.

<sup>127</sup> Hanson, *supra* note 45, at 10.

<sup>128</sup> 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.

<sup>129</sup> Hanson, *supra* note 45, at 1.

<sup>130</sup> 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.”

<sup>131</sup> Jay Reeves and Alicia A. Caldwell, *After Alabama Laws, Few Americans Taking Immigrants’ Work*, THE HUFFINGTON POST (Oct. 21, 2011 12:58 AM ET), [http://www.huffingtonpost.com/2011/10/21/after-alabama-immigration-law-few-americans-taking-immigrants-work\\_n\\_1023635.html](http://www.huffingtonpost.com/2011/10/21/after-alabama-immigration-law-few-americans-taking-immigrants-work_n_1023635.html).

<sup>132</sup> 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-law/2011/12/12/gIQA4UYepO\\_story.html](http://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-of-arizonas-restrictive-immigration-law/2011/12/12/gIQA4UYepO_story.html).

aggressive immigration legislation was an attempt to “level the playing field” between ‘undereducated,’ unemployed Alabamans and undocumented immigrants, “who do not have to pay workman’s comp insurance,” or “employee tax.”<sup>133</sup> Ball asserts that 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.<sup>134</sup>

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 each of those states, netting annual profits of slightly over five billion dollars in Georgia and slightly under five billion dollars in Alabama.<sup>135</sup>

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 use the federal employment eligibility verification system (“E-Verify”),<sup>136</sup> 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.<sup>137</sup>

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

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<sup>133</sup> PBS NEWSHOUR, (Public Broadcasting Service Oct.13, 2011), *available at* [http://www.pbs.org/newshour/bb/law/july-dec11/alimmigration\\_10-13.html](http://www.pbs.org/newshour/bb/law/july-dec11/alimmigration_10-13.html).

<sup>134</sup> *Id.*

<sup>135</sup> Margaret Newkirk, *Ga. Criminals Sub for Immigrant Farm Workers*, BLOOMBERG.COM (June 15, 2011 1:28 PM ET), <http://www.bloomberg.com/news/2011-06-15/georgia-criminals-sub-for-immigrant-farm-workers.html>.

“Farming is a \$5.1 billion industry in Georgia, according to its Agriculture Department.” 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>); 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>

<sup>136</sup> Ga. Code Ann., § 36-60-6 (2011)

<sup>137</sup> *Id.*

economic hardship and lawlessness in this state.”<sup>138</sup> The ATCPA prohibits employers from hiring undocumented workers and mandates the use of E-Verify. 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 “concealing, harboring, [or] shielding of unauthorized aliens.”<sup>139</sup>

#### **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.

In Georgia, forty-six percent of the state’s farmers reported a labor shortage after the passage of the IIREA,<sup>140</sup> sparking a ripple effect that resulted in a \$106.5 million loss in other goods and services.<sup>141</sup> According to a state survey, over eleven thousand agricultural jobs went unfilled during the summer 2011 growing season.<sup>142</sup> Without legislative action, the shortage is

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<sup>138</sup> Ala. Code § 31-13-2 (2011).

<sup>139</sup> Ala. Code § 31-13-13 (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.

<sup>140</sup> Campo-Flores, *supra* note 79.

<sup>141</sup> Jeremy Redmon and Daniel Malloy, *Report: Farm Labor Shortages May Cost Georgia Economy \$391 Million*, THE ATLANTA JOURNAL-CONSTITUTION, October 4, 2011, <http://www.ajc.com/news/georgia-politics-elections/report-farm-labor-shortages-1194039.html>.

<sup>142</sup> 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>). This figure represents roughly fourteen percent of the agricultural jobs filled annually in the state. *See also* Jeremy Redmon and Daniel Malloy, *supra* note 114. *Report: Farm Labor Shortages may Cost Georgia Economy \$391 Million*, THE ATLANTA JOURNAL-CONSTITUTION, October 4, 2011, The state’s economy will lose a projected 3,260 more jobs as a result of labor shortages in the agricultural sector.

likely to continue, resulting in an estimated \$391 million in losses to the agricultural sector as a whole.<sup>143</sup>

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."<sup>144</sup> In the aftermath of the enactment of the law, "many frightened Hispanics [hid] in their homes or fled" the state.<sup>145</sup> Agriculture Commissioner John McMillan reported that the law had "unintended consequences," and that "workers began leaving the state immediately."<sup>146</sup> The exodus of immigrant workers, both documented and undocumented, meant that crops like blueberries, tomatoes, and squash that must be picked by hand were left "rotting in the fields."<sup>147</sup> The Alabama Farmers Federation estimates that the immigration law will have a \$63 million impact on agriculture. Commissioner McMillan expressed doubt that the law's effects would be limited to a single growing season, and advised farmers not to plant labor-intensive crops next year.<sup>148</sup>

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

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<sup>143</sup> Redmon and Malloy, *supra* note 114. 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>.

<sup>144</sup> Center for American Progress Immigration Team, *Not-So-Sweet Home Alabama: What People Are Saying About the State's New Immigration Law*, CENTER FOR AMERICAN PROGRESS, Nov. 21, 2011, [http://www.americanprogress.org/issues/2011/10/alabama\\_law\\_quotes.html](http://www.americanprogress.org/issues/2011/10/alabama_law_quotes.html).

<sup>145</sup> Jay Reeves, *Alabama Hispanics halt work to Protest Tough, New Immigration Law*, MSNBC.COM, Oct. 12, 2011, [http://www.msnbc.msn.com/id/44879612/ns/us\\_news-life/t/alabama-hispanics-halt-work-protest-tough-new-immigration-law/#.Txxom6Wud-c](http://www.msnbc.msn.com/id/44879612/ns/us_news-life/t/alabama-hispanics-halt-work-protest-tough-new-immigration-law/#.Txxom6Wud-c).

<sup>146</sup> Challen Stevens, *Alabama Farmers Losing Immigrant Labor, See Produce Rotting in the Fields*, Sep. 26, 2011, [http://blog.al.com/breaking/2011/09/alabama\\_farmers\\_losing\\_immigra.html](http://blog.al.com/breaking/2011/09/alabama_farmers_losing_immigra.html).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

inherent in the guest worker program, such laborers are the only readily available source.

Amongst 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. "Losing those workers would be devastating. 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."<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> Utah adopted a 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

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<sup>149</sup> Hearing Before the Subcommittee on Immigration Policy and Enforcement, H. Comm. On the Judiciary, 112<sup>th</sup> Congress, (2011) available at [http://judiciary.house.gov/hearings/printers/112th/112-44\\_66887.PDF](http://judiciary.house.gov/hearings/printers/112th/112-44_66887.PDF).

<sup>150</sup> Bernice Yueng, *State Poised to Restrict use of E-Verify Database*, CALIFORNIA WATCH, Sep. 16, 2011, <http://californiawatch.org/dailyreport/state-poised-restrict-use-e-verify-database-12631>

<sup>151</sup> The Attorney General of Arizona, *Frequently Asked Questions (FAQ) about the Arizona Legal Workers Act* (last visited March 8, 2011) <http://www.azag.gov/LegalAZWorkersAct/>

workers, it provides an alternative source of labor by creating a guest worker program operated at the state level.<sup>152</sup> 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.<sup>153</sup> 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 to 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 farmers and

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<sup>152</sup> Utah Illegal Immigration Enforcement Act, Utah Code Ann. 63G-12-201 (West 2011). The Illegal immigration enforcement act includes a state-based guest worker program. Individuals who currently live in Utah, are over the age of eighteen, and provide documentation of a contract for hire are eligible to apply for a guest worker permit. Workers who entered the US 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. 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-12-205. The law also mandates that guest workers "in good faith use best efforts to become proficient in English." Utah Code Ann. 63G-12-209

<sup>153</sup> 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](http://www.abc4.com/content/news/state/story/Utah-bill-would-punish-businesses-who-hire/M6Xc8ac5-ki_E7z_VET_Wg.csp).

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.<sup>154</sup> The 'Utah solution' is not a long-term solution to current conflict between immigration law and 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. The Utah program provides legal status only for individuals living or working in the state prior to May 10, 2011. If successful, this program will thereby ensure an adequate number of laborers in the short term.<sup>155</sup> However, it makes no provision for what will happen should the number of workers who fit that criteria suddenly shrink.<sup>156</sup> Furthermore, Utah's two-year work permit is temporary in nature, thus furthering the instability already endemic in the agricultural sector.<sup>157</sup>

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<sup>154</sup>Utah Illegal Immigration Enforcement Act, *supra* note 152. 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.

<sup>155</sup> On June 15, 2012, the Obama 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 sixteen 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 (August 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.

<sup>156</sup>Utah Illegal Immigration Enforcement Act, Utah Code Ann. 63G-12-205 (West 2011).

<sup>157</sup> 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.

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.<sup>158</sup> 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 agriculture 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

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<sup>158</sup> See also Motomora, *supra* note 29. (arguing that “tolerance 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.”)

the immigration laws and, perhaps, requiring that applicants undertake best efforts to learn English and 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 have proven 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.<sup>159</sup>

## **V. 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. “Restrictive immigration policies” threaten “the viability of agricultural subsectors that remain heavily dependent on farm labor, especially fruit, tree nuts, vegetables, and horticulture.”<sup>160</sup> The mere threat of such legislation was enough to intimidate laborers from showing up at cotton ginning time in Oklahoma;<sup>161</sup> 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.<sup>162</sup> Experience has shown that, in large part, United States citizens and work-

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<sup>159</sup> Motomura, *supra* note 29.

<sup>160</sup> William Kandel, *Hired Farmworkers a Major Input For Some U.S. Farm Sectors*, AMBER WAVES, April 2008, <http://www.ers.usda.gov/AmberWaves/April08/Features/HiredFarm.htm>.

<sup>161</sup> Associated Press, *Anti-illegal Immigration Law Affecting Agricultural Sector*, TULSA WORLD, 11/4/2007, [http://www.tulsaworld.com/news/article.aspx?subjectID=12&articleID=071104\\_1\\_\\_LAWTO37824](http://www.tulsaworld.com/news/article.aspx?subjectID=12&articleID=071104_1__LAWTO37824).

<sup>162</sup> NPR Staff, *Cost Of Georgia's Immigration Laws Passed To Farms*, NATIONAL PUBLIC RADIO, July 2, 2011, <http://www.npr.org/2011/07/02/137572612/cost-of-georgias-immigration-laws-passed-to-farms>.

authorized immigrants are unskilled at agricultural work or unwilling to take such jobs. Eliminating undocumented immigrants from agricultural job is therefore unlikely to significantly reduce unemployment amongst the target group. Even if United States citizens and authorized immigrants begin fill agricultural jobs, such individuals will likely lack the training and experience necessary to perform agricultural jobs as productively as experienced agricultural workers, leading to short term economic losses.

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.<sup>163</sup> Such legislation fails to recognize the fact that, at present, the undocumented immigrants 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.<sup>164</sup>

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<sup>163</sup> ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* 278 (1994).

<sup>164</sup> Less than a year after enacting one of the nation’s harshest immigration restriction laws, Georgia began to reach out to other agricultural states to join Georgia in pushing Congress to modernize and improve the guest worker program. See MSbusiness.com, *Georgia Recruiting Ag States to Help Improve Guest Worker Program*, (Feb. 6, 2012), <http://msbusiness.com/businessblog/2012/02/06/georgia-urges-other-ag-states-to-help-get-workable-guest-worker-program/>.

