

BORDER FIXATION: THE APPEARANCE OF SECURITY AND CONTROL
IN IMMIGRATION REFORM

Fixation: an obsessive or unhealthy preoccupation or attachment.¹

*[The m]igration issue needs sense, not a big fence.*²

By Katherine L. Vaughns

INTRODUCTION

Congress, for the most part, has had an unnerving focus, arguably *unhealthy*—at least in terms of achieving fair, just, orderly, and humane immigration policies³—on sealing the border that the United States shares with its southern neighbor, Mexico, to ensure this nation’s security especially in the post-9/11 era. This fixation continues notwithstanding a potentially adverse impact on the economy⁴ and exorbitant appropriations⁵ that will be needed for yet another round of increased border enforcement expenditures.⁶ For the most part, efforts to control unauthorized migration at the border failed to stem the annual influx of hundreds of thousands of unauthorized migrants who, historically, came primarily because of the push of poverty in Mexico and the pull of job opportunities in the United States.⁷ A failure to realize that two issues, border control and legalization of a large unauthorized immigrant population residing in this country, are *not* necessarily interconnected will doom any prospects for sensible and sane immigration policy choices, thereby undermining this nation’s overall security and economic stability.

¹ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 474 (11th ed. 2007).

² Andres Oppenheimer, Op-ed, *Migration Issue Needs Sense, not a Big Fence*, SACRAMENTO BEE, Nov. 26, 2006, at E4.

³ See generally Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243 (2005). See also Juan Carlos Linares, *Hired Hands: The Impact of Globalization and Human Rights on Migrant Workers in the United States*, 34 Denv. J. Int’l L & Pol’y 321, 350 (2006) (observing that in the various “categories of migrant workers numbering in the millions in the United States are expressly denied labor law and human rights protections.”)

⁴ See, e.g., Jon Birger & Jenny Mero, *Immigration Reform: Building Costs Could Soar*, FORTUNE, May 31, 2006, http://money.cnn.com/magazines/fortune/fortune_archive/2006/06/12/8379210/; see also Adam Davidson, *Q&A: Illegal Immigrants and the U.S. Economy*, NATIONAL PUBLIC RADIO, Mar. 30, 2006, <http://www.npr.org/templates/story/story.php?storyId=5312900>, Tamar Jacoby, *Coming to America*, WASH. POST, May 28, 2006, at BW1 (reviewing MICHELE WUCKER, *LOCKOUT: WHY AMERICA KEEPS GETTING IMMIGRATION WRONG WHEN OUR PROSPERITY DEPENDS ON US GETTING IT RIGHT* (2006)).

⁵ See, e.g., David Dixon & Julia Gelatt, MIGRATION POLICY INSTITUTE, *Immigration Facts: Immigration Enforcement Spending Since IRCA* (Task Force Fact Sheet No. 10, Nov. 2005), http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf.

⁶ Mickey McCarter, *Spending Bill Increases Border Security Funding in 2012* published 12/27/11 in Homeland Security Today. US available at <http://www.hstoday.us/focused-topics/border-security/single-article-page/consolidated-spending-bill-increases-border-security-funding-in-2012/1702131429b8860dfea38f907424bcb6.html>

⁷ But see Jorge G. Castaneda & Douglas S. Massey, *Do-It-Yourself Immigration Reform* NY Times Op-Ed published June 1 2012 available online at http://www.nytimes.com/2012/06/02/opinion/do-it-yourself-immigration-reform.html?_r=2 (last visited July 24, 2012) (indicating that U.S.-Mexico migration has returned to a healthy circular pattern.)

For the federal government, maintaining the appearance of security and control at the border is a political imperative in the post-9/11 era.⁸ But its ability to ensure this nation's security is far from the reality confronting border enforcement in today's global climate of trade and migration trends.⁹ Past history and policies bear this out.¹⁰ If anything, an escalation of organized criminal enterprise associated with drug and human (including migrant) smuggling¹¹, accompanied by increased deaths in the desert and border violence have historically followed in the wake of enhanced border enforcement efforts.¹² And building a nearly 700-mile physical fence proved not to be an impenetrable barrier to unauthorized migration.¹³ Among other factors, it took the economic downturn to accomplish that halt.¹⁴ Congress cannot credibly continue to ignore the need for comprehensive immigration reform. This is especially so now that the Supreme Court has declared most of Arizona's infamous SB 1070 unconstitutional.¹⁵ Moreover, Congress will not be able to keep the public pacified much longer given the changing demographics of the U.S. population and electorate.¹⁶

⁸ See, e.g., Douglass S. Massey, **Borderline Madness**, THE CHRONICLE REVIEW (June 30, 2006) at p.3 on the political symbolism of the Southwest border:

In the wake of September 11, 2001, the border acquired new symbolic importance in the "war on terror." Although Mexico has no significant Islamic population and houses no known terrorist cells, the border has once again been depicted in terms of "national security," though now it is reinforced as a bulwark against terrorists rather than communists. Those who criticize the illogic of building a wall between Mexico and the United States while the coasts are wide open and the border with Canada is undefended miss the greater symbolic point.

⁹ See, e.g., Walter A. Ewing, *A Moratorium on Common Sense: Immigration Accord on Hold While Failed Border Enforcement Policies Continue*, AMERICAN IMMIGRATION LAW FOUNDATION (Immigration Policy Brief, May 2003), <http://www.immigrationpolicy.org/sites/default/files/docs/Brief4%20-%20Moratorium.pdf>. Also, of notable concern is that the focus on the longest unguarded border in the world the U.S. shares with its northern neighbor has never been as intense. For example, there are seventeen thousand border patrol officers that patrol the Southwest border, whereas fewer than three thousand are dedicated to the northern border. See CHAD C. HADDAL, CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 1 & 3 n.6 (2010) (noting that 85% of approximately 20,000 Border Patrol agents are detailed to the Southwest, and that U.S.B.P. does not patrol the 1500 mile Alaska-Canada border at all).

¹⁰ See, e.g., *Comprehensive Immigration Reform: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 107–12 (2005) (testimony of Gary Endelman); see also Wayne Cornelius, *Evaluating Enhanced U.S. Border Enforcement*, MIGRATION INFO. SOURCE (May 2004), <http://www.migrationinformation.org/Feature/display.cfm?ID=223>.

¹¹ Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* IMMIGRATION POLICY 4 September 12, 2011 (opines that the focus should be on guns, money, and drugs which pose the immediate danger.).

¹² See, e.g., Manny Fernandez, *A Texas Agency Runs a Web Site as a Chronicler of Border Violence*, N.Y. TIMES, Feb. 17, 2012, at A13; see also generally PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 2ND ed. 29-112 (Cornell University Press 200, 2009).

¹³ See, e.g., Jason Ackleson, *Fencing in Failure: Effective Border Control Is Not Achieved by Building More Fences*, AMERICAN IMMIGRATION LAW FOUNDATION, IMMIGRATION POLICY IN FOCUS, Apr. 2005, <http://www.aifl.org/ipc/fencinginfailureprint.asp>.

¹⁴ See Jeffrey S. Passel, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center available at www.pewhispanic.org.

¹⁵ *Arizona v. United States*, 567 U.S. ____ (2012); see also, David A. Martin, Reading Arizona, 98 Va. L. Rev. In Brief 41 (2012).

¹⁶ See, e.g., Corey Dade, *Will Population Shifts Alter Immigration Debate?* NPR May 18, 2012; Corey Dade, *Latino Voters: Seen, But Will They Be Heard, In 2012?* NPR May 16, 2012 www.npr.org.

This article explores an interesting but politically confounding area of public policy. Policy choices in immigration tend to ebb and flow depending on several factors but most particularly those involving the economy and national security post-9/11.¹⁷ And immigration reform is the subject of intense debate among politicians, policy experts and analysts, and advocacy groups alike.¹⁸ But because the policy debate over immigration reform is infected with shameless demagoguery, sound policy choices are virtually impossible to hear above the cacophony of strident voices and rhetorical sound bites.¹⁹ For in this political cauldron, talk of border security and control substitute for the reality that is essential to inform policymakers about necessary choices to reform the immigration system comprehensively. A consensus exists that the system is broken (and in need of a “fix”); this consensus, however, breaks down when differing policy choices are advanced. But an irony exists—as the debate over illegal immigration intensifies, the surge of unauthorized migration has ebbed considerably.²⁰

Part I offers a brief historical perspective as background to the current debate; it also underscores the special relationship between the U.S. and Mexico concerning border and migration management. Part II confronts the ongoing, intensified debate describing the rise of stringent border policies and politics post 9/11. Part III then explains why it is rare for reality to play a role in immigration policymaking. Part III also warns that failure to consider the practical realities will continue to invite “abuse and chaos”²¹ if Congress fails to focus on effective policy choices for border and migration management. Part IV, however, explores an alternative to building fences, for example; one that capitalizes on shared responsibilities among regional neighbors. Part IV also underscores the need for a

¹⁷ DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 45 (2002).

¹⁸ Across the myriad disciplines, at every level of theoretical abstractions, from every ideological direction, the presenters at the 2007 University of Chicago Law School symposium offered proof that current immigration policy is a factory for the production of paradoxes. See Symposium, *Immigration Law & Policy*, 2007 U. CHI. LEGAL F. IMMIGRATION LAW & POLICY. The fact that the nation’s politicians continue to seek panaceas for a problem where every panacea, like every fence, has failed might be the greatest immigration paradox of all.

¹⁹ See LISA MAGAÑA, *STRADDLING THE BORDER* 2 (2003).

²⁰ See, e.g., Jorge G. Castaneda & Douglas S. Massey, *Do-It-Yourself Immigration Reform*, New York Times Op-ed published June 1, 2012 www.nytimes.com.

In the noisy American debate over immigration reform, something important seems to have escaped notice: time, and common-sense decisions by Mexican migrants, have brought us nearly everything immigration was supposed to achieve.... [And what remains to be accomplished is the regularization of the immigration status of the 11.5 million unauthorized immigrants who reside in the United States. As the co-authors observe, “a solution can be envisioned by recognizing that self-deportation is not going to happen.”]

²¹ Editorial, *An Invitation to Abuse and Chaos*, Published in the New York Times, April 21, 2012, available at <http://www.nytimes.com/2012/04/22/opinion/sunday/an-invitation-to-abuse-and-chaos.html> [last visited July 20, 2012] (about Arizona’s SB 1070 enacted to bring about “attrition through enforcement” which according to the editorial “invites unfettered racial profiling and the abuse of police power.” The editorial further asserted that if the Supreme Court were to allow this “cold-blooded immigration statute” to stand, “it opens the door to states’ writing their own foreign policy, in defiance of the Constitution.”) Although the Court did strike down the three of the four challenged portions of the act, it did (cautiously) upheld the infamous “show me your papers” measure which issue will undoubtedly land in the Supreme Court in the near future. *Arizona v. United States*, No. slip op. at _____. This is especially likely unless in the interim, Congress enacted a measure that regularizes the statuses of unauthorized immigrants residing in the U.S.

more flexible immigration system given the reality of global migration, to wit, establishing one that, as a bipartisan blue ribbon immigration task force once recommended, "...meets U.S. economic interests now and in the future;"²² and one that does not compromise national security.

I. **Background: A Brief Historical Perspective**

History and geography have given Mexico a unique status in the U.S. immigration system, and have made the Mexico-U.S. migration flow the largest in the world. Mexicans are the largest group of U.S. migrants across most types of immigration statuses—a fact that may have important implications for how Congress makes U.S. immigration policy...²³

A. **U.S.-Mexico Border Relations**

*The U.S.-Mexico border is much more than a boundary between two nations. Over the years, it has become a symbolic stage upon which the nation's insecurities and fears, hopes and dreams, are projected for public consumption...*²⁴

Mexico, along with Canada, is one of the United States' largest trading partners. Approximately 500 million crossings occur annually at the international borders the U.S. shares with Canada and Mexico, respectively.²⁵ In the past, policy discussions about border management and migration have not been very high on the lists of U.S. priorities or, for that matter, in the minds of the American people.²⁶ And this was so despite the fact that enforcement at the U.S.-Mexico border was rather chaotic at times.²⁷ Then September 11 changed U.S. priorities dramatically, especially as it related to U.S.-Mexico border relations. Still, the borders these two countries share with the United States create a special relationship between and among them on a regional basis. And as it relates to the U.S.-Mexico border, this relationship is one that is "a close and complex

²² Demetrios G. Papademetriou, *Foreword*, in SPENCER ABRAHAM ET AL., *MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER*, at vii (2006).

²³ CRS Report for Congress, Rosenblum, et al., *MEXICAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS*, Summary page dated June 7, 2012.

²⁴ Douglas S. Massey, *Borderline Madness*, *THE CHRONICLE REVIEW* 1 (June 30, 2006) available at <http://chronicle.com/article/Borderline-Madness/29421> (last visited July 16, 2012).

²⁵ Deborah Meyers, *Security at US Borders: A Move Away from Unilateralism?* *MIGRATION INFO. SOURCE* (Aug. 1, 2003), <http://www.migrationinformation.org/Feature/display.cfm?ID=149>. See also Peter Andreas, *A Tale of Two Borders: The U.S.-Canada and U.S.-Mexico Lines After 9/11*, in *THE REBORDERING OF NORTH AMERICA* 1, 1 (Peter Andreas & Thomas J. Biersteker eds., 2003) (noting that they are "the two busiest land crossings in the world").

²⁶ Deborah Meyers, *Security at US Borders: A Move Away from Unilateralism?*, *MIGRATION POLICY INSTITUTE* (Aug. 1, 2003), <http://www.migrationinformation.org/Feature/display.cfm?ID=149>.

²⁷ Deborah Meyers, *Security at US Borders: A Move Away from Unilateralism?*, *MIGRATION POLICY INSTITUTE* (Aug. 1, 2003), <http://www.migrationinformation.org/Feature/display.cfm?ID=149>.

bilateral relationship”²⁸; one that has existed between the U.S. and Mexico for a very long time; and one that is “largely of the U.S.’s own making,”²⁹ according to migration historian and scholar Aristide Zolberg.

The U.S.-Mexico border was formalized when the 1848 Treaty of Guadalupe Hidalgo ended the Mexican-American War.³⁰ Nearly sixty years later, immigration inspectors on horseback began enforcing immigration laws on the U.S.-Mexico border in 1904.³¹ Because the Southwest border was not specifically demarcated then, people crossed back and forth freely.³² Beginning in the 1920s and throughout various periods that followed, Mexican nationals entered this country without authorization invariably in response to U.S. economic demands for cheap labor.³³ Border enforcement efforts did not manage to stem the tide of migration, “it took the Great Depression in the 1930s” to accomplish that as sociologist and co-director of the Mexican Migration Project Douglas S. Massey once observed.³⁴

The U.S.’s entry into World War II reignited the U.S.’s demand for cheap labor.³⁵ But this time the U.S. and Mexico negotiated a formal temporary guest worker program,

²⁸ CRS Report for Congress, Clare Ribando Seelke, MEXICO: ISSUES FOR CONGRESS Summary page, dated February 15, 2012 (noting also that the United States and Mexico have extensive economic linkages; but in recent years, security issues have dominated the bilateral relationship.)

²⁹ ARISTIDE ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA; Aristide Zolberg, *A Century of Informality on the United States-Mexico Border*, BORDER BATTLES: THE U.S. IMMIGRATION DEBATE (Aug. 17, 2006), <http://borderbattles.ssrc.org/Zolberg/>.

³⁰ Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2, 1848 U.S.-Mex., 9 Stat. 922; Deborah Waller Meyers, *From Horseback to High-Tech: US Border Enhancement*, MIGRATION INFO. SOURCE (Feb. 1, 2006), <http://www.migrationinformation.org/Feature/display.cfm?id=370>; see also *Sidebar: Selected Timeline of Events Relating to Border Enhancement*, MIGRATION INFO. SOURCE (Feb. 2006), http://www.migrationinformation.org/meyers_feb06_sidebar.cfm.

³¹ Deborah Waller Meyers, *From Horseback to High-Tech: US Border Enhancement*, MIGRATION POLICY INSTITUTE (Feb. 1, 2006), <http://www.migrationinformation.org/Feature/display.cfm?id=370>.

³² Douglas S. Massey, *Borderline Madness*, CHRON. HIGHER EDUC., June 30, 2006, at 11.

³³ *Id.*

³⁴ Massey, *supra* note 32; arguably, history repeated itself post-2007; see e.g. Marc R. Rosenblum Congressional Testimony, *Measuring Border Security: U.S. Border Patrol’s New Strategic Plan and the Path Forward* before the Committee on Homeland Security, Subcommittee on Border and Maritime Security, May 8, 2012 reporting that in evaluating the effectiveness of migration enforcement efforts to decrease illegal migration on the Southwest border:

Assigning casualty is particularly difficult in the case of the post-2007 downturn because many of the most significant new enforcement efforts—including...most border fencing...have occurred in the context of the most severe recession since the 1930s. The economic downturn has been particularly intense in certain industries that have historically employed a large number of unauthorized migrants.

Id. at 9.

³⁵ *Id.* See Douglas Massey, *America’s Never-Ending Debate: A Review Essay*, 32 POPULATION & DEV. REV. 579 (2006) (reviewing ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA (2006) (Due to the mobilization of troops and manpower needs during WWI, Congress gave Wilson a presidential “proviso” exempting Mexicans workers for U.S. seasonal work.).

called the “Bracero Program,”³⁶ which brought millions of Mexican nationals to the United States to offset U.S. labor shortages in agriculture during the war.³⁷ The program officially ended in 1964.³⁸ But when the demand for workers exceeded the supply of temporary visas under the regular immigration system, the growers began to recruit Mexican workers outside the program, and thus illegal immigration in the U.S. steadily rose.³⁹ During the program’s formal period, the braceros, i.e., temporary guest workers, returned home seasonally.⁴⁰ Meanwhile, patterns of cross-border (or circular migration) were established and persisted despite the official end of the Bracero program.

Unauthorized migration continued seemingly without notice until the late 1970s when border enforcement became an issue of national prominence in congressional policy debates.⁴¹ And with each border initiative implemented, the goal was to seal the border.⁴² The circular migration patterns, however, continued unabated until the unprecedented escalation of border enforcement that began in the early 1990s.⁴³ However, the ability of unauthorized migrants to return to Mexico became increasingly riskier and more dangerous.⁴⁴ As a result, many viewed enhanced border enforcement efforts as contributing to the creation of the current composition of unauthorized migrants in the U.S.—those once here on a seasonal basis have now become the predominant part of unauthorized migrants permanently residing in the U.S. today.

³⁶ See Act of Apr. 29, 1943, ch. 82, 57 Stat. 70; Act of Feb. 14, 1944, ch. 14, 58 Stat. 11; Act of Aug. 9, 1946, ch. 934, 60 Stat. 969; An Act to Amend the Agricultural Act of 1949, Pub. L. No. 78, 65 Stat. 119 (1951).

³⁷ See, e.g., JUSTIN AKERS CHACÓN & MIKE DAVIS, *NO ONE IS ILLEGAL: FIGHTING RACISM AND STATE VIOLENCE ON THE U.S.-MEXICO BORDER* 140-47 (2006) (describing the Bracero Program as a “twentieth century caste system”); Ronald L. Mize, Jr., *Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress*, 52 CLEV. ST. L. REV. 273 (2005); Lorenzo A. Alvarado, Comment, *A Lesson from my Grandfather, a Bracero*, 22 CHICANO-LATINO L. REV. 55 (2001).

³⁸ Marc R. Rosenblum & Kate Brick, *US Immigration Policy and Mexican/Central American Migration Flows: Then and Now* 4-5, MIGRATION POLICY INSTITUTE (August 2011).

³⁹ Marc R. Rosenblum & Kate Brick, *US Immigration Policy and Mexican/Central American Migration Flows: Then and Now* 5-6, MIGRATION POLICY INSTITUTE (August 2011).

⁴⁰ BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* [page] TEMPLE UNIVERSITY PRESS (2010); see also Philip Martin, *Guest Workers: New Solution or New Problem?* 2007 U. Chi. Legal Forum 289 [page] (2007)

⁴¹ Deborah Waller Meyers, *US Border Enhancement: From Horseback to High-Tech*, MIGRATION POLICY INSTITUTE 2 (Feb. 1, 2006), <http://www.migrationinformation.org/Feature/display.cfm?id=370>.

⁴² Border strategies based on what “the INS called ‘prevention through deterrence,’” involved “increased fencing, surveillance equipment, penalties, and law enforcement personnel to inhibit illegal entry.” *Id.* at 92. Operations included from Operation Blockade (later changed to Operation Hold-the-Line) in 1993 (in El Paso), to Operation Gatekeeper in 1994 (south of San Diego), to Operation Safeguard in 1995 (in Nogales, Arizona), to Operation Río Grande in 1997 (in southeast Texas) merely shifted the locations of smugglers’ preferred entry points. *Id.* at 92-94. And as they say today, expect more of the same despite any barriers erected on the Southwest border.

⁴³ PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 86-88 (2001) (describing the post-IRCA backlash against illegal immigration and the politicization of border control, especially by Pat Buchanan and California Governor Pete Wilson). “Instead of challenging this border-focused message, both Republicans and Democrats embraced it. Targeting the border (rather than, say, domestic employer demand for inexpensive labor) not only had an irresistible symbolic appeal but helped define the nature of the problem and limited the range of acceptable policy solutions.” *Id.* at 88.

⁴⁴ BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* [page] TEMPLE UNIVERSITY PRESS (2010).

During the late 1970s to early 1980s, the influx of unauthorized migrants continued unabated and the politically orchestrated cry went out that the U.S. was losing control of its borders. Thus became part of the political agenda by the early 1980s, until Congress passed the Immigration Reform and Control Act of 1986 (IRCA).⁴⁵ President Ronald Reagan signed IRCA, also known as the Simpson-Mazzoli Act⁴⁶, into law on November 6, 1986.⁴⁷ With IRCA's enactment, Congress employed a tripartite (also known as "the three-legged stool") approach in an attempt to solve the illegal immigration problem.⁴⁸ President Reagan proclaimed IRCA to be a major step towards reform and touted it as the solution to the problem of illegal immigration.⁴⁹ Unfortunately, this ambitious goal was unrealized. Unauthorized migration continued essentially unabated despite the escalation of border enforcement on the U.S.-Mexico border, except for the legalization (*aka* "amnesty") of former unauthorized status for approximately 3 million unauthorized immigrants.⁵⁰

Although IRCA is considered to be the first serious attempt to curtail illegal immigration⁵¹, many observers consider it to have been "spectacularly unsuccessful" in addressing the problem.⁵² Moreover, Congress did not pass the requisite funding for the unprecedented build-up of enforcement efforts at the U.S.-Mexico border until 1993, years after IRCA had authorized such funding.⁵³ The political will for such enforcement efforts was lacking until emotional anti-immigrant fervor began in California with the

⁴⁵ Pub. L. No. 99-603, *100 Stat. 3359* (codified as amended in scattered sections of 8 U.S.C.)

⁴⁶ As an aside, the Migration Policy Institute celebrated its tenth anniversary on April 19, 2012. Among other honorees, MPI bestowed the Leadership in Public Policy awards to the co-sponsors of IRCA "in recognition to the two legislators for their leadership and bipartisanship in working across the aisle to enact a major reform measure with the interests of the country squarely in mind." See PRESS RELEASE MPI CELEBRATES ITS 10TH ANNIVERSARY AND HONORS CHIEF SPONSORS OF IRCA, FORMER PRIME MINISTER, FOUNDATION PRESIDENT AND YOUNG DIASPORA LEAD dated April 19, 2012. MPI intended for these awards to "serve as reminder of a time when Congress was able to set aside its divisions to accomplish big things in the immigration arena." *Id.*

⁴⁷ See Bill Summary & Status, 99th Congress (1985-1986) S. 1200 All Congressional Actions with Amendments, the Library of Congress Thomas available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SN01200:@@S%7CTOM:/bss/d099query.html> (last visited July 23, 2012).

⁴⁸ See, e.g., MUZAFFAR CHISHTI, ET AL., POLICY BEAT, AT ITS 25TH ANNIVERSARY, IRCA'S LEGACY LIVES ON MIGRATION POLICY INSTITUTE (November 16, 2011) (the three-legged stool approach comprised employer sanctions, border enforcement and legalization of unauthorized immigrants) available online at <http://www.migrationinformation.org/USfocus/display.cfm?ID=861> (last visited 07/23/2012).

⁴⁹ Statement on Signing the Immigration Reform and Control Act of 1986, 2 Pub. Papers 1522 (Nov. 6, 1986) available online at <http://www.presidency.ucsb.edu/ws/index.php?pid=36699#axzz1dKCIUhsf> (last visited 07/23/2012).

⁵⁰ See generally, BETSY COOPER & KEVIN O'NEIL, POLICY BRIEF: LESSONS FROM THE IMMIGRATION AND CONTROL ACT OF 1986 (August 2005) Migration Policy Institute; see also Hiroshi Motomura, *What Is "Comprehensive Immigration Reform"? Taking the Long View*, 63 Ark. L. Rev. 225 (2010) (observing that "legalization is worth addressing directly, precisely because it is so contentious and complex."); Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 Akron L. Rev. 291, 324-329 (2008) (discussing legalization versus amnesty and the intense debate over legalization of "lawbreakers").

⁵¹ Francisco Alba, *Mexico: A Crucial Crossroads*, MIGRATION POLICY INSTITUTE (Mar. 2004), <http://www.migrationinformation.org/Profiles/display.cfm?id=211>.

⁵² See, e.g., Donna R. Gabaccia, *Today's Immigration Policy Debates: Do We Need a Little History?* IMMIGRATION MONTHLY (Dec. 2006), <http://www.migrationinformation.org/usfocus/display.cfm?ID=488>.

⁵³ See e.g., Betsy Cooper & Kevin O'Neil, *Lessons From The Immigration and Control Act of 1986* at p. 3, Migration Policy Institute (August 2005).

passage of Proposition 187.⁵⁴ Then it picked up speed in Congress. But in the interim, Congress passed another immigration reform measure, to wit, the Immigration Act of 1990 (“IMMACT”)⁵⁵ which was aimed at increasing legal immigration.

These two pieces of legislation, namely, IRCA and IMMACT are considered “the cornerstones of modern immigration reform”.⁵⁶ IMMACT, however, has attracted far less attention in the public arena.⁵⁷ With its passage Congress authorized more spending at the border, expanded the number of employment-based visas intended for highly-skilled immigrants and introduced a new category popularly called the visa diversity lottery.⁵⁸ That Congress had increased the number of visa availability, among other positive measures, was viewed as reflecting Congressional confidence in the United States’ “capacity for continuing to absorb new immigrants.”⁵⁹ Not surprisingly at the time of its passage, the economy was doing well.⁶⁰ Finally, one of the measures goals, arguably, was to place the U.S. in an economically competitive position with the European Economic Community.⁶¹

Then President Bill Clinton signed the North American Free Trade Agreement (NAFTA) on December 8, 1993.⁶² Implementation of NAFTA began on January 1, 1994. Since its inception in 1994, has not been without its critics. The concept behind NAFTA was to promote economic growth by easing the movement of goods and services between the U.S., Mexico and Canada.⁶³ NAFTA-related talks in the 1990s presented the two neighboring countries in an opportunity to address unauthorized migration.⁶⁴ Nonetheless the talks did not include migration management. NAFTA did, however, provide for a number of immigration-related visas to ease the movement of highly skilled

⁵⁴ See Kevin R. Johnson, *Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and the Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

⁵⁵ Pub. L. No. 101-649, 104 Stat. 4978 (November 29, 1990).

⁵⁶ Richard A. Boswell, *Immigration Law and Reform: Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 Harv. J. on Legis. 175 (2010).

⁵⁷ Richard A. Boswell, *Immigration Law and Reform: Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 Harv. J. on Legis. 175 (2010).

⁵⁸ See STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 5th ED. 348-50 (FOUNDATION PRESS 2009).

⁵⁹ STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 5th ED. 20 (FOUNDATION PRESS 2009).

⁶⁰ See, e.g., Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 Akron L. Rev. 291, 305 fn. 84 (2208) citing to John Isbister’s book, *THE IMMIGRATION DEBATE 200* (Kumarian Press 1996) in which the author examines the different elements that factor in to immigration debates: “It is no coincidence that the expansive Immigration Act of 1990 was passed at the end of a decade of steady economic growth, increasing prosperity for many Americans (although not all) and falling employment.”).

⁶¹ See, e.g., Statement on Signing the Immigration Act of 1990, 2 Pub. Papers 1717 (Nov. 29, 1990) available online at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117>; Also,

⁶² See **American President: A Reference Resource** at http://millercenter.org/president/events/12_08

⁶³ See generally, Bill Ong Hing, *The NAFTA Effect* in *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* 9-28 (Temple University Press 2010).

⁶⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) It did, however, add professional

professionals.⁶⁵ And the established cross-border patterns and networks of Mexican migration persisted.

Meanwhile, IRCA had failed to curb illegal immigration; IMMACT focused on legal immigration and NAFTA arguably exacerbated the unauthorized migration problem.⁶⁶ With the midterm elections in 1994, Republican restrictionists on immigration reform seized the opportunity to enact their vision. So in 1996 Congress passed immigration laws that many considered harsh, draconian, and violative of individual rights.⁶⁷ These measures were enacted largely in response to the first World Trade Center bombing and that of the Alfred P. Murrah Federal building in downtown Oklahoma City on April 19, 1995, the latter being the largest domestic terrorist attack in the history of the United States, until September 11, 2001.⁶⁸ Although the Oklahoma City bombing was orchestrated by anti-government militia men of the home-grown variety, the newly-enacted immigration laws were principally directed at non-citizens.⁶⁹

Then early in 2001, newly elected U.S. president George W. Bush met with Mexico's relatively-new president Vicente Fox to discuss migration issues between the two countries.⁷⁰ The goal of their meeting was to achieve immigration reform.⁷¹ The historical relationship between the U.S. and Mexico was thus about to play a major role in unauthorized migration initiatives. Later talks were intended to focus on resolving the much larger illegal immigration problem in the U.S. Unfortunately, 9/11 occurred; the ability of politicians to capitalize on the public's fear of future terrorist attacks rendered these two friendly countries – both with major interests in bilateral cooperation given their shared responsibility – unable to complete negotiations on a migration agreement that began in hopeful anticipation prior to 9/11. Clearly the attacks on 9/11 had their impact on border policies and unauthorized migration management.

B. *Border Policies Post-9/11*

...some members of Congress want to rely on the old ways of doing things, such as fencing, which rhetorically and symbolically seem like the easy and simple answer

⁶⁵ Susan Martin, *Politics of U.S. Immigration Reform* 126 in AGUSTIN ESCOBAR LATAPI AND SUSAN F. MARTIN, CO-EDITORS, *MEXICO-U.S. MIGRATION MANAGEMENT: A BINATIONAL APPROACH* (Lexington Books 2008).

⁶⁶ See generally, Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration into the United States*, 27 U.C. Davis L. Rev. 937 (1994).

⁶⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009-546, 3009-546-724 (codified as amended in scattered sections of 8, 42 U.S.C.) [Hereinafter IIRIRA]. [Also need support for the “draconian” nature of IIRIRA]

⁶⁸ Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283-84 (2002).

⁶⁹ Elizabeth M. Burch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 Ky L.J. 197, 210 n. 68 (2007/2008).

⁷⁰ See Rafael Fernandez de Castro & Roberta Clariond Rangel, *Immigration Reform in the United States* 146-147 in AGUSTIN ESCOBAR LATAPI AND SUSAN F. MARTIN, CO-EDITORS, *MEXICO-U.S. MIGRATION MANAGEMENT: A BINATIONAL APPROACH* (Lexington Books 2008).

⁷¹ Kristen McCabe and Doris Meissner, MPI, *Immigration and the United States: Recession Affects Flows, Prospects for Reform* January 2010 at p. 4 available at <http://www.migrationinformation.org/Profiles/>

*for the war on terrorism...Unfortunately, these kinds of border control methods only serve to confuse or ignore the underlying political, social, and economic factors at play on the border and between the United States and Mexico.*⁷²

Prior to the terrorist attacks, many in immigrant communities had applauded the joint venture these two presidents had embarked upon. For pro-immigrant advocates, it represented a move that symbolized a change of direction in immigration policy and simultaneously signaled a return to “kinder, gentler” immigration reform policies, especially those affecting the millions of Mexican nationals residing in the United States.⁷³ But that hopeful outlook was short-lived. In the wake of the terrorist attacks eight months after their meeting in Mexico, Congress and the Administration turned their attention decidedly away from promoting such initiatives and focused on sealing U.S. borders in an effort to prevent further attacks.

These attacks have had a lasting impact, both psychologically and politically. Focusing on border security and control initially was to be expected. In doing so, however, the government failed to fully appreciate that, as the 9/11 Commission put it, “the 9/11 attacks revealed four kinds of failures: in imagination, policy, capabilities, and management,”⁷⁴ none of which related to a failure of land border enforcement efforts.⁷⁵ In its final report, the 9/11 Commission pointed to a failure of intelligence gathering, in concert with outdated visa issuance policies that focused on criteria not likely to detect those seeking to enter the U.S. to engage in terrorist activities.⁷⁶ By consistently

⁷² Jason Ackleson, IN FOCUS: FENCING IN FAILURE: EFFECTIVE BORDER CONTROL IS NOT ACHIEVED BY BUILDING MORE FENCES 6 Immigration Policy Center (April 2005).

⁷³ See, generally, Barbara Hines, *So Near Yet so Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 Tex. Hisp. J. L. & Pol’y 37, 40-45 (2002) (observing how the pendulum had swung toward harsher, more draconian immigration laws and was about to swing back when 9/11 occurred and halted all forward progress on ameliorating the 1996 laws.); see also Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 Minn. L. Rev. 1369, 1371 (2007) (noting that shortly before 9/11, Congress had been seriously considering possible legalization of undocumented workers and reconsideration of the restrictive nature of the 1996 immigration laws).

⁷⁴ THE 9/11 COMMISSION REPORT 339 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> [hereinafter COMMISSION REPORT].

⁷⁵ See, e.g., Juan Carlos Linares, *Hired Hands: The Impact of Globalization and Human Rights on Migrant Workers in the United States*, 34 Denv. J. Int’l L & Pol’y 321, 350-51 (2006):

It will be difficult to isolate the long-term effects of the September 11th terrorist attack on migrant workers rights. [fn. omitted] But what is known today is that law enforcement has focused on hunting down foreign would-be terrorists within U.S. borders, renewing interest in government control of immigration. [fn. omitted] In essence, immigration policy has been treated as a national security issue, rather than as a phenomenon of globalization. [fn. omitted] As a result, the United States currently spends one billion dollars on border enforcement annually. [fn. omitted] Yet, the only clear impact this increased border enforcement appears to have is increased deaths among immigrants [crossing the Southwestern border]. [fn. omitted]

⁷⁶ COMMISSION REPORT, *supra* note 74, at []; See generally CRS REPORT TO CONGRESS, Michael John Garcia & Ruth Ellen Wasem, *9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy* Updated October 18, 2004 (“According to the Commission, up to 15 of the hijackers could have been intercepted or deported through more diligent enforcement of immigration laws”):

portraying the border as security vulnerability,” the temptation to turn to law enforcement agencies and military measures has been “quite predictable.”⁷⁷

Despite a post-9/11 boom in immigration legislation intended to provide more border control, such policy initiatives have yet to stem the flow of unauthorized migrants across the Southwest border. Other factors, however, play a role. Presently, it appears that the economic downturn beginning in 2007 and the later improvement in Mexico’s economy are contributing factors to the sharp decline in migrant border-crossings.⁷⁸ Still, when talking about immigration reform, most politicians will say that the border must first be secured.⁷⁹ It’s like a political mantra.⁸⁰

Congressional frustration may result from being able to do so little, if resolution of the problem is not within its power. If indeed the failure to prevent the attacks was one of a lack of imagination, this may help to explain, in part, the continuing “border fixation” of the policy makers. Another contributing factor, however, is undoubtedly a lack of political will.⁸¹ After all, once better intelligence and sharing of information is recognized as the goal, what really remains for Congress to do in demonstrating its role in preventing the next attack? When the public demanded that something be done, Congress rose to the occasion and passed arguably questionable laws within six weeks of the attacks to show its power.⁸² Another more likely reason may be politics pure and simple.⁸³ Unfortunately, the kind of politics associated with the current immigration debate is not the kind that is likely to generate sound and wise immigration policies and enacted reforms.

From a humanitarian perspective, what has been most disturbing about U.S. border policies is the sharp increase of border-crossing-related deaths that have occurred since the escalation of border enforcement efforts. As comparative migration scholar Wayne A. Cornelius once observed and reported in 2004, the death toll then was “10

The 9/11 Commission’s immigration-related recommendations focused primarily on targeting terrorist travel through an intelligence and security strategy based on reliable identification systems and effective, integrated information-sharing.

⁷⁷ Deborah Waller Meyers, *From Horseback to High-Tech: US Border Enhancement*, MIGRATION POLICY INSTITUTE 9 (Feb. 1, 2006), <http://www.migrationpolicy.org/ITFIAF/Insight-7-Meyers.pdf>; [see also p. 7 re 9/11 to the present; see p. 4 re a new border-control strategy: 1993-2001]

⁷⁸ See Jeffrey Passel, D/Vera Cohn & Ana Gonzalez-Barrera, *Net Migration From Mexico Falls to Zero—and Perhaps Less*, PEW HISPANIC CENTER dated April 23, 2012 and Updated May 3, 2012 available at <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>

⁷⁹ See, e.g., “Face the Nation” anchor Bob Schieffer’s Interview on June 18, 2012 with Mitt Romney in **Face in the News: Mitt Romney** available at: http://www.cbsnews.com/8301-3460_162-57455481/face-in-the-news-mitt-romney/ (last visited 07.27.12).

⁸⁰ [If there is a video of the luncheon speaker at the Border Patrols symposium in March, I recall the Congressman speaking saying something about securing the border. If still available, listen to verify and insert here as another example.]

⁸¹ See *infra* Part III.

⁸² See, e.g., Bob Barr, *The USA Patriot Act and Progeny Threaten the Very Foundation of Freedom*, 2 GEO. J.L. & PUB. POL’Y 385 (2004); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security?: The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002).

⁸³ See *infra* Part II.

times more lives than the Berlin Wall claimed during its 28-year existence.”⁸⁴ Anticipated opportunities for better management of the current migration situation, especially as it related to Mexican migration, had all but vanished.⁸⁵ But then on January 7, 2004, President Bush outlined a set of principles for dealing with illegal immigration to the U.S.,⁸⁶ ostensibly marking the beginning of the current debate now ending its second decade that took hold in earnest during the 109th Congress. Unfortunately, border security concerns came to dominate the political agenda of the 109th Congress.⁸⁷

II. The Current Debate: Border Policies and Immigration Politics

Efforts to police the flow of illegal immigrants across the U.S.-Mexico border have undergone a metamorphosis since the early 1990s: immigration control along the border has been elevated from one of the most neglected areas of federal law enforcement to one of the most politically popular. The unprecedented expansion of border policing...has been strikingly successful in projecting the appearance of a more secure and orderly border.⁸⁸

A. 109th & 110th Congresses: Border Policies

*...Enforcement of laws against unauthorized immigration is, in the vast majority of cases, a resource-and attention-wasting distraction from sensible national security measures. That does not mean the U.S.-Mexico border is free from risk of harm, such as increasingly violent drug trafficking organizations operating nearby in Mexico. But that issue needs to be addressed in different ways than current enforcement policy does.*⁸⁹

Everyone with a stake in this policy debate agrees that the current system of immigration is in need of a major overhaul.⁹⁰ But which approach would best accomplish the much needed “fix” remained the critical bone of contention throughout

⁸⁴ Wayne Cornelius, *Evaluating Enhanced US Border Enforcement*, MIGRATION INFO. SOURCE (May 2004), <http://www.migrationinformation.org/Feature/display.cfm?ID=223> [Add re the issue of building a similar “wall”, i.e., the “Secure Fence Act of 2006” will be discussed later.

⁸⁵ See, e.g., Barbara Hines, *So Near Yet so Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 Tex. Hisp. J. L. & Pol’y 37, 39 (2002) (observing that “[t]he tragedy of September 11th and its aftermath further reinforce the political nature of this area of law.”).

⁸⁶ See Maia Jachimowicz, *Bush Proposes New Temporary Worker Program*, MIGRATION POLICY INSTITUTE (February 1, 2004) available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=202>

⁸⁷ CRS REPORT FOR CONGRESS, Andorra Bruno, et. al, *Immigration Legislation and Issues in the 109th Congress* (Updated December, 2006); see also, *Immigration Reform Beyond the Border*, Center for American Progress September 18, 2006 (noting that the House of Representatives announced its pursuit of a “Secure Border Now Agenda,” formally abandoning CIR.) available at http://www.americanprogress.org/issues/2006/09/beyond_the_border.html

⁸⁸ PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 2ND ED. 85 (Cornell University Press, 2000, 2009).

⁸⁹ Josiah Mc C. Heyman, *Guns, Drugs, And Money: Tackling the Real Threats to Border Security* 2, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL (<http://www.immigrationpolicy.org/perspectives/guns-drugs-and-money-tacking-real-threats-border-security> (last visited 07.23.12).

⁹⁰ See, e.g., Jeanne A. Butterfield, *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 187, 187 (2005).

the 109th and 110th Congresses. For the better part of those congressional terms, the competing approaches can be summed up into two phrases: “enforcement only” or “enforcement plus.”⁹¹ The former approach focused on tougher border control methods, ostensibly intended to prevent future terrorist attacks, but to the exclusion of all other components of a comprehensive immigration reform package. This approach represented a continuation of the harsh and punitive reform measures which Congress repeatedly passed beginning in the mid-1990s.⁹² The latter approach also contemplated (in addition to border control) addressing the millions of unauthorized immigrants residing here together with President Bush’s previously proposed guest worker program.⁹³

At the core of what became a hotly contested debate over these two approaches during the 109th Congress was a determination on the part of the Republican restrictionists not to see any compromise bill undermine their hard-line strategy dealing with the unauthorized migrant population contrary to their anti-immigrant goals. The House adamantly embraced the former approach and passed an enforcement only measure in December 2005, a “take no prisoners” initiative, the highly controversial Sensenbrenner bill.⁹⁴ Also a Senate bill of the “enforcement plus” variety had been pending; it combined the components of a number of bills previously introduced.⁹⁵

For a period of time, however, the pending Senate bill seemed to be at a stalemate. On May 25, 2006, the Senate eventually passed what some hailed as a historic immigration bill;⁹⁶ it turned out to be the high-water mark of the 109th Congress.⁹⁷ Yet the House never budged on its “enforcement only” approach to immigrant reform. The Senate Majority Leader altered the phrase “enforcement plus” to embrace a more politically salvageable approach to comprehensive immigration reform, labeling it as an

⁹¹ See Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 171 (2005) (describing the difference between the two approaches to immigration reform bills introduced in the 109th Congress). See also John O’Neil, *Bloomberg Says Plan to Deport Millions Is ‘Ridiculous,’* N.Y. TIMES, May 24, 2006, <http://www.nytimes.com/2006/05/24/nyregion/24cnd-bloomberg.html?ei=5070&en=6910>.

⁹² See note 42, *supra*.

⁹³ U.S. Representative Sheila Jackson Lee, *Policy Essay: Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border* 43 HARV. J. ON LEGIS. 267 (2006); U.S. Representative Zoë Lofgren, *Immigration in the Twenty-First Century: A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349 (2005).

⁹⁴ See Immigration in Congress-109th Congress Highlight, *The House Passes Rep. Sensenbrenner’s Bill Restrictive Immigration Bill—No Temporary Worker Provisions Included*, Greenberg Traurig LLP available at <http://www2.gtlaw.com/practices/immigration/congress/updates/109/02.htm>.

⁹⁵ CRS REPORT FOR CONGRESS, Andorra Bruno, et. al, *Immigration Legislation and Issues in the 109th Congress* (Updated December, 2006).

⁹⁶ Julia Gelatt, *Senate Approves Scaled-Back Immigration Bill, President Calls for National Guard*, MIGRATION POLICY INSTITUTE [page] (June 1, 2006), <http://www.migrationinformation.org/USfocus/display.cfm?ID=405>. Not everyone was celebrating, however; see, e.g., Facts on Immigration—Fence Offensive: A Nineteenth Century ‘Solution’ to a Twenty-First Century Problem [page] (Oct. 19, 2006) (“no secret that the bill was placed on the Senate calendar for political reasons...proving once again that the bill is a political stunt and not a serious legislative proposal.”).

⁹⁷ Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform 7*, MIGRATION POLICY INSTITUTE (August 2011).

“enforcement first” strategy.⁹⁸ The House split the Sensenbrenner bill into several separate enforcement only bills, one of them being a measure to build a fence on the Southwest border.

On October 26, after strongly bipartisan votes in both houses of Congress, the Secure Fence Act of 2006⁹⁹ became law. It passed both houses with a sizable number of Democrats voting in its favor.¹⁰⁰ The bill was then trotted out for presidential signing just in time for the mid-term elections.¹⁰¹ Speculation ensued about further legislation¹⁰²; but the 109th Congress ultimately ended without having passed any legislation intended to overhaul the immigration system comprehensively.

In a piece entitled the “Dismal Legacy of 109th Congress,”¹⁰³ the Center for American Progress, the progressive Washington think tank, observed that comprehensive immigration reform was “[n]otably absent from the [the 109th Congress] list of last-minute ‘accomplishments’”¹⁰⁴ That Congress failed to deliver on resolving the growing unauthorized immigrant population should not be too surprising.¹⁰⁵ Immigration “enforcement plus” measures were political victims of hardliners in the 109th Congress who adamantly sought security-related measures. They also sought, albeit unsuccessfully, to gain a political advantage during the 2006 midterm elections.

The 110th Congress was poised to take up these measures in its first session. The Democrats had taken control of Congress and considered prospects for reform promising.¹⁰⁶ During the first week in January, 2007, congressional leaders spoke optimistically with President Bush about immigration reform.¹⁰⁷ But the 110th Congress

⁹⁸ See, e.g., Stephen Dinan, *Frist to Take on Border Bill First*, WASH. TIMES, Oct. 14, 2005, at A1.

⁹⁹ Pub. L. No. 109-367, 120 Stat. 2638 (October 26, 2006).

¹⁰⁰ The vote in the Senate was 80-19 in favor (26 Democrats voting for the fence). U.S. Senate Roll Call Votes, 109th Cong., 2d Sess., On Passage of the Bill H.R. 6061, Sept. 29, 2006, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00262. The House vote included 64 Democrats voting in favor of the fence. U.S. House of Representatives Roll Call Vote 446, Sept. 14, 2006, available at <http://clerk.house.gov/evs/2006/roll446.xml>. As the Center for American Progress stated in Dismal Legacy of 109th Congress, *supra* note 103, “[n]otably absent from the [] list of last-minute ‘accomplishments’ [was] comprehensive immigration reform”

¹⁰¹ See Michael A. Fletcher & Jonathan Weisman, *Bush Signs Bill Authorizing 700-Mile Fence for Border*, WASH. POST, Oct. 27, 2006, at A4.

¹⁰² See, e.g., Lee, *supra* note 93, at 267 (promoting adoption of the two measures she introduced in the 109th Congress).

¹⁰³ Center for American Progress, Dismal Legacy of 109th Congress (Oct. 26, 2006), <http://www.americanprogress.org/issues/2006/12/109th.html>

¹⁰⁴ *Id.*

¹⁰⁵ Rick Perlstein, *Fenced Out: A Post-9/11 Boom in Immigration Legislation Hasn't Stemmed the Border Flow, but It Has Created a Flood of New Approaches—Most With Built-In Paradoxes*, U. CHI. MAG., Jan-Feb. 2007, <http://magazine.uchicago.edu/0712/features/fenced.shtml>. (last visited 07.26.2012)

¹⁰⁶ See NEW CONGRESS TAKES FIRST TAKES TOWARD IMMIGRATION REFORM MIGRATION INFORMATION available at <http://migrationinformation.org/datahub/countrydata.cfm?ID=574>.

¹⁰⁷ See NEW CONGRESS TAKES FIRST TAKES TOWARD IMMIGRATION REFORM MIGRATION INFORMATION available at <http://migrationinformation.org/datahub/countrydata.cfm?ID=574>.

ended without passing a comprehensive immigration reform bill.¹⁰⁸ Seemingly, events in 2006, including the role of the media¹⁰⁹, arguably changed the political climate in which immigration would be debated in the future.¹¹⁰

B. 111th & 112th Congresses: Immigration Politics

*Comprehensive immigration reform is the exception, not the rule, in American politics.*¹¹¹

Back in 2006, the American Bar Association (ABA) urged Congress to enact realistic immigration reform measures, calling for a more modern, fair, and transparent immigration system.¹¹² Specifically, the ABA called for “a regulated, orderly and safe immigration system that addresses the unauthorized population, the need for immigrant labor, the value of family reunification and the need for an effective enforcement strategy,”¹¹³ among other things. Congress, in effect, has not only rejected updating the system to provide sufficient opportunities for people to come and join their close family members, as the ABA had urged,¹¹⁴ but also to take into account the reality that the current immigration system is not suitable for the new century.

It is well known that both former president George W. Bush and President Barack Obama favored comprehensive immigration reform.¹¹⁵ Nonetheless, both presidents

¹⁰⁸ Jonathan Weisman, *Immigration Bill Dies in Senate* published June 29, 2007 Washington Post; see also CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Immigration Reform Issues in the 111th Congress* dated October 29, 2010 in which it is reported that “Senate action on comprehensive immigration reform legislation stalled at the end of June 2007 after several weeks of intense floor debate.

¹⁰⁹ Roberto Suro, *Promoting Stalemate: The Media and US Policy on Migration* 2-3, MIGRATION POLICY INSTITUTE (2009).

¹¹⁰ MIGRATION INFORMATION SOURCE, TOP 10 MIGRATION ISSUES OF 2006 ISSUE #3 US IMMIGRATION REFORM: BETTER LUCK NEXT YEAR (Dec. 1, 2006); *Don't Fence Us in: The Debate over Illegal Immigrants Is Subtler than It Seems*, THE ECONOMIST, Oct. 19, 2006, at 3-4 (“That leaves one question for the Republicans But it also leaves one for Mr. Bush: will a new Congress, free from immediate electoral pressure, at last deliver comprehensive reform of immigration policy? Ironically for the president, who first called for such a reform in January 2004, he may need a Democratic-controlled House to make his dream come true.”).

¹¹¹ Susan F. Martin, *Politics of U.S. Immigration Reform 136* in MEXICO-U.S. MIGRATION MANAGEMENT: A BINATIONAL APPROACH EDITED BY AGUSTIN ESCOBAR LATAPI AND SUSAN R. MARTIN (Lexington Books 2008).

¹¹² Am. Bar Ass'n, Recommendation 107D, Feb. 13, 2006, available at <http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107D.pdf>

¹¹³ Am. Bar Ass'n, Recommendation 107B, Feb. 13, 2006, available at <http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107B.pdf>

¹¹⁴ *Legislation: Enforcement Only Will Not Fix Our Broken Immigration System*, NATIONAL IMMIGRATION FORUM, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=777> [broken link—can't find article]

¹¹⁵ See, e.g., COMPREHENSIVE IMMIGRATION REFORM: A PRIMER IMMIGRATION POLICY CENTER dated June 24, 2009; see also former President Bush's CIR principles FACT SHEET: THE SECURE FENCE ACT OF 2006 available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>; President Obama's CIR principles available at CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Immigration Reform Issues in the 11th Congress* at p. 10 (dated October 29, 2010); John D. Skrentny &

have deported record numbers of unauthorized immigrants¹¹⁶, ostensibly making comprehensive immigration reform more politically palatable.¹¹⁷ But such an internal enforcement action is unlikely to achieve the removal of millions of unauthorized immigrants residing in the United States.¹¹⁸ Nonetheless, both presidents, at one time or another, promised to make passage of comprehensive immigration reform a top priority in his second term after efforts had failed in their respective first terms.¹¹⁹ Of course another factor dominated all political agendas at the beginning of the 111th Congress and continued into the 112th Congress, to wit, the downturn in the U.S. economy and its slow recovery.

As reported to the 111th Congress, key elements of the immigration debate included, among other issues, border security, internal enforcement and also legal immigration and legalization.¹²⁰ And similarly reported to the 112th Congress, key elements of the immigration debate included, among other issues, border security, internal enforcement along with legal immigration and legalization.¹²¹ But the latter report noted that the debate over legalization of the unauthorized status of immigrants residing in this country is complicated by opposing positions. On the one hand, those in favor of “earned legalization” and on the other, those who use the term “amnesty” for so-called lawbreakers are opposed to any form of regularization of unauthorized immigrants to lawful immigration status.¹²²

Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 Yale L. J. Online 325, 325-326 (2011), <http://yalelawjournal.org/3/18/skrentny-gelredman.html>.

¹¹⁶ See, e.g., Byron Tau, *FLOTUS: Critical to keep immigration families together* 07.14.12 POLITICO <http://www.politico.com/politico44/2012/07/flotus-critical-to-keep-immigrant-families-together-128932.html> (“Critics note that the rate of deportations under Obama has been nearly double the rate under President George W. Bush. However, Obama recently announced a shift in policy...”)

¹¹⁷ See, e.g., Eric Olson and David Shirk, *Is More Getting Us Less? Real Solutions for Securing Our Border* 5, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL February (“administration officials see securing the border as the first part of a ‘grand bargain’ to negotiate with anti-immigrant forces, which—they hope—will ultimately allow a major overhaul of the U.S. immigration system.”)

¹¹⁸ See generally RAJEEV GOYLE & DAVID A. JAEGER, *DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT* 9 (2005), available at http://www.americanprogress.org/kf/deporting_the_undocumented.pdf (“illustrat[ing] the false allure of deportation as a response” to our broken immigration system).

¹¹⁹ See CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Immigration Reform: Brief Synthesis of Issue 2* Updated May 10, 2007 (Bush); Reuters, *Obama sees second term as time to push immigration reform* dated Feb. 23, 2012; cf. Cristina M. Rodriguez, *The Early Obama Administration: Immigration and the Civil Rights Agenda*, 6 Stan. J.C.R. & C.L. 125, 145 (2010)(noting that “[d]espite promising to tackle immigration reform during his campaign, President Obama has not yet made the issue a serious priority, nor has it risen to the top of the legislative agenda.”); see also Frank Sharry, **Memo to President Obama Regarding Immigration Policy**, MIGRATION POLICY INSTITUTE May 2009 (urging the then newly inaugurated president to deliver on his campaign promise to prioritize comprehensive immigration reform in late 2009 adding: *provided conditions make a reform push viable*).

¹²⁰ See generally CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Immigration Reform Issues in the 111th Congress* dated October 29, 2010.

¹²¹ See generally CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Overview of Immigration Issues in the 112th Congress* dated March 21, 2011.

¹²² CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Overview of Immigration Issues in the 112th Congress* at p. 4 dated March 21, 2011; see also, John Cornyn, *Immigration Reform: Back to the Future*, 115 Yale L. J. Pocket Part 112 (2006), <http://www.thepocketpart.org/2006/05/cornyn.html> (stating as a congressman: “While I favor a second chance for hard-working illegal aliens currently within the United States, I cannot in good faith support any proposal that will repeat the failures of the 1986 amnesty.”)

Not surprisingly, neither the 111th nor the 112th Congresses managed to pass any comprehensive immigration reform package. Although incremental change in the form of the perennial DREAM Act dominated legislative action in the 111th,¹²³ comprehensive immigration reform took “back-burner” status in the 112th Congress.¹²⁴ And notwithstanding the broad-based consensus, some observers have opined that failure to pass an overhaul of U.S. immigration laws—despite substantial efforts in the recent past—is because such a measure is a “zero-sum game” or a “third rail”.¹²⁵ And the “thorniest of these immigration issues centers on policies directed toward unauthorized [immigrants] in the United States.”¹²⁶

Politics aside, immigration policy initiatives will always be viewed through a national security lens. “The post-9/11 era has witnessed the emergence of an immigration system in the United States dominated by national security and enforcement considerations.”¹²⁷ That is 9/11’s unfortunate legacy for an area of law already bedeviled with politics and perennially poor policy choices. Neither the 111th or 112th Congresses were able to accomplish what is now seemingly the impossible, to wit, comprehensive immigration reform. Perhaps, it’s time to pause for a reality check; and, as many have observed, reality and reason tend to be rare when it comes to immigration reform.

III. Overcoming the Stalemate on Comprehensive Immigration Reform

The asymmetries of immigration enforcement versus legalization and visa reform on the one hand, and the short-and long-term political barriers to passing CIR legislation on the other explain the history of U.S. immigration policy in the post-9/11 period. Robust immigration enforcement efforts along the U.S.-Mexico border and within the United States since the 1990s have intensified, but no significant steps have been taken to liberalize immigrant admissions or to legalize unauthorized immigrants already within the United States.¹²⁸

A. *The Rarity of Reality in Border Policymaking*¹²⁹

*...American border policy has less to do with the underlying realities of Mexican immigration than with America’s view of itself and its place in the world.*¹³⁰

¹²³ Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* 9 MIGRATION POLICY INSTITUTE (August 2011).

¹²⁴ Susan Mulligan, *The Myths and 2012 Politics of Immigration Reform* US News April 13, 2011 available at <http://www.usnews.com/opinion/blogs/susan-mulligan/2011/04/13/the-myths-and-2012-pol...>

¹²⁵ CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Overview of Immigration Issues in the 112th Congress* at p. 1 dated March 21, 2011.

¹²⁶ CRS REPORT TO CONGRESS, Ruth Ellen Wasem, *Overview of Immigration Issues in the 112th Congress* at p. 1 dated March 21, 2011.

¹²⁷ Michelle Mittelstadt, et. al., *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11* MIGRATION POLICY INSTITUTE (August 2011).

¹²⁸ MARC R. ROSENBLUM, *US IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM*, THE REGIONAL MIGRATION STUDY GROUP 13 (August 2011).

¹²⁹ Suggested by *Reality Is Still a Rarity in Immigration Debate*, Editorial, ARIZONA DAILY STAR, Nov. 17, 2006, at A10.

As U.S.-Mexico border scholar Douglas S. Massey has noted, our need for symbolic assurances come at a high price.¹³¹ And as distinguished law professor Michael A. Olivas has observed: “[A]ll that enhanced security and border crossing militarization has achieved has been to drive the border-crossers further into the desert, where more of them die.”¹³² For Olivas, “we are all made less-secure by resorting to the easy solutions, which have such clearly counterproductive results.”¹³³ At the Security Initiative of the Mexico Institute at the Woodrow Wilson International Center for Scholars in Washington, D.C., event held in commemoration of the tenth anniversary of 9/11, two noted scholars in residence at the Immigration Policy Center¹³⁴ would likely agree with Olivas’ sentiments.¹³⁵ According to Eric Olson, a Senior Associate at the Institute, “[t]he question [the conferees] want to wrestle with...is whether security at the physical border is truly the best way to enhance national security.”¹³⁶ And although ongoing reports about Mexico’s bloody conflict with organized crime have raised concerns about the violence “spilling over” into the U.S., concerns about illegal migration still drive the policy debate that is centered on “securing the border.”¹³⁷

After concluding his opening remarks, Olson shared an anecdote about a U.S. Border Patrol officer who was asked about his primary responsibility. The officer responded that since 9/11, his primary responsibility is “fighting terrorism and capturing terrorists”.¹³⁸ The obvious follow-up question: “How many terrorists have you actually captured? The response: “None.” Olson then asked the two speakers: “Are the priorities at the border the right ones and how do we define security along the Southwest border?”

¹³⁰ Douglas S. Massey, *Borderline Madness*, THE CHRONICLE REVIEW 1 (June 30, 2006) available at <http://chronicle.com/article/Borderline-Madness/29421> (last visited July 16, 2012).

¹³¹ Douglas S. Massey, *Borderline Madness*, THE CHRONICLE REVIEW [page] (June 30, 2006) available at <http://chronicle.com/article/Borderline-Madness/29421> (last visited July 16, 2012).

¹³² Michael A. Olivas, *Fences and Mushrooms Along the Border*, IMMIGRATION MONTHLY [____] (Nov. 2006).

¹³³ Michael A. Olivas, *Fences and Mushrooms Along the Border*, IMMIGRATION MONTHLY [____] (Nov. 2006).

¹³⁴ See <http://immigrationpolicy.org/> for more information about the Center.

¹³⁵ See generally, Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* IMMIGRATION POLICY CENTER September 12, 2011 <http://www.immigrationpolicy.org/perspectives/guns-drugs-and-money-tackling-real-threats-border-security>; Terry Goddard, *How to Fix a Broken Border: A Three Part Series* IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL September 12, 2012 <http://www.immigrationpolicy.org/perspectives/how-fix-broken-border-three-part-series>

¹³⁶ *Is the Border Broken? Rethinking the Conventional Wisdom*, MEXICO INSTITUTE OF THE WILSON CENTER September 12, 2011 available at <http://www.wilsoncenter.org/event/the-border-broken-rethinking-the-conventional-wisdom> video <http://www.wilsoncenter.org/event/the-border-broken-rethinking-the-conventional-wisdom>

¹³⁷ Eric Olson and David Shirk, *Is More Getting Us Less? Real Solutions for Securing our Border 2* IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL February 2011.

¹³⁸ Webcast video of the event available at <http://www.wilsoncenter.org/event/the-border-broken-rethinking-the-conventional-wisdom>

For Professor Josiah Heyman, a border security, it is time to rethink the equation between borders and security.¹³⁹ And it is “misleading to use public safety...to justify immigration-oriented, boundary-enforcement operations, when immigrants—including the unauthorized—have significant lower violent crime rates than native-born populations.¹⁴⁰” Heyman opines that our fundamental border-security criterion should be “[a] clear and disinterested definition of security [that] is careful and focused.”¹⁴¹ In the end, Heyman offers practical policy steps to address the broad framework of security outlined in his paper, acknowledging that in the current political climate implementation may be challenging;¹⁴² and none more so than comprehensive immigration reform which he considers “essential”.¹⁴³

Terry Goddard, Arizona’s former (two-term) Attorney General, puts it simply: “If the United States wants effective border security, then more effective law-enforcement measures must be taken.”¹⁴⁴ And the first step is to identify the right target, and it’s not illegal migration. For Goddard, symbolism seemingly trumps common sense when it comes to effective border security.¹⁴⁵ And policymakers whose real intent is not to fix the border, but to stop all illegal immigration into the U.S. will never be satisfied.¹⁴⁶ In his paper he describes how Arizona dealt with the drug cartels successfully.¹⁴⁷ And for those seriously interested in real border security in the 21st century, for effective results in terms of a secure and commercially viable border between the United States and Mexico, policymakers should consider Arizona’s story in targeting the cartels and following the money.¹⁴⁸

¹³⁹ Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* 2 IMMIGRATION POLICY CENTER September 12, 2011 <http://www.immigrationpolicy.org/perspectives/guns-drugs-and-money-tackling-real-threats-border-security>

¹⁴⁰ Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* 2-3 IMMIGRATION POLICY CENTER September 12, 2011 citing to

¹⁴¹ Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* IMMIGRATION POLICY CENTER 2-3 September 12, 2011.

¹⁴² Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* IMMIGRATION POLICY 8-9 September 12, 2011.

¹⁴³ Josiah McC. Heyman, *Guns, Drugs, and Money: Tackling the Real Threats to Border Security* IMMIGRATION POLICY 9 September 12, 2011.

¹⁴⁴ See generally, Terry Goddard, *How to Fix a Broken Border: Hit the Cartels Where It Hurts*, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL September 12, 2012.

¹⁴⁵ Terry Goddard, *How to Fix a Broken Border: Hit the Cartels Where It Hurts*, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL 9 September 12, 2012

¹⁴⁶ Terry Goddard, *How to Fix a Broken Border: Hit the Cartels Where It Hurts*, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL 5 September 12, 2012 (Notes that as Arizona’s A.G., he focused on cartel money transfers and that “[u]ntil the cartels are eliminated, the border cannot be considered secure. Period.”)

¹⁴⁷ Terry Goddard, *How to Fix a Broken Border: Hit the Cartels Where It Hurts*, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL 10 September 12, 2012

¹⁴⁸ Terry Goddard, *How to Fix a Broken Border: Hit the Cartels Where It Hurts*, IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL 10 September 12, 2012

¹⁴⁷ Eric Olson and David Shirk, *Is More Getting Us Less? Real Solutions for Securing our Border* 5 IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION COUNCIL February 2011.

Yet, the reality is that the inability to account for the unauthorized migrants now residing here in the shadows, arguably represents a threat to this nation's overall economic, social, and security interests.¹⁴⁹ Without the ability to monitor their presence through the new technological advancements in computer retention capabilities, the government has no way of ascertaining information essential for security purposes. Any approach to enhancing the national interests in these areas would necessarily involve the regularization, in other words, the legalization of immigrant status of this unknown population.

Presently, the immigration system is not only outdated but in need of a twenty-first century solution.¹⁵⁰ For the hardliners in Congress,¹⁵¹ any bill introduced that offers opportunities to regularize unauthorized status and be more realistic in meeting future worker demands, remains a sticking point in the current debate. Once the data is considered, it's hard to justify logically why politicians would appropriate so many billions of dollars to get so little in national interest returns but still leave the country so potentially vulnerable.¹⁵² So linking one to the other in an effort to preserve appearances may be, hopefully, surfacing as a false reality.

B. The Political Feasibility of Continuing Failed Policy Choices

*Making the process of reform even more difficult is a basic ambivalence within the American public regarding immigration...The result of this ambivalence is the absence of any strong consensus among the public about changes in immigration policy...but pressure for positive changes is too often lacking. The safe decision for politicians is no decision—at least until there is no choice but to act.*¹⁵³

¹⁵⁰ Daniel M. Kowalski, *Why "Fixing the Border First" Is Backwards*, BENDER'S IMMIGRATION BULLETIN (June 2, 2006), www.bibdaily.com. As Kowalski notes in conclusion: "Border control will be most effective – and least expensive – when our immigration laws look like they were written in the 21st century, rather than the 19th." See Marc R. Rosenblum, *"Comprehensive" Legislation vs. Fundamental Reform: The Limits of Current Immigration Proposals*, MIGRATION POLICY INSTITUTE (Policy Brief No. 13, Jan. 2006); see also Hiroshi Motomura, *What Is "Comprehensive Immigration Reform"? Taking the Long View*, 63 Ark. L. Rev. 225 (2010); Kevin R. Johnson, *Problems, Possibilities and Practical Solutions: Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 Wayne L. Rev. 1599 (2009); Jonathan G. Goodrich, *Immigration in the Twenty-First Century: Perspectives on Law and Policy: Comments: Help Wanted: Looking for a Visa System that Promotes the U.S. Economy and National Security*, 42 U. Rich. L. Rev. 975 (2008).

¹⁵¹ See Timothy Egan, Editorial, *Republicans Losing the West*, N.Y. TIMES, June 21, 2007, at A23 but in 2010, the House became even more restrictionist-oriented about immigration reform; in other words, if it wasn't about the border, no chance of passage, including measures which once had bipartisan support like the DREAM Act.

¹⁵² See, e.g., Mickey McCarter, *Spending Bill Increases Border Security Funding in 2012* published 12/27/11 in Homeland Security Today. US available at <http://www.hstoday.us/focused-topics/border-security/single-article-page/consolidated-spending-bill-increases-border-security-funding-in-2012/1702131429b8860dfea38f907424bcb6.html>

¹⁵³ Susan F. Martin, *Politics of U.S. Immigration Reform 140* in MEXICO-U.S. MIGRATION MANAGEMENT: A BINATIONAL APPROACH EDITED BY AGUSTIN ESCOBAR LATAPI AND SUSAN R. MARTIN (Lexington Books 2008).

At the root of this hard line restrictionist campaign the American public remains ambivalent about immigration, especially those who fear the other, the foreigner.¹⁵⁴ But nativism is not new to immigration rhetoric. In other words, prejudice and fear, not only of the other, but of the next terrorist attack, tend to energize, in part, this approach. This is not to say that enhanced border enforcement is not an appropriate part of a comprehensive approach to a complete overhaul of our national immigration policies. All speaking on the subject have acknowledged this fact.¹⁵⁵ But it is only one part of a far more complex problem of security related controls.¹⁵⁶ In fact, as one commentator once opined, “‘fixing the border first,’ then reforming our immigration laws, after the border is ‘under control’ ”¹⁵⁷ is a backwards approach to the problem. Complicating matters is the fact that in the post-9/11 era, immigration is viewed almost exclusively as a security issue.¹⁵⁸

Not surprisingly, immigration has always been a contentious issue in America despite its description as a “nation of immigrants”.¹⁵⁹ Thus the congressional stalemate that exists over reforming the immigration system comes as no surprise. In short, there is virtual gridlock over immigration reform on Capitol Hill. But the distinguished professor in journalism, Roberto Suro, has a partial explanation. Based on a 2009 commissioned paper, Professor Suro concluded that the “U.S. media coverage of immigration has hindered effective policy reform for years.¹⁶⁰” He adds that this is a trend exacerbated by the recent transformation in the multiple means Americans get their news. So for him, “one need not favor any particular outcome to conclude that stalemate is a mark of failure in the policy process.¹⁶¹”

Marc R. Rosenblum, noted MPI senior policy analyst, has written extensively on the subject and notes that “immigration policymaking is strongly biased in favor of enforcement rather than legalization or visa reform” the combination of which is the logic

¹⁵⁴ See generally BRIAN N. FRY, NATIVISM AND IMMIGRATION: REGULATING THE AMERICAN DREAM (2007).

¹⁵⁵ See generally Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L. RACE, RELIGION, GENDER & CLASS 154-58 (2005) (discussing the new imperatives facing immigration policy choices in the twenty-first century post-9/11).

¹⁵⁶ See *infra* Part III .A. at ____.

¹⁵⁷ Daniel M. Kowalski, *Why “Fixing the Border First” is Backwards*, BENDER’S IMMIGRATION BULLETIN, published online at www.bibdaily.com (June 2, 2006).

¹⁵⁸ Doris Meissner & Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* 86-87, MIGRATION POLICY INSTITUTE (February 2009)(hoping that with the new leadership in the White House and throughout the executive branch that a “singular opportunity to examine the policies and performance of an immigration system that is, by turns, the most generous in the world but also widely viewed as dysfunctional and unresponsive to the interests of society, the economy, and immigrants themselves”).

¹⁵⁹ Aaron Terrazas, *Migration and Development: Policy Perspectives from the United States* 10, MIGRATION POLICY INSTITUTE (June 2011) (“Few issues are as central to the American identity as immigration, and fewer still are as contentious.”)

¹⁶⁰ See generally Roberto Suro, *Promoting Stalemate: The Media and US Policy on Migration*, Migration Policy Institute (2009).

¹⁶¹ See generally Roberto Suro, *Promoting Stalemate: The Media and US Policy on Migration*, Migration Policy Institute (2009).

of comprehensive immigration reform.¹⁶² This observation has attracted scholarly attention about the dynamics of statutory entrenchment and comprehensive immigration reform.¹⁶³ The goal with this approach in the immigration context is to explain why it is so difficult to enact comprehensive immigration reform legislation.¹⁶⁴ According to the theory America is a “republic of statutes;” as such certain statutes are considered super statutes that are entrenched in American lawmaking.¹⁶⁵ And it appears that the most entrenched lawmaking policy relates to enforcement of restrictions on unauthorized border crossing and visa overstays; whereas legalization is not entrenched at all.¹⁶⁶

Marshall Fitz, director of immigration policy at the Center for American Progress in Washington, D.C., recently wrote about the “dramatic shift in tone and strategy” in the hardliners reaction to two recent immigration developments.¹⁶⁷ First, is the Obama Administration’s decision, in effect, to implement the DREAM Act principles¹⁶⁸ and not deport young unauthorized immigrants of a certain age and criteria; and second, the Supreme Court’s decision in *Arizona v. United States*.¹⁶⁹ But what is most informative about Fitz’s observations relate to “the seismic demographic shifts in the electorate and their concentration in battleground states.”¹⁷⁰ For him, “the road to the White House leads through the Latino electorate.¹⁷¹” Perhaps, the time will soon come when politicians have no choice but to enact comprehensive immigration reform.

¹⁶² Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* 10 MIGRATION POLICY INSTITUTE (August 2011).

¹⁶³ See generally John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 Yale L. J. Online 325 (2011) (exploring the theory in the immigration context, a thoroughly statutory based area of law is based on Eskridge and Ferejohn’s work on the centrality of statutes in American law and constitutionalism.) available at <http://yalelawjournal.org/3/18/skrentny-gelredman.html>.

¹⁶⁴ John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 Yale L. J. Online 325 [pinpoint page] (2011).

¹⁶⁵ John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 Yale L. J. Online 325 [pinpoint page] (2011), <http://yalelawjournal.org/3/18/skrentny-gelredman.html>.

¹⁶⁶ John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 Yale L. J. Online 325, 344-345 (2011), <http://yalelawjournal.org/3/18/skrentny-gelredman.html>.

¹⁶⁷ Marshall Fitz, *Sea Change for Immigration Politics*, POLITICO (July 16, 2012) available at <http://www.politico.com/news/stories/0712/78556.html>

¹⁶⁸ See e.g., Gaby Pacheco, *In 2012, The DREAM Act Will be a Major Electoral Issue in the Latino Community* (03.01.2011) available at http://americasvoiceonline.org/blog/in_2012_the_dream_act_is_a_major_electoral_issue_in_the_latino_community/

¹⁶⁹ See *supra* note 15.

¹⁷⁰ Marshall Fitz, *Sea Change for Immigration Politics*, POLITICO (July 16, 2012) available at <http://www.politico.com/news/stories/0712/78556.html>

¹⁷¹ Marshall Fitz, *Sea Change for Immigration Politics*, POLITICO (July 16, 2012) available at <http://www.politico.com/news/stories/0712/78556.html> (ends by offering the following advice: When it comes to immigration, smart and humane policies are also good politics.”)

And although Rosenblum notes, “the American political system is strongly biased against comprehensive legislation of any kind¹⁷²; he also observed that “[t]he prospects for comprehensive immigration reform increase with the political influence of Latino voters.¹⁷³” Finally, however, he opines that “[t]he resumption of a meaningful bilateral or regional dialogue about common US and Mexican interests in an orderly migration system could make a helpful contribution to the national migration debate.”¹⁷⁴

IV. Redefining Policies on the U.S.-Mexico Border

The need to understand Mexico-U.S. migration is greater today than at any time in its century-long history. Its volume and complexity are greater than most observers might have imagined even a decade ago; and it operates in a context charged with serious new human, political, and security challenges.¹⁷⁵

A. *Shared Responsibility: An Alternative Approach to Unilateral Border & Migration Management*

*The most surprising aspect of international migration...has been the continuing absence of coordination between departments of state in host countries on the various aspects of migration policy.*¹⁷⁶

Instead of building another physical barrier, the resumption of regional partners in border and migration management seems like a logical, realistic alternative choice.¹⁷⁷ According to Demetrios G. Papademetriou, President of the Migration Policy Institute, “[a]s the discussion over immigration reform moves forward in the U.S., Mexico will continue to hold a prominent place both in the debates and the solutions.”¹⁷⁸ And the history of the U.S.-Mexico relationship demonstrates that cooperation on migration issues—although difficult—would not be impossible.¹⁷⁹ Now would be a good time to capitalize on a relationship that has existed for over a hundred years in tackling the illegal

¹⁷² Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* 14 MIGRATION POLICY INSTITUTE (August 2011).

¹⁷³ Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* 14 (but he also notes that whether these demographics translate into policy outcomes depends on several unanswered questions) MIGRATION POLICY INSTITUTE (August 2011).

¹⁷⁴ Marc R. Rosenblum, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* 15 MIGRATION POLICY INSTITUTE (August 2011).

¹⁷⁵ Agustín Escobar Latapi and Susan F. Martin, editors, *MEXICO-U.S. MIGRATION MANAGEMENT: A BINATIONAL APPROACH* at p. ix (2008).

¹⁷⁶ Peter D. Sutherland, Special Representative of the Secretary-General of the United Nations on International Migration and Development as reported in MPI: *Migration Experts Size up 2006*, MIGRATION INFO. SOURCE (Dec. 1, 2006), [url]

¹⁷⁷ [Cite to earlier text/footnote re cost estimates; see also Jason Ackleson, *Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences*, IMMIGRATION POLICY IN FOCUS, IMMIGRATION POLICY CENTER, Apr. 2005, [url] (discussing how border security has become a growth industry since 9/11 and examining the failed policy choices implemented on the Southwest border).]

¹⁷⁸ Demetrios G. Papademetriou, *The Mexico Factor in US Immigration Reform*, MIGRATION POLICY INSTITUTE 5 (Mar. 1, 2004), available at [url].

¹⁷⁹ Marc R. Rosenblum, *Obstacles and Opportunities for Regional Cooperation: The U.S.-Mexico Case 1*, MIGRATION POLICY INSTITUTE (April 2011). [url]

migration problem, especially so because the trend of Mexican migration to the U.S. has ebbed considerably.¹⁸⁰

In the area of border management Mexico already cooperates with the U.S. relating to trade and security concerns.¹⁸¹ Not including a neighbor that shares a common border in migration issues seems counterproductive.¹⁸² Moreover, to date no credible evidence exists to support any claim of terrorist infiltration along the Southwest border.¹⁸³ As for legitimate national security concerns, the United States will undoubtedly continue to work with Mexico as it has in the past. But as observers have suggested, “[v]iewing border security as a solely national security matter tends to neglect the larger economic and social forces that underpin the flow of Mexicans and others into the United States to fill gaps in the U.S. labor force.”¹⁸⁴ As it has done before—now is the time for a coordinated approach that involves border and *migration* management.

In short, the time has come for policymakers to go beyond physical border policies. Admittedly, this will be a hard sell because nation-states are concerned about their territorial sovereignty, that is, the ability to dictate, via restrictive policy choices, who gets to come in and who will be expelled.¹⁸⁵ Admittedly, overhauling the system may be rough sledding; but the apparent good will and bipartisanship once permeating inside the Beltway may be reinvigorated once politicians appreciate that the demographics of future voters arguably will favor immigration reform.

B. *Global Migration: Beyond Physical Borders*

*A proper understanding of the causes of international migration suggests that punitive immigration and border policies tend to backfire, and this is precisely what has happened in the case of the United States and Mexico.*¹⁸⁶

Recognizing the reality of migration as a global phenomenon is a necessary first step in overhauling the current system. “International migration is a defining feature of

¹⁸⁰ See Damien Cave, *Better Lives for Mexicans Cut Allure of Going North: Economic, Demographic and social changes in Mexico are suppressing illegal immigration as much as the poor economy or legal crackdowns in the United States*, The New York Times published July 6, 2011; see also, PBS NEWSHOUR, Pew Hispanic Center Report: Mexican Migration into U.S. Has Slowed (interview with Jeffrey Passel on April 24, 2012) available at http://www.pbs.org/newshour/bb/law/jand-june12/migration_04-24.html?print.

¹⁸¹ Gustavo Mohar, *Mexico-United States Migration: A Long Way to Go*, MIGRATION POLICY INSTITUTE [page] (Mar. 1, 2004), available at <http://www.migrationinformation.org/feature/display.cfm?ID=209> (re Mexico-U.S. Border Partnership Action Plan signed in March 2002 to create a “smart border”). And the sidebar on p. 90 re Independent Task Force]

¹⁸² Walter A. Ewing, *Border Insecurity: U.S. Border-Enforcement Policies and National Security*, SPECIAL REPORT, IMMIGRATION POLICY CENTER (Spring 2006).

¹⁸³ *Id.*

¹⁸⁴ Jason Ackleson, *Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences*, IMMIGRATION POLICY IN FOCUS, IMMIGRATION POLICY CENTER, Apr. 2005, at 7.

¹⁸⁵ Marc R. Rosenblum, *Obstacles and Opportunities for Regional Cooperation: The U.S.-Mexico Case 4*, MIGRATION POLICY INSTITUTE (April 2011). [url]

¹⁸⁶ Douglas S. Massey, *Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration*, IMMIGRATION POLICY IN FOCUS, IMMIGRATION POLICY CENTER, Sept. 2005, at [page].

the contemporary era of globalization.”¹⁸⁷ And the U.S. is not alone when it comes to managing illegal migration; it is a universal problem.¹⁸⁸ Commentators now speak of approaches to illegal migration in binational terms. U.S. policymakers, perhaps, should consider how European countries are dealing with their illegal migration problems as well.¹⁸⁹ Importing a multinational concept into the policy equation for resolving illegal immigration is a second step. A look across the pond at the European Union relating to the movement of people across European continent might be a third step.¹⁹⁰

As long as there are wealthier countries and individuals in other countries seeking to better their lives, such migration, now a global phenomenon in this advanced technological age of communication and transportation options, will persist indeterminately or at least until developing countries can provide acceptable levels of economic opportunities, social norms, and domestic security.¹⁹¹ Thus countries worldwide seeking strategies to promote more security in border management must also incorporate strategies designed to address their respective illegal immigration problems. This leads us back to the comprehensive immigration debate that is assuredly going to take place in the 113th Congress.

Continually promoting restrictionist policies ignores the reality that globalization has rendered heretofore “closed borders” open, if not *de jure* then *de facto*.¹⁹² As one foreign migration expert observed, “[e]very nation-state has the right to base its immigration policy on truly selfish national interests.”¹⁹³ In the case of comprehensive immigration reform, this same expert offers that any “reform must deal with border control, enforcement of the legality of the workforce, and the national economy’s need for human resources within the context of an aging population.”¹⁹⁴ Such a comprehensive approach

¹⁸⁷ Marc R. Rosenblum, *Obstacles and Opportunities for Regional Cooperation: The U.S.-Mexico Case 2*, MIGRATION POLICY INSTITUTE (April 2011). [url]

¹⁸⁸ See generally, Demetrios G. Papademetriou & Elizabeth Collett, *A New Architecture for Border Management*, MIGRATION POLICY INSTITUTE (March 2011) (“The dual role of nationality and individual characteristics is likely to endure for the foreseeable future as governments implement new border management systems while exploring the potential for greater bilateral and regional collaboration.”).

¹⁸⁹ [Insert specific examples; see also **Top 10 Migration Issues of 2006: Issue #5 All about the Border** published in the Migration Information Source, MIGRATION POLICY INSTITUTE (Dec. 1, 2006), available at <http://www.migrationinformation.org/Feature/print.cfm?ID=536>]

¹⁹⁰ See generally, Philippe Fargues, et. al., *Shared Challenges and Opportunities for EU and US Immigration Policymakers* MIGRATION POLICY INSTITUTE (October 2011).

¹⁹¹ NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 16 (1997).

¹⁹² See, e.g., Marc R. Rosenberg & Kate Brick, *US Immigration Policy and Mexican/Central American Flows: Then and Now* 5-6 (1965-1986: The Construction of an Illegal Regime), MIGRATION POLICY INSTITUTE (August 2011); see also Marc R. Rosenberg, *US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform* (August 2011) (noting that “[t]hroughout the 20th century, and particularly in the 20 years after the end of the US-Mexican Bracero Program, the US immigration system has tolerated a high degree of illegality and tacitly permitted widespread employment in agriculture and other low-skilled sectors of the economy.”).

¹⁹³ MIGRATION INFORMATION SOURCE, *American Immigration Reform from a Scandinavian Perspective*, MIGRATION POLICY INSTITUTE [page] (May 1, 2006), available at <http://www.migrationinformation.org/Feature/display.cfm?id=397>.

¹⁹⁴ *Id.* at [page]

is also consistent with the well-received report by the independent bipartisan task force on immigration that outlined “suggestions to simplify and strengthen U.S. immigration policy.”¹⁹⁵ The key here is flexibility. Congress would do well to heed the task force’s recommendations and enact comprehensive immigration reform to relieve an overburdened and outdated immigration system.

Finally, from a global perspective, adopting an approach of shared responsibility whether bilateral or trilateral is arguably this nation’s best hope for sound policy choices in the area of border security and the management of unauthorized migration. Despite the threat of global terrorism, which is something all nations potentially share, the U.S. needs to reform its immigration laws beginning with the regularization of millions of unauthorized immigrants residing in this country, enact flexible measures that will accommodate the demand for foreign workers in the future, thereby allocating limited resources to areas of concern more efficiently and effectively in a genuine effort to protect the nation’s security and the growth of the U.S. economy. In other words, fix the domestic immigration system first so that the U.S. can participate as envisioned in a new global border and risks management architecture that goes beyond the physical borders.

CONCLUSION

Immigration is “America’s never-ending debate”.¹⁹⁶ Illegal immigration will continue unless and until Congress enacts a flexible immigration system that responds to economic and social realities of the new century. As for border enforcement efforts, the time has come to put aside the symbols and political rhetoric that allow appearances of security and control to substitute for wise and sound policy proposals. Maintaining this nation’s security is best done the old fashioned-way, via intelligence gathering and sharing with pertinent agencies; aided by regional or global initiatives in place and enhanced to track and prevent terrorist infiltration.

Congressional hardliners believe that legalizing the immigration status of unauthorized migrants would reward them for entering the country illegally and thus undermine the rule of law. But maintaining the present status quo, in effect, denying them an opportunity to regularize their unauthorized status is a much greater threat to the rule of law, particularly given the government’s complicity in establishing the illegal regime.¹⁹⁷ Similarly, building fences along the Southwest border will not effectively stop the influx of unauthorized migrants when push-pull factors dominate the practical realities of their choices to migrate to the U.S.; border violence, and other criminal enterprises, such as drug and human smuggling, likely will continue largely unabated and the stakes and associated risks will be exponentially greater.

¹⁹⁵ Marissa Melton, *U.S. Task Force Recommends Radical Changes to Immigration Policy*, VOICE OF AMERICA NEWS, Jan. 19, 2007, <http://www.voanews.com/english/2007-01-19-voa68.cfm> (recommending, among other things, the establishment of an “as-needed” work visa for foreign workers; and devising a path to legal residency for illegal workers already in the country).

¹⁹⁶ Douglas Massey, *America’s Never-Ending Debate: A Review Essay*, 32 POPULATION & DEV. REV. 573 (2006) (reviewing ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006)).

¹⁹⁷ See *supra* Part IV. B. n. 187.

Finally, Congress can no longer indulge its unhealthy fixation on first sealing the border. All border enforcement efforts, among other factors, have not succeeded in stemming unauthorized migration effectively. And the majority of those still residing in the U.S. without lawful status are likely to remain here; and the government is unlikely to deport those millions who remain. Failure to consider the beneficial aspects of according fair and humane treatment to those living and working in this country without authorization would be, arguably, inconsistent with this country's democratic values, freedoms, and notions of fairness.¹⁹⁸ And the Supreme Court in *Arizona v. United States*¹⁹⁹ recently cautioned the federal government as follows:

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.²⁰⁰

In other words, the time has long since passed for Congress to step aside from its fixation on sealing the border first and take responsibility for reforming this nation's immigration laws comprehensively.

¹⁹⁸ See ARISTIDE ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA [page]: "...the resurgence of nativist responses constitutes a more immediate threat to liberal democracy than immigration itself."

¹⁹⁹ Cite as: 567 U.S. ____ (2012)

²⁰⁰ *Id.* No. 11-182 slip op. at 25.