

## The Basic Immigration Choice: Limit or No Limit

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The long-standing dissatisfaction with the U.S. immigration system continues with repeated descriptions of that system as “broken”<sup>2</sup>, but with no agreement on how or why it’s broken or how to fix it. President Obama has promised to make immigration reform a priority of his second term, but the sharp political divisions and competing interests over this issue make the eventual result of presidential reform efforts unpredictable at best.

Both of my parents were immigrants, and many of their friends and neighbors, the parents of the children with whom I grew up, were also immigrants. So I start out with tremendous respect for immigrants and their enormous and undeniable contributions to America.

I’ve been privileged to both teach and administer the U.S. immigration laws which allowed my parents and their friends and neighbors to come to this country. I respect those laws and the effort undertaken to produce an immigration system

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<sup>2</sup> Find a source for this.

that is both faithful to our immigrant traditions and also in the best interests of the country as a whole.

But I've been troubled by our inability not just to reach consensus on immigration policy, but even to have a civil discussion over our choices. Discussions of immigration reform options can easily degenerate into name-calling and confrontation. Why is that?

I've concluded that one reason is our inability to agree on the most basic issue of immigration policy: Should we enforce a numeric limitation on immigration to the United States or not?

Some may assume we in fact have consensus on this issue, but I contend that we do not, and that our failure to even address this basic issue insures destabilizing conflict as we try to "fix" our immigration system.

In this paper I will present the basic choice we have to make, explain why both sides of the basic choice are reasonable, and why the advocates on both sides are entitled to respect. I will suggest why it's a difficult choice to make, and also why it's a binary choice, without any other alternatives.

I will suggest why policy makers avoid taking a position on the basic choice, and instead prefer to respond to short-term political pressures. Finally, I will share

my concerns over the future to which our failure to make the basic choice is leading us.

Limit or no limit? The critical but unasked question in immigration policy is whether we want to enforce a numerical limitation on immigration to the United States or not.

The Pew Research Center has estimated that the U.S. population will grow to 438 million by 2050, up from 296 million in 2005, and increase of 142 million in only 45 years.<sup>3</sup> Where are we going to put another 142 million people? Where will they drive and park their cars? How much more highway pavement will they require? How much more land for housing? How much more fossil fuel will they burn to heat and air-condition their homes? How will we provide good jobs, education and health care for the additional population when we are struggling to provide the minimum requirements for the current population? How will another 142 million people affect the environment and climate change?

Are these questions we should be asking? Or are these questions we can afford to ignore? Should we be trying to slow the growth of the U.S. population, or should we allow population growth without limit and without regard to cost?

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<sup>3</sup> <http://www.pewsocialtrends.org/2008/02/11/us-population-projections-2005-2050/>

Another study by the Pew Research Center reports that the birthrate in the U.S. has now fallen to 1.9 children per U.S. woman, which is below the 2.1 children per U.S. woman required to maintain the U.S. population.<sup>4</sup> But how can the U.S. population be projected to experience rapid future growth at the same time that the birthrate has fallen below the replacement level?

The answer is immigration. The first Pew report makes clear that fully 82% of the 142 million population growth projected between 2005 and 2050 will be attributable to immigrants entering during that time period and their descendants.<sup>5</sup>

That study estimated the foreign-born percentage of the population at 12% in 2005, but projected to increase to 19% by 2050.<sup>6</sup> Twelve percent of the 2005 population would be about 36 million. Using the popular estimate of the U.S. illegal alien population at 12 million, produces the further estimate that one-third of the foreign-born population of the U.S. is illegally present.<sup>7</sup>

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<sup>4</sup> [http://articles.washingtonpost.com/2012-11-29/local/35585758\\_1\\_birthrate-immigrant-women-population-growth](http://articles.washingtonpost.com/2012-11-29/local/35585758_1_birthrate-immigrant-women-population-growth). <http://www.pewsocialtrends.org/2012/11/29/u-s-birth-rate-falls-to-a-record-low-decline-is-greatest-among-immigrants/>

<sup>5</sup> <http://www.pewsocialtrends.org/2008/02/11/us-population-projections-2005-2050/>

<sup>6</sup> <http://pewsocialtrends.org/files/2010/10/85.pdf>, Table I.

<sup>7</sup> I don't want to debate the propriety of using the term "alien" to refer to non-citizens. The term is used throughout the Immigration and Nationality Act, and is specifically defined at 8 U.S.C. Sec. 1101(a)(3) [INA Sec. 101(a)(3)]. CAN YOU FIND A RESPECTABLE CITE TO THE 12 MILLION FIGURE?

Do those statistics suggest that we need to numerically restrict the number of aliens allowed to immigrate to the U.S.? Or alternatively, can we allow the aliens themselves to decide whether to immigrate to the U.S. without numerical limitation?

Why both choices are reasonable and entitled to respect. In the past and present debate over immigration policy, there has been an unfortunate tendency for advocates to demonize their opponents, labeling those who would enforce limits as nativists at best and racists at worst, and alternatively labeling those who would not enforce limits as either foolishly naïve or selfishly focused on material profits and cheap labor to the detriment of American workers.

As a lawyer, I like to think I can argue both sides of any contested issue, and on the issue of whether or not to enforce a numerical limit on immigration, I find both sides to have reasonable if contradictory positions. A host of detailed talking points can be assembled in support of either side.

The case for no numerical limit on immigration. All Americans are either immigrants themselves or descendents of ancestors who came here from somewhere else. (That includes Native Americans.) A great American republic was founded and successfully built on free and unlimited immigration, as reflected

in the famous poem by Emma Lazarus inscribed on the Statue of Liberty.<sup>8</sup> The historical precedent for allowing unlimited immigration to the U.S. is clear.

Furthermore, unlimited immigration serves the libertarian idealism of the American Revolution, freedom for all. Unlimited immigration is utilitarian in the sense of benefiting the largest number of people, including an aging American population in need of more and younger taxpayers. It is consistent with the ideal of social justice, benefiting in particular some of the poorest people and nations in the world.

There is I think a religious justification for unlimited immigration and opposition to enforcing immigration restrictions. Every religious tradition teaches some version of the Golden Rule advocating respect for others. Christians might succinctly ask, “What would Jesus do about immigration policy?”

Finally, we have learned from experience that trying to enforce a numerical limit on immigration is both very expensive<sup>9</sup> and very difficult. The political

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<sup>8</sup> “Give me your tired, your poor,

Your huddled masses, yearning to breath free,

The wretched refuse of your teeming shore,

Send these, the homeless, tempest tost to me,

I lift my lamp beside the golden door.”

<sup>9</sup> A recent Migration Policy Institute study estimated \$18 billion spent on immigration enforcement in 2012, and a total of \$187 billion spent over the 26 years since the 1996 immigration law reforms.

process of setting the numerical limit involves difficult decisions not only on how many immigrants to allow, but also what kinds of immigrants should be preferred and actually chosen to immigrate. Do we want more high skilled immigrants, low skilled agricultural workers, or family relatives of those already here regardless of skills? Lobbyists are hired to represent the different and opposing interests in the process.

The case for enforcing a numerical limit on immigration. The historical precedent for open immigration is no longer applicable. The frontier is long gone, and the country is fully settled and populated. We live in a world where both communication and travel are easier and cheaper than at any time in the past, increasing the demand for immigration. And we live in a world where foreign terrorism is a constant threat, which could be reduced by limiting immigration and the size of the “haystack” in which we have to search for “needles”.

The U.S. is now a social welfare state struggling and having to borrow to pay the social costs of the population which is already here. Augmentation of the population through additional immigration increases the social costs without sufficient offsetting revenue. That true especially for state and local government

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[http://www.migrationpolicy.org/news/2013\\_1\\_07.php](http://www.migrationpolicy.org/news/2013_1_07.php). But see the Center for Immigration Studies response questioning those numbers. [http://cis.org/Announcements/Immigration-Enforcement-United-States-Rise-Formidable-Machinery?utm\\_source=E-mail+Updates&utm\\_campaign=5369b036db-MPI+Jessica&utm\\_medium=email](http://cis.org/Announcements/Immigration-Enforcement-United-States-Rise-Formidable-Machinery?utm_source=E-mail+Updates&utm_campaign=5369b036db-MPI+Jessica&utm_medium=email).

which incurs cost for education, emergency Medicaid, and incarceration of criminal aliens,<sup>10</sup> but also for the federal government.<sup>11</sup>

A 2009 Pew Hispanic Center report found that unauthorized immigrants are disproportionately likely to be poorly educated and living in poverty.<sup>12</sup>

Immigrant workers compete with some native workers for jobs. In times of high unemployment they hold down wages and undermine labor standards.<sup>13</sup>

Maybe abandoning the numerical limit on immigration would be a bold move that would transform America into the clear world leader in everything. But most Americans are unlikely to support betting the republic on that gamble.

Why limits or no limits is a hard choice. Current U.S. law provides for a complex statutory formula setting a numerical limitation on immigration to the United States in various categories and preferences.<sup>14</sup> That formula results in approximately a million legal immigrants entering the U.S. every year.<sup>15</sup>

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<sup>10</sup> See generally Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments (December 2007). <http://www.cbo.gov/publication/41645> .

<sup>11</sup> Steven Camarota, The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget (Center for Immigration Studies 2004). <http://www.cis.org/High-Cost-of-Cheap-Labor> .

<sup>12</sup> <http://www.pewhispanic.org/files/reports/107.pdf> .

<sup>13</sup> CAN YOU FIND AND CITE SUPPORT GENERALLY FOR THIS?

<sup>14</sup> See generally 8 U.S.C. Sec. 1151-1153 [I.N.A. Sec. 201-203].

<sup>15</sup> Yearbook of Immigration Statistics: 2011. <http://www.dhs.gov/yearbook-immigration-statistics-2011-1> . See Table 1, Persons Obtaining Legal Permanent Residence Status.

Immigration to the U.S. has been restricted since enactment of the Chinese Exclusion Act in 1882. It has been numerically limited since the enactment of temporary national origins quotas in 1921, followed by permanent national origins quotas in 1924.<sup>16</sup>

So abandoning the limit on immigration and reverting to the open immigration policy that existed before 1882 would be a radical departure from U.S. immigration policy of more than a century, a difficult choice to make even for a proponent of no limits on immigration.

On the other hand, actually enforcing numerical limits on immigration to the U.S. has become increasingly unpopular. Enforcement requires turning away would-be immigrants who often resemble or remind us of our ancestors, not because they are bad people, but simply because their admission would exceed the numerical limit enacted into law. And if those persons should enter illegally or remain illegally after a temporary visit, enforcement of the numerical limit on immigration would require their deportation, again not because they are bad people, but simply because allowing them to stay would exceed the number of legal immigrants authorized by law.

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<sup>16</sup> Select Commission on Immigration and Refugee Policy, Staff Report 161-216 (1981), reprinted in Aleinikoff et al., *Immigration and Citizenship: Process and Policy* (6<sup>th</sup> ed., Thomson West, 2008) pages 164, 170.

Enforcement of the numerical limit on immigration has become so unpopular that the Obama administration on its own initiative has unilaterally decided not to enforce the numerical limit against violators who are not felons or national security threats or repeat immigration violators,<sup>17</sup> and offers work authorization and temporary legal status to certain violators who entered as children.<sup>18</sup>

Policy makers avoid the binary immigration choice. Should we set and enforce a numerical limit on immigration or not? Because the choice is hard, policy makers don't want to make it. They don't want to abandon the policy of a numerical limit on immigration, but they don't want to enforce it either.

Actual enforcement of any numerical limit on immigration would be difficult as long as the number is set lower than the demand for immigrant visas. Enforcement requires not just chasing and catching violators, but also trying to deter other violators from making the attempt, by cutting off access to the jobs, documents (e.g., driver's licenses), and amenities (like in-state tuition) that make violation possible and worthwhile.

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<sup>17</sup> John Morton memo, June 17, 2011. <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>18</sup> Janet Napolitano memo, June 15, 2012. <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

Why aren't there other, easier choices? Simply increasing the numerical limitation isn't a third choice. We are still left with the binary choice of whether we are willing to enforce that limitation against violators or not. Similarly, allowing the "market" to determine the numerical limitation is not really a third choice, just a way to re-phrase abandonment of the numerical limitation, which is fine only if that's what we really want.

The politics of immigration reform also argue against making a hard choice on whether or not to set and enforce a numerical limit. Polls have repeatedly suggested that Americans do not favor increased immigration, and actually think we have too much immigration.<sup>19</sup> But for most Americans the desire for reduced immigration is a secondary issue overridden by more important concerns about jobs or taxes or the economy or schools or something else.

Meanwhile, a constituency of recent immigrants and the children of immigrants has grown up for which expanded immigration really is a primary political issue, because they would like to have their family members join them as legal immigrants, to reunite their families in the United States. Politicians understandably do not want to offend this constituency focused on immigration in order to address the secondary concerns of those who favor reduced immigration.

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<sup>19</sup> CITE CIS STUDY.

The political reality is that the proponents of increased immigration hold their opinion more passionately than those favoring reduced immigration, for which immigration is just one among many issues. Elected officials understand this, which dissuades them from supporting enforcement of immigration limits supported by the majority of their constituents.