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U.S. Immigration Policy: Contradictions and Projections for the Future

KITTY CALAVITA*

It would seem to be a dangerous time to make predictions about the future of U.S. immigration policy. The global economy is undergoing rapid and wrenching changes, and the politics of immigration has rarely been so volatile. But, I start from the premise laid out by Professor Scanlan that while history cannot predict the future, it at least allows us to make plausible guesses.¹

In this brief commentary I will address some of the same questions raised by Professor Scanlan and see what further insights we can glean from the historical pattern. Most important, what will become of immigration barriers in the future, particularly given the globalization of capital and the increasing free trade of goods? And second, is democratic rule antithetical to or destructive of such barriers?

In addressing these issues, my comments will center on another question not posed by Professor Scanlan. One of the most conspicuous patterns in the history of U.S. immigration policy is a pronounced gap between the stated intent of immigration policies and their actual effects. The question I wish to raise here is, how can we best explain this gap? I will then use the answer to this question to make projections about globalization and immigration barriers in the future.

Two illustrations of this gap in immigration policy between stated intents and outcomes may be useful. In 1885, Congress passed the Alien Contract Labor Law, proclaiming that it would be the "salvation" of U.S. labor against the mass immigration of impoverished workers from Europe.² In the fifteen years following its enactment, the law barred fewer than one-half of one percent of the immigrant flow, which continued to increase

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1. John Scanlan, *A View from the United States—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 *IND. J. GLOBAL LEGAL STUD.* 79 (1994).

2. Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (repealed 1952); KITTY CALAVITA, *U.S. IMMIGRATION AND THE CONTROL OF LABOR: 1820-1924*, at 41-51 (1984).

many times over. Such a gap between the law in the books and the law in action is perhaps even better illustrated by the fact that, with the exception of a few years during the Bracero Program in the late 1950s and early 1960s, policies aimed at restricting undocumented immigration have rarely had any effect on the size of the flow.³

Some observers have explained this failure of U.S. immigration policy as due to the inherent difficulty of modifying through law that which is essentially economically driven.⁴ Others have explained it as an indication of the incompetence or underfunding of the U.S. Immigration and Naturalization Service (INS).⁵ At least one scholar argues that it stems from the attempt to balance competing, equally compelling principles—"right versus right."⁶ It seems unlikely that any single factor or dynamic can account for the pattern of discrepancies between intent and outcome in U.S. immigration policy history. I propose instead to examine a set of three contradictions or "paired oppositions" which, taken together, might yield insight into not only the history of U.S. immigration policy, but also its future.

The first opposition I wish to examine is that between employer and worker interests on the issue of immigration, which makes a "national" interest difficult to identify. In the late nineteenth century the new U.S. industrialists applauded the influx of immigrants from Europe, as these immigrants provided the cheap labor with which to fuel the Industrial Revolution. Native-born workers and immigrants of previous eras were less enthusiastic, precisely because immigration allowed employers to stabilize wages and break the grip of union labor (a primary virtue of immigration

3. The Bracero Program brought in over 5 million Mexican farm workers on contract to growers and ranchers in the southwest United States between 1942 and 1964. After the U.S. Immigration and Naturalization Service deported thousands of undocumented Mexicans during Operation Wetback in 1954, and convinced growers to employ only legal "braceros," the flow of illegal immigration from Mexico temporarily subsided. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); JUAN RAMÓN GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980).

4. See, e.g., Robert Bach, *Mexican Immigration and U.S. Immigration Reforms in the 1960s*, 7 *KAPITALISTATE* 73 (1978); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of A Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615 (1981).

5. See, e.g., JOHN CREWDSON, *THE TARNISHED DOOR: THE NEW IMMIGRANTS AND THE TRANSFORMATION OF AMERICA* (1983); *Department of Justice Authorization and Oversight for Fiscal Year 1981: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1980).

6. Michael S. Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 *FOREIGN AFF.* 21 (1980).

from the employer's perspective).⁷ In 1885, Congress responded with the Alien Contract Labor Law, which barred immigrants with preexisting contracts. While the law was presented as a way to curtail the immigration through which "greedy capitalists" reduced wages, it was carefully crafted *not* to interrupt the immigration that Andrew Carnegie called "a golden stream which flows into the country each year."⁸

A century later, the employer sanctions provision of the Immigration Reform and Control Act of 1986 repeats the pattern.⁹ Responding to the public demand to "regain control of the border," but unwilling to "harass" employers who depend on immigrant labor, Congress passed a symbolic measure with little meaningful potential.¹⁰ The point here is not just that immigration control is difficult, but that Congress's inability to respond effectively to undocumented immigration has less to do with the difficulties of finding a *solution* than it does with arriving at an agreement as to what exactly the *problem* is. Thus the first paired opposition is that which exists between workers and employers, which precludes a consensus and generates political incentives to enact symbolic measures with little impact.

The second paired opposition is to be found in the political economy, or more specifically, the "politics of the economy." A tension seems to exist between the need of part of the economy for an essentially Third World work force, and the political unwillingness to officially endorse or recognize that need. Since the 1940s illegal immigration to the United States has been high. Undocumented workers have performed much of the low-wage labor in certain sectors of the economy, such as agriculture, the garment industry, construction clean-up, hotels, and restaurants.¹¹ Wages and working conditions in these sectors (including violations of safety and health laws, take-home work, and substandard wages) are insufficient to

7. See CALAVITA, *supra* note 2; JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955).

8. CALAVITA, *supra* note 2, at 49, 52.

9. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

10. See NANCY HUMEL MONTWEILER, *THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, LEGISLATIVE HISTORY* (1987); Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC'Y REV. 1041 (1990).

11. See Leo R. Chavez, *Settlers and Sojourners: The Case of Mexicans in the United States*, 47 HUM. ORGANIZATION 95 (1988); Wayne A. Cornelius, *The Persistence of Immigrant-Dominated Firms and Industries in the United States: The Case of California* (1980) (unpublished manuscript, on file with author); UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980s (Frank D. Bean et al. eds., 1990).

attract legal workers and U.S. citizens to these jobs in which Third World immigrants are concentrated. With U.S. policymakers unwilling either to enforce labor laws to eliminate these working conditions, or to officially recognize the existence of such jobs by importing a legal immigrant workforce, the jobs and the immigrant workers who fill them go underground. In other words, policymakers are not prepared to send the message that the U.S. economy produces jobs that only Third World workers find acceptable, by designing guestworker or other programs to satisfy the demand. The result is a clandestine movement—illegal immigration—to satisfy an economy's labor needs, the margins of which are politically unpalatable.

The Bracero Program is a good example of this dynamic. From the 1940s through 1964, millions of Mexican braceros were imported through bilateral agreements to work for temporary periods in southwestern agriculture. The program was closed down in 1964 in part because of continuing exposés of the deplorable working conditions and other abuses. The Kennedy Administration, known for its concern for civil rights, was unwilling to put its implicit stamp of approval on these conditions and therefore terminated the program. But, when the government got out of the business of importing braceros, the abuses in southwest agriculture did not stop; instead, illegal immigrants replaced the braceros of the past.¹² It was the political unwillingness to take responsibility for prevailing agricultural working conditions—either by improving them or by endorsing them through the operation of the Bracero Program—that turned legal braceros into today's undocumented farm workers.

A third contradiction seems important for understanding the gap between the law in the books and the law in action. That is, an inherent tension may exist between border control on the one hand, and the liberal democratic principles upon which western democracies are grounded on the other. There are at least two levels to this contradiction. First, effectively controlling the borders and/or removing those undocumented people already inside U.S. territory would require draconian measures antithetical to basic constitutional principles and human rights. The difficulty the Clinton Administration has had in handling the Haitian refugee problem is a good illustration. Having criticized then-President Bush in his electoral campaign and insisting that he

12. See CALAVITA, *supra* note 3, at 141-66.

would not violate Haitians' right to apply for asylum, President Clinton nevertheless soon faced the very real tensions between human rights and border control, and ended up following the same basic policy as his predecessor.¹³

While the right of Haitians to apply for asylum may be sacrificed without political repercussion, it is less likely that the police measures that would be required to deport massive numbers of undocumented immigrants would be tolerated. While Operation Wetback in the 1950s succeeded in rounding up and deporting most of the undocumented Mexicans in the southwest, it also resulted in the inadvertent deportation of some legal residents and U.S. citizens.¹⁴ It is true that, as Schuck has so aptly put it, "Immigration [law] has long been a maverick, a wild card" in that it is "radically insulated" from many norms of due process and administrative procedure.¹⁵ But, it is unlikely that U.S. citizens would accept the ongoing inconvenience and restrictions on their freedom entailed in the scale and scope of police action—round-ups, checkpoints, barricades, and inevitable mistakes such as citizen deportations—required to gain true control of the border.

The second level of this tension between border control and democratic principles involves a more general contradiction between the concepts of inalienable human rights and national sovereignty. Perhaps the most basic premise underlying the concept of democratic rule in the U.S. context is that certain civil liberties and freedoms are inalienable rights of U.S. citizens. Among these rights is freedom of movement. Thus, no restrictions are placed on travel within the U.S. nor is there any restriction—absent some exceptional circumstance such as pending criminal charges—on the ability of a U.S. citizen to leave the country. This freedom of movement is so integral to our concept of democracy that countries infringing on this right—such as the former Soviet Union—are considered *ipso facto* "totalitarian."

Further, the Founding Fathers maintained that "[all men] are endowed by their Creator" with "unalienable rights." In other words, these liberties and freedoms are the rights of U.S. citizens because they are inalienable

13. David G. Savage, *Haitian Intercept Policy Backed by High Court*, L.A. TIMES, June 22, 1993, at A1.

14. See sources cited *supra* note 3.

15. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

rights of *all* men. Of course, at the signing of the Declaration of Independence and later the U.S. Constitution, “all men” in practice referred to a minority of the U.S. population, excluding women, African-Americans, Native American Indians, and others. But, the fact that the principle was violated in practice does not detract from the point that the rights accruing to U.S. citizens were considered by the Founding Fathers to be “endowed by the Creator,” and were therefore basic *human* rights, not merely rights of citizenship.

However, side by side with the right of free movement is the concept of national sovereignty. This concept of national sovereignty is so well-entrenched that the right of a nation-state to determine who shall enter its territory is virtually absolute and considered unproblematic. The Supreme Court asserted in *Fong Yue Ting v. United States* that the ability to exclude aliens was inherent in sovereignty.¹⁶ Two decades later, as Congress was considering quota restrictions, members of the House Committee on Immigration and Naturalization agreed that they had the right to exclude anyone for any purpose: “If we wanted to be arbitrary about it . . . we could refuse to admit red-haired men.”¹⁷ Justice Frankfurter, writing a concurring opinion in *Harisiades v. Shaughnessy*, put it this way: “Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State.”¹⁸

It seems then that inalienable human rights, such as the right of free movement, do not apply to aliens. Not only are substantive and procedural rights of aliens within U.S. territory subject to restrictions, but more important here, those outside U.S. territory have no presumed right to enter. Thus, while exit rights retain a central place in democratic rule, their corollary—entrance rights—do not.

This conflict between the concepts of national sovereignty and the inalienable human right of free movement is rarely noticed, testifying in part to the unquestioned status of national sovereignty. Also contributing to the absence of controversy is that, unlike the police measures that would be

16. *Fong Yue Ting v. United States*, 142 U.S. 698, 705 (1893).

17. *Deportation for Acts Tending to Incite Disloyalty and Denial of Public Land Privileges to Certain Aliens: Hearing Before the House Comm. on Immigration and Naturalization*, 66th Cong., 1st Sess. 14 (1919).

18. *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring).

required to deport large numbers of illegal aliens already within U.S. territory, legislation barring aliens outside its boundaries from legal entrance inconveniences few U.S. citizens. Such exclusion is thus carried out with little debate and relative political impunity. One product of these legal barriers, which are justified on the grounds of national sovereignty, is plentiful illegal immigration.

To summarize thus far, the recurring gap in U.S. immigration policy between the goals of the law and its practical effects is the result of contradictory interests between workers and employers; a political unwillingness either to eliminate or officially sanction the working conditions in those parts of the economy in which Third World immigrants are concentrated; and, the inherent tensions between border control and inalienable human rights. Because these paired oppositions are structural in nature and inhere in the political economy of a capitalist democracy, their ramifications will continue to be felt in the future. The current anti-immigrant backlash, particularly strong in California, has yielded some strong political language, and even some legislative changes, that aim to “regain control of the border.” Some of these measures—such as the proposals to bar undocumented immigrants from receiving emergency medical care or attending public schools—violate basic human rights and constitutional principles. None, however, are likely to close the gap between intent and outcome, nor to affect in any significant way the scale of undocumented immigration in the future.

Finally, might economic globalization and free trade reverse the recurring pattern by dismantling immigration barriers and legalizing the illegal movement? I agree here with Professor Scanlan that where immigration is concerned, globalism is likely to leave national sovereignty almost exactly where it found it.¹⁹ It may seem curious that just as the North American Free Trade Agreement (NAFTA) lowers barriers to the free movement of capital and goods, the Clinton Administration has announced a two-year “border initiative”—more secure fences, an enhanced Border Patrol, improved sensors and mobile infrared scopes—in an effort to control the movement of people.²⁰ Despite all the “globalism” talk about breaking down walls and collapsing boundaries, immigration talk is increasingly

19. Scanlan, *supra* note 1.

20. Ronald J. Ostrow, *U.S. Plans Effort to Stem Illegal Entry at Border*, L.A. TIMES, Feb. 3, 1994, at A1.

restrictionist. How can we make sense of this, particularly in light of the discussion above on the political economy of illegal immigration?

Again, historical perspective may help. In the nineteenth century, early U.S. capitalists were protected by high tariffs on imported goods, which effectively preserved the U.S. market for products manufactured in the United States. Until the Civil War, these tariffs averaged about twenty-five percent; when the Civil War raised the costs of production in the United States, tariffs on imported goods reached an average of forty-seven percent, where they stayed for the rest of the century.²¹ U.S. workers who unsuccessfully sought immigration restrictions in the mid-nineteenth century often pointed to the discrepancy that while employers were protected by tariffs from competition with foreign goods, the open-door immigration policy subjected workers to unrestricted competition with foreign labor.²²

Contemporary "globalism," with its open door on goods and a restrictive posture on immigration, is the mirror image of this nineteenth century pattern. The reversal is not coincidental but is related to a radical change in the structure and operation of late twentieth century capitalism. Most important is capital mobility, which is, after all, the primary component of today's globalism. From the perspective of the U.S. worker, capital mobility often means capital flight, accompanied by two interrelated transformations. First, capital mobility allows many manufacturers to go to the source of cheap labor rather than depending on immigration as early U.S. manufacturers did.

Second, the U.S. economy has undergone de-industrialization. As Professor Scanlan argues, this phenomenon is accompanied by a need for highly educated and skilled workers as high-tech enterprises replace the assembly lines of the past. At the same time, however, a large proportion of new jobs are minimum-wage and/or part-time and many are in the expanding service sector. A study prepared for the Congressional Joint Economic Committee estimated that close to sixty percent of the workers added to the labor force between 1979 and 1984 earned less than \$7,000 per year.²³ A new Commerce Department study reveals that while in 1979 twelve percent of full-time workers in the U.S. earned \$13,000 or less, by

21. BERNARD A. WEISBERGER, *THE NEW INDUSTRIAL SOCIETY* 26-27 (1969).

22. See CALAVITA, *supra* note 2; see also SEYMOUR MARTIN LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790-1970* (1970).

23. David M. Gordon, *Minimum Wage Hike's Real Payoff*, L.A. TIMES, May 12, 1987, at IV-3.

1992 that percentage had risen sharply, to eighteen percent.²⁴ Approximately thirty percent of the U.S. workforce is now composed of "contingent" workers doing part-time work or on short-term, terminal contracts.²⁵ In 1982, approximately one out of four new jobs was for part-time or temporary work; a decade later, fully half of all new jobs were for such contingent work.²⁶

In the past, increased unemployment levels triggered immigration restrictionism and, at the same time, temporarily reduced the demand for immigrant workers and thus slowed down the flow of immigration.²⁷ Historically, the ebbs and flows of immigration have closely paralleled the business cycle. When unemployment has increased, demand for new immigrant labor has dried up, and the immigration flow has contracted.²⁸ However, the current economic restructuring simultaneously maintains high levels of chronic unemployment and underemployment *and* perpetuates the demand for immigrant labor as the proportion of low-wage and contingent work increases.

Open borders for capital are a prerequisite of the new globalized economy, as are open borders for the movement of manufactured goods back to consumers in the U.S. and other developed countries. But, the open borders for labor characteristic of nineteenth century America have closed. The demand for immigrant labor has not disappeared in the restructured U.S. economy nor has the movement of labor abated. The de-industrialized, increasingly service-oriented economy in the U.S. continues to absorb infusions of Third World labor, but immigration restrictions illegalize a substantial portion of the flow of immigration. In part, this illegalization is no doubt due to the politics of symbolic lawmaking discussed above; it may also be that "contingent"—that is, illegal—immigrant workers fit well into the restructured economy of the late twentieth century with its high levels of contingent, low-wage work and chronic unemployment. One thing is

24. Robert A. Rosenblatt, *Survey Finds Sharp Rise in Working Poor*, L.A. TIMES, Mar. 31, 1994, at B5.

25. Marshall Ingwerson, *Workers Brave New Job Frontiers*, CHRISTIAN SCI. MONITOR, Mar. 24, 1993, at 9, 12.

26. Peter T. Kilburn, *New Jobs Lack the Old Security in Time of 'Disposable Workers'*, N.Y. TIMES, Mar. 15, 1993, at A1, A15.

27. See WAYNE A. CORNELIUS, *AMERICA IN THE ERA OF LIMITS: MIGRANTS, NATIVISTS, AND THE FUTURE OF U.S.-MEXICAN RELATIONS* (Center for U.S. Mexican Studies Working Paper No. 3, Univ. of Cal., S.D., 1982).

28. See CALAVITA *supra* note 2, at 20-21.

clear: neither the demand for immigrant labor nor the anti-immigrant sentiments of a population facing economic restructuring and increased levels of economic uncertainty seem likely to change in the near future. Thus, the irony is that in this period of globalization marked by its free movement of capital and goods, the movement of labor is subject to greater restrictions than at the dawn of the Industrial Revolution.