



Federal Immigration Reform, Texas-Style

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About the Author

Clint Bolick is a senior fellow with the Texas Public Policy Foundation and serves as the Goldwater Institute’s Vice President for Litigation.

In a recent profile, the New York Times said that Bolick is “known for his aggressive litigation to defend individual liberties.” He has argued and won cases in the United States Supreme Court, the Arizona Supreme Court, and state and federal courts from coast to coast. He has won landmark precedents defending school choice, freedom of enterprise, and private property rights and challenging corporate subsidies and racial classifications.

Before joining the Goldwater Institute in 2007, Bolick was co-founder of the Institute for Justice and later served as president of the Alliance for School Choice.

Bolick has authored several books, most recently with Governor Jeb Bush, *Immigration Wars: Forging an American Solution*. Other titles include *Death Grip: Loosening the Law’s Stranglehold Over Economic Liberty* (2011) and *David’s Hammer: The Case for an Activist Judiciary* (2007). In addition to his work at the Goldwater Institute, Bolick serves as a research fellow with the Hoover Institution.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation’s mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

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Federal Immigration Reform, Texas-Style

by Clint Bolick, Senior Fellow

Introduction

Of all the states, Texas arguably has the most at stake in the debate over federal immigration laws. As one of only four states that shares a border with Mexico, Texas has a tremendous interest in border security, both in terms of public safety and the costs of illegal immigration. And as one of the few states whose economies are heavily invested in both high-tech industries and agriculture, Texas has much on the line when it comes to the flow of both high-skilled and low-skilled immigrants.

Unfortunately, current federal immigration policy serves neither Texas' nor the nation's interests very well. Misguided federal policy insures that Texas endures disproportionate burdens of immigration while failing to fully experience its potential benefits.

The United States is the only major nation whose immigration policy is based primarily on family preferences, which account for nearly two-thirds of all legal immigrants. The result is that many aspiring immigrants who want to make a living in the United States must either enter illegally or cannot enter at all. Many are turning instead to competitor nations like Canada, New Zealand, and Chile. At the same time, family preferences insure that many legal immigrants to the United States will not soon contribute to our economic well-being, and some never will. At the same time, the dearth of opportunities for work-based immigration encourages illegal immigration.

Texas and Immigration

Texas has unique immigration-related needs, challenges, and benefits. Increasingly, Texas is home to immigrants. Its foreign-born population is steadily rising, from 9 percent of all Texas residents in 1990 to 13.9 percent in 2000 and 16.4 percent in 2011.¹ The immigrants' descendants in turn are producing an ethnically diverse Texas population. The percentage of Hispanic Texans has grown from 25.5 percent in 1990 to 32.1 percent in 2000 and 38.1 percent in 2011. Similarly, the percentage of Texans of Asian descent has more than doubled during that same period, from 1.8 percent in 1990 to 2.7 percent in 2000 and 3.9 percent in 2011.²

Texas shares a 1,254 mile-long border with Mexico, nearly two-thirds of the U.S.-Mexico border.³ Not surprisingly given the porous border, many of Texas' immigrants entered the country illegally. In 2008, the Department of Homeland Security reported that Texas had 1.68 million illegal immigrants, compared to 10.8 million in the nation.⁴ Texas is the only one of the six states with the largest migration of illegal immigrants that did not experience a decline in illegal immigration between 2007-11. Unlike the other five—Florida, New Jersey, California, Illinois, and New York—Texas had a small but steady increase in illegal immigrants during that time. The explanation appears to be opportunity. As of 2013, unemployment in Texas was only 6.4 percent, a full percentage point below the national average.⁵

States bear the greatest costs of illegal immigration. Although illegal immigrants (and most legal immigrants for varying periods of time) are excluded from in most federal welfare programs, states are required to provide two costly services: by virtue of a U.S. Supreme Court decision, illegal immigrant children are entitled to free public education; and under federal statute, illegal immigrants are entitled to emergency room care. Additionally, of course, children born in the United States to illegal immigrants are U.S. citizens, entitling them to all social services and welfare benefits.

The price tag is sizable. A 2006 study found that the cost for Texas K-12 education provided to children of illegal immigrants was \$3.7 billion annually, accounting for 10.5 percent of local public school budgets.⁶ Likewise, the annual cost for hospitals to provide care to noncitizens was \$393 million annually.⁷

The massive black market system is the inevitable product of an immigration system that limits and discourages work-based immigration.

Texas also chooses to provide social services to illegal immigrants that are not mandated by the federal government. For instance, the state provides in-state public college tuition to illegal immigrants who graduate from public high schools, at an annual cost of \$34.5 million.⁸ Texas has elected to provide food stamps to noncitizens, which costs \$107.4 million annually.⁹ And it spends \$1.65 million each year to provide Temporary Aid for Needy Families.¹⁰

Fortunately, unlike other states, illegal immigrants in Texas have lower incarceration rates than native-born residents. Despite having a large immigrant population, El Paso has one of the lowest crime rates in the United States.¹¹

At the same time, Texas' economy is heavily dependent on immigrants, both legal and illegal. Texas is one of the few states that combine a strong agricultural economy with a vibrant knowledge economy, two of the industries that are most reliant on immigrant workers. As a whole, immigrants account for about 21 percent of the Texas workforce.¹² In 2010, illegal immigrants were estimated to account for 6.7 percent of the state's population, but a full 9 percent of its labor force.¹³

Texas is the fourth-largest exporter of agricultural products in the U.S., and the agriculture industry accounts for one out of every seven jobs in the state.¹⁴ Illegal immigrant labor plays a critical role in the state's agricultural economy. "Let's just cut to the chase on this thing," remarks Steve Pringle, legislative director for the Texas Farm Bureau. "Eighty-five percent of the agricultural labor that goes on in the State of Texas . . . is done by either undocumented or illegally documented people. If and when that labor supply is not there, that production simply goes out of business."¹⁵

Texas' high-tech economy also relies heavily on immigrant workers. In 2011, the U.S. Department of Labor processed 27,775 H-1B specialty high-skilled visas for foreigners to work in Texas. The jobs for which they were employed paid an average annual salary of \$67,942—more than twice as much as the per capita Texas income.

Between 2007-10, in the midst of national economic recession, 257,000 immigrants opened businesses in Texas, accounting for nearly one-third of all new businesses in the state during that period.¹⁶ Meanwhile, in 2011, nearly three-quarters of all of the patents coming out of the University of Texas system had at least one foreign-born creator.¹⁷

Because of its location as a border state, and because it has both strong agricultural and high-technology economies, Texas is perhaps more impacted by federal immigration policy than any other state. Unfortunately, our dysfunctional federal immigration policy imposes disproportionate burdens on Texas without allowing it to reap the full economic benefits that could flow from sensible immigration policy.

Immigration Policy and Practice Today

Under the current immigration system, it is often much easier to hire workers illegally than legally. On the one hand, the numbers of immigrants who lawfully can be employed are artificially limited by federal policies and the process to employ them is cumbersome and expensive. On the other, the risks and consequences of hiring illegal workers are fairly minimal. As a result, our current immigration system creates a powerful incentive for a black market for immigrant workers.

Current federal immigration policy traces back to the 1950s, and has been altered so many times that the result is a massive, complex, incoherent statutory monstrosity that makes Obamacare look simple and rational.

Our current conundrum largely results from a fundamental shift in federal immigration policy in the mid-1960s that was largely unnoticed and whose far-reaching consequences were unanticipated. Historically, American immigration policy has focused on admitting able-bodied newcomers who could support themselves, contribute to the economy, and not require public assistance. But like most countries, a central tenet of American immigration policy has always been family reunification—that is, reuniting spouses and children with their families. Traditionally in the United States and in other countries, "family" has meant nuclear family. But the Immigration Act of 1965 expanded the definition of family—for purposes of preferential admission to

the United States—to encompass both parents and siblings. In turn, of course, the parents and siblings became entitled to preferences for their spouses, children, parents, and siblings, resulting in a phenomenon called “chain migration.”¹⁸

In the subsequent decades, chain immigration has become the driving and dominant force in legal American migration. It has produced numerous unintended yet adverse consequences. First, instead of bringing in productive, able-bodied legal immigrants who will not quickly become dependent on public assistance, many legal immigrants are either elderly or children, thus requiring social services while not contributing to the economy. Second, because the number of legal immigrants has stayed relatively stable, family preferences have crowded out work-based immigrants. The dearth of work-based immigrants in turn produces two adverse consequences: first, because we are unable to import enough high- and low-skilled workers, we are increasingly exporting both high-tech and agricultural sector jobs; and second, because there are insufficient avenues for legal work-based immigration, many workers come here illegally.

The consequences of extended-family preferences are exacerbated by the fact that there is no “line” for aspiring Americans to get into. If people wishing to become Americans aren’t eligible for family preferences and can’t squeeze into the small number of available work-based visas, few legal avenues exist to come to the United States and become eligible for citizenship. The fact that no line exists contributes to the problem of illegal immigration. Outside of the family preferences, there are three main types of work and skill-based visas.

Each year approximately 80,000 H-1B visas are issued. H-1B visas are limited to immigrant workers with at least a bachelor’s degree in specified fields, and 20,000 are reserved for foreign graduates receiving master’s degrees or doctorates from American universities. The employer must apply and the process can cost about \$50,000 per worker, hence most H-1B visas are obtained by large companies. Any company with immigrants comprising 15 percent or more of its workforce must prove “good faith” efforts to hire domestic workers, and all immigrant workers must be paid at least the “prevailing wage.” When demand exceeds supply—as it nearly always does—a lottery is held to award visas. Once the visa is issued, the immigrant worker cannot change employers without starting the visa process all over. Only about 30,000 H-2A visas are issued each year for



temporary or seasonal agricultural work, reflecting only a fraction of demand. Employers must apply for the visas and must document active efforts to recruit domestic workers. Another 66,000 visas are issued each year for temporary nonagricultural workers.

By contrast, employers can hire “authorized” workers in unlimited numbers, for whatever compensation they wish, without the bureaucratic process required for visas. The vast majority of immigrant agricultural workers are hired with false documents or “under the table.”

Current law requires all employees to complete an I-9 form. That form requires workers to produce documents that establish their identity and authorization to work, such as driver’s licenses, passports, birth certificates, voter identification cards, green cards (permanent resident status), or Social Security cards—many of which easily can be falsified. The employer only need verify that the documents “reasonably appear on their face to be genuine and to relate to the person presenting them.” Indeed, any employer imposing rigorous document requirements may be found guilty of discrimination. Federal authorities monitor compliance through I-9 audits. Employers can be sanctioned for “harboring” illegal workers. The fines range from \$375 per illegal worker for the first offense up to a maximum of \$1,600 per worker in a third or subsequent offense. If a pattern and practice of harboring illegal workers is shown, the fine increases to \$3,000 per worker and/or six months in jail.¹⁹

The fines are relatively light compared to the costs and burdens of hiring immigrant workers legally—if they can be hired at all. Between 2003-08 during the Bush Administration, only \$1.5 million in fines were assessed nationally. The Obama Administration has stepped up the fines to \$52.7 million from 2009-12, but many of the fines are reduced based on hardship.²⁰ At the same time, unauthorized workers are rarely deported unless they have committed other crimes. But those who falsify Social Security cards pay into the system without any prospect of reaping benefits. Some illegal immigrants are finding creative ways to circumvent laws prohibiting employment. They are starting their own businesses, creating limited liability corporations, or working as independent contractors. Companies are not required to verify employment eligibility if they contract with other companies or hire independent contractors. Following Arizona's 2007 law mandating employers to use the E-Verify system determine employment eligibility, tens of thousands of illegal immigrants became self-employed by creating businesses or limited liability corporations or by becoming independent contractors.²¹

The massive black market system is the inevitable product of an immigration system that limits and discourages work-based immigration.

Consequences of Current Immigration Policy

The economic consequences of inadequate work-based immigration opportunities are severe. A system of work-based immigration would be an engine of economic growth, bring immigrants who are far more likely to start new businesses, and to obtain patents than are native-born Americans. The number of high-skill H-B1 visas is capped at 65,000 annually. America produces far more high-skilled jobs than it does native-born graduates with the skills to fill them. So we are exporting those jobs—and the tremendous economic growth they would generate—to Canada, New Zealand, Chile's "Chilecon Valley," and even China.²²

Similarly, agricultural states like Texas rely on illegal immigrants to work the fields. When Alabama clamped down on illegal immigration, the result was economic catastrophe, with a decline of billions of dollars in the state's gross domestic product and the loss of 60,000 "downstream" jobs.²³

The lack of adequate work-based immigration opportunities also means that roughly half of the people currently in the U.S. illegally entered legally and overstayed their visas. As became painfully clear in the 9/11 terrorist attack, we have no way of knowing who is in the country illegally or how to find them. In effect, the massive flow of job-seeking immigrants provides "cover" for those who would do us harm.

The Role of States

It is not widely known that federal immigration policy is a relatively recent phenomenon. The U.S. Constitution vests in Congress the power to "establish a uniform rule of naturalization"²⁴—that is, who may become citizens and under what procedures and circumstances. It says nothing about immigration—that is, who may lawfully enter the country and under what procedures and circumstances. Hence, until the late 19th Century, almost all immigration law came from the states rather than the federal government. Only in 1875 did the U.S. Supreme Court determine that the federal government had exclusive authority over immigration as well as naturalization.²⁵ The Court reasoned that congressional power over immigration was implicit in its authority to conduct and regulate affairs with foreign countries.

That has not deterred states from passing statutes regarding immigration, especially illegal immigration. The Supreme Court repeatedly has ruled that federal immigration laws pre-empt conflicting state laws, leaving little room for the states to establish substantive immigration policy. In *Chamber of Commerce v. Whiting*²⁶ in 2011, the Supreme Court upheld Arizona's law allowing the suspension and revocation of business licenses for employing illegal immigrants and requiring the use of the E-Verify system, on the



grounds that Congress had not expressly preempted such measures and that they fell within an exemption in federal immigration law for state licensing rules. The following year, the Court invalidated most of Arizona's controversial S.B. 1070 law.²⁷ It struck down provisions making a failure to comply with federal alien-registration requirements a state misdemeanor, making it a misdemeanor for unauthorized aliens to seek or engage in work in the state, and authorizing arrests for federal offenses under which an illegal immigrant can be removed from the country. The Court held that those provisions interfered with federal immigration policy and enforcement. However, it upheld a provision requiring police officers who have a reasonable suspicion that a suspect is in the country illegally to verify citizenship status during a stop, detention, or arrest. The Court held that the citizenship verification requirement was not yet shown to delay release of suspects, which would violate federal law. This decision is especially important because it shows that even state laws that appear to further the objectives of federal immigration policy may be preempted if they interfere with a comprehensive federal regulatory scheme.

Despite congressional hegemony and the narrow realm of state authority over immigration, Congress is free to *broaden* the scope of state involvement in immigration policy. It already has done so in multiple areas. As recognized in the *Whiting* case, for instance, Congress provided an exemption for certain state licensing rules. Likewise, states are free to provide broader welfare benefits than are required by federal law, and may allow illegal immigrants to have in-state tuition rates, but are not obliged to do so. As a result, there are broad variations among the states in terms of those policies.

The requirement that states provide K-12 public education to illegal immigrant children is not a requirement of federal immigration law but rather the result of a 1982 U.S. Supreme Court ruling, *Plyler v. Doe*.²⁸ Immigrant schoolchildren often face educational challenges, including language proficiency. States have great latitude in addressing those needs. For instance, although states under federal law must provide funding for English language learners, the Supreme Court approved Arizona's program to deliver those services through English immersion.²⁹ Likewise, recognizing that low-income children often are consigned to poor-performing public schools, states can provide school vouchers or other forms of school choice.

States also have different interests when it comes to immigration. Some need more high-skilled immigrant labor, others need low-skilled workers. Some states bear a disproportionate financial or law-enforcement burden from illegal

immigrants, and obviously some states are more proximate to our southern border than others.

The following are examples of areas of immigration malfunction that particularly impact states:

Worker and entrepreneurship visas. Under the current visa system, visas for high-skilled workers, guest workers, and entrepreneurs are not allocated on a geographic basis, hence no assurance exists that foreign workers and investors will find their way to areas of greatest need. Visas for high-skilled workers, in particular, are usually linked to company sponsors, and the workers are not allowed to change jobs or start their own businesses—indeed, their spouses are not allowed to work at all.³⁰ Additionally, under current federal immigration laws, the number of visas for immigrants with exceptional skills is limited to 40,040 nationwide each year.³¹

Law enforcement. The U.S. House Judiciary Committee found that illegal immigrants who were not detained after a first arrest went on to commit an average of more than two additional offenses, many of them serious crimes. States and localities shoulder most of the costs of illegal immigrants who commit crimes.³²

Emergency room treatment. Although states generally have great discretion in extending social services to illegal immigrants, they are required by law to provide emergency room services, which is the costliest way to provide medical treatment. As a result, many illegal immigrants use emergency rooms for routine medical services.

Voter ID. States have a great interest in protecting the integrity of elections. The U.S. Supreme Court already has ruled that states may require voters to show photo identification prior to voting.³³ However, in 2013, the Court ruled that a state law requiring proof of citizenship to qualify to vote in federal elections was preempted by federal law.³⁴ States may, though, impose proof of citizen requirements to register for state and local elections. A comprehensive immigration reform law should extend that discretion to federal elections as well.

Conclusion

Because states bear much of the burden of our dysfunctional system and are better suited to understand the needs of their citizens and economies, changes to the current immigration system should provide for a larger role for states. Texas' unique immigration-related needs, challenges, and benefits places it in a perfect position to lead the way to workable reform. ★

Endnotes

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- ²³ *Ibid.*, 81-83.
- ²⁴ U.S. Constitution. Article 1, Section 8, Clause 4.
- ²⁵ Bush and Bolick, 123-125, discussing *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).
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- ²⁹ *Horne v. Flores*, 129 S.Ct. 2579 (2009).
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- ³¹ Davey, Monica. 2014. “Immigrants Seen as Way to Fill Detroit Ranks,” *New York Times* (January 23).
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