



More Than a Wall

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In the latter half of the 20th century, the Democratic and Republican Parties were split on immigration, with unionized Democrats and traditionalist Republicans favoring less, while leftist Democrats and business-oriented Republicans favored more. Those days are past. The 21st century's "Great Awakening" has transformed the Democrats into a virtual open-borders party, while the GOP has been shifting toward immigration restrictionism, largely because of former president Donald Trump's discovery in 2016 that nothing brought more cheers from GOP audiences than a commitment to controlling immigration. His discovery accords with a 2021 Cato Institute poll finding that 81 percent of Americans wanted less immigration and 59 percent would cut it by half or more. Such sentiments also help explain why President Biden's opening of the borders is so unpopular.

The history of U.S. immigration policy is short and simple. In the century after securing independence, the United States received relatively few immigrants even though it imposed almost no limits. Then the 1880s saw a "Great Wave" of immigration, fueling America's expanding industrial and agricultural sectors. As immigration continued, opposition developed, and in 1924 Congress enacted quotas, giving preference to Western European immigrants. Immigration flows remained modest until 1965, when Congress passed the Immigration and Nationality Act, replacing 1924's ethnic quotas with preferences favoring spouses, children, and siblings of U.S. citizens. The ensuing explosion in non-European immigration motivated Congress to increase the quotas in 1990, but those enlarged quotas were soon overwhelmed.

This challenge was the main topic of the mid-1990s Commission on Immigration Reform, chaired by Barbara Jordan, a former Democratic U.S. representative from Texas and the first African-American woman elected to Congress from the South. The Jordan commission concluded that family-based preferences were unworkable because they led to an endless, exploding migration "chain," as earlier arrivals sponsored their relatives, who in turn sponsored relatives of their own. The commission proposed capping legal immigration at 550,000 annually, limiting family migration to spouses and children of U.S. citizens and lawful permanent residents, and allocating any remaining visas to immigrants with valuable skills.

While the Left believes (or at least argues) that immigration restriction is an effort to maintain "white supremacy," support for it transcends race. The 2021 Cato poll found that a greater percentage of blacks (61 percent) and Hispanics (66 percent) than whites (52 percent) favored cutting legal immigration by more than half. These views are in keeping with a long tradition.

From Booker T. Washington to Cesar Chavez, minority leaders have warned that the importation of foreign workers would substitute for addressing underemployment at home. Immigration reform also has the potential to appeal to environmentalist sentiments — overpopulation as the greatest threat to clean air and water, pristine forests, and so on — from which modern Democrats have cut themselves off.

The GOP's drift towards restrictionist policies did not end with President Trump's departure from office, as can be seen in the fiscal-2023 budget proposed on June 9 by the Republican Study Committee of the House of Representatives. That proposal includes a section titled "Protecting Conservative Values," which proposed the following immigration reforms: (1) reduce legal immigration by eliminating "chain migration" and the "diversity lottery" (which gives preference to immigrants from countries that otherwise send few immigrants to the U.S.), (2) complete the border wall, (3) limit asylum eligibility to those entering from unsafe countries, (4) limit "birthright citizenship" to U.S.-born children of U.S. citizens and permanent resident aliens, and (5) mandate the use of E-Verify, a system that allows employers to verify online that a new hire has a valid Social Security number (SSN) and, if an alien, has valid work-authorization documents. While these proposals are essential to genuine immigration reform, they are not yet part of any formal GOP political platform and do not cover all the ground needed to achieve full-scale reform. Below are some further policy ideas that could attract support by limiting immigration, legal and illegal.

Focus on bollard fences and not the imaginary "wall." The GOP needs to be more specific about its plans for a "border wall." Most of Trump's border barriers are not walls but fences with thick steel posts ("bollards"). Opponents of the bollard fences claim that no matter how strong or high they are, determined immigrants can cut through or climb over them. However, the purpose of the barriers was not to make illegal entry impossible for migrants, but to make it so time-consuming that electronic-surveillance devices on the U.S. side can detect their entrance in time for the Border Patrol to intercept them. Any GOP "border barrier" proposal should therefore be specific, not just about the number of additional miles, but also about the technologies and additional personnel that will need to be funded.

Get behind the already-written E-Verify regulation. As noted above, the GOP Study Committee proposed to mandate E-Verify, but it overlooked a significant and readily available enhancement. When an employer hires a citizen or alien, it must do three things: submit to the Social Security Administration (SSA) a Form W-2 containing the new hire's name and SSN; complete and retain on-site U.S. Citizenship and Immigration Services (USCIS) Form I-9, which contains the Form W-2 information along with alien work-authorization documentation; and, if the employer wants confirmation of an alien's work eligibility, submit all the same information through the online E-Verify system, which is administered by the SSA and USCIS.

Although federal contractors are required to use E-Verify and more than 20 states mandate its use by some employers, as of 2018 only 13.5 percent of employers used the system. It's easy, of course, to explain why the small fraction of employers that knowingly hire illegal immigrants do not use E-Verify; but it is actually not much harder to explain why the law-abiding majority do not use it: Employers' administrative departments are overwhelmed with internal, federal, state,

and local reporting requirements, and the SSA and USCIS reporting obligations are burdensome enough by themselves, without a third step.

The Trump administration's Department of Homeland Security (DHS) proposed a regulation called G-Verify (Government-Verification) that would replace SSA Form W-2, USCIS Form I-9, and E-Verify with a single online filing that included the same information and would offer immediate confirmation of the employee's work eligibility. The overwhelming majority of employers do not knowingly hire illegal aliens and would almost certainly welcome any federal regulation that reduced three government reporting obligations to one.

Since G-Verify would apply only to new hires, it would not oust illegal aliens from current U.S. jobs, but it would make it much harder for those who do lose their jobs to find new ones. For that reason, the draft regulation contemplated a "Voluntary Repatriation Program" (VRP) pursuant to which the Justice Department would not prosecute VRP applicants for immigration-law violations, DHS would help them secure travel documents and transportation home, and the State Department would assist them in meeting home-country requirements.

The G-Verify regulation was submitted to the White House in December 2020, when the president had other matters on his mind. If the GOP wins control of Congress this November, it should enact the terms of the regulation into law.

Clarify by statute the scope of "birthright citizenship." The GOP Study Committee also recognized the critical importance of restricting so-called birthright citizenship. The 14th Amendment contains this passage: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." "Birthright" citizenship has never been absolute; "subject to the jurisdiction" has always been understood to exclude U.S.-born children of foreign diplomats and invading armies. Only one Supreme Court decision has interpreted the "subject to the jurisdiction" clause as it might apply to U.S.-born children of other aliens. That decision, *United States v. Wong Kim Ark* (1898), held that a young man born in the United States to Chinese-born parents was entitled to birthright citizenship notwithstanding that both of his parents remained "subjects of the Emperor of China." The Court's given reason was that the parents "have a permanent domicile and residence in the United States and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China."

The Court's premising of birthright citizenship on an alien parent's "permanent domicile" is now timely and of critical importance. The ordinary meaning of "domicile" is a place where an individual has lived and plans to return to if not currently residing there. Quite clearly, a "birth tourist," who legally visits the U.S. for the purpose of giving birth here, is not "domiciled" in the United States within this meaning. But even illegal migrants would likely struggle to demonstrate that they intend to live permanently in the United States. In *Elkins v. Moreno* (1978) the Supreme Court held that "fraudulent entry" was an "adverse factor" in adjudicating claims of an alien resident to domicile. Based on that precedent, the GOP should establish through legislation a legal presumption that an illegal migrant is not domiciled in the United States for purposes of *Wong Kim Ark*.

Restore asylum to its original purpose. Last, any effort to control our borders cannot succeed without attention to the issue of asylum, which over 90 percent of illegal immigrants apprehended at the border claim entitles them to U.S. admission and residence. Asylum allows aliens to stay in the United States if they reasonably fear persecution in their home country, but for most of them, such claims are a sham, and nearly a third of claimants never show up for their hearings. According to the Justice Department's Executive Office for Immigration Review, in 2019 only 15 percent of alien applicants were granted asylum.

The Trump administration tried to implement a regulation providing that any alien who enters the U.S. after transiting through at least one "safe" country is generally ineligible for asylum. The regulation was blocked by federal courts, largely on the ground that it did not go through the proper notice-and-comment procedure. Representative Andy Biggs (R., Ariz.) has introduced the "Stopping Border Surges Act," which would bypass intransigent federal courts by memorializing in a statute the operative language of the Trump regulation.

If the GOP were to incorporate into its 2022 congressional campaign these widely popular immigration-reform recommendations and contrast them with the widely unpopular open-borders policies that have rooted themselves in the Democratic Party, it would not only be doing the right thing for our nation but might also find itself with a winning hand.