

Penn State Journal of Law & International Affairs

Volume 7 | Issue 1

February 2019

American Immigration: A Path Of Return to a Pre-Modern Ideal of Open Immigration Policy

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ISSN: 2168-7951

Recommended Citation

Zachary J. Carls, *American Immigration: A Path Of Return to a Pre-Modern Ideal of Open Immigration Policy*, 7 PENN. ST. J.L. & INT'L AFF. 187 (2019).

Available at: <https://elibrary.law.psu.edu/jlia/vol7/iss1/21>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2019

VOLUME 7 No. 1

**AMERICAN IMMIGRATION: A PATH OF
RETURN TO A PRE-MODERN IDEAL OF
OPEN IMMIGRATION POLICY**

*Zachary J. Carls**

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I. INTRODUCTION

The Mother of Exiles “[c]ries . . . [w]ith silent lips, [g]ive me your tired, your poor, [y]our huddled masses, yearning to breathe free, [t]he wretched refuse of your teeming shore.”¹ The words of Emma Lazarus have, since 1883, captured the vision of what America is supposed to be: an immigrant state welcome to all comers. Yet, despite the warmth and optimism expressed in “The New Colossus,” the words are in some sense a forgotten ideal. Although we imagine that the advance of time brings progress, one may find that in the case of immigration policy we have suffered a regression. Lady Liberty was more receptive to immigrants in 1883 than she is in 2018.

This, of course, is not to say that the past was in any way idyllic, that racism was not far more rampant then than at present, nor that the law lacked highly discriminatory provisions. Both society and the law have greatly improved. However, the fact remains that in 1883 the flow of immigrants into the country was highly unrestricted, and the law often encouraged immigration—despite a few restrictions which are sources of national shame, and aberrant to the general structure of the old system.²

Today, rather than taking in people of all backgrounds, wherever they may come from, the law and its administrators pick and choose who is let into the country.³ Every year, millions of people wait

¹ EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

² The Chinese Exclusion Act of 1882 operated as a general exception to America’s open immigration policy and barred any further immigration from China. Likewise, the Naturalization Act of 1790 barred immigrants of non-European origin from naturalizing and becoming citizens. However, neither act comprehensively regulated the flow of immigration itself. *See* WALTER A. EWING, *IMMIGR. POL’Y CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY* 1–4 (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf [hereinafter “OPPORTUNITY AND EXCLUSION”] (detailing the Chinese Exclusion Act of 1882 and the Naturalization Act of 1790 and the Alien and Sedition Act of 1798).

³ *See* U.S. Dep’t of State, Bureau of Consular Affairs, *Visa Bulletin* (Sept. 2017) (setting exact limits on the issuance of visas, based on region, familial

in line to gain admission to the U.S., and some of them end up waiting decades for green cards.⁴ In fact, a very recent article revealed that some green card applicants will have to wait over one-hundred and fifty years for admission.⁵ They are delayed because each year the U.S. only admits a few hundred thousand of each category of immigrants. Admissions are based on arbitrary statutory determinations of what the country and its citizens need, and not the demand for various kinds of visas. These classifications are arbitrary because, despite their appearance, they do not comport with the economic and familial needs of the U.S. and its citizens, have been written for ease of administration, and are rooted in the subjective value judgements of the statute's framers.

The law dictates what types of family members are “immediate relative[s],” as well as what kinds and how many laborers and professionals are useful and not detrimental to our economy.⁶ The number of visas provided to foreign workers, family members of U.S. citizens and Lawful Permanent Residents are allocated accordingly. Now, rather than finding refuge, safe harbor, and a new life in America, the huddled masses must wait patiently outside the golden door, hoping that the quota is large enough to admit them and that their names will be called.

The delays created by the modern quota system, detailed in the Immigration and Nationality Act (INA), adversely impact all other aspects of the immigration system. Naturally, long wait times and stringent requirements to keep one's visa classification encourage illegal immigration. The system is so impractical that faithfully abiding

preference, and worker priority); 8 U.S.C. § 1153 (detailing how limits on visa issuance and preferences are to be calculated).

⁴ CLAIRE BERGERON, MIGRATION POL'Y INST., GOING TO THE BACK OF THE LINE: A PRIMER ON LINES, VISA CATEGORIES, AND WAIT TIMES, MIGRATION POL'Y INST. 3–4 (2013).

⁵ See David Bier, *150 Year Wait for Indian Immigrants With Advanced Degrees*, CATO INSTITUTE (June 8, 2018, 12:45 PM), <https://www.cato.org/blog/150-year-wait-indian-immigrants-advanced-degrees> (explaining that EB-2 applicants from India will have to wait over 150 years, compared to Indian EB-1 and EB-3 applicants, who will respectively have to wait 6 and 17 years for their green card applications to become current).

⁶ See Immigration and Nationality Act, 8 U.S.C. § 1153(c)(1)(A).

by it creates too high of an opportunity cost.⁷ It does not allow one the flexibility one requires in order to make important decisions relating to one's career, family, or community life, because those changes may alter one's immigration status. By consequence, it may often seem more practical for one to break the rules.⁸ Although rates of illegal immigration from Mexico have been down since the recession of 2008—and the general rate of illegal immigration has remained static⁹—the specter of illegal immigration continues to exacerbate concerns about border security, sovereignty, and health screening. However, if the demand for visas was not perpetually out of step with the supply, and the wait times to get a visa were not so egregious, then the incentives to enter the country illegally, or without inspection, would be drastically reduced. Further, without the quota, there would be no need to sort people into various “preference” categories, based on arbitrary determinations of the person's economic value or familial importance. Absent this—and the strategic, complicated application schemes would-be immigrants must center their lives around—there would also be less of an incentive to let one's visa expire. One would be able to maintain one's status while still maintaining social and economic flexibility.

There are few people, if any, who would assert that the country's immigration system is not broken. This is the common consensus, even though many would disagree on what a better system would look like or whether it should be more liberal or more restricted. Many proposed reforms place too much of an emphasis on security

⁷ Walter A. Ewing, Symposium, *Globalization, Security & Human Rights: Immigration in the Twenty-First Century: From Denial to Acceptance: Effectively Regulating Immigration to the United States* 16 STAN. L. & POL'Y REV. 445, 450–52 (2005) [hereinafter “*Globalization, Security & Human Rights*”].

⁸ While any immigration attorney may point out that there are serious consequences to violating immigration laws, and that it is never wise to do so, it is the actions people commonly feel compelled to take that indicate what the balance of incentives are. In this case, harsh legal repercussions are often not enough to dissuade violation of the law, because the law is itself too onerous to follow.

⁹ JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR., OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009 5 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/09/31170303/PH_2016.09.20_Unauthorized_FIN_AL.pdf.

and sovereignty and actually seek to exercise more control over immigration flows.¹⁰ These approaches are counterproductive. Attempts to restrict immigration conflict with U.S. economic policy and the broader trends and migratory incentives created by globalization.¹¹ Yet, even among more liberal-minded reformers, most assume that quotas must be a feature. Some suggest expanding the number of people admitted in general, while others wish to change the emphasis the INA places on various preference categories.¹² In particular, there is a push to prioritize worker visa applicants over family visa applicants, altering the focus of the immigration system.¹³ These reformers ignore the fact that most immigration is driven by economic push and pull factors that cannot be accommodated by a system of central management. The flow of people must be allocated naturally, otherwise, the needs of the U.S., its citizens, and immigrants will not be met. A scant few reformers argue for a market-centered model of immigration that is greatly unmanaged. Yet, they are often left out of the popular dialogue, and occasionally fail to argue for the complete abolition of quotas.

The imposition of any form of quota will always come at a high cost to both immigrants and U.S. citizens. No mere adjustment of quota sizes or changes to immigration priorities and preferences can adequately address the issues with the U.S. immigration system. Truly comprehensive reform requires the complete abolition of quotas as well as any type of immigrant prioritization scheme; this is not to say, however, that other laws and regulations relating to public safety, public health, or criminal activity need to be abandoned. By first assessing the failures of the present system, the causes of those failures,

¹⁰ *Globalization, Security & Human Rights*, *supra* note 7, at 449–51.

¹¹ *Id.*

¹² See Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201, 207 (2005); Meriam N. Alrashid, *The “Comprehensive” Immigration Reform: Only as Good as the Bureaucracy it is Built Upon*, Symposium, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS J. OPINION 29 (2007–2008).

¹³ See generally DARRELL M. WEST, *BRAIN GAIN: RETHINKING U.S. IMMIGRATION POLICY* (2010). West argues that future immigration policy should focus on recruiting bright and creative minds to drive economic growth, using what he calls the “Einstein principle,” and move away from a family centered policy. *Id.* at 126–55 (explaining the Einstein principle).

and the inadequacies of reform, this comment will demonstrate the need for the abolition of quotas and preference categories. Then, using pre-modern immigration policy as a guideline, it will attempt to show that a feasible balance can be struck between the legitimate interests of the state and unrestricted immigration flows, despite objections to the contrary. Finally, this comment will put forward a model proposal for comprehensive reform.

The first section of this comment provides a brief history of U.S. immigration policy and its evolution from an open policy to a restricted one. The next section outlines the basic structure of the U.S. immigration system under the Immigration and Nationality Act and also assesses the functionality of that system. That section also outlines various attempts at immigration reform, their failures, and their promises. The final section details the comment's policy recommendations and the shifts in cultural attitudes that would make these policy changes possible.

II. A BRIEF HISTORY OF IMMIGRATION

The history of American immigration policy can largely be divided into three eras: the founding through 1920, 1920 – 1965, and 1965 – present. During the first era, immigration was largely unmanaged, despite several regulations concerning naturalization, information, and processing.¹⁴ Following international shifts in trade and migration policy resulting from the Great War, the U.S. exerted more control over immigration and migration.¹⁵ Quotas were introduced as a means of managing the flow of immigrants from places that were seen as culturally and racially undesirable—achieving in broad scope what the Exclusion Acts had attempted decades earlier.¹⁶ Finally, amidst the civil rights movement, the quotas based on national origins were abolished, and new quotas emphasizing family unity were put in place.¹⁷ However, recently, as national security has become a greater concern, modern immigration reform has centered on

¹⁴ See OPPORTUNITY AND EXCLUSION, *supra* note 2, at 1–7.

¹⁵ See *id.* at 1, 4.

¹⁶ See *id.* at 4.

¹⁷ See *id.* at 5.

enforcement of the immigration code and not on the justifications or sustainability of quotas.¹⁸

A. The Era of Open Immigration

From 1790 until 1921, the United States Government made no comprehensive attempt to manage the numbers of people entering, settling, and working in the country.¹⁹ Instead, early attempts at regulation were more limited in scope: the Alien and Sedition Acts of 1798 empowered the state to deport immigrants;²⁰ the Naturalization Act of 1790 limited opportunities for citizenship to immigrants of European descent; and the precursor to the Chinese Exclusion Act, passed in 1875, limited the rights of criminals and prostitutes to immigrate.²¹ Only the Chinese Exclusion Act of 1882 ultimately barred the further admission of Chinese immigrants, resulting in the egregious deportation and dispossession of Chinese people residing in the country.²² But far from discouraging immigration itself, the nation's growth demanded its encouragement. The Homestead Act of 1862, aiming to motivate westward expansion, actually incentivized immigration to the United States.²³ This general condition of openness did not change until the passage of the National Origins Quota Act of 1921.²⁴

B. The National-Origins Quota Era

The Chinese Exclusion Act could be considered a modern immigration law, relating more to the present body of law than to the general policy of open, quota-less immigration that preceded it.²⁵ It was

¹⁸ *See id.* at 7.

¹⁹ *See id.* at 2–4.

²⁰ OPPORTUNITY AND EXCLUSION, a *supra* note 2, at 2.

²¹ *Id.* *See also*, Jan C. Ting, *Other Than a Chinaman: How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 302–05 (1995) (detailing history of immigration and Chinese exclusion); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

²² *Id.*

²³ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 3–4.

²⁴ *Id.*

²⁵ Jan C. Ting even goes so far as to argue that modern immigration law is the *product* of early attempts to restrict Chinese immigration, and identifies several

the first time the state had attempted to regulate the flow of people from one part of the world into the U.S. The core provisions of the Act remained in effect until 1943, even when the 1790 restrictions on naturalization were abandoned in 1906.²⁶ Yet, the first truly modern immigration law was passed in 1921 and established quotas based on national origin.²⁷ Between the administrative keenness of the progressive movement, the new security measures imposed as a result of the Great War, and several large waves of immigration stoking nativist sentiment, the nation was finally moved to adopt a centrally managed system of immigration. Under the new law, quotas were set for immigrants to be accepted in varying proportion from different regions of the globe based on their perceived cultural compatibility and desirability.²⁸ In this sense, the new quota system was founded on the same spirit as the Chinese Exclusion Act but applied in a more general and expansive manner.

C. The Modern Era

The national origins quota system remained in place until approximately 1952 but was not entirely replaced until the passage of the Immigration Act of 1965.²⁹ In the spirit of the civil rights era, the Act abolished the previous quota system which focused on national

vestiges of the exclusion in the current law, including: (1) restrictions on immigration from countries whose total visa applications meet or exceed 7% of the total number of immigrants allowed, adversely impacting Chinese applicants; (2) and the NP-5 and OP-1 “diversity” visa programs, which underhandedly curbed Chinese immigration and heavily favor Western European immigrants. Ting, *supra* note 21, at 308–09.

²⁶ *Id.* at 305.

²⁷ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 4.

²⁸ *Id.* The Quota Law of 1921 established an overall allowance of 350,000 new immigrants per year, and fixed a maximum per-country cap of 3% the total proportion of U.S. citizens from each country of origin as of the 1910 census; this heavily favored European immigration, and most of the U.S. population was of European descent. *Id.* The law also retained the bans on Asian and Chinese immigration, but curiously exempted North American and Latin American nations from the overall quotas. *Id.* The 1924 National Origins Act reduced the total allowable number of new immigrants to 165,000 per year, and reduced the percent of immigrants per-country to 2%, with the basis of that percentage being the 1890 census population (which was even whiter). *Id.*

²⁹ *Id.* at 5.

origins.³⁰ Not only was the national origins quota obsolete, it was racist and arbitrary.³¹ Instead, the INA enacted a system of preferences based on familial relationships and various worker categories.³² In this sense, the new system attempted to direct immigration flows based on the nation's real interest. However, despite abandoning regional quotas, the INA preference categories still sorted potential immigrants into various groups and set quotas for each group according to formulas which will be discussed in more detail later in the comment.³³

Despite the good intentions of the INA and subsequent reforms, the system remains highly discriminatory due to the mathematical realities of the quota system, population differences, and varying demand for visas relative to preference categories. Barriers to entry also contribute to “illegal” immigration, while border restrictions transform temporary economic migrants into permanent settlers. Beyond that, quotas continue to create large disparities between domestic supply and demand for workers and divide families for years at a time. People seeking to immigrate are only issued visas if the allowance cap for their given category has not yet been reached.³⁴ Worse still, a change in age, employment, or marriage can alter a person's application category and send them to the back of a new line.³⁵ As the years drag on, applicants can be separated from families and are often left in periods of legal limbo. Employers miss opportunities to hire useful people in a timely manner and are often precluded from hiring the best because arbitrary preference categories limit the availability of potential employees based on the nature of the job or the skill it requires. As one might expect, the occupational quotas are nearly always misaligned with the demands of the present

³⁰ *Id.*

³¹ *See id.* at 5–6.

³² *See id.*

³³ *Id.* *See* 8 U.S.C. § 1153 (allocating visas based on immigrant preference categories).

³⁴ *See*, U.S. Dep't of State, Bureau of Consular Affairs, Visa Bulletin (Sept. 2017) (setting exact limits on the issuance of visas, based on region, familial preference, and worker priority); 8 U.S.C. § 1153 (detailing how limits on visa issuance and preferences are to be calculated).

³⁵ CLAIRE BERGERON, MIGRATION POL'Y INST., ISSUE BRIEF NO. I, GOING TO THE BACK OF THE LINE: A PRIMER ON LINES, VISA CATEGORIES, AND WAIT TIMES 5–7 (2013).

labor market. Likewise, while immediate family members of U.S. citizens are not subject to quotas, the immediate family members of Lawful Permanent Residents and all the extended family members of either are subject to quotas. This leaves many good people deprived of their loved ones based on ill-fitting legal definitions of “closeness.”

More recently, following the 9/11 terror attacks in 2001, there has been a radical shift in the organization of the U.S. immigration system. In 2002, former agencies which managed immigration, such as the Immigration and Naturalization Service (INS), were consolidated and became the Department of Homeland Security (DHS).³⁶ The creation of the DHS embodies the new approach that the U.S. has adopted regarding immigration. The primary concern of the state is now national security and the enforcement of immigration laws.³⁷ Economic growth, labor interests, and family unity have become of secondary importance.³⁸ This is in spite of the adoption of the North American Free Trade Agreement.³⁹ While these policies were enacted under the Bush Administration, the Obama Administration ultimately deported record numbers of immigrants.⁴⁰ The current administration has pushed for increased funding for the U.S. Border Patrol—another sub-department of the DHS—and attempted to increase travel restrictions from middle eastern countries.⁴¹ Despite the issues created by the quota system and management of visa allocation, these subjects have failed to garner the attention they deserve in legislative and administrative circles.

³⁶ See, “Who Joined the DHS?” accessible at www.dhs.gov/who-joined-dhs.

³⁷ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 7.

³⁸ Ernie Garcia, *National Security, Unskilled Labor, and Why the United States Should Overhaul Its Immigration Policy*, 51 S. TEX. L. REV. 1043, 1055–56 (2010).

³⁹ See *Globalization, Security & Human Rights*, *supra* note 7, at 451–53.

⁴⁰ MUZAFFAR CHISHTI, SARAH PIERCE, & JESSICA BOLTER, MIGRATION POLY INST., THE OBAMA RECORD ON DEPORTATIONS: DEPORTER IN CHIEF OR NOT? (2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> (indicating that President Obama deported 5,281,115 people over the course of eight years).

⁴¹ Caroline Kelly & Todd J. Gillman, *Trump’s Plan for Border Patrol, ICE Hiring Surges Face Timing, Security Obstacles*, DALLAS NEWS (July 2017), <https://www.dallasnews.com/news/politics/2017/07/06/trumps-plan-border-patrol-ice-hiring-surges-face-timing-security-obstacles>.

A good example of the government's current emphasis on immigration enforcement over constructive reform is perhaps the recent parent-child separation scandal. While in the past practical issues surrounding the detention of immigrants might have occasionally led to the separation of detained parents or children, the Trump administration sought to transform this into an official, zero-tolerance policy.⁴² It was thought that separating families of immigrants apprehended at the border would deter illegal immigration.⁴³ However, it did not dissuade many central American refugees, who came to the U.S. seeking asylum.⁴⁴ In total, well over two-thousand children were separated from their parents, and the DHS is currently holding approximately two-thousand and fifty-three of them.⁴⁵ Public outcry caused the administration to reconsider this policy, and now children are detained alongside their parents.⁴⁶ The INA was written to encourage family unity by prioritizing visas for close family members.⁴⁷ While those particular provisions of the INA are related to visa allocation and not immigration enforcement, this episode illustrates the ways in which the government has recently put the cart before the horse. The current administration consciously attempted to divide families in order to enforce the law. Moreover, these actions were a result of administrative guidance and orders from the President rather than a product of legislation.⁴⁸ The structure of the law has remained the same.

⁴² See DEP'T OF HOMELAND SECURITY, FACT SHEET: ZERO TOLERANCE—TOLERANCE PROSECUTION AND FAMILY REUNIFICATION (2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.

⁴³ Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (June 15, 2018, 12:03 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>.

⁴⁴ *Id.*

⁴⁵ DEP'T OF HOMELAND SECURITY, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ See 8 U.S.C. § 1151; *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (explaining that it was the intent of Congress to protect familial unity).

⁴⁸ See DEP'T OF HOMELAND SECURITY, *supra* note 42.

III. THE CURRENT SYSTEM

A. The Current System's Structure

The quota system is not perfect and has many problems. Individual visa applicants wait for years to be approved for admission into the U.S. There are also vast disparities between the number of visas issued to each country and the demand for visas in particular countries. While in part the general imbalance between visa supply and demand can be explained by the size of the quotas themselves as well as the number of visas allocated to each preference category, such flaws are the result of the INA's core architecture. Therefore, mere adjustments to the number of visas available to be issued or to the preferences which govern their issuance cannot fix the problems caused by quotas, even if such adjustments may temporarily ameliorate them. Moreover, the policies dictated by the INA, compounded by its subsequent reforms, run counter to the other economic and trade goals of the U.S. and are, in fact, exacerbated by these other goals. The promotion of free trade and the embrace of globalization necessarily spurs immigration.⁴⁹ Despite the good intentions of the framers and reformers of the current law, the system is unfortunately set up to fail.

Immigration is fundamentally economic in nature.⁵⁰ However, it has scarcely been viewed that way by lawmakers. Rather, it is often viewed as a matter of law enforcement and, more recently, national security.⁵¹ To the extent that immigration *is* viewed as economic in nature, it is often seen through a protectionist lens.⁵² With the exception of persons possessing extraordinary ability or international renown, most worker visa applicants must show that they have an employer waiting to hire them.⁵³ Further, the employer must show that

⁴⁹ *Globalization, Security & Human Rights*, *supra* note 7, at 445–46.

⁵⁰ *See id.*

⁵¹ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 6–7.

⁵² Wadhia, *supra* note 12, at 207 (explaining that most comprehensive reform proposals include strong measures protecting U.S. labor interests, workers' rights, and bargaining rights against competition from immigrants).

⁵³ *See* 8 U.S.C. §§ 1153(b)(1–3).

there are no suitable domestic workers available to do the job.⁵⁴ However, the core emphasis of the INA is on familial unity, and the vast majority of visas issued are allocated to foreign family members of U.S. citizens and Lawful Permanent Residents.⁵⁵ Economic productivity and efficiency are a secondary goal at best.⁵⁶

The INA quotas are based on a framework of preference categories which divide people into several different classes of family members and prospective workers.⁵⁷ Each subclass of family members and workers has its own base numerical limit and floor for visa amounts.⁵⁸ However, the INA provides formulas for the reallocation of visas from one preference category to another. In the event that a given category is oversubscribed, visas can be reallocated from another, undersubscribed category.⁵⁹ The numerical limit for each category is calculated by adding and subtracting the amount of used or unused visas from the previous fiscal year.⁶⁰ If the previous year's numbers drive the visa issuance limit for the following year too low, some preference categories provide a minimum floor for available visas.⁶¹ For instance, the maximum number of family-based immigrant visas issued each year is calculated by subtracting the number of

⁵⁴ 8 U.S.C. § 1153(b)(3). With regard to this provision, it should also be noted that waivers are available for skilled professionals, but not for unskilled and agricultural workers. *See, id.* The added competition of imported labor is often viewed as a threat to the wages and job security of domestic workers.

⁵⁵ Darrel M. West takes particular issue with this, arguing that workers ought to take priority, and that many of the economic problems associated with immigration result from the policy emphasis on family unity rather than economic productivity. West believes that the U.S. needs a greater proportion of skilled and educated people entering the country, and that encouraging familial immigration allows a higher proportion of less productive people to take their place. WEST, *supra* note 13, at 126–55.

⁵⁶ Note below, the difference between the number of available visas for the various familial and employment-based categories. The September 2017 Bulletin reported that a total of 226,000 visas were available for those waiting in the familial preference categories, as opposed to only 140,000 for those in the employment-based categories. U.S. Dept. of State, *supra* note 3.

⁵⁷ *See* 8 U.S.C. § 1153.

⁵⁸ *See id.*

⁵⁹ *See id.*; 8 U.S.C. § 1152(a).

⁶⁰ *See* 8 U.S.C. §§ 1152, 1153(a).

⁶¹ 8 U.S.C. §§ 1153, 1152.

“immediate family members” admitted last fiscal year from the 480,000-visa ceiling and then adding the number of unused employment visas left over from the last fiscal year.⁶² In spite of this, the total number of familial visas issued cannot fall below 226,000.⁶³

The quota formulas provided by the INA are neat, easily calculable, and readily predictable from year to year. While this is certainly administratively convenient, quota calculation is not a scientific or rational practice. The quota formula’s logic is based on the value judgements of the INA framers and subsequent reformers and is not designed to align with the needs of the real world. Rather, what is and is not preferable is a matter of opinion which, however well informed at its inception, will inevitably fall out of step with present conditions. For example, the decision to favor family relations over economic productivity is a moral and sentimental determination.

To be scientific, each visa allocated must be directed toward meeting the actual and specific needs of society.⁶⁴ However, this is impossible because quotas and preference categories are stiff and mechanical; they cannot anticipate the exact needs of people or the proper balance of visas issued to any class of people because those needs are always changing. The needs of society and the economy are determined by the various and several needs of the individuals which comprise it.⁶⁵ Put simply, the exact degree of benefit that can be provided to an individual by the reunification with a particular family member or to a business by the addition of a new employee cannot be

⁶² While “immediate” family members are exempt from the quota, their admission into the country reduces the number of visas available to “non-immediate” family members, who are subject to the quota. 8 U.S.C. § 1151(b)(2)(A)(i). It is also worth noting that there are almost never any employment-based visas left over from the previous fiscal year. *See* Stephen H. Legomsky & Cristina M. Rodríguez, IMMIGRATION AND REFUGEE LAW AND POLICY 260–62 (6th ed. 2015).

⁶³ 8 U.S.C. § 1151(c).

⁶⁴ *Contra* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 *passim* (1945) (explaining that there can never be a scientific means of centrally managed resource allocation because such allocation would require the use of particular knowledge which it could never have).

⁶⁵ *See id.* at 519–20.

reasonably estimated by an abstract formula.⁶⁶ Knowledge of this kind cannot be collected or aggregated and is specifically the province of individuals.⁶⁷ “Need” is nearly impossible to define in general terms.

Economist Fredrich A. Hayek famously described why the centrally managed allocation of resources was impossible without omnipotence.⁶⁸ The price system (supply and demand), which he ardently defended, made use of diffuse knowledge, never knowable to a single individual at one time.⁶⁹ The issue with visa allocation is the same, as visas are merely another commodity. The fundamental problem with visas fixed by mathematical formulas is a problem of forming a rational economic order. Since it is impossible to know who will really make the best use of their visas, or even to define what the “best use” is, it is impossible to create a properly functional means of *conscious* visa allocation. As Hayek argued,

[t]he peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate “given” resources—if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data.” It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge

⁶⁶ For that matter, the requirement that an employer determine that no suitable local worker is available for hire ignores all of the potential, personal and intangible reasons that may cause a given employer to favor a particular foreign individual for the job. *See* 8 U.S.C. § 1153(b) (relating to the issuance of work-related immigrant visas and visa requirements).

⁶⁷ Hayek, *supra* note 64, at 519–20.

⁶⁸ *Id.*

⁶⁹ *Id.*

not given to anyone in its totality. This character of the fundamental problem has, I am afraid, been rather obscured than illuminated by many of the recent refinements of economic theory, particularly by many of the uses made of mathematics.⁷⁰

Any appearance of scientific exactitude gleaned from the INA formulas is illusory; it is “scientistic” rather than scientific.⁷¹ Rather than being rational, as they appear to be, quotas are irrational, regardless of how neat the formulas are. When it comes to something as ephemeral and particular as human need, a bureaucratic system of management can never respond in such an attentive and appropriate way as a market. The arbitrary nature of quotas is the major reason why they consistently fail to remain in step with the demand for visas.⁷² As people’s needs change, the types of visas they need change too, as does the total amount of visas needed. These needs cannot always be accommodated by the existing classes of visas or the number of visas allocated to each category. The system is too rigid.

However, the arbitrary nature of quotas is not the only reason that they fail to remain in step with visa demand. At the same time that the U.S. has endeavored to stem the tide of immigrants at the border, it has also pursued policies which make immigration more desirable and more likely.⁷³ Congress passed the Immigration Reform and Control Act (IRCA) in 1986 and, a decade later, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷⁴ While the former piece of legislation contained a large amnesty provision, it also included penalties for employers who “knowingly” hired undocumented immigrants.⁷⁵ The latter act greatly expanded the grounds for inadmissibility and deportability under the INA by

⁷⁰ *Id.* at 519–20.

⁷¹ F.A. Hayek, *The Pretense of Knowledge*, Nobel Prize Lecture (Dec. 11, 1974), in LUDWIG VON MISES INST., 2008, at 29, 29–31 (elaborating on the nature and dangers of “scientism,” or that which pretends to be scientific).

⁷² *Globalization, Security & Human Rights*, *supra* note 7, at 445.

⁷³ *Id.* at 446–47.

⁷⁴ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 6.

⁷⁵ *Id.*

broadening the definition of “aggravated felony.”⁷⁶ However, perhaps somewhat mercifully, Congress also expanded the general quota in 1990 and added two new preference categories.⁷⁷ Nevertheless, since the 1980s, the state has attempted to reform immigration by making its laws more enforceable rather than more accommodating. Despite the government’s best efforts, the number of immigrants—both legal and undocumented—has only increased since that time.⁷⁸ Additionally, as was mentioned above, the expansion of the quota did next to nothing to address the disconnect between visa supply and demand.

Immigration reform was not the only feature of the 1990s legislative agenda. The North American Free Trade Agreement (NAFTA) was signed into law in 1993, further intertwining the economies of the U.S., Canada, and Mexico.⁷⁹ NAFTA “profoundly altered” the demand for immigration and labor by intertwining the economies of U.S. and Mexico.⁸⁰ The value of goods exchanged between the U.S. and Mexico between 1985 and 2003 increased from 32.8 billion to 235.5 billion dollars.⁸¹ At the same time, trade and the effects of comparative advantage disrupted the structure and emphasis of both the American and Mexican labor markets.⁸² Mexico created

⁷⁶ *Id.* See also Wadhia, *supra* note 12, at 221 (explaining that the meaning of an “aggravated felony” was expanded, by broadening the definition of “conviction” far beyond its traditional meaning). Even persons with expunged convictions are still considered convicted felons under the law, and crimes which are considered misdemeanors in some jurisdictions are considered felonies for purposes of immigration law, following the passage of the INTC in 1994 and HIRAIRA in 1996. See *id.* at 221–22.

⁷⁷ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 6.

⁷⁸ *Id.* at 7.

⁷⁹ See *Globalization, Security & Human Rights*, *supra* note 7, at 451–52.

⁸⁰ *Id.*

⁸¹ *Id.* at 451.

⁸² See *id.* at 452. Each country has sectors of its economy which are comparatively weaker or stronger than its trade partners. When countries trade with one another, it is more efficient to import goods that can be more easily be produced abroad than at home, and vice versa. See generally *Comparative Advantage*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/comparative-advantage> (last visited Sept. 9, 2018). This means that when countries trade, certain sectors of their economy will shrink while others grow in response to the trade. This alters the proportion of laborers working in different industries for each country involved.

more export-focused manufacturing jobs, but their number of agricultural jobs and agricultural output fell. Agriculture shifted in favor of the U.S.⁸³ Naturally, the creation of new labor markets within the U.S. spurred immigration, and American employers were eager to hire more workers. In the decades since the adoption of NAFTA, the forces of globalization have only grown stronger in their influence, disrupting more labor markets across the planet and increasing the need for more fluid immigration and allocation of labor.⁸⁴ As the U.S. has embraced globalization, the notion of a regulated scheme of immigration through quotas has become an archaic relic of a more economically insular past; its continuation is incompatible with the country's current ambitions and trajectory of economic development.

It is worth noting that, while the law has not yet changed, treaties such as NAFTA are still in effect, and global trade is still expanding, the Trump administration's positions on trade and immigration are consistent. The President has levied tariffs against the major trade partners of the U.S.—including the E.U., China, Mexico, and Canada—in spite of various trade agreements with those countries.⁸⁵ As such, the current administration simultaneously seeks to reduce the volume of trade and immigration together, rather than promoting one and discouraging the other. Limitations on trade should, in theory, reduce the influence of globalization, and thus reduce the demand for foreign labor and the volume of immigration. However, it is unclear whether these new trade restraints constitute permanent changes to U.S. trade policy or whether they will affect general trends in trade and immigration. It is possible that the administration or its successors will reverse course on this policy, as

⁸³ See *Globalization, Security & Human Rights*, *supra* note 7, at 452–53.

⁸⁴ See *id.* at 448, 452–53.

⁸⁵ Bob Bryan, *Trump's Trade War With China is Starting to get Nasty for U.S. Companies*, BUSINESS INSIDER (Oct. 25, 2018), <https://www.businessinsider.com/trump-tariffs-china-trade-war-us-companies-prices-2018-10>; David J. Lynch, Josh Dawsey, & Damian Paletta, *Trump Imposes Steel and Aluminum Tariffs on the E.U., Canada and Mexico*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/business/economy/trump-imposes-steel-and-aluminum-tariffs-on-the-european-union-canada-and-mexico/2018/05/31/891bb452-64d3-11e8-a69c-b944de66d9e7_story.html?utm_term=.f10166eb73a5.

U.S. trade partners have all retaliated.⁸⁶ Moreover, the new trade restrictions relate to the importation of specific goods and are not general in nature.⁸⁷ Thus, it seems unlikely that these measures will permanently reverse the tide of globalization which drives immigration. Further, it is unclear at this time what effect they have had on immigration, and no data is yet available to answer this question.

Overall, it still seems fair to say that the immigration policy of the U.S. remains incompatible with its economic and trade policies, since each has only recently been altered on the administrative level. Significant governmental actions are required before it is justifiable to say that the U.S. has permanently adopted an anti-trade, anti-globalization position. Barring broader trade restrictions, legislative action, new treaties, and a continuation of this policy by the next administration, long lasting state opposition to trade and globalization seems unlikely. As such, economic trends will continue to exacerbate the shortcomings of the quota-based immigration system.

B. The State of the Current System

The very nature of the quota system leads to gross imbalances between the demand for visas and the number of visas granted. In particular, the regional limitations imposed by the INA have an outsized effect on countries with a higher demand for visa applications. However, the per-country limits are not set with an intent to limit the migration of people of certain ethnicities as they were in the 1920s.⁸⁸ Rather, these limits are set in the interest of fairness, so that the demand for visas in any particular region does not eclipse or exclude visa applicants from other regions.⁸⁹ To the contrary, INA Section 202(a) emphasizes that race and national origin are not grounds for discrimination.⁹⁰ In fact, the provision explicitly bars the issuance of immigrant visas, and the setting of preferences and priorities, based on a “person’s race, sex, nationality, place of birth, or place of

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ OPPORTUNITY AND EXCLUSION, *supra* note 2, at 3–4.

⁸⁹ 8 U.S.C. § 1152(a).

⁹⁰ *Id.*

residence.”⁹¹ The regional limitations now in place are merely the logical consequence of trying to make a quota system “fair.” Where there is a cap on the total number of persons admitted, distinctions will have to be drawn to ensure no single group is favored to the exclusion of the rest.

When viewed in terms of proportion, this policy is far less just in practice than in principle, because the places with the greatest need are subject to the greatest limitation. As of November 2016, there were 4,259,573 applications for visas under the four family preference categories, not including the millions more who were exempted from the quota as “immediate family members.”⁹² Within the family preference categories, Mexico has 1,308,000 visa applicants patiently waiting for admittance, while the remaining top ten nations with the most applicants only had between 300,000 and 100,000 applicants.⁹³ Despite the excessively high demand within the family preference category, there was a 15,820 visa limit per-country, including Mexico.⁹⁴ At the same time, there were also 107,479 applications for visas filed under the employment-based visa categories.⁹⁵ India, mainland China, and the Philippines collectively accounted for the overwhelming majority of employment-based applications, numbering 98,948 in total.⁹⁶ However, each of these countries was only allotted 9,800 employment visas in accordance with INA Section 202.⁹⁷ Since the countries with the highest demand for visas are allotted so few, the applicants from those countries must wait a very long time for admittance. By contrast, applicants from countries with less demand will face shorter wait times.

The current backlog of applications is also immense and intractable. Immigrant visa applications are filed all around the globe

⁹¹ *Id.*

⁹² NAT’L VISA CTR., ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2016 12(2016).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 15.

⁹⁶ *Id.*

⁹⁷ *Id.* at 14.

but can only be satisfied when there are visas available for issue. Since this can take a considerable amount of time, lines form and a backlog of applications builds up. It can take up to two decades before an applicant's priority date becomes current, allowing them to apply for permanent resident status.⁹⁸ Prior to that, they file a petition, which is then processed, and while processing itself is rather sluggish, one's priority date only becomes current when there are visas available for the applicant's particular preference category and country of origin.⁹⁹ Thus, the wait times for Mexican, Chinese, Indian, and Filipino applicants are usually extremely long.¹⁰⁰ For example, in 2013, Filipino siblings of U.S. citizens faced wait times of roughly twenty-three years while those of Mexican origin faced wait times of up to sixteen years.¹⁰¹ By contrast, siblings of U.S. citizens from nations with substantially fewer applications faced wait times of up to thirteen years.¹⁰² While wait times for most visa applications are long, the seven-percent cap imposed on nations with higher volumes of applications makes wait times for those countries extreme. At the very least, the length of time applications wait to become current indicates that present visa allotments are grossly out of step with the demand for visas.¹⁰³ It is also fairly clear that the law does not adequately take into account the inequities that result from demand varying from place to place, despite the stated goals of INA Section 202(a).¹⁰⁴ All in all, the Migration Policy Institute estimates that it could take up to nineteen years to completely clear the backlog.¹⁰⁵

The preference category a green card applicant selects can also have a drastic impact on his or her wait time. It may be that an applicant is eligible for multiple visa categories, but that filing for one type of visa over another could mean a wait difference of a few decades or more. For example, in India, applicants filing for an EB-1 visa, for persons of "extraordinary ability," face a projected wait time of only

⁹⁸ Bergeron, *supra* note 35, at 3–4.

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.* at 3–4.

¹⁰⁴ *See id.*; 8 U.S.C. § 1152(a).

¹⁰⁵ Bergeron, *supra* note 35, at 8.

six years for their visas to become current.¹⁰⁶ Whereas, people filing EB-3 applications for persons with bachelor's degrees face wait times of up to seventeen years.¹⁰⁷ EB-2 applicants from India, or those with advanced degrees, face an incredible projected wait time of *one-hundred and fifty years*, effectively barring their admittance.¹⁰⁸ This means that the choice of filing for one's application is a highly strategic decision. However, when the shortest wait times belong to the most exclusive categories, and when those times are also many years long, immigration to the U.S. from certain countries may not be an option at all. This results in the same kind of region by region discrimination that the INA was supposed to undo.

Of course, there are more consequences to centrally managed immigration and arbitrary allocation of visas than long wait times. The closed nature of the system comes at a high economic cost, creating black market labor, encouraging worker exploitation, and forcing taxpayers to fund the Sisyphean project of restricting the natural movement of people at the borders.¹⁰⁹ This is especially true with regard to Mexican immigration.¹¹⁰ As economic forces continue to encourage Mexican workers to enter the American labor market, restrictive granting of both temporary and permanent work visas contributes to increased undocumented traffic into the country.¹¹¹ This makes border enforcement more difficult and more expensive, because incentives created by the law encourage the violation of the law. Meanwhile, stricter border enforcement and stiffer penalties for entering the country without authorization discourage the temporary migration of seasonal agricultural workers. Threatened with detainment and permanent bars to future reentry into the U.S., it often seems wiser to simply remain in the U.S. than to attempt to return to Mexico. Such an attempt would raise the risk of capture and economic exile from the country due to enhanced border security. Ironically, the draconian enforcement of laws designed to restrict immigration and

¹⁰⁶ Bier, *supra* note 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See generally *Globalization, Security & Human Rights*, *supra* note 7, at 445 *passim* (detailing the failures of U.S. immigration policy with regard to Mexico).

¹¹⁰ *Id.*

¹¹¹ Garcia, *supra* note 38, at 1052–53.

unlawful presence converts would-be economic migrants into permanent settlers by reducing migrants' incentives to return to their countries of origin.

Worse still, when migrants and immigrants are undocumented they become at risk for blackmail, coercion, and worker exploitation.¹¹² Due to the fact that they are in the country without valid documentation and often exist outside the system, undocumented immigrants and migrants operate without the protection of U.S. federal and state labor laws.¹¹³ This is especially true of unskilled workers.¹¹⁴ Moreover, the threat of detainment and deportation can be used as a weapon by employers—as well as others—to exploit undocumented persons who stand to lose their entire livelihoods.¹¹⁵ In combination, this means that people drawn to the U.S. by promises of economic opportunity may become trapped in inhospitable working conditions for little pay because they have the prospect of deportation hanging over their heads.

Curiously, black market labor conditions also provide undocumented persons a competitive edge over domestic workers.¹¹⁶ Since undocumented workers can work for less than minimum wage, and since their labor conditions are not subject to regulation, this makes them less costly and therefore more desirable than domestic workers and documented immigrants.¹¹⁷ Thus, it stands to reason that a more liberal immigration policy, and the uninhibited issuance of visas, would equalize competition between domestic and foreign workers. Domestic and documented workers would not be undercut to the same degree by undocumented workers, because fewer workers would be undocumented. Additionally, fewer undocumented

¹¹² *See id.* at 1062–63.

¹¹³ *See id.*

¹¹⁴ *See id.* at 1061–63.

¹¹⁵ *See id.*

¹¹⁶ *See* CHRISTOPH ALBERT, UNIVERSITAT POMPEU FABRA, THE LABOR MARKET IMPACT OF UNDOCUMENTED IMMIGRANTS: JOB CREATION VS. JOB COMPETITION 3 (2017), https://www.upf.edu/documents/2963149/3253728/The_Labor_Market_Impact_of_Undocumented_Immigrants_Christoph_Albert_April2017.pdf.

¹¹⁷ *See id.*

workers—either immigrants or temporary laborers—would be subject to exploitation because of their status.

C. Attempts at Reform

Over the years there have been many proposed reforms offered to fix the American immigration system. Conventionally defined, “comprehensive proposals” usually attempt to address most of the problems with immigration at once. Functionally, these proposals try to address five key aspects of immigration policy and their associated problems.¹¹⁸ First, they offer provisions for accommodating the undocumented immigrants currently residing in the country.¹¹⁹ Second, they attempt to account for the future flow of immigrants and the changes in demand for visas.¹²⁰ Third, they attempt to reduce processing and wait times that currently plague the system.¹²¹ Fourth, they place emphasis on creating more targeted immigration, border, and customs enforcement.¹²² Finally, they attempt to mitigate any domestic economic hardship that may result from further immigration.¹²³ However, the various proposals go about this in different ways and with different points of emphasis.

Many—if not most—reform proposals focus on heightened border security, amnesty, and the elimination of red tape. Yet, these proposals do not radically alter the current system or its architecture. Instead, they simply intend to streamline it. New provisions mandate electronic documentation, more precise filing dates, and an increase in funding for border security.¹²⁴ In terms of satisfying the goals of comprehensive reform, the recommended measures do address the key goals but fail to treat the underlying problem, which is the attempt to manage the flow of immigration in the first place. The misperception that immigration regulation is a function of sovereignty

¹¹⁸ Wadhia, *supra* note 12, at 207.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See generally* Alrashid, *supra* note 12 (wherein, the article discusses several proposals that center around these three things).

has not been shed by many of these authors.¹²⁵ Truly comprehensive reforms would require the abolition of the quota system, the creation of an efficient system of application processing, and a change in attitude, which would leave behind more modern notions of “sovereignty.” However, from a practical perspective, it makes sense that, despite their comprehensive scope, most proposed reforms attempt merely to modify the existing structure of the law; that task is comparatively easy. Unfortunately, many proposals also overemphasize security or make use of negative reinforcement to manage immigration flows and labor demands.

Congress recently attempted to pass immigration reform, in response to the Trump administration’s rescission of the Deferred Action for Childhood Arrivals program (DACA).¹²⁶ However, as of publication of this comment, this reform bill has not been passed.¹²⁷ S.1615, or the Dream Act of 2017, would have enshrined DACA in law, whereas DACA previously existed merely as a form of prosecutorial discretion prescribed by the Obama administration.¹²⁸ Thus, the bill would cancel the removal of “dreamers,” now of-age persons who unlawfully entered the U.S. as children, so long as they were not considered inadmissible for some other reason detailed in the INA. It would also create a pathway for dreamers to become Lawful Permanent Residents. However, like DACA, the Dream Act is not comprehensive. The only persons eligible for its protection are those who were present for four years before the bill’s passage.¹²⁹ Those who entered the country after that time could not claim its benefits: namely, stays of removal and a pathway to Lawful Permanent Resident status.¹³⁰ Unfortunately, this means that the Dream Act offers only a temporary fix available to a select group of people. The problem the bill attempts to address will persist for similarly situated people who

¹²⁵ *Globalization, Security & Human Rights*, *supra* note 7, at 447.

¹²⁶ S. 1615, 115th Cong. (2017).

¹²⁷ Jesse Byrnes, *Pelosi Insists on ‘Clean’ DREAM Act Amid Trump Furor*, THE HILL (Jan. 12, 2018, 10:05 PM), <http://thehill.com/homenews/house/368856-pelosi-insists-on-clean-dream-act-amid-trump-furor>.

¹²⁸ S. 1615.

¹²⁹ *Id.* § 3(b)(1)(A).

¹³⁰ *See id.* § 3.

have entered after that time and for justly aggrieved people in different circumstances not comprehended by DACA.

DACA and the Dream Act are thought to be necessary because it seems fundamentally unjust to enact removal proceedings against people who have lived the majority of their lives in the U.S. Culturally, many dreamers are American and have little or no meaningful ties to their country of birth.¹³¹ They are trapped by circumstance because as children they entered or remained in the country unlawfully as dependents of their parents.¹³²

However, the circumstances which lead to the necessity of DACA and the Dream Act are created by the INA itself. As previously discussed, the wait times for immigrant visas are extremely long and even longer for countries which exceed the seven-percent limit placed on visa issuance.¹³³ “Illegal” immigration is thus incentivized, and black markets for immigration are formed in response.¹³⁴ By consequence, the arbitrary nature of the law is brought into full view; people who have lived in the U.S. for virtually their entire lives are treated as unamerican by the law and live under constant threat of removal. This is why many proposals include an amnesty provision; it is impractical and unjust to remove large numbers of productive and peaceful people who established roots inside the country.

Prior comprehensive reforms, such as IRCA in 1986, contained amnesty provisions but also covered other areas of the law.¹³⁵ IRCA was described as a “three-legged stool” which granted amnesty to persons already residing illegally in the U.S. but also enhanced border security and created penalties for hiring

¹³¹ See AUDREY SINGER & NICOLE PRCHAL SVAJLENKA, BROOKINGS METROPOLITAN POL’Y PROGRAM, IMMIGRATION FACTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 9 (2013), https://www.brookings.edu/wp-content/uploads/2016/06/DACA_singer_svajlenka_FINAL.pdf.

¹³² See *id.*

¹³³ Bergeron, *supra* note 35, at 4.

¹³⁴ Wadhia, *supra* note 12, at 206.

¹³⁵ See MUZAFFAR CHISTI & CHARLES KAMASAKI, MIGRATION POL’Y INST., IRCA IN RETROSPECT: GUIDEPOSTS FOR TODAY’S IMMIGRATION REFORM 1–2 (2014).

undocumented immigrants.¹³⁶ In doing so, IRCA attempted to discourage further unlawful immigration.¹³⁷ Current political discussions surrounding the Dream Act also indicate that its passage will require the inclusion of more border security provisions and possibly the construction of a border wall.¹³⁸ Indeed, even the more positive aspects of the bill, such as pathways to citizenship, have been considerably weakened throughout the course of negotiation.¹³⁹ Since these reforms build off of the current structure of the law, they often draw from a sort of carrot-and-stick approach. They grant amnesty but couple it with punishments and enhanced security for the future.

The incentives for illegal immigration to the U.S. are strong because, despite the INA's emphasis on family-based immigration, employment is also a large driver of immigration.¹⁴⁰ By consequence, there is a large backlog of work visa applications, which encourages understandably frustrated applicants to bypass the system.¹⁴¹ Thus, to solve the problem, many proposals increase the quota limit for work visas or reallocate a greater share of the existing visa supply to the worker categories. For example, the Secure America Act of 2005 would have allocated 400,000 visas to a new "H-5" worker visa category.¹⁴² The exact supply of these H-5 visas would have been allowed to increase or decrease somewhat based on demand.¹⁴³ Another bill, proposed at the same time as the Secure America Act, would have expanded the availability of temporary worker visas under a newly invented "W" category.¹⁴⁴ The former bill was advertised as "market-based" when it was proposed, because it focused on worker categories and attempted to expand quotas to better accommodate the demand

¹³⁶ *Id.* at 1.

¹³⁷ *See id.*

¹³⁸ Ali Vitali, *Trump: Give me the wall, I'll give you 'Dreamers'*, NBC NEWS (Jan. 4, 2018, 12:51 PM), <https://www.nbcnews.com/politics/white-house/trump-border-wall-must-be-part-any-daca-deal-n834671>.

¹³⁹ Tara Golshan, *Congress Failed to do Something on Immigration — again. Here's Why.*, VOX (July 2, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/7/2/17509726/congress-fail-immigration-again>.

¹⁴⁰ *See generally* WEST, *supra* note 13.

¹⁴¹ *See* Wadhia, *supra* note 12, at 205–06.

¹⁴² *Id.* at 208.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 209–10.

for visas.¹⁴⁵ However, it is misleading to describe the bill as market-based because it still placed a fixed number on the amount of visas that could be issued. A truly market-centered approach would not set a cap on the issuance of any particular kind of visa to the exclusion of others, based on the perceived needs of policymakers, because markets allocate resources *unconsciously*.¹⁴⁶ Moreover, a truly market-oriented approach would not set an artificial cap on the supply of available visas. Markets are not and cannot be guided by means of central administration.¹⁴⁷

Another major push for comprehensive reform was made in 2007. The Comprehensive Immigration Reform Act of 2007, or “Secure Borders, Economic Opportunity and Immigration Reform Act of 2007,” like previous bills, would have created a new visa category.¹⁴⁸ This one would have created transitional “Y” and “Z” visas, which were designed specifically to adjust to permanent resident status.¹⁴⁹ This would have allowed more people to wait inside the U.S., rather than in their countries of origin, so that the visa wait times would not overly disrupt the lives of prospective immigrants. It failed to pass.¹⁵⁰ While this solution would not have eliminated or curbed wait times caused by visa quotas, it might have made their effects less pernicious. However, the bill also included more nativist provisions, such as one that made English the national language and another which restricted familial migration to immediate relatives only.¹⁵¹ This latter provision was designed to end chain migration.¹⁵²

¹⁴⁵ See *id.* at 208; *Id.* n.33.

¹⁴⁶ See Hayek, *supra* note 64, at 519–20 *passim*.

¹⁴⁷ See *id.*

¹⁴⁸ Alrashid, *supra* note 12, at 30–33.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 33–34.

¹⁵² *Id.* Chain migration is the logical result of a visa system that creates preferences based on familial proximity. However, it is also a pattern of immigration that has occurred in the U.S. for its entire history. Person A immigrates to the country, qualifying person B for a visa because they are a relative of A. Person B’s status then qualifies person C—a relative of B—for a visa, C qualifies D, and so on. There is nothing wrong with chain migration, but its potentially exponential effects are often exaggerated by those who wish to stigmatize immigrants. In reality, the visa

While most proposals attempt in some way to alleviate the disparity in supply and demand for visas, they also seek to enhance administrative efficiency in the enforcement of the law. Despite adding provisions which contribute to the INA's complexity—such as new visa categories and nuanced eligibility requirements for each of them—reformers seek to cut through red tape by consolidating federal databases to make the application process more streamlined.¹⁵³ These same efficiency measures are also intended to augment enforcement of immigration laws.¹⁵⁴ Many, including the reform acts of 2007, introduce digital registries which make things like proof of employment or visa currency more efficient and accessible.¹⁵⁵ This has potential to speed up the application process for preference categories that require proof of employment.¹⁵⁶ This is what the e-verify program does.¹⁵⁷

The digitizing of information is intended to consolidate the knowledge of various federal and state agencies and thereby enhance efficiency.¹⁵⁸ In particular, the data gathered from the Employment Eligibility Verification System would be used to identify employers engaged in the unlawful hiring of immigrants who are not eligible to work in the U.S. This would be achieved through a careful monitoring of social security numbers.¹⁵⁹ Although it makes perfect sense to digitize the system for the sake of efficiency, doing so is a double-edged sword. More effective enforcement of the immigration law means that the law will increasingly conflict with the demands of the labor market.

backlog means that, at present, the progression from person A to C could take decades to resolve; a move from A to D could take close to a century. “Chain migration” has, for this reason, become a loaded and often misleading term. *Contra* JESSICA VAUGHAN, CTR. IMMIGR. STUD., IMMIGRATION MULTIPLIERS: TRENDS IN CHAIN MIGRATION 1 (2017), https://cis.org/sites/default/files/2018-01/vaughan-chain-migration_0.pdf, (in which the author describes the process of chain migration, and suggests ways of curbing it).

¹⁵³ Alrashid, *supra* note 12, at 35–37 (discussing employment eligibility verification).

¹⁵⁴ *See id.* at 35–37.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 36.

As globalization continues to exert its influence, the country is projected to become increasingly reliant on foreign-born workers.¹⁶⁰ Constricting the flow of labor, and doing so more effectively, appears counterproductive.

Despite laudable goals of increasing visa access and enhancing administrative efficiency, reformers often include measures which reemphasize U.S. sovereignty and security. The assertion of sovereignty is often expressed through measures which enhance border security and enforcement, even when doing so is highly problematic. For example, the Employment Eligibility Verification System would rely on the REAL ID Act for enforcement.¹⁶¹ That act enabled immigration judges to deny relief to immigrants merely because they lack written proof of hardship.¹⁶² It also restricts habeas corpus rights in places where the INA bars judicial review.¹⁶³ This can lead to undue hardship and lack of due process for certain kinds of immigrants, and refugees in particular.¹⁶⁴

Border security is also emphasized to an often irrational extent. However, this may be because it is a politically popular measure. Given that the majority of persons unlawfully present in the U.S. entered with inspection, and thus did not illegally cross the border, border enforcement certainly seems overemphasized.¹⁶⁵ It is evident that this is motivated by notions of sovereignty, even in the naming of the bills. For example, the names of the Secure America Act and the Secure Borders Act, covered above, clearly assert the authors' intents to solidify American borders and thus assert the sovereignty of the country. The Comprehensive Immigration Reform Act of 2007 would have added 20,000 more full-time U.S. Border Patrol agents to the

¹⁶⁰ *Globalization, Security & Human Rights*, *supra* note 7, at 451.

¹⁶¹ Alrashid, *supra* note 12, at 35.

¹⁶² *See* Wadhia, *supra* note 12, at 237–38.

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See* Robert Warren & Donald Kerwin, *The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays have Outnumbered Undocumented Border Crossers by a Half Million*, 5 J. MIGRATION & HUM. SECURITY 124, 127 (2017) (providing statistics for 2014 indicating that two-thirds of all unauthorized immigrants are visa overstays and not EWIs.)

BPA, along with 370 miles of fencing along the U.S.–Mexico border.¹⁶⁶ The Trump administration has also echoed calls for expansion of the border patrol.¹⁶⁷ In particular, President Trump requested 15,000 more agents for the Border Patrol and Immigration and Customs Enforcement (ICE), despite its possible deleterious effects on agency competency.¹⁶⁸ Increases to border fencing were also called for in the CLEAR Act, which would have enabled state police officers to enforce immigration laws in a manner similar to ICE, and converted the civil offense of unlawful presence into a criminal offense.¹⁶⁹

Overall, most proposed reforms are mixed bags. In reality, they are inadequate suggestions that also include some rather harmful provisions. In general, all of the proposals detailed above suffer from two major flaws. First, and most importantly, they fail to change the fundamental mechanism of visa allocation provided by the INA. Second, by placing an emphasis on security and enforcement of the existing law, they exacerbate the inefficiencies and black-market incentives created by the quota system. The best remedy detailed above, transitional visas—designed to alleviate the pain of waiting for permanent visas—is only a half measure.¹⁷⁰ Other suggestions, like new visa categories and an increase of 400,000 available visas, are also only temporary solutions to the imbalance of visa demand and supply.¹⁷¹ In time, demand may again come to exceed the supply; thus, such measures are, at the very least, not stable solutions.

Crackdowns on immigration enforcement exacerbate the pains caused by the inefficiencies inherent in the allotment of visas. The long wait times created by the lack of visa supply is in part alleviated by unlawful migration. Lax enforcement of immigration laws provides people who could otherwise not afford to wait in a twenty-year long

¹⁶⁶ Alrashid, *supra* note 12, at 30–31.

¹⁶⁷ Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR (Feb., 23, 2017, 5:12 AM), <https://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

¹⁶⁸ *Id.*

¹⁶⁹ See Wadhia, *supra* note 12, at 212.

¹⁷⁰ See Alrashid, *supra* note 12, at 35–38.

¹⁷¹ See Wadhia, *supra* note 12, at 208.

line the ability to live their lives in the U.S., even though they might place themselves at risk for removal.¹⁷² While this does open up unfortunate possibilities of worker exploitation, such issues would be better attended to by vigorous enforcement of employment law and worker's rights rather than immigration law.¹⁷³ While one might argue that overstaying one's visa or entering without a visa is unfair to those who have patiently waited, one cannot know what exigencies, challenges, or pressing concerns any particular individual faces. Yet, in most cases, immigrants, documented and undocumented, have lived peacefully in the U.S. for more than a decade.¹⁷⁴ Crackdowns on enforcement may incentivize overstays, for fear that one may not be able to reenter the country after making a small mistake. Aside from this risk, crackdowns on immigration enforcement and stricter border security may simply make the lives of good people needlessly difficult. In general, the efforts expended during enforcement are asymmetrically disproportionate to the risks of lax enforcement.

IV. LESSONS FROM HISTORY AND A PATH FORWARD

A. Proposed Policy Changes

An open and generous immigration policy would best meet the five general goals of comprehensive immigration reform, because it would alleviate the systemic imbalances created by the present incarnation of the INA. First, a general amnesty provision could accommodate people who are already here unlawfully. Second, visas issued without quota limits, with simple eligibility requirements, could eliminate the current backlog of applications. The backlog exists because more people apply for visas every year than there are visas

¹⁷² Consider that those seeking employment in the United States must often demonstrate that they have a job before their visa is approved. The wait time involved in getting that visa may cause opportunity to pass them and their employers by. Likewise, people may be separated from spouses, siblings, parents, and other close family members for undue amounts of time. In many cases, this may be enough incentive to stay past the time allotted by one's temporary visa. Administrative difficulties inherent to the system may also be too difficult to navigate effectively, making mistakes and overstays more likely.

¹⁷³ *Globalization, Security & Human Rights*, *supra* note 7, at 446.

¹⁷⁴ See PASSEL & COHN, *supra* note 9, at 5–6.

available.¹⁷⁵ If there were no quota and visas were issued according to market demand, then there would be no delay other than processing. There would be little issue accommodating the future flow of immigrants because such a system would not attempt to manage it. Visas would simply be issued as qualifying people apply. Third, without complex visa preference categories, processing times could be reduced. General immigrant visas could simply require that the applicant meet basic health standards and satisfy criminal background checks. The visa applicant would no-longer have to navigate complex employment requirements or prove that they are of some specific familial relation to a sponsor. No visa sponsors would be required. In this context, digitization of the process could also help streamline applications. Finally, because incentives for black-market labor and immigration would be reduced by the unlimited availability of legitimate visas, enforcement of current border and customs law would become less burdensome. Fewer people would be in violation of the law because they would have access to legitimate alternatives. How this might impact domestic laborers is another question.

A general amnesty provision is necessary for comprehensive reform. People who are already peacefully residing in the country deserve to stay. However, the amnesty provision must be as sweeping as possible. It must also be accompanied by another provision that renders future grants of amnesty unnecessary, as amnesty is always a temporary solution. Thus, the provision of the INA which penalizes unlawful presence must also be amended.¹⁷⁶ When a non-citizen has not committed an actual crime, it should always be possible for the non-citizen to re-enter the country or adjust oneself to legal status. Waivers for hardship must not be the only exceptions to the rule.¹⁷⁷ Rather, bars to re-entry themselves should be the exception. They should be reserved solely for non-citizens who have committed serious

¹⁷⁵ See Bergeron, *supra* note 4, at 4 (indicating that the most extreme wait times are in excess of twenty years in countries that have exceeded the 7% global visa cap, and thus are treated to special restrictions on visa issuance).

¹⁷⁶ 8 U.S.C. § 1182(a)(9)(B). This section of the INA provides for a three and ten-year bar to re-entry after accruing unlawful presence in the U.S. *Id.* at § 1182(a)(9)(B)(i). Since admissibility is a requirement for visa eligibility, this presents a major obstacle for non-citizens not covered by the amnesty provision.

¹⁷⁷ 8 U.S.C. § 1182(B)-(C).

crimes or pose dangers to the public health. In general, the only limit on re-entry into the U.S. should be the time it takes to process a valid visa, whether temporary or permanent.

Amnesty provisions necessarily have certain drawbacks. Aside from being temporary fixes which do not help contend with future undocumented populations, they also seem to do some harm to the rule of law. People who are residing in the U.S. unlawfully, after all, are here unlawfully. To forgive their transgressions en masse is to undermine the legitimacy of law itself. “Amnesty,” because of this notion, has become somewhat of a dirty word.¹⁷⁸ However, the rule of law is threatened more by the conditions created by the current immigration system and the INA than it would be by a temporary measure designed to alleviate those conditions. A law that encourages its own violation does harm to the rule of law. Black market labor, border evasion, entry without inspection, and unlawful presence itself, are all, in part, the result of too few available visas. While the unlimited issuance of visas, regulated merely by demand, would solve these problems, it could not assist the millions of people who are already ineligible for visas due to the accrual of unlawful presence. Therefore, an amnesty provision would be needed.

The most necessary element of truly comprehensive reform is the complete elimination of all visa quotas. This requires the repeal of INA § 203 and the seven-percent per-country allocation limit of INA § 202. There should be no ceiling for the issuance of visas. They should be issued on an unlimited basis, whenever a qualified applicant applies. While some might object that unlimited visas would allow an unmanageable number of immigrants into the U.S., this is not the case. Immigration flows are mostly self-regulating. Although visas are theoretically unlimited, rates of immigration tend to vary alongside the

¹⁷⁸ David Frum, *Five Reasons Obama Shouldn't Declare Amnesty*, THE ATLANTIC (Nov. 14, 2017), <https://www.theatlantic.com/politics/archive/2014/11/five-reasons-obama-shouldnt-declare-amnesty-immigration-executive-order/382845/>; Mark Krikorian, *Just Don't Call it 'Chain Migration'*, CTR. IMMIGR. STUD. (Dec. 21, 2017), <https://cis.org/Oped/Just-Dont-Call-It-Chain-Migration>.

unemployment rate and economic conditions in general.¹⁷⁹ Low unemployment rates tend to coincide with high rates of immigration.¹⁸⁰ Whereas, when the unemployment rate is high, rates of immigration are reduced.¹⁸¹ Thus, we will never be overwhelmed by immigrants. They come when there is room for them, and when they can find opportunity. Pull factors are relative to the present condition of our country, and so people generally come only when the conditions are comparatively favorable to those of their own. For example, the recent, net-negative rate of immigration coincided with the 2008 financial crisis.¹⁸² Similar drops in immigration occurred during the Great Depression.¹⁸³ If anything, rates of immigration are a vital sign that indicates the health of the country. High rates of immigration indicate good health.

Some might fear the consequences of quota-less immigration. Two principal concerns are that the high demand for visas might overburden the state's administrative apparatus and that a flood of foreign workers might depress domestic wages and working conditions. These fears are misguided. Initially, the current backlog might create a temporary flood of applications which the current bureaucratic infrastructure could not accommodate. However, there is little reason to imagine that this problem would remain an issue forever. The backlog is a side effect of the quotas which suppressed the supply of visas. In time, that would subside and give way to more regular requests for visas. At the moment, there is a mass of people waiting in line. But without a quota, a buildup of visa applications is less likely because they will be granted as needed. The current of applications will become steady, even if the initial rush is like a tidal wave. To mitigate the impact of the initial rush, it may also be necessary to bolster the resources available to consulates and federal agencies

¹⁷⁹ David Bier, *Why Unemployment is Lower When Immigration is Higher*, CATO INST. (July 26, 2016, 1:15 PM), <https://www.cato.org/blog/why-unemployment-lower-when-immigration-higher>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See PASSEL & COHN, *supra* note 9; Bier, *supra* note 179.

¹⁸³ Bier, *supra* note 179, at fig. 1.

charged with processing applications. To that end, it is advisable to increase funding to relevant agencies prior to enacting this proposal.

The second concern is more complicated. However, a more liberal immigration policy would reduce the frequency of unfair competition between foreign and domestic workers. People who are U.S. citizens or documented workers are subject to labor laws, minimum wage laws, and entitled to certain benefits. All of this makes them far costlier to hire than people who can be paid at any wage and who are not entitled to any sort of protection. However, by making it easy to acquire documentation and enter the system, the incentive to work at depressed wages is reduced. This is particularly true when documentation offers the promise of higher wages and hospitable working conditions, as mandated by law. Moreover, because rates of immigration rise alongside economic growth and strong employment numbers, there is little reason to suppose that immigration will depress wages or harm domestic rates of employment.¹⁸⁴

Optimally, all worker and familial preference categories should be done away with, alongside the quotas themselves. With a limitless supply of visas available for eligible persons, it would seem useless to draw distinctions between types of applicants. However, policymakers may still wish to retain visa categories in order to protect domestic laborers. If that is the case, no numerical limits need to be set, but visas could still be issued based on whether an applicant satisfies the requirements of any given category. If an applicant could not prove that they would not threaten domestic employment, the visa could still be denied, absent a quota. The backlog would still be relatively minimal because there would be no “line” for pending application currency. Whenever an applicant satisfied the conditions of admission, they could be admitted. In either case, the abolition of quotas would vastly improve the present situation and problems with the law.

However, preference categories ought to be abolished. Without quotas, the preference categories seem superfluous. If an applicant fails to meet the qualifications of one visa category, they

¹⁸⁴ See Albert, *supra* note 116, at 2–4 (arguing that the job creation effect of immigration dominates and outweighs the negative effects of immigration on wages, resulting in an increase in the net wealth of society).

could simply apply for another. As there is no limit to the number of visas available, visa types would not be much of an obstacle. The choice of application one files is already strategic, as mentioned above. People choose whichever preference category affords them the best chance of timely admission. Moreover, as they are arbitrary distinctions which do not objectively assess the potential benefits of individual immigrant's admissions, or the national interest, preference categories should be gotten rid of. Absent quotas, preference categories provide no tangible benefit to the public interest.

Finally, this proposal would not require any serious change to customs and border enforcement law. The reduction of wait times would inherently make the law more enforceable, because there would be less incentive to violate the law. Assuming that adequate background checks and security at points of entry are carried out, there should be little security risk from greater volumes of legal immigrants entering the country. National security and public health interests can still be protected. There is no reason not to screen visa applicants. There just might be more of them to screen. While this may increase processing time for applications, the primary cause of the backlog—a limited supply of visas—will still be addressed. Therefore, the incentives to follow the law will not be meaningfully diminished because wait times will not be egregious, or decades long. Overall, it is easier to address national security and public health concerns when it is known who is in the country and when they have been vetted. To accomplish this, people must be encouraged to enter the country legally and to submit to inspection. Thus, an open and liberal immigration policy would further protect U.S. security and public health interests.

B. Historical Analogues & Shifts in Attitudes

Although the Chinese Exclusion laws were passed in the 1870s, they did not reflect the general character or framework of the law. Rather, they were an explicit exception to the law. Immigration into the country was unrestricted.¹⁸⁵ Visas were also not a requirement until

¹⁸⁵ While the topic of naturalization is somewhat outside of the scope of this comment, one should also note that from 1790 until the early 1900s, the only immigrants capable of naturalizing were of European descent. *See generally*

after World War I. Prior to this period, migration between the U.S. and other nations was fairly open and free-flowing.

While for most of the nation's history borders were unrestricted and migration and immigration were unregulated, this might have been, to some degree, a matter of practicality rather than desire. Technological or financial issues could have rendered strong border enforcement impossible. Yet, it is highly doubtful that anyone could have said that condition diminished the nation's sovereignty. The U.S. thrived in this period, in part because immigrant labor helped fuel the industrial revolution and westward expansion. The United States' power as a nation-state was visibly augmented. By World War I, the U.S. was a prominent player on the world stage. What processing did occur was often done at ports and other common points of entry; control of infectious disease was the primary concern.¹⁸⁶ It is also worth noting that even after this era had ended and the National Origins Quota System had gone into effect, the country's immediate neighbors, Canada and Mexico, were exempted from the law.¹⁸⁷ Enforcement of strong physical borders was not a priority.

The modern notion of strong borders and the regulation of immigration arose in part because of Chinese Exclusion. The inevitable legal battles that resulted from the passage of the Chinese Exclusion Act helped establish the plenary powers doctrine.¹⁸⁸ This doctrine afforded the government virtually unlimited power to regulate immigration as a natural extension of its sovereignty and established that non-citizens have little or no constitutional protections.¹⁸⁹ If we

OPPORTUNITY AND EXCLUSION, *supra* note 2. Although this comment uses America's early history to provide an example of how and why unrestricted immigration works, one should not think that all aspects of this period's immigration policy were ideal, or that that is in any way what this comment suggests.

¹⁸⁶ Howard Markel & Alexandra Minna Stern, *Which Face? Whose Nation? Immigration, Public Health, and the Construction of Disease at America's Ports and Borders, 1891-1928*, 42 AM. BEHAV. SCIENTIST, 1314, 1315 (1999). Markel and Stern also argue that concern about infectious disease and other health concerns was also highly racially charged and pretext for discrimination. *See id.* at 1315-16.

¹⁸⁷ *See* OPPORTUNITY AND EXCLUSION, *supra* note 2, at 1-5.

¹⁸⁸ *See* Ting, *supra* note 21, at 304-06 (discussing the role of Chinese Exclusion adjudication in the creation of the plenary power).

¹⁸⁹ *Id.*

can rediscover older notions of sovereignty, it may be easier to convince people that an open border state would not injure the country or the rule of law.

The Supreme Court recently ruled on a case that promised to reconsider the scope of the plenary power. It was hoped by some, including this author, that a negative ruling on the Trump administration's travel ban would narrow the reach of the plenary power, or perhaps even spell its doom.¹⁹⁰ This would, in turn, create room for a national reconsideration of the relationship between border security and sovereignty. Modern notions of sovereignty were born as a justification for the Chinese Exclusion Act and expressed as the plenary powers doctrine. If that doctrine were undermined, it is possible that a shift in law could influence a subsequent shift in the public conception of sovereignty. That would make a meaningful change in policy all the more probable.

Instead, the Court implicitly endorsed the plenary power, the power of Congress to manage immigration with great judicial deference, and confirmed that Congress could delegate that power to the President.¹⁹¹ Moreover, the Court also expanded the scope of the power as applied to the President.¹⁹² They expanded the modern expression of the plenary power, articulated in *Fiallo v. Bell*, saying, “[f]or more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”¹⁹³ Ultimately, the Court upheld the travel ban, applying nothing more than rational basis review.¹⁹⁴ Thus, while hope that the Court and the nation might reconsider the plenary powers doctrine and its relationship to U.S. sovereignty is not lost, it has been greatly diminished.

¹⁹⁰ Jill E. Family, *Trump’s Travel Ban and the Limits of the U.S. Constitution*, WIDENER U. COMMONWEALTH L. SCH. LEGAL STUD. RES. PAPER SERIES NO. 17–10. 1–2 (2017).

¹⁹¹ *See generally Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁹² *See id.* at 2412–15.

¹⁹³ *Id.* at 2418 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

¹⁹⁴ *See Trump*, 138 S. Ct. at 2418–23 (evaluating legitimate state interests).

In many ways, the law as it existed before the National Origins Quota Act, or even the Chinese Exclusion Act, serves as an excellent model for a comprehensive reform proposal going forward. History illustrates that rather than harming U.S. workers, the nation was better off as a result of immigration. The modern experience illustrates this as well.¹⁹⁵ Given that the modern economy is increasingly intertwined with that of Mexico and Canada, the reduction of any barriers between all three countries also seems logical; a reversion to this state of affairs would be a positive change. Processing and approval for entry at ports and airports should remain for security and health reasons, but the larger bureaucratic framework could be markedly reduced. Specific enforcement of land borders could also be largely abandoned. With the law enforcement emphasis cast aside, a more market-oriented system of free migration could replace the antiquated quota model. The government would still retain the power to deport criminals, as it has since its inception. However, a system of free migration and immigration would virtually eliminate wait times and sharply reduce the amount of bureaucratic red tape. Sadly, much must change, culturally and legally, before such reform is possible.

V. CONCLUSION

Despite various reforms and reform proposals, the core policy instituted by the INA is archaic, and cannot be remedied. The quotas and preference categories that characterize the system are inherently arbitrary and remain in conflict with U.S. economic interests and the basic laws of supply and demand.¹⁹⁶ The consequences have been long wait times, miles of red tape, and people deprived of opportunities to work or live with their families.¹⁹⁷ By examining history and shifting the emphasis away from sovereignty and back to economic expansion, it is possible to correct these wrongs, although this shift is unlikely to occur. The INA quota system ought to be abandoned in favor of a system of free migration and immigration.

¹⁹⁵ See Bier, *supra* note 179.

¹⁹⁶ See *Globalization, Security & Human Rights*, *supra* note 7, at 449.

¹⁹⁷ See Bergeron, *supra* note 4, at 1–7 (detailing wait times and logistical red tape).

A system of free migration and immigration, rooted in the actual demand for visas, could eliminate the unjust backlog created by the quota system. It would also conceivably reduce the burdens of enforcing immigration and customs law. The processing of visas would go more smoothly because there would be less required to file an application. One would simply need to satisfy basic requirements relating to health and public safety. Rather than creating a lawless atmosphere, it would simply make the law more realistic, manageable, and reflective of people's needs. There is also little need to reduce the strength of the U.S. security apparatus. As more people apply for legal status within the U.S., less energy will be required to police the activity of those who do not. However, such a proposal will face significant opposition, and its enactment is, sadly, unlikely.

At present, the U.S. has a strong tradition of sovereignty, but popular notions of what that entails are newer than is commonly understood.¹⁹⁸ This tradition is unlikely to change, as suggested by the most recent Supreme Court precedent on the subject.¹⁹⁹ Maintaining porous borders and allowing theoretically limitless migration and immigration from all corners of the Earth seemingly threatens this tradition. However, the threat is misbegotten. Sovereignty comes from a nation's ability to enforce its own laws, not the solidity of its borders. Further, migration and immigration are not limitless; they are regulated by supply and demand. Demand is not always high. During times of economic strife in the U.S., or prosperity elsewhere, rates of immigration and migration into the U.S. are reduced.²⁰⁰ The unemployment rate is actually lower when the rate of immigration is higher, and vice-versa.²⁰¹ In order for a system of free migration to become politically feasible, myths of what sovereignty is and is not must be broken. In order to do this, it is necessary for the public to acquire greater knowledge of the United States' immigration history.

¹⁹⁸ See Ting, *supra* note 21, at 303–07 (explaining that these notions arise out of Supreme Court cases contrived to justify the Chinese Exclusion Act and establishing the plenary power).

¹⁹⁹ See *Trump*, 138 S. Ct. at 2418–19 (upholding the principle that the executive and legislative branches wield extensive power over “the admission and exclusion of foreign nationals. . .”).

²⁰⁰ See Wadhia, *supra* note 12, at 204.

²⁰¹ Bier, *supra* note 179.

In particular, Americans must understand that the management of immigration is a relatively recent phenomenon.²⁰² They must realize that the present system runs counter to the country's long history of free migration.

In conclusion, the INA should be amended to abandon the quota framework in favor of a system of natural allocation of visas based on market principles. Presently, most other parts of the law are negatively impacted by stresses created by the quota system. American cultural dedication to sovereignty prevents such a proposal from succeeding, but more conservative reform efforts would not adequately address current issues. Therefore, radical change is needed to reform one particular aspect of the INA: the quotas.

²⁰² See generally OPPORTUNITY AND EXCLUSION, *supra* note 2 at 1–7.