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National Interests and Common Ground in the US Immigration Debate: How to Legalize the US Immigration System and Permanently Reduce Its Undocumented Population

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Executive Summary

The conventional wisdom holds that the only point of consensus in the fractious US immigration debate is that the system is broken. Yet, the US public has consistently expressed a desire for a legal and orderly immigration system that serves compelling national interests. This paper describes how to create such a system. It focuses on the cornerstone of immigration reform,[1] the legal immigration system,[2] and addresses the widespread belief that broad reform will incentivize illegal migration and ultimately lead to another large undocumented population.

The paper begins with an analysis of presidential signing statements on seminal immigration legislation over nearly a century. These statements reveal broad consensus on the interests and values that the United States seeks to advance through its immigration and refugee policies. They constitute additional common ground in the immigration debate. To serve these interests, immigration and refugee considerations must be "mainstreamed" into other policy processes. In addition, its policies will be more successful if they are seen to benefit or, at least, not to discriminate against migrant-sending states.

Not surprisingly, the US immigration system does not reflect the vast, mostly unanticipated changes in the nation and the world since Congress last meaningfully reformed this system (27 years ago) and last overhauled

1 Effective legal immigration policies constitute the cornerstone of reform because, without them, the immigration enforcement system and any eventual legalization program will not be able to deliver on their promises.

2 The paper treats US refugee admissions as a form of legal immigration.

the law (52 years ago). The paper does not detail the well-documented ways that US immigration laws fall short of serving the nation's economic, family, humanitarian, and rule of law objectives. Nor does it propose specific changes in categories and levels of admission. Rather, it describes how a legal immigration system might be broadly structured to deliver on its promises. In particular, it makes the case that Congress should create a flexible system that serves compelling national interests, allows for real time adjustments in admission based on evidence and independent analysis, and vests the executive with appropriate discretion in administering the law.

The paper also argues that the United States should anticipate and accommodate the needs of persons compelled to migrate by its military, trade, development, and other commitments. In addition, the US immigration system needs to be able to distinguish between undocumented immigrants, and refugees and asylum seekers, and to treat these two populations differently.

The paper assumes that there will be continued bipartisan support for immigration enforcement. However, even with a strong enforcement apparatus in place and an adaptable, coherent, evidence-based legal immigration system that closely aligns with US interests, some (reduced) level of illegal migration will persist. The paper offers a sweeping, historical analysis of how this population emerged, why it has grown and contracted, and how estimates of its size have been politically exploited.

Legalization is often viewed as the third rail of immigration reform. Yet, Congress has regularly legalized discrete undocumented populations, and the combination of a well-structured legalization program, strengthened legal immigration system, and strong enforcement policies can prevent the reemergence of a large-scale undocumented population. In contrast, the immense US enforcement apparatus will work at cross-purposes to US interests and values, absent broader reform.

The paper ends with a series of recommendations to reform the legal immigration system, downsize the current undocumented population, and ensure its permanent reduction. It proposes that the United States "reissue" (or reuse) the visas of persons who emigrate, as a way to promote legal immigration reform without significantly increasing annual visa numbers.

The National Interests Served by US Immigration and Refugee Policies

All the partisans in the immigration debate agree that US immigration and refugee policies should serve the nation's interests, begging the question: What interests? Presidential

signing statements often poorly predict the impact of immigration legislation,[3] and their use in judicial interpretation is hotly contested (Yoo 2016, 1807-09). Yet, they can strongly illuminate the interests, principles, and goals that underlie the law. A review of signing statements on seminal immigration and refugee legislation — beginning with the national origins quota legislation of 1924 and ending with the 2002 legislation that established the US Department of Homeland Security (DHS) — reveals a rough consensus on these interests, as well as the traditions and values that gave rise to them. The historical touchstones and first principles of US immigration and refugee policy offer potential common ground in the immigration debate. They reveal a belief that:

- Families constitute the fundamental building block of society and their integrity should be preserved.
- Admissions policies based on national origin, race, or privilege offend the US creed and civic values.
- Fairness and process should characterize admission and removal decisions.
- Providing haven to persons fleeing persecution and violence reflects US history, tradition, and its core commitment to liberty, freedom, and dignity.
- Immigrants embody the US tradition of self-sufficiency, hard work, and drive to succeed, and further the nation's economic competitiveness.
- All US residents deserve access to "the benefits of a free and open society" (Reagan 1986).
- A system characterized by "fair, orderly, and secure" migration upholds the rule of law (ibid.).
- Illegal migration challenges US sovereignty, threatens US security, and devalues citizenship.
- Criminals and security threats flout US ideals, should not be admitted, and forfeit the right to remain.

The Johnson-Reed Act of 1924 represents an important point of departure in reviewing the interests and values served by the US immigration system over the last century. This discriminatory legislation restricted immigration levels from eastern and southern European nations to two percent of the number of their foreign-born residents in the United States in 1890. It also barred permanent immigration from Japan. In his signing statement, President Calvin Coolidge took exception only to the legislative bar on Japanese immigrants, favoring instead the existing Gentlemen's Agreement of 1907, which required Japan to prevent the emigration of its nationals to the United States (IMR 2011; Young 2017, 221).

Nearly 30 years later, President Harry S. Truman vetoed the Immigration and Nationality Act (INA) of 1952,[4] although Congress overturned his veto. Truman objected to the Act's retention of the national origins quota system, which he called "deliberately and intentionally" discriminatory and "insulting to large numbers of our finest citizens, irritating to our allies abroad, and foreign to our purpose and ideals" (IMR 2011, 192-93). Truman

3 In signing the Immigration and Nationality Act of 1965, for example, President Johnson said the legislation did "not affect the lives of millions" and would not "reshape the structure of our daily lives" (Johnson 1965). Yet, the legislation has done both. In signing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), President Clinton said the Act would not punish legal residents, although it manifestly has had that effect (CLINIC 2001, 48-56).

4 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

argued that the quotas violated the US commitment to equality, its "humanitarian creed," and the "brotherhood of man" (ibid., 193-94). He also opposed its deportation provisions related to activities "prejudicial to the public interest" and "subversive to the national security" because they did not require "findings of fact made upon evidence" (ibid., 197). In addition, he resisted restrictions on the attorney general's discretion to suspend the deportation of the family members of US citizens and residents (ibid.), and its denial of citizenship to dual national US-born citizens with foreign-born fathers (ibid., 198). Truman also urged Congress to remove the bars to Asian immigration (ibid., 199).

The Immigration and Nationality Act of 1965 repealed the national origins quota system and replaced it with a system that prioritized family ties and workers with needed skills and abilities.[5] President Lyndon B. Johnson said that the Act corrected "a cruel and enduring wrong," overturned a law that "violated the basic principle of American democracy . . . that values and rewards each man on the basis of his merit," and removed the "twin barriers of prejudice and privilege" from the immigration system (IMR 2011, 201-02). He said the Act upheld the American ideal of admitting those "enduring enough to make a home for freedom, and . . . brave enough to die for liberty" (ibid., 202-03). He averred that because the United States was "built by a nation of strangers" and "nourished by so many cultures and traditions and peoples" that its citizens felt "safer and stronger" in the world (ibid., 201).

The Refugee Act of 1980[6] established the US refugee resettlement program, sought to bring US law into compliance with the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees,[7] and made asylees and refugees eligible for lawful permanent resident (LPR) status after one year. In his signing statement, President Jimmy Carter said the Act reflected the nation's "long tradition as a haven for people uprooted by persecution and political turmoil" and its "humanitarian traditions" (Carter 1980). He praised its "fair and equitable treatment of refugees in the United States, regardless of their country of origin" (ibid.). He also lauded the Act for assisting refugees to become "self-sufficient and contributing members of society" (ibid.).

The Immigration Reform and Control Act of 1986 (IRCA)[8] established the nation's last large-scale legalization initiative, authorized increased border enforcement, and created a system of sanctions for employers that hired undocumented persons to work. IRCA made it an "unfair immigration-related employment practice" to discriminate in hiring, or recruitment, or referral for a fee, or firing citizens and certain legal residents based on national origin or alienage.[9] In signing IRCA into law, President Ronald Reagan said the Act "preserves and enhances the Nation's heritage of legal immigration" and removes "the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens" (Reagan 1986). He said the Act would "go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of

5 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

6 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

7 Convention relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 (*entered into force* April 22, 1954); Protocol relating to the Status of Refugees, January 31, 1967, 606 UNTS 267 (*entered into force* October 4, 1967).

8 Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

9 IRCA, § 102.

a free and open society" (ibid.). He stressed the need "to humanely regain control of our borders" in order to preserve the value of US citizenship. IRCA, he said, sought to "establish a reasonable, fair, orderly, and secure system of immigration . . . and not to discriminate in any way against particular nations or people" (ibid.). It also precluded noncitizens from securing temporary or permanent residence if they had committed a felony or three or more misdemeanors, or they were likely to become a "public charge."[10]

The Immigration Act of 1990[11] increased legal immigration levels; established the Temporary Protected Status (TPS) program for nationals of designated states experiencing conflict or natural disaster; created new nonimmigrant visas (primarily for skilled workers); eased naturalization requirements; strengthened IRCA's antidiscrimination provisions; authorized funding for 1,000 more border personnel; and expanded the criminal grounds of removal. In his signing statement, President George H.W. Bush called the legislation "a complementary blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs" (G. H. W. Bush 1990). He vowed that it would contribute to "a more competitive economy," support "the family as the essential unit of society," and punish "drug-related and other violent crime" who "forfeit their right to remain in the country" (ibid.).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[12] one of the most ambitious immigration enforcement bills in the nation's history, created new federal, state, and local enforcement programs; authorized funding for border and interior enforcement; expanded the criminal grounds of removal; created expedited and accelerated removal programs; established multiyear bars to admission based on past presence without immigration status and past removals; limited relief from removal; expanded mandatory detention; and created more demanding sponsorship requirements for visa petitioners. In his signing statement, President William J. Clinton said that the legislation "strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system — without punishing those living in the United States legally" (Clinton 1996).

The Homeland Security Act of 2002[13] created DHS and reconceptualized the US immigration system as a homeland security concern. In his signing statement, President George W. Bush situated border security within an "unprecedented" and "unified government response" to defend US "freedom and security" and "to prevent and defend the United States from terrorist attacks" (G. W. Bush 2002).

The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) sought to promote interests similar to those set forth in the signing statements, i.e., immigrant integration, secure borders, national security, and economic, military, and ethical strength.[14] Of all the "comprehensive" reform bills in last 15 years, S. 744 advanced the furthest, passing the US Senate on June 27, 2013.

10 IRCA, §§ 102(a)(4)(B) and 201(d)(2)(B).
11 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).
12 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 (1996).
13 Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135 (2002)..
14 S. 744, 113th Cong. § 2 (2013).

Immigration Policy and Foreign Relations

Beyond identifying underlying US interests and values, the signing statements recognize the close connection between foreign relations and immigration/refugee policies, which invariably implicate citizens of other nations, require cooperation from source, transit, and destination states,[15] and project US ideals and intentions. Successive administrations have viewed this system as a tool to strengthen the country and enhance its global standing.[16] The signing statements also frequently appeal to other states regarding US intentions and seek to anticipate and assuage their concerns.

In vetoing the Immigration and Nationality Act of 1952, for example, President Truman called for a bill that would be "a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad" (IMR 2011, 195). President Johnson praised the Immigration and Nationality Act of 1965 for conveying "the light of an increased liberty for the people from all the countries of the world" (ibid., 204). President Reagan took pains to clarify that illegal immigration was not "a problem between the US and its neighbors" (Reagan 1986). President George W. Bush sought to ensure US "friends" that the Homeland Security Act's was laying the groundwork for a more "welcoming" immigration system (G. W. Bush 2002).

By contrast, states have been acutely sensitive to US immigration laws and practices that they believe discriminate against their nationals, as evidenced most recently by the global reaction to the Trump administration's executive orders to suspend immigration from Muslim-majority states and to cut refugee admissions (Markon, Brown, and Nakamura 2017).

US refugee policies, in particular, serve as an extension of its foreign policy, as was particularly evident during the Cold War (Scribner 2017). US leadership was also central to mobilizing the global response to the refugee crises created by World War II and the Vietnam conflict (Kerwin 2016).

The Challenge of Meeting Evolving Needs and Changed Conditions

US presidents have been frustrated by the infrequency of legislative reform on immigration and have stressed the importance of flexibility and discretion in implementing the law. In his veto statement to the Immigration and Nationality Act of 1952, for example, President Truman vented: "In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration" (Truman 1952).

President Carter praised the Refugee Act of 1980's flexibility in allowing refugee admissions levels to change "in response to conditions overseas, policy considerations, and resources available for resettlement" (Carter 1980).

15 The Refugee Action of 1980, § 101(a), declared one of its purposes to be "encourag[ing] all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."

16 Even Calvin Coolidge preferred a diplomatic approach (rather than a law) to prevent migration from Japan.

President H.W. Bush expressed concern regarding language in the Immigration Act of 1990, which referred to TPS as the "'exclusive authority' by which the executive could allow otherwise deportable aliens to remain in the United States based on their "nationality or region of origin" (G. H. W. Bush 1990). As a result, Bush interpreted the legislation as not "detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases" (ibid.).

Disputes over the scope of executive authority in this area have been particularly acute in the last two administrations. President Barack Obama argued that Congressional inaction on immigration reform forced his administration to create the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, which ultimately did not survive a legal challenge and change in administration.

The Trump administration's executive orders to reduce refugee admissions and to suspend immigration from certain Muslim-majority states have also been subject to legal challenge and, at this writing, temporarily enjoined. However, while the scope of executive action will remain a contentious issue, the *need* to exercise discretion — based on US interests, a principled reading of the law, and limited resources — persists. The alternative is laissez-faire enforcement, without a plan or priorities (Kerwin, Meissner, and McHugh 2011, 14-15).

Migration Governance: Situating the US Immigration System in a Broader Policy Context

Politicians, the media, and public demand both too much and too little from US immigration policies. On the one hand, none of the interests served by immigration policies — family, economic, or humanitarian — can be achieved *only* by them. The success and integrity of immigrant families depends both on their legal reunification, for example, and on a range of domestic policies and programs in host communities. The degree to which immigrants can contribute economically to the nation depends not only on the admission of talented, hard-working immigrants, but on the state of the economy and the relatively open job market. US refugee and humanitarian programs benefit from and (often) depend upon collaboration from other states, local communities, nongovernmental actors, and the affected populations themselves.

Refugee resettlement can save lives and leverage better conditions for refugees, like education, employment, and other integration opportunities in host communities.[17] However, resettlement to third countries is only available to one percent of the world's refugees. Thus, diplomacy to prevent and mitigate refugee-producing conditions and development assistance to refugee host communities can benefit more refugees than resettlement.[18] The 9/11 Commission argued that the terrorist threat requires a response that enlists all elements of "national power" (National Commission on Terrorist Attacks

17 These communities host upwards of 90 percent of the world's refugees.

18 Support for greater education, employment opportunities, entrepreneurial activity, and legal immigration options for refugees have proven particularly consequential and cost-effective investments.

Upon the United States 2004, 363-64). A similar claim can be made for immigration and refugee policy: Its goals can only be met in cooperation with other nations, multiple federal agencies, states, localities, and civil society.

In other ways, the United States expects too little from its immigration and refugee programs and, as a result, does not fully leverage these programs or fully exploit the drive, skills, and ideas of immigrants or refugees. This may be clearest in the case of highly skilled immigrants who cannot work in their chosen field due to credentialing barriers. However, it also occurs in less obvious areas. Prior to the 9/11 attacks, for example, US intelligence and law enforcement agencies did not draw on the Immigration and Naturalization Service (INS) for information on terrorist travel methods or profiles, or on immigrant communities for information on potential threats (Kerwin 2016, 94, 103).

In recent years, the state-led High-Level Dialogues on International Migration and Development, which occurs under the aegis of the United Nations, has documented the contributions of expatriates to poverty reduction, disaster relief, economic development, and reconciliation initiatives in their ancestral or birth communities. This process has also identified specific immigration policies that facilitate these contributions, like circular migration policies that allow migrants to secure education and training in migrant destination states; to lend their expertise, know-how and financial resources to their communities of origin; and to travel back and forth in order to sustain family and business ties. The Migration and Development dialogue has also led some states to "mainstream" migration into development planning and programs; that is, to attempt to maximize the development potential and inputs of immigrant communities. In the United States, it inspired the International diaspora Engagement Alliance (IdEA), a public-private partnership managed by the US Department of State and the US Agency for International Development "that promotes and supports diaspora-centered" economic and social development initiatives (IdEA 2016).

Immigrant and refugee concerns should also be "mainstreamed" into domestic policymaking. Immigrants have distinct needs, which should be reflected in educational, labor, workforce development, language access, credentialing, criminal justice, health care, citizenship, and many other policies on multiple levels. To this end, Els de Graauw and Irene Bloemraad (2017) have proposed establishing a horizontally and vertically integrated national integration initiative which would enlist federal, state, and local agencies, and diverse civil society actors in integration programs and partnerships.

Finally, it is essential that the United States distinguish between illegal migration and refugee and humanitarian flows, like the hundreds of thousands of migrants driven over the last five years from the violence-plagued Northern Triangle states of Central America (Musalo and Lee 2017). Large-scale migration flows invariably include persons with diverse motives and aspirations. However, the legal norms and strategies to protect refugees and asylum seekers differ substantially from the standard enforcement responses to illegal migration. Applying deterrence, detention, and expedited removal strategies to refugee-like populations violates the spirit and often the letter of international law (Gammeltoft-Hansen and Tan 2017, 30-32; MRS/USCCB and CMS 2015, 165, 182-83). Moreover, these tactics

will ultimately be ineffective in reducing the flight of persons who have no legal recourse from violence in their own states, and will have the perverse effect of contributing to the US undocumented population.

These examples underscore a governance imperative, i.e., that immigration/refugee officials engage the full range of government and private actors that will allow them to meet their institutional goals and responsibilities, that they participate in other processes that are essential to the wellbeing of immigrants and refugees, and that they treat refugees, asylum seekers, and humanitarian migrants differently than other irregular migrants. Over the years, there have been many proposals — both from government and nongovernmental sources — intended to ensure that immigration and refugee concerns benefit from and inform other policymaking processes. However, it remains far from clear whether this kind of "mainstreaming" occurs in an intentional way between federal, state, and local agencies or among federal agencies, or even whether the constituent agencies of DHS systematically engage on crosscutting policy issues and operational needs (Meissner and Kerwin 2009, 92-95).

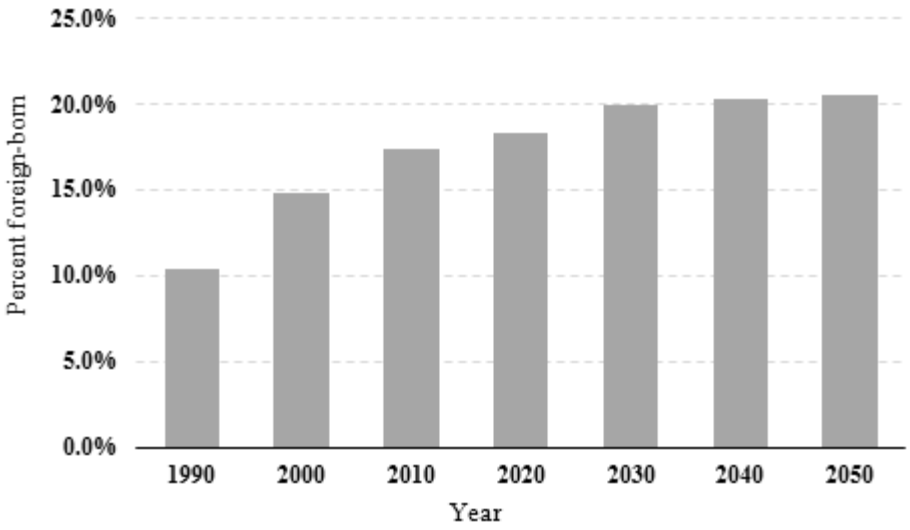
The Need for Cooperation from Other States

As suggested by the presidential signing statements, US immigration and refugee policies can benefit from and their success often requires cooperation from other states, whether in responding to the causes of forced migration, promoting the humane treatment of migrants in transit, protecting migrants in destination states, or receiving returning nationals. Cooperation has been strongest on deterrence and enforcement policies that seek to deny refugees and immigrants access to developed states, and weakest on refugee protection and responsibility sharing (Frelick, Kysel, and Podkul 2016). Yet this need not be the case. For example, policies that combine third-country resettlement of particularly vulnerable refugees, with financial support to refugee host communities, can benefit individual refugees, and create more opportunities for integration of refugees in host communities.

The outline of potential win-win "labor migration" programs is apparent in data on the aging and shrinking workforces in developed states, and the younger populations in developing states that would willingly migrate to work. Many developed states need impossible-to-get numbers of immigrants from 2010 to 2050 just to maintain a stable work force and a steady ratio between residents age 65 and above, and working age residents between the ages of 20 and 64. This dynamic has been "mitigated" in the United States by the relative youth and high fertility rates of its large immigrant population (Reznik, Shoffner, and Weaver 2005-2006, 38).

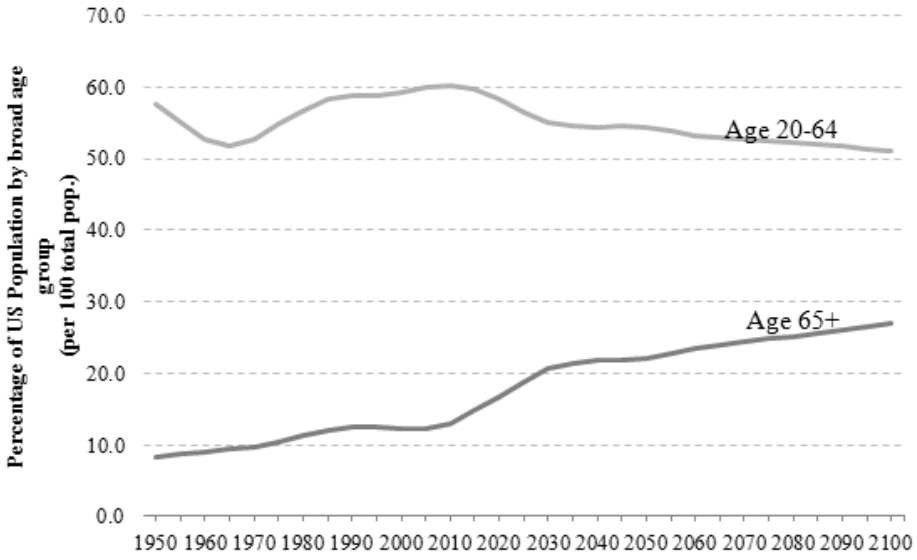
Foreign-born workers are essential to the US labor force, and their share is projected to rise over the next few decades. As figure 1 shows, about 10 percent of the US population between age 18 and 64 were foreign born in 1990. By 2030, the percentage is projected to double to 20 percent and will continue to increase, but at a slower rate, from 2030 to 2050.

Figure 1. Percent of Foreign-Born in the Population Aged 18 to 64: 1990 to 2050



Source: 1990 to 2010, census data; 2020 to 2050, Colby and Ortman (2014).

Figure 2. US Population by Broad Age Group: 1950 to 2100



Source: UN DESA (2015). Custom data acquired via website.

Nonetheless, the percentage of the US population age 65 and over is projected to increase from 13 percent in 2010, to more than 20 percent in 2030 (Ortman, Velkoff, and Hogan 2014, 2-3), pushing the Social Security and Medicare programs to the brink of insolvency.

Taking a broader historical view, the ratio of the US population between the working ages of 20 to 64, to the population at the standard retirement age of 65 and above, fell from nearly 7 to 1 in 1950, to 4.6 to 1 in 2010, and is projected to decrease further to 3.5 to 1 in 2020, 2.4 to 1 in 2050, and 1.9 to 1 in 2100 (figure 2).

The legal immigration of younger workers represents one of many strategies needed to mitigate this trend.[19]

Creating Coherent Laws and Policies

Policy coherence would also contribute to the success of legal immigration and enforcement polices, and reduce illegal immigration. As Orrenius and Zavodny (2017) have documented, the United States regularly creates immigration laws and procedures that predictably lead to the need for more visas, but that make no provision for meeting this demand. It also erects unnecessary barriers to available legal immigration procedures.

As of November 2016, for example, 4.26 million persons had been determined by US Citizenship and Immigration Services to have a close family relationship that qualified them for a visa, but were enmeshed in backlogs based on statutory caps by country and by visa preference category (DOS-BCA 2016). An unknown, but certainly large percentage of persons in this situation reside in the United States with the US citizen or LPR family member who petitioned for them. When their visa priority dates become current, most will need to leave the country for consular processing. INA § 245(i) allows certain undocumented persons who pay a substantial fine to adjust to LPR status in the United States, but this process is now available only to beneficiaries of visa petitions filed on or before April 30, 2001.

To make matters worse, IIRIRA created bars to reentry based on unlawful presence in the United States, three years for those out of status for at least 180 days and 10 years for those without status for more than one-year. After leaving the country, potential visa beneficiaries can apply for a waiver to these bars, but many have opted to remain in the United States and forego the ability to secure a visa for fear they will not be able to return. In response, the Obama administration created a process that allows persons in this situation to pre-apply for a waiver to the reentry bars, which offers a reasonable assurance that they will be able to return (USCIS 2016). A coherent immigration system would incentivize "playing by the rules," reduce backlogs, and permit the beneficiaries of family-based visa petitions to adjust status in the United States within a short period. Removing these barriers to legal status would advance the nation's interest in unified families and the rule of law.

On a smaller scale, albeit a program with profound consequences, US law bars asylum claims not filed within one year of the applicant's entry, with exceptions for cases involving "extraordinary circumstances relating to the delay in filing" or "changed circumstances which materially" affect asylum eligibility.[20] Yet beyond the narrow statutory exceptions, victims of violence, torture, and political persecution have many legitimate reasons —

19 Advancing the eligibility age for federal retirement programs and substantial increases in the number of US residents working past age 65 represent additional, complementary strategies to address this challenge.
20 INA § 208(a)(2)(B) and (D).

psychological, emotional, financial and evidentiary — for not applying for political asylum within a year of entry. This deadline — which has affected roughly 30 percent of affirmative asylum cases (Schrag et al. 2010, 688) — has not diminished meretricious or fraudulent claims (Acer and Magner 2013, 449; Kerwin 2015, 233-34). However, it does diminish the ability of bona fide asylum seekers to have their claims considered and, thus, constitutes another unnecessary barrier to legal status. Multiple legislative attempts to repeal this provision have failed (Nezer 2014, 126-27).

Policy coherence also demands that the United States attempt to forecast and plan for the migration and refugee flows generated by US actions in other contexts. In its 2016 report on global risk, the World Economic Forum predicted the increased "likelihood and impact" of involuntary migration, which it saw as strongly connected to conflict, violence, water crises, climate change, and economic factors (WEF 2016, 15). Yet, at present, the United States does not assess the potential "likelihood and impact" on migration of its own policies, much less act to reduce or respond to their inevitable human consequences. It should.

If US foreign interventions, for example, could reasonably be expected to displace large numbers of persons, the United States should take steps to minimize the dislocation or to secure haven for the displaced, including in the United States. This need may be most apparent in the case of US military engagements like the Vietnam War or the invasion of Iraq in 2003, or in proxy conflicts like US interventions in Central American in the 1980s and early 1990s (Kerwin 2016, 89, 93, 98; Musalo and Lee 2017, 52-57). Conflicts predictably generate large numbers of refugees and placed a heightened responsibility on participating states to address their needs (Hollenbach 2016, 160). Although not a perfect fit, "risk management" assessments by the US Department of Defense constitute one possible vehicle to project the migration implications of US overseas commitments and to take steps to minimize forcible displacement and its consequences.

Migration can also result from trade agreements. The North American Free Trade Agreement, which took effect in 1994, vastly disrupted the Mexican agricultural sector and prompted large-scale migration, but did not provide sufficient legal avenues of migration for displaced workers (Fernández-Kelly and Massey 2007, 99). Other regional integration processes facilitate entry or simplify migration in the case of workers tied to particular services or products, or more broadly liberalize the migration of nationals from participating states, thus reducing irregular migration.

The Importance of Flexible, Evidence-Based Immigration Policies

Immigration has been a politically contentious issue throughout US history. Assuming this remains the case and global integration continues to accelerate, the United States will increasingly need an immigration system that can adjust its admission priorities and numbers, relying on the best, most current data and research, in order to meet its underlying goals. Yet, the US employment-based immigration system has not been substantially revised since 1990, and at present there is no mechanism in place to adjust visa categories

or admission levels based on changed US economic conditions or labor needs. The system's lack of flexibility and responsiveness represents a glaring deficiency.

In recent years, several proposals have emerged to remedy this problem and to make US legal immigration policies more flexible and responsive to US needs and interests. In 2006, for example, the Migration Policy Institute proposed the establishment of a Standing Commission on Immigration and Labor Markets to analyze data on labor market conditions, trends, and needs, and to make recommendations to Congress and the president on possible adjustments to levels and categories of admission (Meissner et al. 2006, 41-43). The commission's overarching goals would to be to promote economic growth, prevent wage depression, and help maintain low unemployment rates (ibid.). Similarly, in 2009, Ray Marshall, former Secretary of the Department of Labor, proposed an independent Foreign Worker Adjustment Commission (FWAC), which would "assess labor shortages and determine the number and characteristics of foreign workers to be admitted for employment purposes" based on "analyses of domestic labor supply and demand of workers with appropriate skills and training" (Marshall 2009, 22). Unless Congress rejected FWAC's recommendations, they would become law (ibid.).

These ideas have been caricatured on one hand as an attempt to insert a clumsy, central planning mechanism between employers and necessary workers, and on the other for the possibility that a commission could be co-opted by business interests set on depressing wages and undermining working conditions.[21]

Pia Orrenius and Madeline Zavodny (2017, 190) argue that flexibility in admissions could also "be built in via automatic adjustment mechanisms, such as a formula that increases the number of temporary and permanent employment-based visas when the unemployment rate is low and falling and GDP growth is rising and reduces it when the opposite occurs" or via "market-based mechanisms to allocate employment visas, such as auctioning off [employment] permits" (ibid.). They also propose "[a]utomatically creating more family-based visas for migrants from a given country in response to larger legal inflows from that country" or simply to remove "the country cap on permanent visas" (ibid., 189).

As it stands, there is no formal, independent body on which Congress or the executive can rely to:

- identify the nation's evolving labor, family, or humanitarian needs that might be met through immigration, including on a state and local level;
- identify shortages in skills and occupations necessary to promote that nation's economic competitiveness;
- assess the labor market contributions and other trajectories of those who enter via different categories of admission, including family-based visas;
- propose adjustments in legal admission levels and categories to reflect the nation's needs, interests, and fluctuations in its economy;
- conduct research on the views of immigrants on US immigration policies in order to strengthen the legal immigration system, develop strategies to advance policy goals,

21 A less threatening version of these ideas might be the United Kingdom's Migration Advisory Committee, which is "an independent, non-statutory, non-time limited, non-departmental public body that advises the government on migration issues," producing reports on the impacts of immigration, limits on immigration, and labor shortages within occupations (Migration Advisory Committee 2017).

and better understand and address noncompliance with the law (Ryo 2017); and
- champion access by researchers to relevant datasets in order to build a more extensive evidence base on which Congress and the executive can make policy judgments in this area.

The absence of this kind of body is not just an opportunity foregone. Rather, the status quo undermines US competitiveness, a central goal of the immigration system. As Orrenius and Zavodny (2017, 189) point out: "Rigid caps for permanent residents and some categories of temporary foreign workers have resulted in tremendous backlogs and inefficient lotteries and have discouraged countless potential would-be immigrants from applying or staying in the United States; they may even encourage some companies to open or expand operations overseas instead of domestically" (ibid.). Moreover, the misalignment between US needs and available workers incentivizes illegal migration and the illegal hiring of undocumented immigrants. For example, the United States allots only 5,000 permanent visas per year, and has two narrow temporary worker programs for less skilled workers. These programs do not begin to cover the need for foreign workers, as was particularly evident during the height of illegal migration to the United States in the mid to late 1990s and early 2000s (Rosenblum 2012, 20).

By contrast, the Refugee Act of 1980 built a measure of flexibility into US refugee admissions by requiring the president annually, in consultation with Congress, to establish overall refugee admission levels and allocate refugee numbers by region and to an unallocated reserve. The system is not ideal: Annual caps mean that "humanitarian migrants may have to choose between living in deplorable conditions in a third country and risking a dangerous journey . . . in order to apply for asylum" (Orrenius and Zavodny 2017). Yet, it allows for adjustment in numbers and geographic mix of refugees based on US priorities, changed conditions, and need. Beyond refugee admission, the legal vehicles available to admit imperiled persons from abroad are limited to "parole" on a "case-by-case" basis for urgent humanitarian reasons or significant public benefit, and to visas for certain Iraqi and Afghani nationals who supported the US military and related entities (Kerwin 2014, 51-53).

A more robust refugee and humanitarian program would provide greater flexibility and more options for admitting refugees and humanitarian migrants who are at great risk (ibid., 62-63). It would also rely on available data to target development and diplomatic interventions; to anticipate and plan for large-scale humanitarian migration; and, to establish refugee admission and humanitarian parole priorities. As it stands, many states and international actors produce annual reports, indices, state performance rankings and data on development, human rights, the rule of law, civil rights, business friendliness, corruption, transparency, human capital, state fragility, poverty, and religious liberty. However, these credible reports do not inform US admission policies. They should.

Along these lines, a team of scholars from Georgetown University has been engaged in a promising initiative to forecast forced migration and other responses by families, households, and communities to what the scholars call "menacing contexts" (Collmann 2016). The research builds on "dread threat" theory, which addresses how "ordinary people" assess the risks posed by hazardous activities and technologies (ibid., 274, 276).

A "menacing context emerges when a dread threat" persists and leads to a community response, whether it is flight or strategies to mitigate the risk that involve staying in place (ibid., 277, 286). While in its preliminary stages, this work could ultimately be valuable in anticipating, preventing, and mitigating the consequences of forced migration.

Reducing Illegal Migration and the US Undocumented Population into Perpetuity

The paper has, thus far, argued for reform of the legal immigration system, and assumed a robust immigration enforcement system. However, "legalizing" the US immigration system also demands that the US undocumented population be substantially reduced in size and kept at acceptably low levels in the future. To that end, this section provides a historical overview of this population, how and when it emerged, why it grew from being undetectable in the 1970 census count to peaking at 12 million in 2008 before declining to 11 million in 2015.

Reports of massive levels of undocumented immigration have surfaced since at least the 1920s. In 1925, the Immigration Service reported that 1.4 million immigrants were living in the country illegally (AIC 2016). Exaggerated numbers were generated for three primary reasons: to increase the budgets of agencies charged with regulating immigration, to frighten the public into voting for particular candidates, and to support the positions of anti-immigrant groups. Until 1983, the reports had another feature in common — *none* of them had any empirical basis.

This section of the paper contrasts the data-based estimates of the undocumented population with the exaggerated, self-interested claims, especially in the 1970 to 1983 and the 2015 to 2016 periods. It divides this review into three time periods: before 1970, 1970 to 1982, and 1983 to the present. It concludes that a properly structured legalization program, combined with underlying legal immigration reform and strong enforcement, would not trigger large-scale illegal migration and could lead to a permanently reduced undocumented population.

Before 1970

Before the 1970s, the topic of undocumented immigrants and illegal migration was raised at different times, but generally was not perceived to be a pressing national issue. In the 1920s, the focus was primarily on preventing entries from Asia and southern and eastern Europe. According to a 1923 article in the *New York Times*, W. H. Husband, commissioner general of immigration, sought "'to stem the flow of immigrants from central and southern Europe, Africa and Asia'" which had been "'leaking across the borders of Mexico and Canada and through the ports of the east and west coasts'" (AIC 2016).

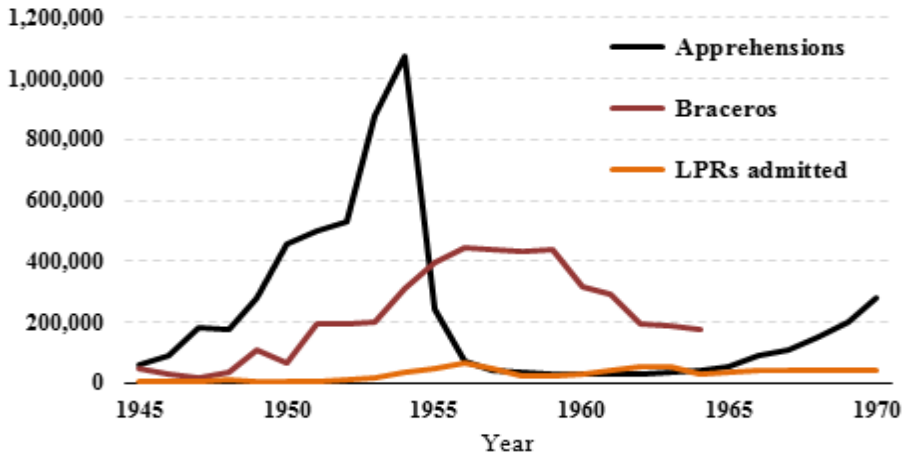
Comparing DHS data on admissions from 1920 to 1929 with the 1930 census count of the foreign-born population admitted during that period does not show any growth in the undocumented population in the 1920s. A total of 4.3 million immigrants were admitted from 1920 to 1929, but only 2.5 million foreign born were counted in the 1930 census. This indicates that to the extent there was any undocumented immigration in the 1920s, it

was far overshadowed by emigration from the United States. This analysis casts doubts on the Immigration Service's claim of 1.4 million immigrants living in the country illegally in 1925.

The Great Depression and World War II reduced the flow of immigrants during the 1930s and 1940s. During that 20-year period, a total of 1.5 million immigrants were admitted, and 930,000 emigrated (Warren and Kraly 1985, table 1).[22] Because of ageing and emigration, the foreign-born population dropped by 3.5 million, from 13.1 million in 1930 to 9.6 million in 1950.

The 1950s were more eventful in terms of undocumented migration, and much of the focus was on temporary migration between Mexico and the United States. As figure 3 shows, the number of apprehensions increased with the admission of *braceros*[23] in the early 1950s.

Figure 3. Migration from Mexico, by Category: 1945 to 1970



After a large-scale enforcement operation in 1954, apprehensions fell sharply and remained at a relatively low level even as the Bracero Program was being phased out from 1960 to 1964 (figure 3). By 1970, the total undocumented population had reached almost one million.[24]

As the pre-1970 period came to a close, two significant events set the stage for an unprecedented expansion of the US undocumented population. The first, the Bracero Program, gave Mexican workers extensive experience in the US labor market and helped to reinforce the migration pattern already established by the hundreds of thousands of Mexicans who had begun migrating on their own at the end of the war (figure 3). The second

22 Of the 930,000 emigrants, 640,000 were non-US citizens and 290,000 were US citizens.

23 The Bracero Program involved a series of agreements between the United States and Mexico that began in August 1942 when the United States and Mexico signed the Mexican Farm Labor Agreement. The program was designed to prevent labor shortages in perishable agriculture in the United States. A detailed description of the Bracero Program is available in Martin (2003).

24 This figure was derived based on estimates of "Entered 1960-1969" shown in Warren and Passel (1987), table 2, adjusted for emigration, mortality, and undercount from 1970 to 1980.

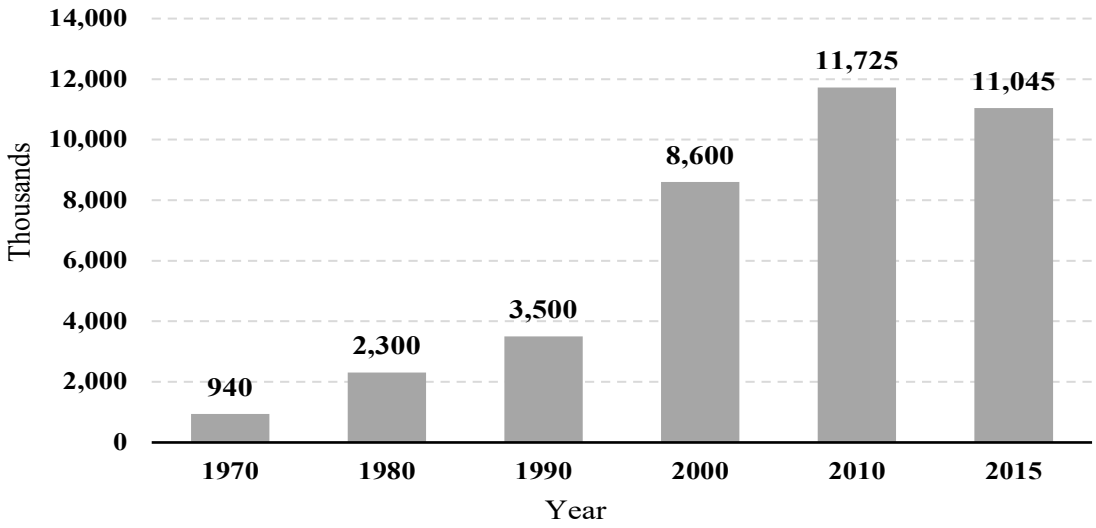
event was the passage of the Immigration and Nationality Act of 1965. The Act established the first numerical limit on immigration from the Western Hemisphere. In addition, it had the effect of increasing immigration from other areas of the world. Immigration from Asian countries, especially India, increased sharply.[25] Undocumented immigration from Mexico began to increase during the 1970s, and increasing numbers of undocumented immigrants began to arrive from India and other countries.

The 1970 to 1983 Period

The pre-1970 period might be characterized as a pre-undocumented period. It saw relatively low undocumented population growth, little national concern about this population, and no empirically based estimates of the population. By contrast, the 1970 to 1983 period was marked by a growing undocumented population and increasing national concern about the undocumented, but, as in the earlier period, *no* empirically-based estimates of the population. The combination of a growing population, increasing concern over it, and the lack of credible estimates produced a period of uninformed speculation that made the search for solutions on this issue even more difficult.

Figure 4 shows the best empirical estimates[26] of the number of undocumented residents living in the United States from 1970 to 2015.

Figure 4. Undocumented Residents in the United States: 1970 to 2015



25 The Act may also have increased undocumented migration from Asian and other countries because it failed to set aside visas for the relatives (who would arrive later) of its beneficiaries.

26 While there is a (hopefully small) range of error around these estimates, each of the estimates shown in figure 4 is based on US Census Bureau and DHS data along with assumptions that are supported by other demographic data. The estimates generally agree with similar estimates derived by the Pew Research Center and DHS.

The estimates in Figure 4 provide perspective on the discussion that follows. In contrast to some of the speculative estimates made during this period, there is now convincing statistical evidence that in this period the actual population varied from 1.0 to 2.5 million and average annual growth was in the 100,000 to 200,000 range (figure 4).

Arthur Corwin (1982) provided a detailed description of what he termed "the numbers game" in the period from 1970 to the early 1980s. He reported that in 1972, Immigration and Naturalization Service (INS) Commissioner Raymond Ferrell estimated that as many as one million undocumented immigrants lived in the United States. Ironically, this is one of the few good statistical guesses during this period. The estimates leaped upward in 1974 as Attorney General William Saxbe estimated the number to be between four and seven million. That same year, INS Commissioner Chapman spoke of a "silent invasion," and estimated the number to be between four and 12 million.

In 1975, the INS awarded a contract to Lesko Associates to derive estimates. In the absence of any data, a panel of immigration experts and academics concluded that the undocumented population was 8.2 million, of which 5.2 million were from Mexico. Next, Commissioner Chapman asked the INS district directors to estimate the size of this population. The resulting district-by-district survey led to a total estimate of 5.5 to 6 million, and the results were presented to congressional committees in early 1976. From 1971 to 1977, the INS budget doubled from $121.9 million to $245 million. In 1980, at the request of the Select Committee on Immigration and Refugee Policy, Census Bureau demographers reviewed the various studies and estimates and concluded: "The total number of illegal residents in the United States . . . is almost certainly below 6.0 million, and may be substantially less, possibly only 3.5 to 5.0 million." With hindsight, we can see that even these estimates were far too high, although at the time they were generally considered to be too conservative.

The report by Corwin is more than a compilation of unfounded estimates of the population during this period. It also includes important insights into the unforeseen consequences of the numbers game. The tendency to fabricate numbers without regard for facts set a pattern that persists today. It also established a template for increasing funding for the INS. Corwin noted that by the "use of plausible statistical estimates, and a whirlwind public relations campaign . . . Commissioner Chapman, with assistance from understanding Congressmen, was able to bring about a considerable improvement in the pathetic resources of the INS," leading to increased "apprehension totals" (Corwin 1982).

Even more importantly, the large budget increases, based on unfounded estimates, led to sharply increasing numbers of apprehensions, setting the stage for a rapid increase in the resident undocumented population. Because it became more difficult to work in the United States temporarily, visit home for the holidays, and then return to the United States, increasing numbers of undocumented residents chose to settle in the United States.

The end of the Bracero Program, limits on immigration from Western Hemisphere countries, increased border control, and insufficient numbers of visas set the stage for rapid growth in the undocumented population. Even so, it would take about 25 years for the population to reach the speculative levels of the mid-1970s (figure 4).

1983 to the Present

In early 1983, the Reagan administration estimated the undocumented population to be 6.5 million and the Congressional Budget Office estimated it at 4.5 million (Pear 1983). However, that same year demographers at the Census Bureau derived the first empirically based estimates of the undocumented population in the United States (Warren and Passel 1987). First, they estimated that 12 million foreign born resided legally in the United States in 1980. Then, they subtracted that number from the 14.1 million foreign born counted in the census. The difference, or the residual, was 2.1 million counted in the 1980 census. The finding that the population in 1980 was roughly two million, rather than three or four times that number, probably contributed to IRCA's eventual passage.

IRCA included four legalization programs:

- a general legalization program for persons without status from January 1, 1982 to the date of the bill's enactment, and who met continuous presence and other requirements;
- a Special Agricultural Worker (SAW) program that covered persons who had performed seasonal agricultural work for at least 90 days in a 12-month period in 1985 and 1986;
- an updated registry program for persons who arrived in the United States prior to January 1, 1972; and
- a smaller program for certain "Cuban-Haitian" entrants who arrived prior to January 1, 1982 (Kerwin 2010, 3-4, 7).

After IRCA's passage, the INS had to determine the number of potential applicants living in each state in order to set up legalization offices. The Statistics Division adopted the methods developed by the Census Bureau, along with a range of assumptions about undercount, to project the number likely to apply at the national and state level. Applications were projected to be between 1.3 million and 2.6 million. In fact, ultimately 1.6 million applied for the general amnesty program, and applications were within the projected ranges in nearly all of the states. This result strongly validated the residual method, which became the standard for estimating the undocumented population.

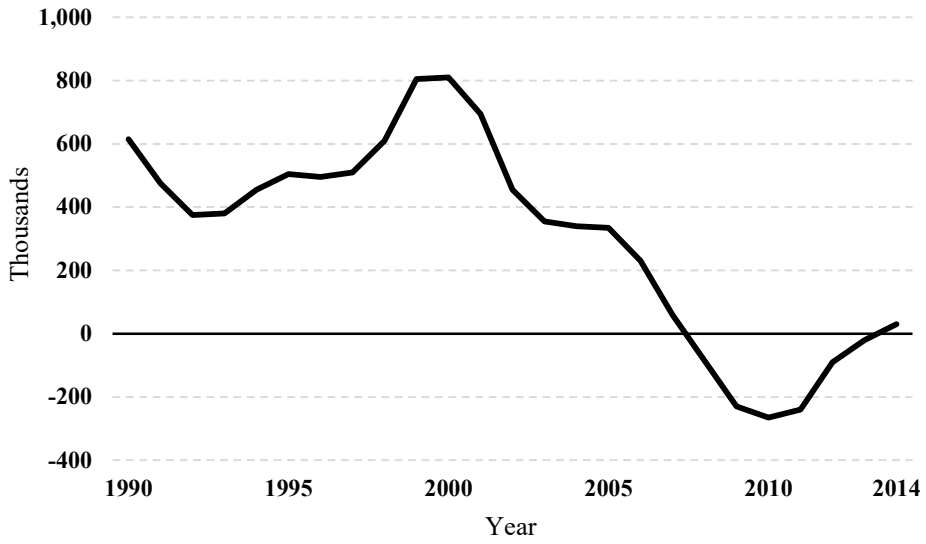
Figure 5 shows the change in the undocumented population from 1990 to 2014. Population growth increased for about three years after IRCA before returning to pre-IRCA levels. The relatively high growth for 1990 in the trend line in figure 5 was likely the result of relatives coming to join IRCA beneficiaries.

After falling to pre-IRCA levels from 1992 to 1994, growth rose to about 500,000 per year in 1995 and 1996. Population growth fell sharply in the decade from 2000 to 2010, reaching zero growth in 2008 (figure 5). Since 2008, the total population has declined by about one million.

IRCA is often cited as a case study in how legalization programs invariably spur further illegal migration. However, IRCA's well-known shortcomings need not be replicated in a future legalization program. IRCA failed to prevent growth in the US undocumented population for five principal reasons. First and foremost, it did not reform the US legal immigration system. Neither IRCA nor subsequent legislation established a legal immigration system

that could accommodate the high demand for lower-skilled work in the mid- to late 1990s and early 2000s. Illegal migration spiked during this period to fill the void.

Figure 5. Annual Undocumented Population Change: 1990 to 2014



Second, IRCA did not provide "derivative" status to the close family members of general legalization or SAW beneficiaries. Instead, only after program beneficiaries became LPRs could they petition for their family members to join them. The resulting glut in petitions led to the current multiyear backlogs in the family-based immigration system.

Third, IRCA did not legalize enough undocumented persons, paving the way for the subsequent growth of this population. Perhaps as many undocumented immigrants did not meet its eligibility standards, as those who did. As an example, the general legalization program applied to persons who lacked status for the entire period from January 1, 1982 to the bill's passage. Even a single day in legal status during this period was disqualifying.

Fourth, the SAW program attempted to address the labor needs of the perishable agriculture industry, which overwhelmingly employs workers between age 18 and 30. By 2000, however, virtually all SAW-legalized workers had effectively "aged out" of perishable agriculture work and been replaced by undocumented workers (Martin 2017, 256). As a result, there were no shortages to trigger IRCA's program to replenish agricultural workers. Fifth, the INS did not aggressively enforce IRCA's employer verification and sanctions program, and these programs were easily circumvented by the widespread use of fraudulent documents.

The Current Undocumented Population

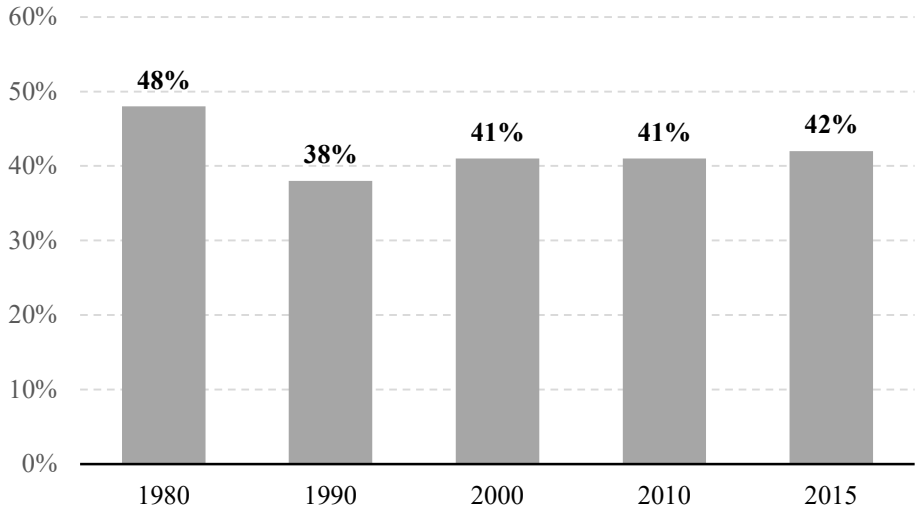
Much of the public discussion about undocumented immigration has focused on illegal entries across the southern border (often labeled as "entry without inspection," or EWIs).

The substantial numbers of undocumented residents who overstay temporary visas has received less attention. Unauthorized immigrants from all but a few countries (primarily Mexico and some Central American countries) are overstays.[27] The Center for Migration Studies (CMS) recently released a report focusing on the percent of the 2014 undocumented population that are overstays (Warren and Kerwin 2017b). Its major findings include the following:

- In 2014, about 4.5 million US residents, or 42 percent of the total undocumented population, were overstays.
- Overstays accounted for about two-thirds (66 percent) of those who *arrived* (i.e., joined the undocumented population) in 2014.[28]
- Overstays have exceeded EWIs every year since 2007: 600,000 more overstays than EWIs have arrived since 2007.
- Mexico is the leading country for both overstays and EWIs; about one-third of undocumented arrivals from Mexico in 2014 were overstays.
- California has the largest number of overstays (890,000), followed by New York (520,000), Texas (475,000), and Florida (435,000).

The CMS report focused on the undocumented population residing in the United States in 2014. To determine long-term trends in the proportion of the population that are overstays, CMS derived estimates of the percent of the undocumented population that were overstays as far back as 1980,[29] as shown in figure 6.

Figure 6. Percent of the Undocumented Population That Were Overstays: 1980 to 2015



27 The term "overstays" refers to foreign-born persons who enter the United States legally on a nonimmigrant (temporary) visa and remain beyond their approved period of admission.

28 The proposed 2,000-mile border wall will do nothing to address visa overstays.

29 The percentages shown in figure 5 are based on the total population estimates shown in figure 4.

This overview of the US undocumented population offers several lessons on "legalizing" the US immigration system. It illustrates how:

- Baseless estimates of the US undocumented population can hamper effective policymaking.
- The failure to act in the area of legal immigration can lead to large increases in the undocumented population.
- The United States created and allowed to flourish demand for labor from Mexico during World War II and its aftermath, and a large circular flow ensued.[30]
- The United States in the 1960s and 1970s increased enforcement and interrupted that flow without setting up a mechanism (acceptable to labor and business) to legalize and channel the flow through ports of entry.
- The Bracero Program, limited immigrant visas, and ramped up enforcement did not stop illegal immigration, but led the undocumented increasingly to stay in the United States.
- The failure to create the necessary visas for close relatives that were sure to join their legalized close relatives led to increased illegal migration (figure 3).
- The SAW program failed to anticipate that its beneficiaries would "age out" of perishable agriculture work, and their jobs would largely be filled by undocumented workers.

It remains to be seen whether the Trump administration's threatening rhetoric and early surge in immigration enforcement will meaningfully reduce the undocumented population. If past is prologue, it could (instead) further entrench, marginalize, and discourage the integration the US undocumented and their families (Massey, Durand, and Pren 2014, 1042-43; Warren and Kerwin 2017a). While a credible system of immigration enforcement will be necessary to minimize the size of the undocumented population now and in the future, enforcement alone cannot achieve this goal. It must be combined with legal immigration reform and a legalization program that does not repeat the mistakes of past programs.

Finding the Numbers to Facilitate Reform

Some of the proposed reforms set forth in this paper could reduce legal immigration numbers by, for example, reducing visas in categories in which there are sufficient US workers. Others might require increased legal admissions to respond, for example, to family-based visa backlogs or to the immigration needs created by US immigration laws and foreign policy commitments. However, increases in legal immigration numbers can be offset, at least in part, by reissuing the visas of those who have left the country.

Emigration has always been an integral part of the process of immigration to the United States, even though it has gone largely unrecognized. About 10 million, or one-third, of the 30 million immigrants admitted from 1900 to 1980 emigrated (Warren and Kraly 1985). In 2001, the Census Bureau derived estimates of foreign-born emigration for use in their national population estimates program (Mulder et al. 2001). Average annual emigration was estimated to be 265,000 in the 1990 to 1999 decade. In the period from 2010 to 2015,

30 We know this migration was circular because, even with the large flow of labor from Mexico from the war to 1970, there were only 105,000 Mexican born aged 65 and over in the 1970 census.

a total of 5.15 million immigrants were admitted by DHS, but the Census Bureau's count of the foreign born increased by only 3.73 million during the same period. Based on these numbers, average annual emigration was 284,000 in the most recent five-year period. These examples make it clear that 250,000 visas could be reissued each year without exceeding the INA's numerical limits.

The recommendation to reissue the visas of emigrants each year was first raised in 1985 (Warren and Kraly 1985). The authors stated: "Recognizing and measuring the emigration of former U.S. immigrants would allow U.S. immigration policy to become more flexible and responsive to changing circumstances." If this proposal had been adopted as part of IRCA, a total of 6.5 million visas would have been available from 1987 to 2017. As Warren and Kraly noted, these visas could have been used for emergency situations, as well as to speed up the reunification of families already in the United States. As a result, the undocumented population would be far smaller today, possibly only one-half of its current size.

The policy of reissuing visas would help to achieve some of the goals described in this paper. For example, reissuing 250,000 visas of emigrants each year could reduce the backlog of 4.3 million family-based visas by more than one-half in nine years and, thus, substantially reduce the US undocumented population in less than a decade.

Policy Recommendations

Fix the Legal Immigration System

This paper has identified several interests and goals to be served by US immigration and refugee policies, and has argued that these interests can only be met through:

- coordination with other nations, multiple federal agencies, local government, and relevant NGOs, preferably through a national integration program;
- improved migration governance;
- incorporation of immigration and refugee concerns into a larger set of policy processes; and
- fact-based, flexible, and timely legal immigration and refugee policies.

As the Council on Foreign Relations' Independent Task Force on US Immigration Policy concluded in 2009:

> . . . [G]etting legal immigration right is the most critical immigration policy challenge facing the administration and Congress. Although not enough on its own, the most effective way to combat illegal immigration is to have an immigration policy that provides adequate and timely means for the United States to admit legal immigrants.
>
> (CFR 2009, 49)

To that end, the paper endorses previous calls for an independent commission to advise Congress and the executive on US labor market and economic needs that might be met

by immigrants. Such a commission could also study the perspectives and perceptions of immigrants regarding the US immigration system in order to create stronger legal immigration policies, develop new strategies to achieve US policy goals, and promote greater compliance with the law (Ryo 2017). The paper also proposes that the United States rely upon the abundant datasets, indices, state rankings, and reports on the conditions that drive migration, in order to target its development and diplomatic interventions; anticipate and plan for large-scale migration; and inform its refugee admission and humanitarian parole priorities.

It stands to reason that more closely aligning US immigration policies with the nation's interests and, where possible, with the needs of sending, transit, and other host states would channel more migrants into legal immigration streams and reduce illegal migration. The paper also offers a way to carry out these reforms without substantially increasing legal immigration numbers, i.e, by reissuing the roughly 250,000 visas of persons who emigrate each year.

Legal immigration reform must be the centerpiece of broader reform legislation because, without it, the US immigration system cannot advance *any* of the compelling national interests that it is intended to serve. Moreover, illegal migration and the undocumented population will persist at unacceptable levels, putting immense pressure on the enforcement system. At present, this massive system often works at cross purposes to other social values (Meissner et al. 2013), including those the immigration system is supposed to advance. It divides and impoverishes US families (Chaudry et al. 2010; ABA 2004; CLINIC 2001, 39-45; CLINIC 2000); threatens social cohesion (Warren and Kerwin 2017a; Heyman 2014); subverts US humanitarian goals (Kerwin 2015, 213-22); and undermines due process and the rule of law (MRS/USCCB and CMS 2015, 180-84; ACLU 2014; ABA 2010). Absent reform, its continued growth will only exacerbate these anomalies.

Legalize the Current Undocumented Population

The authors have repeatedly argued in favor of a large legalization program based on the transitional nature of immigration status and the high (and growing) percentage of undocumented residents with long tenure and strong equitable ties to the United States (Warren and Kerwin 2015, 99-100). This paper underscores the need for such a program, and the related need to eliminate barriers to legal immigration like the three and 10 year bars and the cutoff date on eligibility for in-country adjustment of status under INA § 245(i). The great majority of undocumented residents: (1) will ultimately qualify to become legal residents under current law if given the time; (2) have developed such strong ties to the United States that their removal would work disproportionate harm on them, their US families, and their broader circles of association; or (3) arrived as children and would like to become full members of their nation. At present, the US undocumented population includes:

- a high percentage of the 4.26 million trapped n family-based visa backlogs;[31]
- a high percentage — perhaps 15 percent — who may be eligible for an immigration

31 In any given year, a high percentage of new LPRs, including family-based visa beneficiaries, formerly lacked immigration status (Jasso et al. 2008).

benefit or relief, but do not know it or cannot afford to pursue it (Wong et al. 2014; Kerwin et al. 2017, 9);
- a large number who will ultimately fall out of this status: between 1982 and 2012, 6.5 million left voluntarily, were removed, or died;
- 1.9 million with 20 years or more of US residency, 1.6 million with 15 to 19 years of US residency, and 3.1 million with 10 to 14 years of US residency (Warren and Kerwin 2015, 98-100);
- 3.9 million parents of US citizens or LPRs who would have qualified for the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and 2.5 million undocumented residents brought to the United States at age 15 or under (ibid., 95); and
- roughly one million who are counted as undocumented in standard estimates, but whose status is provisional, including persons granted TPS, asylum seekers, parolees, and others.[32]

A legalization program that offered a path to LPR status for these populations would advance many of the goals that US immigration policy exists to serve, and would allow enforcement resources to be directed at a far smaller population.

While politically fraught, legalization programs have been a regular feature of US immigration legislation. Between World War II and the Refugee Act of 1980, for example, the United States admitted and subsequently extended LPR status to several large refugee-like populations, including displaced persons after World War II, Hungarians after the Revolution of 1956, Cubans in flight from the communist revolution, Chileans after the military coup in 1973, Indochinese after the fall of Saigon, and Soviet Jews and other religious minorities (Kerwin 2012, 31). It has also legalized undocumented immigrants based on long tenure and good moral character, including through IRCA's general legalization and registry programs, and to persons granted "cancellation of removal" (previously "suspension of deportation") based on continuous residence for at least 10 years, good moral character, and "exceptional and extremely unusual hardship to a US citizen or LPR spouse, parent or child."[33] Since 1986, the United States has legalized 2.15 million persons that belong to discrete groups (not counting IRCA's general legalization program), defined by work (farmworkers and nurses), equitable ties, and nationality (Kerwin 2010, 2-3).

Keep the Undocumented Population Low

Once the United States meaningfully reduces the undocumented population, it should ensure that this population remains at acceptably low levels in the future. As discussed, the kind of legal immigration policies set forth in this paper — coherent, flexible, fact-based, and closely aligned to US interests — represent one way to keep the population low. Removing

32 Some categories of legal or quasi-legal residents, such as asylum seekers, parolees, persons who have filed for (but not officially received) LPR status, and TPS recipients, are included as undocumented residents in virtually all of the current estimates of 11 million. Passel and Cohn (2009) noted that their residual estimate of 11.9 million unauthorized residents in 2008 included "immigrants from certain countries holding temporary protected status (TPS) or people who have filed for asylum status but whose claims are unresolved." They reported that: *"This group may account for as much as 10% of the unauthorized estimate."* Emphasis added.
33 INA § 240A(b).

barriers to legal status like the three- and 10-year bars and the limited eligibility of the 245(i) program — would also reduce the undocumented population. Affording asylum seekers a reasonable opportunity to make their claims, as opposed to threatening them with detention and expedited removal, will uphold the rule of law and provide a disincentive to illegal migration. Offering support for legal screening of low-income undocumented immigrants, combined with reduced application fees and a concerted public education campaign, would prompt many of those who qualify for legal status to pursue it (Wong et al. 2014).

Congress should also advance the registry cutoff date. Nearly two-thirds of the US undocumented population have lived in the United States for at least 10 years, including five million for at least 15 years (Warren and Kerwin 2015, 100). Moving forward the registry date at regular intervals would help to ensure that the long-term undocumented population never again approximates its current size. The US registry program provides LPR status to certain, long-term undocumented residents, with good moral character, who would not be ineligible for citizenship, and who are not inadmissible on security and other grounds.[34] This program initially covered persons who arrived prior to June 3, 1921 and resided continuously in the United States until the passage of the Act of March 2, 1929.[35] The arrival cutoff date has been advanced several times since 1929. However, it has not been advanced since the passage of IRCA more than 30 years ago, which is the longest gap in advancing the date since 1929. Moreover, registry has historically been available to undocumented persons who have resided in the United States from between eight to 18 years. However, it now extends only to persons that have resided continuously in the United States since January 1, 1972, which is 45 years ago (table 1).

Table 1. Summary of Changes to the Registry Provision

Date of change	Eligible if entered before Jan. 1	Years between date enacted and year eligible
1929	1921	8 years
1940	1924	16 years
1958	1940	18 years
1965	1948	17 years
1986	1972	14 years
Currently	1972	45 years
Average years between date changes		Average years above
14.5		14.5

Source: USCIS.

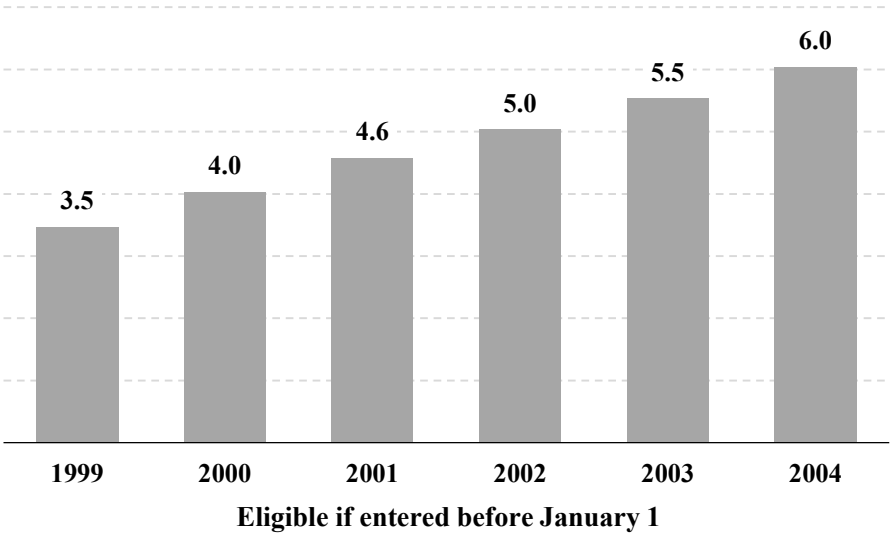
Figure 7 shows the number of undocumented persons who would qualify to register if the date were moved ahead. If Congress advanced the cutoff date to January 1, 2002, for example, five million undocumented persons would be potentially eligible.

34 INA § 249.

35 Act of March 2, 1929, ch. 536, 45 Stat. 1512-1513 (1929).

Figure 7. Number Eligible for Selected Registry Dates

*Assumes legislation is enacted in 2017 *(in millions)*



The registry date should also be moved up automatically by one year, each year thereafter. A "rolling" registry program would ensure that the United States would never again have another long-term undocumented population, comparable to the present one. Another way to accomplish this goal would be to allow undocumented persons to apply affirmatively for "cancellation of removal," rather than to have to wait until they are placed in removal proceedings.

The US deportation and detention system offers far fewer due process protections than the criminal justice system and its shortcomings have contributed to the large US undocumented population. For example, there is no statute of limitations for administrative immigration violations, as opposed to immigration-related crimes. Moreover, the INA affords very few possibilities for undocumented persons to gain legal status based on long-term residence and equitable ties to the United States. DHS can exercise prosecutorial discretion in deciding which undocumented persons to apprehend and place in removal proceeding. However, Immigration and Customs Enforcement (ICE) trial attorneys and Department of Justice immigration judges have little statutory discretion to negotiate or offer undocumented persons an option (other than removal) based on the equities. ICE trial attorneys can agree to close or terminate cases, but their discretion is tightly circumscribed. As immigration judges regularly remind the persons before them, they do not preside over a court of equity (Ahmed, Appelbaum, and Jordan 2017, 208).

The three principle options for persons in removal proceeding are: to be found not removable as charged, to be granted relief from removal, or to be ordered removed. By contrast, prosecutors have broad discretion in charging defendants and negotiating plea agreements, which is how the overwhelming majority of criminal cases are resolved (Weiser 2016).

Finally, the concept of *mens rea*, which speaks to the need for criminal knowledge and intent, cannot be invoked as a defense to deportation. The result is particularly egregious

in the cases of undocumented persons brought to the United States as children. Congress should provide greater equitable relief from removal, more options (like fines) that would allow government attorneys to settle cases in ways short of a removal order, and should vest greater discretion in immigration officials so that they can take into account the blameworthiness and intent of immigration violators before placing them in the removal adjudication system. These three reforms would help to reduce and maintain the US undocumented population at a low level. Combined with the other proposals set forth in this paper, they would go far to "legalizing" the US immigration system.

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