

A Proposed Legislative Scheme to Solve the Mexican Immigration Problem

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I. INTRODUCTION

[I]f we really want to do things in an orderly manner, and if we want to be sure that these people immigrate within the law, then we must increase the current annual quota in order to make it possible for more people to come to the United States from both Canada and Mexico in a legal manner.

— Representative Roybal, 1986

This article proposes a legislative scheme to undo the incentives that Congress has created and perpetuated since the 1960s for Mexicans to live unlawfully in the United States. The main features of the proposed scheme are: (1) the exemption of all family-sponsored immigrant visas from Mexico’s per-country quota, (2) a guaranteed percentage of the quota of diversity (“lottery”) visas for Mexicans who have no family member or employer who has sponsored their immigration, (3) a waiver of unlawful presence for Mexicans who return to Mexico by a specified deadline, and (4) revocation of the visa petitions of Mexicans who remain unlawfully in the U.S..

There are an estimated three million Mexicans unlawfully present in the U.S., representing over one-half of all aliens unlawfully present in the U.S., and about 150,000 Mexicans continue to enter the U.S. illegally each year.² Of those Mexicans who are unlawfully in the U.S., an estimated one million are waiting for family-sponsored immigrant visas to become available.³ Such Mexicans are unlawfully present in the

1. See 132 CONG. REC. H9785-01 (daily ed. Oct. 9, 1986) (statement of Rep. Roybal); see also 131 CONG. REC. H2037-01 (daily ed. Apr. 16, 1985).

2. See Immigration and Naturalization Service Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> [hereinafter INS Website]. The results of the 2000 United States census suggest that the number of Mexicans unlawfully present in the United States is much higher. See L. Parker & P. McMahon, *Immigrant groups fear backlash*, USA TODAY, April 9, 2001, at A3.

3. The estimate is based upon the numbers of Mexicans who took advantage of the waiver program that took place between 1994 and 1997. See Immigration and Nationality Act of 1952 § 245(i), 8 U.S.C. § 1255(i) [hereinafter INA]; see *infra* text

U.S. at the risk of being apprehended and removed and consequently subjected to a ten-year bar to re-entry.⁴ For them, apparently, the risk is outweighed by the length of time they must wait for their immigrant visas to become available.

Other Mexicans unlawfully present in the U.S. are criminals who are not eligible to receive a waiver of inadmissibility.⁵ This article does not propose relief for them. Rather, by eliminating the unlawful presence and influx of otherwise *admissible* Mexicans, the Immigration and Naturalization Service (INS) can better concentrate on the detection of *inadmissible* and deportable aliens. Also, many Mexicans who are unlawfully present in the U.S. are seasonal workers who have no intention of residing permanently in the U.S. This article does not propose relief for them either, although there are many who have advocated a revival of the *Bracero* program.⁶ Still others are otherwise admissible but have no prospect of ever becoming eligible for an immigrant visa because they have no family member or employer who will sponsor them. This article proposes relief for them with a guaranteed percentage of diversity (“lottery”) visas.

The unlawful presence and influx of Mexicans has raised myriad foreign affairs,⁷ human rights,⁸ unemployment,⁹ and welfare¹⁰ issues.

accompanying notes 146-56; see *infra* note 68. In administrative proceedings, lawyers and judges cite only the INA. In judicial proceedings, they generally cite only Title 8 of the United States Code. Throughout this article, both citations will be provided. Regarding the total volume of aliens who are waiting for their visas to become available, see U.S. DEP'T OF STATE, VISA BULL. (current), reproduced at http://travel.state.gov/visa_bulletin.html [hereinafter STATE DEP'T VISA BULL.].

4. See Samuel Bettwy, *Fewer Aliens May Wait in the U.S. for Their Immigrant Visas*, 1 TRANSLEX 10 (Apr. 1998). Regarding the ten-year bar to re-entry, see INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (aliens previously removed).

5. See INA § 212(a), 8 U.S.C. §§ 1182(a) (classes of aliens ineligible for visas or admission); INA § 212(c), (h), (i), 1182(c), (h), (i) (waivers of inadmissibility).

6. See *Be my guest: A new guest-worker programme?: Talk of a new guest-worker programme for Mexicans*, THE ECONOMIST, March 31, 2001, at 28; *Nixon Urges New Bracero Program*, L.A. TIMES, Jan. 11, 1979, pt. 1, at 3, col. 3. For a description of the “Bracero” program, see *infra* text accompanying notes 91-93. Mexicans are currently experiencing a significant backlog of employment-based visas in the “Other Workers” category, see STATE DEP'T VISA BULL., *supra* note 3. This article does not address that problem or whether the “Bracero” program should be revived.

7. See, e.g., Alan C. Nelson, *NAFTA: Immigration Issues Must be Addressed*, 27 U.C. DAVIS L. REV. 987 (1994); P.J. McDonnell, *Mexico Rebukes Wilson Over Immigrant Plan*, L.A. TIMES, Sept. 11, 1993, at A1.

8. Mexicans who seek illegal entry into the United States are the natural exploit of thieves, alien-smugglers, and vendors of fraudulent documents. See, e.g., *Brutality Unchecked: Human Rights Abuses Along U.S. Border With Mexico* (Americas Watch)

The reason for most of the unlawful entries is basic economics. Using so-called “quotas,” called “numerical limitations” in the statutes, the U.S. issues only a limited number of family-sponsored immigrant visas per country per year, and there is a far greater demand, among Mexicans, for such visas than are allocated to them.¹¹ Since Mexico is contiguous to the U.S., illegal entry is a feasible expedient.¹²

Using economic terms by analogy, the worldwide and per-country quotas artificially “freeze” the supply of immigrant visas despite demand for them. This article proposes lifting the per-country freeze with respect to Mexico’s demand for family-sponsored immigrant visas. Such a “float” would allow Mexicans to compete, without restriction, against the natives of all other countries.

Tinkering with immigration laws to favor Mexicans is not a new

(1992); Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 759 (1995); Michael J. Nunez, *Violence at our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1575-76 (1992); Marisa Taylor, *Jump in Immigrant Smuggling Reported*, S.D. UNION-TRIB., Jan. 31, 2001, at B1 (describing aliens who “squeeze into gas tanks [or] lie in coffin-like compartments built into the floors of vans.”); H.G. Reza, *Illegal Aliens Fearful of Border Bandits, Patrol*, L.A. TIMES, May 12, 1985, at B1.

9. See, e.g., Charles D. Smith & Juan E. Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The ‘Scorched Earth’ Approach to Immigration Control*, 6 N.C.J. INT’L L. & COM. REG. 19, 57-58 (1981), reprinted in *The Knowing Employment of Illegal Immigrants: Hearing on Employer Sanctions Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 473-74 (1981); Samuel Bettwy, *Mexican Transmigration: A Case for the Application of International Law*, 10 CAL. W. INT’L L.J. 92, 96-99 (1980); Guadalupe Salinas & Isais D. Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 HOUS. L. REV. 863, 866-68 (1976).

10. See, e.g., Paul Meehan, *Combating Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389, 396-97 (1997); Barbara Nesbet & Sherilyn K. Sellgren, *California’s Proposition 187: A Painful History Repeats Itself*, 1 U.C. DAVIS J. INT’L L. & POL’Y 153 (1995); Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271, 281-83 (1992); Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 2-9 (1992); Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 401-21 (1988).

11. As one author sums it up: “There is no adjustment in the per-country ceiling for countries with large populations, or for countries that are geographically adjacent to the U.S., or for countries that historically send immigrants to the U.S. in large numbers. Luxembourg has the same visa ceiling as China and Mexico.” Bernard Trujillo, *Immigrant Visas Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 715 (2000).

12. By comparison, there is also a far greater demand among Filipinos for immigrant visas than there are immigrant visas allocated to them. See STATE DEP’T VISA BULL., *supra* note 3. However, given the expense of traveling from the Philippines to the United States, the unlawful presence of Filipinos in the United States (95,000) does not begin to approach the magnitude of the unlawful presence of Mexicans (at least 3 million). See INS Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm#Table1>.

concept. Congress and the President did it from 1917 to 1964 (under exemptions to the literacy requirements),¹³ from 1942 to 1964 (under the *Bracero* program),¹⁴ in 1986 (under the legalization program),¹⁵ and from 1992 to the present (under unlawful-presence exemptions for certain aliens who are waiting for their family-sponsored immigrant visas to become available).¹⁶

The current backlog of available immigrant visas can be traced to legislation inspired by the civil rights movement of the 1960s,¹⁷ to the demise of the *Bracero* program in 1964 (also inspired by the civil rights movement),¹⁸ and to unintended adverse effects of the 1986 legalization program.¹⁹ The introduction of per-country quotas in the 1960s established a sudden unrealistic freeze on the availability of immigrant visas for Mexicans.²⁰ The 1986 legalization program, intended to legalize the immigration status of hundreds of thousands of illegal aliens, caused a rush of Mexicans (and other foreign nationals) into the U.S. and created a tremendous demand for immigrant visas by the family members of Mexicans who were legalized.²¹ Congress's 1990 legislation was an inadequate attempt to alleviate some of the strain caused by the 1986 legalization program by creating more visas for the spouses and children of lawful permanent residents (LPRs), but not for aliens in the other immigrant visa categories.²² Congress's 2000 legislation is a further attempt to relieve the pressure by forgiving the unlawful presence of aliens who are waiting in the U.S. for their family-sponsored immigrant visas to become available, but the legislation compromises respect for U.S. immigration law.²³ In the end, despite Congress's attempts to repair the damage done by its 1960s and 1986 legislation, there remains a significant "backlog" or "over-subscription" of Mexicans in *all* categories of family-sponsored immigrant visas.²⁴

Part II of this article describes how the current visa "quota" system

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13. See *infra* text accompanying notes 86-89.
 14. See *infra* text accompanying notes 91-93.
 15. See *infra* text accompanying notes 117-20.
 16. See *infra* text accompanying notes 133-57.
 17. See *infra* text accompanying notes 94-98.
 18. See *infra* text accompanying note 98.
 19. See *infra* text accompanying notes 119-22.
 20. See *infra* text accompanying notes 100-09.
 21. See *infra* text accompanying notes 121-22.
 22. See *infra* text accompanying notes 133-41.
 23. See *infra* text accompanying notes 142-57.
 24. STATE DEP'T VISA BULL., *supra* note 3.

works. Part III describes the events that have led up to today's Mexican immigration problem. Part IV sets forth a proposed legislative scheme to solve the problem.

II. THE CURRENT QUOTA SYSTEM²⁵

An immigrant visa permits an alien to enter the U.S. as a lawful permanent resident (LPR).²⁶ To obtain an immigrant visa, an alien who lives outside the U.S. generally must apply for one at an American embassy or consulate and then wait for it to become available.²⁷ The alien must "wait in line" for an immigrant visa because the U.S. limits the number of immigrant visas issued each year with quotas.²⁸ Depending upon the supply and demand in a given category of immigrant visas, the wait may be from several months to several years.²⁹

Congress has defined certain categories of aliens who may apply for immigrant visas. No alien is eligible to receive an immigrant visa unless he or she meets the requirements for one of the statutory categories of family-sponsored, employment-based, diversity (lottery), special-immigrant, or immediate-relative visas.³⁰

In the case of family-sponsored immigrant visas, the sponsoring family member files a visa petition on behalf of the alien, and the alien receives a "priority date"³¹ that corresponds to the date of filing the visa petition. The priority date gives the alien a place in line, so to speak, behind aliens whose sponsors have already filed family-sponsored visa petitions. The alien is then required to wait outside the U.S. until the visa becomes available; in other words, until the visa is no longer

25. See generally INS Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics>.

26. INA § 201, 8 U.S.C. § 1151.

27. INA § 203(e)(1), 8 U.S.C. § 1153(e)(1). An alien who is lawfully present in the United States applies for permanent resident status at an INS office pursuant to INA § 245, 8 U.S.C. § 1225 (adjustment of status).

28. Note that "immediate relatives" are not subject to quota restrictions. "Immediate relative" includes: (1) spouses and unmarried minor children of U.S. citizens; (2) parents of citizens when the citizen is at least twenty-one years of age; and (3) certain widows and widowers of citizens and their children. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

29. Consular posts are required to maintain records of immigrant visa applicants and their priority dates. INA § 203(e), 8 U.S.C. § 1153(e); 22 C.F.R. § 42.54(a). These records indicate the order in which consideration may be given to applicants within the several categories that are subject to quotas. The Department of State compiles the records in its *Visa Bulletin* which is available on a monthly basis from: United States Department of State, Bureau of Consular Affairs, Visa Office, Washington, D.C. 20520. It is also available on the State Department's website. See STATE DEP'T VISA BULL., *supra* note 3.

30. INA § 201(a)-(b), 8 U.S.C. §§ 1151(a)-(b).

31. INA § 203(e)(1), 8 U.S.C. § 1152(e)(1).

restricted by a quota. As explained below, Congress has created some exceptions to the waiting requirement.³²

There are two quotas for each general category of immigrant visa (family-sponsored, employment-based, and diversity), a worldwide quota, and a per-country quota. Each quota overrides the other. The worldwide quota limits the overall or “worldwide” number of visas that may be issued in a particular category each year, and the per-country limits the number of visas that a country’s natives may receive each year. The worldwide quota for *family-sponsored* immigrant visas is about 480,000 before adjustments and about 226,000 after adjustments and the per-country quota of family-sponsored immigrant visas is 15,820.³³

The worldwide quota of family-sponsored immigrant visas (226,000) is further divided into five categories or “preferences,” and Congress has limited the number of visas that may be issued within each category as follows:

Preference	Annual Quota
(1) Unmarried Sons and Daughters of Citizens	23,400
(2) Total Children and Spouses of LPRs	114,200
(a) Spouses and Children of LPRs	87,934
(b) Unmarried Sons and Daughters of LPRs	26,266
(3) Married Sons and Daughters of Citizens	23,400
(4) Brothers and Sisters of Citizens	65,000
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TOTAL	226,000 ³⁴

32. See *infra* text accompanying notes 133-57.

33. INA § 201(c), 8 U.S.C. § 1151(c). From 1993 through 1998, the following “adjusted” numbers reflect the numbers of aliens that legally immigrated to the United States:

	Total	Immediate Relatives	Family- Sponsored	Employment- Based	Diversity
1993	880,014	257,089	226,776	147,012	33,480
1994	798,394	251,647	211,961	123,291	41,056
1995	720,461	222,254	238,122	85,336	47,245
1996	915,900	302,090	294,174	117,499	58,790
1997	798,378	322,440	213,331	90,607	49,374
1998	660,477	284,270	191,480	77,517	45,499

See DEP’T OF JUSTICE, INS, YEARBOOK, FISCAL YEAR 1998, at 17, tbl. 4 [hereinafter INS YEARBOOK, FY 1998], reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/>

As indicated above, the so-called “second preference” is divided even further into two subcategories: one for spouses and children³⁵ of lawful permanent residents (LPRs) (subcategory “2A”) and the other for unmarried sons and daughters³⁶ of LPRs (subcategory “2B”). At least seventy-seven percent (87,934) of the second-preference family-sponsored immigrant visas (87,934) must be allocated to the first subcategory (spouses and children of LPRs), and the remainder to the second subcategory (unmarried sons and daughters of LPRs).³⁷

Overriding the worldwide quotas described above is the per-country quota which limits the number of aliens who may emigrate from a particular country.³⁸ In general, the annual “per-country” quota is seven percent of all visas allowed for employment-based and family-sponsored visas, or a total of 25,620 for the two categories.³⁹ The per-country quota of family-sponsored immigrant visas is 15,820 (seven percent of 226,000).⁴⁰

In sum, family-sponsored immigrant visas become unavailable to natives of a particular country when either the worldwide quota (226,000) or the native’s per-country quota (15,820) is reached.

statistics/imm98.pdf, at 17.

34. INA § 203, 8 U.S.C. § 1153. See also U.S. DEP’T OF JUSTICE, INS, 1998 ANNUAL REPORT 6 (July 1999) [hereinafter INS ANNUAL REP. 1998], reproduced at <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/98Legal.pdf> at 6.

35. To be considered a “child” for immigration purposes, the alien must be unmarried and under twenty-one years of age. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1). “Child” includes children born in wedlock, stepchildren, legitimated children, children born out of wedlock sponsored by their natural mothers or by natural fathers who have a “bona fide parent-child relationship” with them, adopted children, and orphans who will be adopted by U.S. citizens. *Id.*

36. By definition, “sons and daughters” do not qualify as “children” because they are married or are twenty-one or more years old. *Id.*

37. Applying the formulas above, the United States experienced the following numbers of family-sponsored immigrants from 1993 through 1998:

	(1)	(2)	(3)	(4)	TOTAL
1993:	12,819	128,308	23,385	62,264	226,776
1994:	13,181	115,000	22,191	61,589	211,961
1995:	15,182	144,535	20,876	57,529	238,122
1996:	20,909	182,834	25,452	64,979	294,174
1997:	22,536	113,681	21,943	55,171	213,331
1998:	17,717	88,488	22,257	63,018	191,480

See INS YEARBOOK, FY 1998, *supra* note 33, at 17, tbl. 4, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/imm98.pdf>, at 17.

38. INA § 202, 8 U.S.C. § 1152.

39. INA § 202(a)(2), 8 U.S.C. § 1152(a)(2).

40. *Id.* As explained below, this number can be exceeded. See *infra* text accompanying notes 46-50 *infra*; see also the actual number of family-sponsored immigrants from Mexico, the Dominican Republic, and India, at INS YEARBOOK, FY 1998, *supra* note 33, at 36, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/imm98.pdf>, at 36.

Typically, Mexicans reach the per-country quota before reaching the worldwide quota for family-sponsored visas.⁴¹

This article proposes elimination of all per-country quota restrictions on the issuance of family-sponsored immigrant visas to Mexicans, making them subject only to the worldwide quota.

The State Department's "Immigrant Preference Numbers" in its periodic *Visa Bulletin*⁴² have long indicated a considerable backlog in family-sponsored immigrant visas for natives of Mexico, the Philippines and India. To alleviate the backlogs, in 1990 Congress created an exception to the per-country quota for seventy-five percent (65,950 or more) of the visas issued in the first subcategory of second-preference visas (spouses and children of LPRs). In other words, Congress provided that seventy-five percent of visas issued in that subcategory would not be counted toward any country's per-country quota.⁴³ That means that a single country's natives could theoretically receive all exempted 65,950 or more visas plus their per-country quota of 15,820.⁴⁴

In actuality, Mexicans received the following numbers of family-based immigrant visas from 1994 through 1998:

1994	39,136 ⁴⁵
1995	61,877 ⁴⁶
1996	99,156 ⁴⁷
1997	68,996 ⁴⁸
1998	55,140 ⁴⁹

41. When Congress partially exempted certain family-sponsored immigrant visas from the per-country quota in 1990, Mexicans began receiving more such visas than the per-country quota would otherwise allow. See *infra* text accompanying notes 45-49.

42. See STATE DEP'T VISA BULL., *supra* note 3.

43. INA § 202(a)(4)(A), 8 U.S.C. § 1152(a)(4)(A). The 1990 Act also contained a transitional program for fiscal years 1992-1994, which provided for the immigration of a significant number of spouses and children of aliens legalized under various programs instituted by Congress in the mid-1980s.

44. That could happen if all of those natives had "priority dates," see *infra* note 154, that preceded the priority dates of the natives of all other countries in that subcategory and if the natives of that country received no other types of immigrant visas that counted toward the per-country quota.

45. See U.S. DEP'T OF JUSTICE, INS, 1994 ANNUAL REPORT, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/annual/fy94/745.htm>.

46. See U.S. DEP'T OF JUSTICE, INS, 1995 ANNUAL REPORT, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/annual/fy95/133.htm>.

47. See U.S. DEP'T OF JUSTICE, INS, 1996 ANNUAL REPORT, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/annual/fy96/1007.htm>.

48. See INS YEARBOOK, FY 1997, *supra* note 33, at 47, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1997YB.pdf>, at 47.

The following is an overview of the immigration legislation that has led to today's Mexican immigration problem and the need for reform of the current quota system.

III. LEGISLATION THAT HAS LED TO THE MEXICAN IMMIGRATION PROBLEM⁵⁰

Until the early 1960s, U.S. immigration law tended to discriminate against natives of certain regions of the world and, except during the Depression Era, favored Mexicans. Early U.S. immigration history is replete with examples of racial discrimination. For example, in its first naturalization act, in 1790, the U.S. offered benefits only to whites,⁵¹ and in 1924, Americans of African descent were not counted for purposes of assigning quotas to foreign countries.⁵² Most noteworthy is the long history of discrimination against Asians and Eastern and Southern Europeans.

A. *Discrimination Against Asians (1875–1964)*

In 1875, Congress openly sought to stem increases in the Asian population in the U.S. when it passed the so-called “Coolie” restrictions, which prohibited “coolie labor,” namely the “importation” of Chinese to work on the construction of railroads in the U.S.⁵³ Such restrictions were followed, in 1882, by the Chinese Exclusion Act.⁵⁴ And, in 1917, as Japanese and Asian Indians began to immigrate, Congress created the Asiatic Barred Zone to exclude them as well.⁵⁵

In the Immigration Acts of 1921⁵⁶ and 1924,⁵⁷ Congress passed the so-

49. See INS YEARBOOK, FY 1998, *supra* note 33, at 36, reproduced at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/imm98.pdf>, at 36.

50. See INS Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/LegisHist/index.htm>.

51. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed* by Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (retaining restriction of naturalization to “free white person[s]”). After the Civil War, persons of African descent were made eligible to apply for naturalization. See Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

52. See Act of May 26, 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (*repealed* 1982) (also known as the Reed-Johnson Act or National Origins Act) [hereinafter Immigration Act of 1924] (stating that “the term ‘inhabitants in continental United States in 1920’ does not include . . . the descendants of slave immigrants”).

53. Act of Mar. 3, 1875, ch. 141, §§ 1, 2, 4, 18 Stat. 477 (*repealed* 1974).

54. Act of May 6, 1882, ch. 126, 22 Stat. 58 (*repealed* 1943) [hereinafter Chinese Exclusion Act]. See *infra* note 64 (“Chinese Repealer” legislation).

55. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876 (*repealed* 1952) [hereinafter Immigration Act of 1917].

56. Act of May 19, 1921, ch. 8, 42 Stat. 5 (*repealed* 1952) [hereinafter Immigration Act of 1921].

57. Immigration Act of 1924, *supra* note 52.

called "National Origins" law which placed no quota restrictions on immigrants from the Western Hemisphere⁵⁸ and barred virtually all immigration from Africa and Asia.⁵⁹ For example, the 1924 Act created a category of excludable aliens known as "alien[s] ineligible to citizenship."⁶⁰ This category was a euphemism for Asians because the Act defined an alien "ineligible to citizenship" as one covered by the Chinese Exclusion Act or by the Asiatic Barred Zone.⁶¹ Thus, the quota allotment for Asia was effectively zero.⁶² In 1940, naturalization was limited to persons of "races indigenous to the Western Hemisphere," thereby excluding Asians from eligibility to naturalize.⁶³

In the 1943 "Chinese Repealer" legislation, Congress softened anti-Asian immigration law by repealing the 1882 exclusion legislation, awarding China a minimal quota (150) of immigrant visas, and allowing Chinese aliens to naturalize.⁶⁴ In 1946, Congress extended these privileges to Filipinos and Indians.⁶⁵ In reality, the Chinese Repealer legislation, motivated by World War II,⁶⁶ was a diplomatic gesture toward China, which did not result in significant increases in Chinese immigration.⁶⁷

58. Immigration Act of 1921, *supra* note 56, § 2(a)(7), 42 Stat. 5, 5. See John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 823 n.12 (1982).

59. Immigration Act of 1924, *supra* note 52, § 11(d)(4), 43 Stat. 153, 159; Immigration Act of 1921, *supra* note 56 § 2(a)(7); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 58-59, 62, 68-77, 80-82, 478-80 (1981).

60. Immigration Act of 1924, *supra* note 52, § 13(c), 43 Stat. 153, 162.

61. *Id.* at § 28(c), 43 Stat. 153, 168. See also Immigration Act of 1917, *supra* note 55 (Asiatic Barred Zone); Chinese Exclusion Act, *supra* note 55.

62. Immigration Act of 1924, *supra* note 52, § 11(b)-(d), 43 Stat. 153, 159 (noting that "aliens ineligible to citizenship" were not counted as "inhabitants in the continental United States in 1920").

63. Act of Oct. 14, 1940, ch. 876, § 303, 54 Stat. 1137.

64. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (rescission of Chinese Exclusion Act) (amended 1946).

65. Act of July 2, 1946, ch. 534, 60 Stat. 416 (amended 1952).

66. President Roosevelt called the legislation as "important in the cause of winning the war and of establishing a secure peace." S.REP. NO. 78-535, 78th Cong., 1st Sess. 2 (1943).

67. Representative Earl Michener remarked: "[T]he enactment of this legislation will have an infinitesimal effect on immigration into this country." 89 CONG. REC. 8603 (1943). See also *id.* at 8628 (statement of Rep. William Page) ("[I]t will have no practical effect on the United States. . . . In China, however, it will have vast practical effects."). A Senate Report noted: "The number of Chinese who will actually be made eligible for naturalization under this section is negligible." S.REP. NO. 78-535, 78th Cong., 1st Sess. 6 (1943). Representative John Coffee stated: "[The] current proposal is

In 1952, the McCarran-Walter Act⁶⁸ eliminated the remaining bars against Asian naturalization and awarded all Asian countries immigration quotas, most of which were at the hundred-per-year minimum.⁶⁹ Although the statute has been credited with making progress towards racial equality, it was really more of a foreign relations gesture, as was the Chinese Repealer legislation.⁷⁰ As explained below, the bias of immigration laws against Asians was not eliminated until 1965.⁷¹

B. *Discrimination Against Eastern and Southern Europeans (1917–1964)*

When Congress established the National Origins quota system in 1921, it sought to maintain the ethnic composition of the U.S. at 1910 proportions.⁷² The system permitted the annual immigration of no more than three percent of national groups existing in the U.S., according to the 1910 census.⁷³ In 1924, Congress changed the percentage to two percent and based ethnic composition upon the 1890 census instead of the 1910 census.⁷⁴ The revision “materially favored immigrants from Northern and Western Europe because the great waves from Southern and Eastern Europe did not arrive until after 1890.”⁷⁵ As explained in a

a gesture—a beau geste. This does not open the door.” 89 CONG. REC. 8601 (1943).

68. Act of June 27, 1952, ch. 477, § 201(a), 66 Stat. 163, 175 (also known as the McCarran-Walter Act) (amended 1965) [hereinafter Immigration and Nationality Act of 1952].

69. See *id.* § 201(a), 66 Stat. 163, 175 (“[T]he minimum quota for any quota area shall be one hundred.”).

70. See ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY 1924-1952, 152-53 (1957) (“The few who saw repeal as a renunciation of racist concepts and an effort to realize American ideals were very definitely in a minority....”); BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990, 37-38 (1993) (“The ideological Cold War between capitalism and communism made the United States acutely conscious of how its domestic policies, including immigration, were perceived abroad.”); JOHN H. TOROK, “INTEREST CONVERGENCE” AND THE LIBERALIZATION OF DISCRIMINATORY IMMIGRATION AND NATURALIZATION LAWS AFFECTING ASIANS, 1943-65, in CHINESE AMERICA: HISTORY AND PERSPECTIVES 1995 10-11 (Chinese Historical Society of America ed., 1995); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N. CAR. L. REV. 273, 287 (1996) (citing ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 329 (1990) (The 1952 liberalization “should be seen as a fruit of the Cold War.”)).

71. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 [hereinafter Immigration and Nationality Act of 1965]. See *infra* text accompanying notes 94-109.

72. Immigration Act of 1921, *supra* note 56, § 2(a), 42 Stat. 5, 5.

73. See *id.*

74. See *id.* § 11(a), 43 Stat. 153, 159.

75. Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1933 (1996) (footnote omitted). See also Chin, *supra* note 70, at 279-97 (discussing how the quota system limited immigration

House report:

With full recognition of the material progress which we owe to the races from southern and eastern Europe, we are conscious that the continued arrival of great numbers tends to upset our balance of population, to depress our standard of living, and to unduly charge our institutions for the care of the socially inadequate.

If immigration from southern and eastern Europe may enter the United States on a basis of substantial equality with that admitted from the older sources of supply, it is clear that if any appreciable number of immigrants are to be allowed to land upon our shores the balance of racial preponderance must in time pass to those elements of the population who reproduce more rapidly on a lower standard of living than those possessing other ideals.

...

[The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity....

After World War II, Congress passed a great deal of humanitarian legislation, which had the effect of permitting the immigration of more Europeans.⁷⁷ This tended to reverse past discrimination against Southern and Eastern Europeans. And, in 1952, Congress passed the McCarran-Walter Act which codified and revised U.S. immigration laws as the Immigration and Nationality Act (INA), as it is still known today.⁷⁸ However, the INA preserved the National Origins quota system, provoking President Truman's veto, which was overridden by Congress.⁷⁹

from Asia).

76. Staff of House Comm. On Immigration and Naturalization, Report on Restriction of Immigration, H.R. REP. NO. 68-350, pt. 1, 68th Cong., 2d Sess. 13-14, 16 (1924). See generally Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L. J. 1111 (Fall 1998). As one commentator noted at the time, the National Origins quota system was "a scientific plan for keeping America American." A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 AM. J. INT'L L. 737, 740 (1924).

77. Act of Sept. 2, 1958, Pub. L. No. 85-891, 72 Stat. 1712 (favoring Dutch and Azore Portuguese); Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (Hungarian Refugee Act); Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15, 71 Stat. 639 (favoring refugees from the Middle East and Communist countries); Act of Aug. 31, 1954, ch. 68, 68 Stat. 1044 (amending the Refugee Relief Act) (favoring Dutch, Italians, and Greeks); Act of June 25, 1948, ch. 647, 62 Stat. 1009 (Displaced Persons Act) (favoring Austrians, Czechs, Germans, and Italians).

78. Immigration and Nationality Act of 1952, *supra* note 68.

79. See PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 441 (1952-53) (explaining veto of the INA because it perpetuated discriminatory national origins quota system and emphasizing that "immigration policy is . . . important to the conduct of our foreign relations and to our responsibilities of

The continuing bias of the 1952 Act is reflected in a Senate report which concluded that the National Origins quota system “preserve[d] the sociological and cultural balance in the U.S.,” which was justified because Northern and Western Europeans “had made the greatest contribution to the development of [the] country” and the nation should “admit immigrants considered to be more readily assimilable because of the similarity of their cultural background to those of the principal components of our population.”⁸⁰

Before addressing the immigration law reforms of the 1960s, consider the contrast between the treatment of Mexicans and the treatment of Asians and Southern and Eastern Europeans during the same, pre-1960s era of U.S. immigration law.

C. By Contrast, Pre-1965 Legislation That Favored Mexicans

While early U.S. immigration law discriminated against Asians, it tended to favor Mexicans. As explained above, during the 1800s Congress and the President enacted legislation to prevent the immigration of Asians. Consider, by contrast, the Treaty of Guadalupe-Hidalgo, which settled the Mexican-American War of 1847 and addressed the status of former Mexican citizens.⁸¹ Mexicans remaining in the former Mexican territories were free to stay or to go to Mexico.⁸² Those who stayed could elect to be treated as either U.S. or Mexican citizens.⁸³ If they did not make an election within one year, they automatically became U.S. citizens.⁸⁴ Most Mexicans remained rather than moving to Mexico.⁸⁵

Another contrast of treatment occurred in the 1900s when Congress established a literacy requirement that excluded “[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or

moral leadership in the struggle for world peace”). The 1952 Act increased the quota slightly and limited the annual quota for immigrants from any particular country to one-sixth of one percent of their number in the 1920 United States census.

80. Staff of Senate Comm. on the Judiciary, Report on the Immigration and Naturalization Systems of the United States, S.REP. NO. 81-1515, 81st Cong., 2d Sess. 455 (1950).

81. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), *entered into force* May 30, 1848, United States-Mexico, 9 Stat. 922, T.S. No. 207, 9 Bev. 791, *reproduced at* <http://www.loc.gov/exhibits/ghtreaty/>.

82. *See id.* art. VIII.

83. *See id.*

84. *See id.* art. IX.

85. *See* Gerald P. Lopez, *Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 642 (1981).

Yiddish.”⁸⁶ The requirement tended to discriminate against Italians, Russians, Poles, Hungarians, Greeks, and Asians.⁸⁷ The Immigration Act of 1917 also authorized the admission of temporary workers,⁸⁸ primarily intended to benefit Mexicans. The literacy requirement could have adversely affected Mexicans, so in 1918, under a provision of the Act that authorized it, the Immigration Commissioner waived the literacy requirements for Mexican laborers.⁸⁹

Due to the Great Depression, the U.S. discouraged the admission of temporary workers from 1921 to 1942.⁹⁰ However, that changed during World War II, when the U.S. experienced a labor shortage. In 1942, the waivers for Mexicans of the literacy requirements and head tax were reinstated, and the *Bracero* program was established through a series of bilateral agreements with Mexico designed to alleviate the labor shortage.⁹¹ The program allowed Mexicans to work in U.S. agricultural areas.⁹² An estimated 4.2 million *braceros* were contracted for labor in agriculture between 1947 and 1964.⁹³

86. Immigration Act of 1917, *supra* note 55, § 3, 39 Stat. 874, 877.

87. See HUTCHINSON, *supra* note 59, at 465-68, 481-85.

88. Immigration Act of 1917, *supra* note 55, § 3, sometimes described as “the first Bracero program.” Gilbert Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 69 (1975).

89. See Immigration and Naturalization Service (INS) Order 52641/202, cited in James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 242 (1995); see also Cardenas, *supra* note 88, at 68.

90. During the depression years, Mexicans were cited as a cause of unemployment. As a result of a campaign to repatriate Mexicans, about 345,000 Mexicans returned to Mexico between 1929 and 1932. See THOMAS ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 746-47 (2d ed. 1986). The INS strictly enforced the restrictive literacy, contract labor, and public charge exclusions, rather than waiving them, reducing Mexican immigration from 4,000 to 250 per month. See Cardenas, *supra* note 88, at 68. Compare 132 CONG. REC. E3276-01 (daily ed. Sept. 25, 1986) (statement of Rep. Richardson), with Congress's 1874 “Coolie” restrictions, *supra* note 54.

91. See Agreement on the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, United States-Mexico, 56 Stat. 1759 (incorporated into the Agricultural Act of 1949, ch. 223, §§ 501-09, 65 Stat. 119 (1951) (repealed 1964)); see also Act of Aug. 9, 1946, Pub. L. No. 79-707, 60 Stat. 969; Act of Feb. 14, 1944, ch. 16, 58 Stat. 11; Act of April 29, 1943, ch. 82, § 5(g), 57 Stat. 70.

92. See Act of Feb. 14, 1944, ch. 16, 58 Stat. 11. The laws waived the head tax, contract labor provisions, and literacy requirements for the workers. After the United States and Mexico failed to renegotiate the “Bracero” Treaty, Congress amended Pub. L. No. 82-78 to allow the United States to operate the program unilaterally. See Act of July 12, 1951, ch. 223, 65 Stat. 119 (1951), repealed by Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (effective Dec. 13, 1964).

93. The “Bracero” program also led to increased illegal immigration, prompting

*D. Immigration Legislation Inspired by the Civil Rights Movement
(1964–Present)*

All of the advantages that Mexicans had experienced⁹⁴ under U.S. immigration law disappeared during the civil rights movement of the 1960s.⁹⁵ Presidents Kennedy and Johnson denounced the National Origins quota system and strenuously supported reform.⁹⁶ Congress and the President enacted the Immigration and Nationality Act of 1965, which replaced the discriminatory National Origins quotas with a “unified quota” system.⁹⁷ Under the unified system, each country was allotted the same number of visas, regardless of the population of the country, regardless of the demand of its natives for visas, and regardless of the current or historical ethnic composition of the U.S.

During the 1960s, Congress also became increasingly concerned with the work conditions of Mexican farm laborers in the *Bracero* program. Congress was concerned that the employment of Mexican workers depressed the wages and working conditions of U.S. workers and that farmers had little incentive to pay higher wages. In 1964, the *Bracero* program ended.⁹⁸

The combined effect of the Immigration and Nationality Act of 1965 and the 1964 termination of the *Bracero* program was devastating to Mexicans who wanted to live and/or work in the U.S.⁹⁹ INS

passage of the so-called “Wetback Act,” which provided criminal sanctions for the smuggling, harboring, and entry of aliens who had not been legally admitted and inspected. Immigration and Nationality Act of 1952, *supra* note 68, at 228-29 (codified at 8 U.S.C. § 1324(a) (1988)).

94. It should be noted that, before 1965, immigration policy favored not only Mexicans, but it also favored Canadians, Central and South Americans, and other residents of the Western Hemisphere. For example, England, Germany and Ireland had quotas so large that they were often unfilled. See Immigration and Nationality Act of 1952, *supra* note 68, § 101(a)(27)(C), 66 Stat. 163, 169 (amended 1965) (stating that the term “nonquota immigrant” includes “an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America.”).

95. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. I, II, III, IV, VI, VII, 78 Stat. 241, 244-46, 252-53 (codified at 42 U.S.C. §§ 2000a-2000h (1994)) (prohibiting racial discrimination in voting (Title I), public accommodations (Title II), public facilities (Title III), public schools (Title IV), federally funded programs (Title VI), and government employment (Title VII)).

96. See HUTCHINSON, *supra* note 59, at 435; see also JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964).

97. Immigration and Nationality Act of 1965, *supra* note 71, § 1, 79 Stat. 911, 911 (codified as amended at 8 U.S.C. § 1151(a)).

98. Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (effective Dec. 13, 1964).

99. 132 CONG. REC. H9708-02 (daily ed. Oct. 9, 1986) (“Today’s so-called illegal immigration crisis exists not so much because the numbers seeking to live and work in this country are greater, but because the 1965 reform makes legal entry all but

Commissioner Raymond F. Farrell attributed the significant rise in Mexican illegal immigration to the end of the *Bracero* program and the imposition of quotas.¹⁰⁰ In 1961, the INS reported 30,000 deportations of Mexicans.¹⁰¹ In 1967, after the 1965 Act and the end of the *Bracero* Program in 1964, the INS reported 108,000 deportations.¹⁰²

Given its rejection of National Origin quotas, Congress repeatedly rejected efforts to establish a preferential quota for Mexico. In 1971, both Presidents Ford and Carter unsuccessfully urged a special quota for Mexico.¹⁰³ In 1974, it was acknowledged in Congress that illegal immigration was so high that a proposed 35,000 limit for Mexico would still be insufficient.¹⁰⁴ In 1976, Western Hemisphere countries, including Mexico, were subjected to the 20,000 per-country limit.¹⁰⁵ Thus, the availability of immigrant visas for Mexicans was virtually cut in half overnight.¹⁰⁶ In 1978, the Eastern and Western Hemisphere quotas were combined, making the Western Hemisphere subject to a lower annual worldwide quota.¹⁰⁷ In 1979, the INS reported 450,000 deportations.¹⁰⁸

The number of deportable aliens found in the U.S. in 1961 was 88,823. This number steadily increased over the next 27 years to 1,679,439 in 1998.¹⁰⁹

impossible.”) (statement of Rep. Gonzalez).

100. Hearings before House Subcomm. on the Judiciary, 92nd Cong., 1st Sess. 19 (1971) (statement of Raymond F. Farrell, INS Commissioner).

101. See U.S. DEP'T OF JUSTICE, INS, 1961 ANNUAL REPORT n.p.

102. See U.S. DEP'T OF JUSTICE, INS, 1967 ANNUAL REPORT n.p.

103. See H.R. REP. NO. 1, 92d Cong., 1st Sess., pt. 1, at 216, 269-70 (1971); LAWRENCE H. FUCHS & SUSAN B. FORBES, SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 58, *reprinted in* ALEINIKOFF & MARTIN, *supra* note 90, at 40-50.

104. See H. R. REP. NO. 94-1553, 94th Cong., 1st Sess. 9 (1976), *reprinted in* 1976 U.S. CODE & CONG. NEWS 6073, 6081 (quoting a May 1976 joint statement of the Departments of State and Justice).

105. Act of Oct. 20, 1976, Pub. L. 94-571, 90 Stat. 2703.

106. See *Silva v. Bell*, 605 F.2d 978, 981 (7th Cir. 1979) (“This new quota reduced Mexican immigration to this country by as much as 50 per cent and thus ‘made room’ for increased non-Mexican immigration under the total Western Hemisphere immigration quota.”).

107. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 1, 92 Stat. 907, 907 (codified as amended at 8 U.S.C. § 1151(a) (Supp. V 1981)).

108. See U.S. DEP'T OF JUSTICE, INS, 1979 ANNUAL REPORT.

109. INS YEARBOOK, FY 1998, *supra* note 33, at 9, *reproduced at* <http://www.ins.usdoj.gov/graphics/aboutins/statistics/ENF98.pdf>, at 9.

E. Attempts to Relieve the Problems Caused by the Immigration Act of 1965

It was not until the mid-1980s that Congress responded to mitigate the damage that the 1965 Act was causing.

The most basic cause of the problem is the mistake made 21 years ago in the Immigration [and Nationality] Act of 1965, which placed an unrealistic ceiling on immigration from countries within the Western Hemisphere. From that day forward, legal entry became all but impossible for the vast majority of those who sought to come here because they could find work and freedom and dignity here. All that was required until that time was the showing of good character and the offer of a good job. The quota that was imposed by the 1965 Act was unrealistically low, it did not recognize the fact that our southern border is only a political – not an economic or social – boundary.¹¹⁰

To relieve the backlog of applications for immigrant visas, primarily caused by the Immigration and Nationality Act of 1965, Congress has made a number of inadequate and counterproductive attempts. Most notable are the legalization program of the Immigration Reform and Control Act of 1986¹¹¹ which primarily favored Mexicans, the diversity (lottery) program which has excluded Mexicans,¹¹² the Immigration Act of 1990¹¹³ which has resulted in significant but inadequate relief, primarily for Mexicans and Filipinos,¹¹⁴ and the Legal Immigration Family Equity (LIFE) Act¹¹⁵ and Amendments¹¹⁶ of 2000, which, in effect, waive and/or legalize the unlawful presence of certain aliens who are waiting for their family-sponsored immigrant visas to become available.

1. The 1986 Legalization Program

In 1986, Congress and the President enacted the Immigration Reform and Control Act of 1986, which, among other things, promised the

110. CONF. REP. ON S.1200, 99th Cong., 2d Sess. (1986), *reprinted in* 132 CONG. REC. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Gonzalez).

111. Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359 (legalization provisions codified at INA § 245A, 8 U.S.C. § 1255a) [hereinafter IRCA].

112. *Id.* § 313 (visa waiver pilot program favoring the natives of up to eight countries (*see* 52 Fed. Reg. 1447)); Act of Nov. 29, 1990, Pub. L. No. 101-649, §§ 131-34, 104 Stat. 4978 (diversity visas favoring countries to be designated by the Attorney General (*see* 58 Fed. Reg. 6559), plus 1000 visas for Tibetans (§ 134)) [hereinafter Immigration Act of 1990].

113. *Id.*

114. *See* STATE DEP'T VISA BULL., *supra* note 3.

115. Pub. L. No. 106-553, 114 Stat. 2762, 2762A-345, *reprinted in* U.S. CODE & CONG. NEWS (2000) [hereinafter LIFE Act], .

116. Pub. L. No. 106-554, 114 Stat. 2763, *reprinted in* 146 CONG. REC. H12100-03, H12299 (daily ed. Dec. 15, 2000).

“legalization”¹¹⁷ of immigration status (meaning it promised lawful resident status) to aliens who could prove that they had resided unlawfully in the U.S. since at least December 31, 1981.¹¹⁸ President Carter’s mere suggestion of such a program in 1977 caused illegal entries to increase sharply.¹¹⁹ The program itself caused an influx of illegal entries and opened up a vast underground market of document fraud.¹²⁰

Furthermore, the legalization of hundreds of thousands of Mexicans enabled them to file visa petitions for their family members. Government figures show that about eighty percent of the spouses and minor children on the visa waiting lists are being sponsored by legalized aliens.¹²¹ Thus, legalization caused a sudden significant burden on the family-sponsored immigrant visa waiting lists.¹²²

2. *The 1986 and 1988 Diversity (Lottery) Programs*

In the 1986 Act, Congress also specifically provided for the natives of thirty-six countries that have been “adversely affected” by the Immigration and Nationality Act of 1965.¹²³ To be considered “adversely affected,” a country’s natives must have been issued fewer visas after 1965 than before.¹²⁴ The 1986 law provided a modest 5,000

117. The “legalization” program was also nicknamed, incorrectly, the “amnesty” program. It was not really an amnesty program because it did not forgive the criminal and other consequences of a prior illegal entry.

118. See IRCA, *supra* note 111.

119. 131 CONG. REC. H7617-02 (daily ed. Sept. 19, 1985) (statement of Rep. Smith); see also *Increase in Illegal Aliens Linked to Amnesty Plan*, N.Y. TIMES, July 7, 1977, § 1, at 16, col. 6.

120. See 142 CONG. REC. H2378-05, H2389 (daily ed. Mar. 19, 1996) (statement of Rep. Cunningham). It also sparked extensive complex litigation. See, e.g., *Catholic Social Services, Inc. v. Meese*, 813 F.2d 1500, 1987 WL 61013 (9th Cir. 1987), *opinion vacated and remanded*, 820 F.2d 289 (9th Cir. 1987), *on remand*, 685 F. Supp. 1149 (E.D. Cal. 1988), *aff’d and remanded sub nom.*, *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992), *judgment vacated and remanded sub nom.*, *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993), *on appeal after remand, judgment vacated and remanded*, 134 F.3d 921 (9th Cir. 1997).

121. Whereas, in 1981 nearly seventy percent of the one million aliens waiting for preference visas were relatives of United States citizens or of permanent resident aliens. See John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 258 (1988).

122. See STATE DEP’T VISA BULL., *supra* note 3.

123. IRCA, *supra* note 111, § 314.

124. *Id.* § 314(b)(1). Thus, the list included such countries as Great Britain,

diversity visas during 1987 and 1988.¹²⁵

In 1988, Congress created 20,000 diversity visas for 1989 and 1990.¹²⁶ But this time the visas were available only to natives of countries that were “under-represented,” namely a country that used less than twenty-five percent of its 20,000 preference visas in 1988.¹²⁷ Therefore, natives of Mexico were not eligible to apply for the visas.¹²⁸

3. *The Immigration Act of 1990*

In 1990, Congress created a “permanent” and a “transitional” diversity program.¹²⁹ The transitional program, which ran from 1991 to 1994, was more commonly known as the “Irish provision” because forty-percent (16,000) of the annual 40,000 visas were reserved for natives of Ireland.¹³⁰

The permanent program, which began on October 1, 1994, was established to attract immigrants from countries that have sent fewer than 50,000 immigrants over the preceding five years.¹³¹ *Therefore, Mexico is not an eligible country.* The 55,000 visas are randomly distributed,¹³² hence the diversity program is also called a “lottery.”

Congress also attempted to alleviate the immigrant visa backlogs caused by its 1986 legalization program, by creating the Family Unity program,¹³³ which provides special deferred status to “second-preference” family-sponsored immigrant visa applicants (spouses and unmarried children of LPRs) who are sponsored by LPRs who were

Germany, and France, but no countries from Africa, who sent few immigrants prior to 1965.

125. *Id.*

126. *See* Act of Nov. 15, 1988 (Immigration Amendments of 1988), Pub. L. No. 100-658, §§ 2-3, 102 Stat. 3908, 3908-09.

127. *Id.*

128. *See* State Department Reports Country Figures for OP-1 Program, 66 INTERPRETER RELEASES 659, 669-70 tbl. IV (1989).

129. Immigration and Nationality Act of 1990, *supra* note 112, §§ 131-32.

130. *Id.* at § 132(c) (“[A]t least 40 percent of the number of such visas in each fiscal year shall be made available to natives of the foreign state the natives of which received the greatest number of visas issued under section 314 of the Immigration Reform and Control Act....”).

131. INA § 203(c)(1)(B)(ii)(II), 8 U.S.C. § 1153 203(c)(1)(B)(ii)(II); *see generally* INS YEARBOOK, FY 1997, *supra* note 33, at 16, reproduced at www.ins.usdoj/graphics/aboutins/statistics/1998yb.pdf, at 16. To be eligible, the alien must be from an eligible country and have a high school education or two years of work experience in a skilled occupation. *See Id.*

132. *See* INA § 203(e)(2), 8 U.S.C. § 1153(e)(2).

133. The “Family Unity” provisions are set forth at Immigration Act of 1990, *supra* note 113, at § 301. Note the following proposal that was made two years earlier: “Congress should eliminate the numerical ceilings on entry of the spouses and minor children of permanent resident aliens.” Guendelsberger, *supra* note 121, at 254.

legalized under the 1986 legalization program.¹³⁴ In effect, the Family Unity program waives and/or legalizes the unlawful presence of such visa applicants while they wait for their visas to become available.

To speed up the availability of immigrant visas, the Immigration Act of 1990 also increased the worldwide quota of family-sponsored immigrant visas to 480,000,¹³⁵ created an exception to the per-country quota for the spouses and children of LPRs,¹³⁶ and provided an additional 55,000 visas per year, from 1992 to 1994, for the spouses and children of legalized aliens.¹³⁷

To see how the 1990 legislation has benefited Mexicans, note the percentage of family-sponsored immigrant visas that were issued to Mexicans as a percentage of the worldwide number issued:¹³⁸

FAMILY-SPONSORED IMMIGRANT VISAS

	Mexico (M)	Worldwide (W)	Percentage (M/W)
1993	15,800	226,776	6.97
1994	39,136	211,961	18.46
1995	61,877	238,122	25.98
1996	99,156	294,174	33.71
1997	68,996	213,331	32.34
1998	55,140	191,480	28.80

Thus, the effect of the 1990 legislation has been to give Mexicans a higher number of family-sponsored immigrant visas, many more than formerly allowed by the per-country quota.¹³⁹ But the additional visas went to Mexicans only in one subcategory of the second-preference category of family-sponsored immigration visas, namely spouses and children of LPRs. Furthermore, even in that subcategory, Mexicans still have to wait years longer than any other aliens for available visas.¹⁴⁰

134. The "Family Unity" doctrine mandates that such relatives who are in the United States, who can show that the relative relationship was established as of May 5, 1988, be given temporary stays of deportation and interim employment authorization. Immigration Act of 1990, *supra* note 112, § 301.

135. *See id.* § 201.

136. *See id.* § 102.

137. *See id.* § 112.

138. *See* STATE DEP'T VISA BULL., *supra* note 3.

139. The State Department's Visa Bulletin corroborates that, as intended, the 1990 legislation has benefitted natives of Mexico, the Philippines, and the Dominican Republic. *See id.*

140. *See id.*

The longest delays are in the fourth family-sponsored preference category (siblings of U.S. citizens). For example, as of February 2001, the visa waiting list for fourth-preference Mexican natives exceeded eleven years.¹⁴¹ Only Filipinos and Indians have to wait longer for visas in the fourth-preference category, and only Filipinos have to wait longer for visas in the first and third-preference categories.

4. *The Legal Immigration Family Equity Act (LIFE) and Amendments of 2000*

On December 21, 2000, President Clinton signed the LIFE Act¹⁴² and Amendments¹⁴³ into law. Among other things, the new law creates a new nonimmigrant “V” visa for certain aliens who are waiting for their family-sponsored immigrant visas to become available.¹⁴⁴ To qualify for the “V” visa, the alien must be the spouse or child of a lawful permanent resident and must be the beneficiary of an immigrant visa petition that was filed on or before the date of enactment of the LIFE Act, namely on or before December 21, 2000, and that visa petition must have been pending for at least three years.¹⁴⁵ Even aliens who have been waiting unlawfully in the U.S. for their visas to become available are eligible to apply for the “V” visa. In effect, the legislation waives and/or legalizes the unlawful presence of a large number of aliens who have been waiting, or who wish to wait, in the U.S. until their visas become available.

In addition, Congress revived INA section 245(i)¹⁴⁶ to permit *unlawfully* present aliens to apply for adjustment of status¹⁴⁷ in the U.S. by paying an “enhanced filing fee” of \$1,000.00 in addition to the regular adjustment-of-status application fee of \$220.00.¹⁴⁸ INA section

141. Note that, in interpreting the State Department’s Visa Bulletin, one cannot determine precisely how long it will take for a particular visa to become available. One can determine only how long currently available visas have taken to become available. The waiting period fluctuates depending upon the demand in each category. If the demand increases, the waiting line slows down and, sometimes, may even go backwards!

142. LIFE Act, *supra* note 115.

143. *Id.*

144. *See id.* § 502. A nonimmigrant visa is only for temporary stays in the United States. *See* INA §§ 101(a)(15), 214, 8 U.S.C. §§ 1101(a)(15), 1184.

145. *Id.* There is also a provision, beyond the scope of this article, for immediate relatives who experience delays in obtaining their immigrant visas.

146. 8 U.S.C. § 1255(i).

147. Adjustment of status is the process by which an alien applies for lawful permanent resident status from *within* the United States. *See* INA § 245, 8 U.S.C. § 1255. An alien *outside* the United States makes a visa application at an American embassy of consulate. Either way, an immigrant visa must become available to the alien.

148. 8 C.F.R. §§ 103.7(b)(1), 245.10(b).

245(i) was originally enacted into law on October 1, 1994,¹⁴⁹ with a sunset provision of September 30, 1997.¹⁵⁰ The program was extended until January 14, 1998.¹⁵¹ After that, Congress received much pressure to revive the provision and finally did so in the LIFE Act.¹⁵² The LIFE Act temporarily revives INA section 245(i), by extending the previous eligibility cut-off date of January 14, 1998, to April 30, 2001.¹⁵³ That means that any beneficiary with a “priority date”¹⁵⁴ of April 30, 2001, or earlier will be eligible to adjust his or her status to that of a lawful permanent resident under INA section 245(i) upon payment of the \$1,000 surcharge, regardless of past unlawful presence and regardless of when he or she actually adjusts status. However, as explained below,¹⁵⁵ INA section 245(i) waives unlawful presence only at the time that the alien eventually applies for adjustment of status. The alien remains deportable (due to unlawful presence) up until that time.¹⁵⁶

As part of a legislative scheme to undo legislation, since the 1960s, that has served only to encourage the unlawful presence of Mexicans in the U.S., this article proposes no further extensions of the non-immigrant “V” visa or INA section 245(i).¹⁵⁷

IV. THE PROPOSED LEGISLATIVE SCHEME

This proposed legislative scheme consists of five aspects: (1) elimination of all per-country quota limitations on family-sponsored immigrant visas for Mexico; (2) a diversity program whereby Mexicans who are not waiting for visas to become available would be guaranteed half of all available diversity visas; (3) a “reverse-amnesty” program whereby Mexicans who are unlawfully present in the U.S. would be forgiven their unlawful presence if they departed the U.S. and reported to an American embassy or consulate by a specified deadline; (4) no

149. Pub. L. No. 103-317, Title V, § 506, 108 Stat. 1724 (1994) (amended in 1997 and 2000).

150. *Id.* § 506(c).

151. Pub. L. No. 105-119, § 111(b), 111 Stat. 2440, 2458 (1977).

152. LIFE Act, *supra* note 115.

153. *Id.* § 1502.

154. The date that an immigrant visa petition is filed on behalf of the alien. *See* INA § 203(e)(1), 8 U.S.C. § 1152(e)(1). Note that diversity visas are selected at random. *See* INA § 203(e)(2), 8 U.S.C. § 1153(e)(2).

155. *See infra* text accompanying notes 170-72.

156. *See* INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). *See infra* text accompanying note 179.

157. 8 U.S.C. § 1255(i); *see infra* text accompanying notes 168-73.

further extensions of the nonimmigrant “V” visa and INA section 245(i), which in effect, waive and/or legalize the unlawful presence of aliens in the U.S.; and (5) a bar to judicial review.

A. Elimination of All Per-Country Quota Restrictions on the Issuance of Family-Sponsored Immigrant Visas to Mexicans

The proposed legislation of this article *would not* result in an increase in the worldwide immigrant visa quotas. Rather, the intended effect is to increase the number of family-sponsored immigrant visas available to Mexicans at the expense of the natives of all other countries. To do so, Congress should eliminate all per-country quota restrictions on the issuance of family-sponsored immigrant visas for Mexicans by amending INA section 202(a)¹⁵⁸ as follows:

202 Numerical Limitation To Any Single Foreign State

(a) Per Country Level.—

...

(2) Per Country Levels For Family-Sponsored And Employment-Based Immigrants.—Subject to paragraphs (3), ~~and~~ (4), and (5) the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

...

(5) *Exception For Natives of Mexico.*—*The total number of immigrant visas made available to natives of Mexico is limited only by the total number of visas made available under subsection (a) of section 203 in any fiscal year.*

The effect of such a change would be to “float” Mexican priority dates, allowing them to compete against all other priority dates in all of the family-sponsored categories. Thus, only one quota would apply to Mexico, namely the worldwide quota of family-sponsored immigrant visas. The intended effect of the elimination of the per-country quota for family-sponsored visas for Mexico would be to significantly decrease the length of time that Mexicans must wait for such visas. Since Mexicans typically reach their per-country quota before reaching the worldwide quota for family-sponsored visas, the desired effect ought to be achieved.

158. 8 U.S.C. § 1152(a).

B. Diversity Program for Mexicans

In addition, Congress should guarantee a certain percentage of diversity (lottery) visas for Mexicans who are not already waiting for an immigrant visa to become available by amending INA section 201(e)¹⁵⁹ and INA section 203(c)¹⁶⁰ as follows:

201 Worldwide Level of Immigration

...

(e) Worldwide Level of Diversity Immigrants.—The worldwide level of diversity immigrants is equal to 55,000—for each fiscal year. *Of that number, no less than fifty percent shall be issued to natives of Mexico.*

To ensure that the diversity or “lottery” visas are available only to Mexicans who are not already waiting for an immigrant visa to become available, the following subsection would be added to INA section 203(c)(1):¹⁶¹

203 Allocation Of Immigrant Visas

...

(c) Diversity Immigrants—
(1) In General—

...

(G) No native of Mexico shall be eligible for a visa under this subsection if he or she has a pending approved visa petition.

In addition, Mexicans should be exempted from the educational and work-experience requirements. Therefore, INA section 203(c)(2)¹⁶² should be amended as follows:

203 Allocation of Immigrant Visas

...

(c) Diversity Immigrants—

...

(2) Requirement of Education or Work Experience.—An alien, *other than a native of Mexico*, is not eligible for a visa under this subsection unless the alien—

159. 8 U.S.C. § 1151(e).
160. 8 U.S.C. § 1153(c).
161. 8 U.S.C. § 1153(c)(1).
162. 8 U.S.C. § 1153(c)(2).

The purpose of the proposed diversity program is two-fold. It reverses the adverse effects of the Immigration and Nationality Act of 1965. More importantly, it ensures that *every* otherwise admissible Mexican, not just those with family or employer sponsors, will have an incentive not to enter or remain in the U.S. unlawfully.

C. “Reverse-Amnesty”: Waiver of Unlawful Presence for Mexicans

In conjunction with the elimination of per-country quota limitations on family-sponsored immigrant visas, the proposed legislation would give aliens who are unlawfully present in the U.S. an incentive to depart the U.S. by forgiving their accumulated unlawful presence and thus avoiding revocation of their visa petitions by adding the following subsections to INA section 205:¹⁶³

205 Revocation of Approval of Petitions

...

- (c) *WAIVER*¹⁶⁴ For purposes of INA 203(c)(1)(H), subsection (b) of this section, and of 212(a)(9)(B) and (C), the Attorney General shall not consider periods of unlawful presence that occur prior to 180 days after the effective date of this provision if the alien is a native of Mexico and produces proof of foreign presence obtained pursuant to subsection (d) prior to the lapse of such 180 days.
- (d) *PROCEDURE FOR OBTAINING PROOF OF FOREIGN PRESENCE*. To obtain the proof of foreign residence required in subsection (c), an alien who is a native of Mexico must personally appear before any United States consular officer abroad to apply for proof of foreign presence.

In contrast to the 1986 legalization program, INA section 245(i) (1994), and the nonimmigrant “V” visa (2000), all of which have rewarded aliens who have unlawfully remained in the U.S., the proposed legislation rewards Mexicans who leave the U.S. by a specified deadline. Their previous unlawful presence is forgiven if they personally register with an American embassy or consulate by a specified date. As set forth below, if they are subsequently found unlawfully present in the U.S., their approved visa petitions shall be revoked, and they become ineligible for the diversity program.

163. 8 U.S.C § 1155.

164. See *infra* text accompanying notes 166-67.

165. Note that the proposed legislation also provides for a waiver of excludability due to accumulated periods of unlawful presence.

D. Revocation of Visa Petition for Unlawful Presence

The proposed legislation would create an added incentive for Mexicans who are unlawfully present in the U.S. to return to, and remain in, Mexico pending the availability of their immigrant visas by adding the following subsection to INA section 205¹⁶⁶ as follows:

205 Revocation of Approval of Petitions

...

(b) *REVOCAION OF VISA PETITIONS FOR UNLAWFUL PRESENCE.*¹⁶⁷ *Subject to paragraphs (c) and (d), the Attorney General shall revoke the approval of any petition approved by him or her under section 204 for an alien who is a native of Mexico by reason of a relationship described in section 203(a) when it has been established by clear and convincing evidence that such alien has ever been unlawfully present in the United States for a period of more than 30 days.*

A similar subsection should be added to INA section 203(c)(1) as follows:

203 Allocation of Immigrant Visas

...

(c) Diversity Immigrants.—

166. See 8 U.S.C. § 1155.

167. Note that current law already provides that an unlawfully present applicant for adjustment of status is inadmissible to the United States. See INA § 245(a)(2), 8 U.S.C. § 1255(a)(2). If unlawful presence has been more than one year, the alien is subject to a ten-year bar to admission. See INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). If the period of unlawful presence has been more than 180 days (up to one year), the alien is subject to a three-year bar to admission. See *id.* There are exceptions for minors, asylees, battered women and children, and certain aliens subject to the family unity provisions. See INA § 212(a)(9)(B)(iii)(I) through (IV), 8 U.S.C. § 1182(a)(9)(B)(iii)(I)-(IV). Also, current law provides for the rescission of an adjustment of status for aliens who, unknown to the INS, had been inadmissible to the United States due to previous periods of unlawful presence in the United States. The statute provides that the Attorney General may, within five years after the adjustment of status, commence rescission proceedings against an alien upon discovering that the alien “was not in fact eligible for such adjustment of status...” INA § 246(a), 8 U.S.C. § 1256(a). Furthermore, Mexicans who nonetheless decided to remain in the United States while waiting for their immigrant visas to become available would still be eligible to apply for a waiver of inadmissibility. Under current law, an alien who is the spouse, son, or daughter of a United States citizen or lawful permanent resident may obtain a waiver of inadmissibility under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). However, aliens sponsored by siblings or children are not eligible to apply for the waiver.

(1) In General.—

...

(H) *No native of Mexico shall be eligible for a visa under this subsection when it has been established by clear and convincing evidence that such alien has ever been unlawfully present in the United States for a period of more than 30 days.*

E. No Extension of INA Section 245(i) or the Non-Immigrant “V” Visa

As explained above, Congress recently revived INA Section 245(i) which, for a fee, forgives aliens who remain unlawfully in the U.S. while waiting for a visa to become available.¹⁶⁹ Although the program has its business,¹⁷⁰ family-unity, and fiscal¹⁷¹ advantages, it compromises respect for immigration laws. During the period of time that prospective beneficiaries of INA section 245(i) remain unlawfully in the U.S., the INS expends tremendous amounts of resources to detect and remove them. According to the INS, the vast majority of aliens using the program from 1994 to 1997 had entered the U.S. illegally.¹⁷² An extension of INA Section 245(i) would not be consistent with the proposed legislation.

In late 2000, Congress also created a new non-immigrant “V” visa which permits certain aliens to remain in the U.S. while they wait for their family-sponsored immigrant visas to become available.¹⁷³ The “V” visas are available even to aliens who have been unlawfully present in the U.S.. Like INA section 245(i), the “V” visa tends to undermine respect for fundamental norms of U.S. immigration law. Extension of the “V” visa would be inconsistent with the proposed legislation.

168. Note that proposed INA §§ 205(c) and (d) provide for “reverse-amnesty” if the alien departs the United States and reports to an American embassy or consulate by a specified date. *See supra* text accompanying notes 164-65.

169. INA § 245(i), 8 U.S.C. § 1255(i).

170. The program avoids the disruption or delay of having current or prospective employees return to their home countries for their immigrant visas. The law is supported by the U.S. Chamber of Commerce and such firms as AT&T, Apple, Bayer, Digital, Dow Chemical, Ford, Hewlett-Packard, Intel, Maytag, Merck, Microsoft, Monsanto, Motorola, Procter & Gamble, Sun Microsystems, Texas Instruments, TRW, Westinghouse and Xerox.

171. *Id.* In 1997, for example, revenues approached \$200 million, which were used for increased detention space for criminal aliens, additional adjudication staff, and improved customer service. *Id.*

172. Approximately 203,000 applications for adjustment to permanent residence were received by INS in FY 1994 prior to the enactment of INA § 245(i). With INA § 245(i) in effect, the number of applications increased to 471,000 in FY 1995 and 544,000 in FY 1996. *See* INS Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/annual/fy96/977.htm>.

173. *See supra* text accompanying notes 142-43.

F. Nondiscrimination, Equal Protection, and Jurisdiction

Because the proposed legislation gives Mexicans preferential immigration treatment, INA section 202(a)(1)¹⁷⁴ should be amended as follows:

202 Numerical Limitations To Any Single Foreign State

(a) Per Country Level.—

- (1) Nondiscrimination.—Except as specifically provided in *this Act* ~~paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203~~, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Also, because the proposed legislation provides preferential treatment to Mexicans at the expense of the natives of other countries and because it creates disincentives that are specifically directed at Mexicans, such other natives and Mexicans might attempt equal protection challenges. To avoid impediments to implementation of the proposed legislation, the legislation should include a bar to judicial review by adding the following to the INA:¹⁷⁵

210A Judicial Review

No court shall have jurisdiction to hear any cause or claim by or on behalf of anyone concerning the validity of any provision of this Act which expressly affects natives of Mexico concerning per-country numerical limitations, diversity visas, the revocation of visa petitions on the grounds of the beneficiary's unlawful presence in the United States, and/or waivers of unlawful presence.

In the alternative, the following should be added:

210A No Capacity To Sue

No one shall have capacity to commence an action against the United States or its agencies or officers or any other person in any court with respect to the validity of any provision of this Act which expressly affects natives of Mexico concerning per-country numerical limitations, diversity visas, the revocation of visa petitions on the grounds of the beneficiary's unlawful presence in the United States, and/or waivers of unlawful presence.

174. 8 U.S.C. § 1152(a)(1).

175. See, e.g., INA §§ 226(e), 241(a)(2)(B), 242(a)(2)(C), 242(g), 8 U.S.C. §§ 1226(e), 1252(a)(2)(B), 1252(a)(2)(C), 1252(g).

An equal protection challenge would raise several delicate issues, including: whether the natives of other countries would have standing to sue; whether such natives, especially those outside the U.S., would have an equal protection right to assert;¹⁷⁶ and whether the government could demonstrate a “facially legitimate and bona fide reason”¹⁷⁷ for the exceptional treatment of Mexicans. Although the United States Supreme Court has long held that the level of constitutional scrutiny is minimal in immigration matters, especially when the law in question concerns who may enter the U.S.,¹⁷⁸ even frivolous litigation can result in delay, expense, and political embarrassment.

Clearly, there is ample precedent for giving preferential immigration treatment to one group of nationals, especially for humanitarian or political reasons.¹⁷⁹ Examples of favored groups of nationals include

176. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens....”).

177. See *Fiallo v. Bell*, 430 U.S. 787, 794 (1977); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (A statutory classification “must be upheld against equal protection challenge if there is any conceivable state of facts that could provide a rational basis for the classification.”) (internal quotation marks omitted).

178. It is well-settled that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo v. Bell*, *supra* note 177, 430 U.S. 787 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)); see also *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (“It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference.”). This principle “has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.” *Galvan v. Press*, 347 U.S. 522, 531 (1954); accord *Reno v. Flores*, 507 U.S. 292, 305-306 (1993) (“[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Over no conceivable subject is the legislative power of Congress more complete.”) (internal citations omitted). These oft-repeated principles require the courts to uphold a statute as long as it “meet[s] the (unexacting) standard of rationally advancing some legitimate governmental purpose....” *Reno*, 507 U.S. at 306. The Supreme Court has only twice struck down congressional immigration statutes, neither time on equal protection grounds. See *INS v. Chadha*, 462 U.S. 919 (1983) (congressional statute authorizing one House of Congress to “legislatively veto” Attorney General’s decision to suspend deportation in individual cases violated separation of powers); *Wong Wing v. United States*, 163 U.S. 228 (1896) (congressional statute subjecting Chinese alien, illegally residing in the United States, to imprisonment and hard labor held unconstitutional where statute did not require judicial finding of guilt).

179. Irish Peace Process Cultural and Training Program Act of 1998, Pub. L. No. 105-319, § 2, 112 Stat. 3013; Omnibus Appropriations, Pub. L. No. 105-277, §§ 2244, 2225, 112 Stat. 2681 (1998) (Haitians, Vietnamese); Immigration Act of 1990, *supra* note 112, §§ 134, 152, 154-55, 302-03, 405 (Tibetans, Hong Kong, Lebanese, Salvadorans, Filipinos WWII veterans); Foreign Operations Act of 1990, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (religious refugees); Foreign Relations Authorization

Panamanians,¹⁸⁰ Cubans,¹⁸¹ Haitians, Central Americans,¹⁸² Southeast Asians,¹⁸³ Chinese,¹⁸⁴ Taiwanese,¹⁸⁵ Africans,¹⁸⁶ and East Europeans.¹⁸⁷ U.S. legislation is also replete with examples, outside the area of immigration, in which nationals of one country are given more favorable treatment than the nationals of all other foreign countries. Examples are found in the areas of trade and investment, most notably the North American Free Trade Agreement,¹⁸⁸ which favors Canadians and Mexicans over the nationals of all other foreign countries.

V. CONCLUSION

The purpose of the proposed legislative scheme is to remove the incentives that Mexicans currently have to live unlawfully in the U.S., incentives that Congress has created and perpetuated since the 1960s. It

Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, §§ 902-06, 101 Stat. 1331 (1988) (Afghanis, Ethiopians, Poles, Ugandans, Cubans, Indochinese, and Amerasians); IRCA, *supra* note 111, § 202 (adjustment of status of Cubans and Haitians).

180. Panama Canal Act of 1979, Pub. L. No. 96-70, § 3201(a), 93 Stat. 452, 496 (certain aliens with employment, on or before 1977, with the Panama Canal Company, the Canal Zone government, or the U.S. government in the Canal Zone, and their families).

181. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, § 401, 110 Stat. 785; Act of Nov. 2, 1966 (Cuban Refugee Adjustment Act), Pub. L. No. 89-732, 80 Stat. 1161, *amended by* Immigration Act of 1990, *supra* note 112, § 104, 104 Stat. 4978 (Cuban refugees).

182. Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, §§ 202-03, 111 Stat. 2160 (Nicaraguans, Cubans, Salvadorans, Guatemalans, and East Europeans); International Security Act of Dec. 29, 1981, Pub. L. No. 97-113, § 731, 95 Stat. 1557 (extended voluntary departure for Salvadorans).

183. Act of Oct. 22, 1982, Pub. L. No. 97-359, 96 Stat. 1716 (Amerasian children) (codified at INA § 204(g), 8 U.S.C. § 1154(g)); Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223 (Vietnamese, Laotians, and Cambodians); Act of May 23, 1975, Pub. L. No. 94-23, 89 Stat. 87 (Vietnamese, Laotians and Cambodians).

184. Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1629.

185. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, §§ 201, 221, 108 Stat. 4305 (Taiwanese).

186. In 1990, Congress considered a bill that would increase quotas for immigrants from African countries. *See* H.R. 4300, 101st Cong., 2d Sess. § 203 (1990) (proposed "Family Unity and Employment Opportunity Immigration Act of 1990"), *reprinted in* 136 CONG. REC. H8629-02, H8659 (daily ed. Oct. 3, 1990) (proposing an additional 15,000 visas for African countries).

187. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 646, 110 Stat. 3546 (IIRIRA) (Hungarians and Poles).

188. The North American Free Trade Agreement (NAFTA), United States-Canada-Mexico, *entered into force* Jan. 1, 1994, *reprinted in* 32 INT'L LEG. MATS. 605 (1993); Act of Dec. 8, 1993 (North American Free Trade Agreement Implementation Act), Pub. L. No. 103-182, § 342, 107 Stat. 2057.

is proposed that Congress eliminate the per-country quota restrictions on family-sponsored immigrant visas for Mexicans, allowing them to compete freely against the natives of all other countries for the worldwide quota of such visas. In addition, a percentage of diversity visas should be guaranteed to Mexicans who have no family member or employer who will sponsor their immigration. As a part of the proposed legislative scheme, Congress should grant “reverse-amnesty” to all Mexicans who are unlawfully present in the U.S. by giving them a deadline by which to register at an American embassy or consulate. At the same time, Congress should deny benefits of the legislative scheme to Mexicans who nonetheless remain unlawfully in the U.S. And finally, as an overall guiding principle, Congress should not pass, revive, or extend any law that tolerates the unlawful presence of aliens in this country.