WE WANT YOU WHEN WE NEED YOU, OTHERWISE GET OUT: THE HISTORICAL STRUGGLE OF MEXICAN IMMIGRANTS TO OBTAIN LAWFUL PERMANENT RESIDENCY IN THE UNITED STATES

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Abstract

While it is true that a large number of immigrants to this country entered through seaports during the 19th century, they were not the only arriving legal immigrants. The West Coast has its own very different picture of arriving legal immigrants, one that includes subjugation, treaties, and dusty townships, as well as assumptions and mischaracterizations. This essay explores the treaties and statutes that directly affected Mexican permanent legal immigration to the United States.

We begin with a discussion of 19th Century immigration, but quickly turn to the immigrant visa program. The paper then discusses the availability of administrative and regularization remedies to undocumented Mexican immigrants in the United States. These three particular programs represent the primary means by which Mexicans have lawfully and permanently immigrated to the United States in the past 160 years. We purposely excluded discussions of temporary lawful immigrants and legal migration to the United States, focusing instead on the processes that have made it possible for Mexicans to legally and permanently settle in the United States.

The evolution and manipulation of these programs by political forces leaves a legacy worthy of inquiry. Mexicans intending to make a permanent home in the United States confronted enormous obstacles in their pursuit of this status. Although Mexicans were not summarily excluded in the way Asians were, the United States sought to limit their settlement in the United States. At several points in history Mexican immigrants were encouraged, threatened, or forced to depart the United States irrespective of their right to lawfully reside in the United States. The waves of displacement disrupted advances in permanent legal resettlement.

Furthermore, statutes and regulations were manipulated to discourage permanent Mexican immigration. Then as now, the United States misconstrued the unique relationship between Mexico and the United States choosing to sidestep the realities of the countries' interconnectedness, and leaving the "Mexican immigration problem" no closer to resolution.

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INTRODUCTION

Most school history books show U.S. immigration history from an East Coast perspective. They depict ships arriving to Ellis Island full of European migrants. This picture is accurate but incomplete. While it is true that a large number of European immigrants entered this country through sea ports during the 19th century, they were not the only arriving legal immigrants. The West Coast has its own very different picture of arriving legal immigrants, one that includes subjugation, treaties, and dusty townships, as well as assumptions and characterizations. Many Americans living in the Southwest have heard, if only in passing, about the Bracero program and Operation Wetback. Such programs speak to temporary labor[3] and the deportation of persons accused of lacking immigration status;[4] but, leave out the reality that Mexican immigrants could and have legally immigrated to the United States despite legislative, bureaucratic, and geographical barriers for over 160 years. Additionally, many articles on the topic do not differentiate between temporary and permanent legal immigrants, which we believe to be a significant gap in understanding the complexity of Mexican legal migration to the United States.[5] Therefore, in this short essay we only focus on the processes that have made it possible for Mexicans to legally and permanently settle in the United States.

Why Mexicans? Mexicans have a unique immigration history to the United States, distinct even from other Latin American countries. Mexico shares a border with the U.S., and several states were previously Mexican territories. Moreover, Mexicans constitute a majority of Latinos residing in the United States.[6] Mexican immigrants continue to be one of the largest groups moving to the United States today, a trend unlikely to change in the foreseeable future.[7] Addressing Mexican migration to the United States will be critical in the 21st century. Issues relating to labor, trade, human rights, and American identity will dominate the debate. Not surprisingly, these same issues have dominated

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3. *See generally* VICTOR S. CLARK, MEXICAN LABOR IN THE UNITED STATES, U.S. DEPART. OF COMMERCE AND LABOR, BUREAU OF LABOR BULLETIN, NO. 78 (1908); CAMILLE GUERIN-GONZALES, MEXICAN WORKERS AND AMERICAN DREAMS: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900-1939 (Rutgers University Press 1994) (Articles discussing temporary Mexican workers).

4. JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (Greenwood Press 1980).

5. Research revealed data and mention of Mexican permanent immigration. No article, however, could be found that dealt exclusively with means by which Mexicans immigrated permanently, and the vast majority focused on temporary worker programs and issues involving undocumented immigrants. *E.g.* Victoria Lehrfeld, *Patterns_of Migration: The Revolving Door from Western Mexico to California and Back*, 8 LA RAZA L.J. 209 (1995); Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003); Lorenzo A. Alvarado, Comment, *A Lesson From My Grandfather, The Bracero*, 22 CHICANO-LATINO L. REV. 55 (2001); Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401 (2007).

6. PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2007 (March 5, 2009), *available at* http://pewhispanic.org/files/factsheets/hispanics2007/Table-5.pdf (indicating that Mexicans constitute 64% of Latinos within the United States).

7. Between 2000 and 2009, nearly two million Mexicans became lawful permanent residents, which is more than any other country during that time period. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2009, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ ois_yb_2009.pdf

the debate for the past 160 years. Therefore, it is prudent, if not essential, to reflect on the effect of past immigration policies on Mexican immigrants, especially when this history is not readily accessible in school books.[8]

This essay focuses on treaties and statutes that have directly affected Mexican permanent legal immigration. Although there is a rich judicial history that accompanies these legal processes, the task would be made too daunting and complex for an essay of this length. Yet, despite the incompleteness of our historical review, the medium of an online law review gives us a very accessible means to revive the discourse over past history in the current debate over immigration reform.

This paper begins with a discussion of 19th century immigration, but quickly turns to the immigrant visa program. Then, the paper discusses the availability of administrative and regularization remedies to undocumented Mexican immigrants in the United States. These programs represent the primary means by which Mexicans have lawfully and permanently immigrated to the United States in the past 160 years. The evolution and manipulation of these programs by political forces leaves a legacy worthy of inquiry.

History is built upon the shoulders of those that came before us, and in writing this piece we have consulted a number of articles by contemporaries to the immigration laws we discuss. In addition to explaining the immigration statutory schemes of their time, these scholars also shared their insights, views, and conclusions in their articles. Strikingly, many of the concerns and ideas circulating in the past echo the issues in today's immigration debates, and are worth revisiting as we confront the current national debate over immigration reform

The picture that emerges is one of a double standard. Mexicans intending to make a permanent home in the United States confronted enormous obstacles in their pursuit of this status. Although Mexicans were not summarily excluded the way Asians were, the United States sought to limit their settlement in the United States. At several points in history, Mexican immigrants were encouraged, threatened, or forced to depart the United States irrespective of their right to lawfully reside in the United States. The waves of displacement disrupted advances in permanent legal resettlement. Furthermore, statutes and regulations were manipulated to discourage permanent Mexican immigration. Then as now, the United States misconstrued the unique relationship between Mexico and the United States choosing to sidestep the realities of the countries' interconnectedness, and leaving the "Mexican immigration problem" no closer to resolution.

1848-1920: Early Immigration to the Southwest

In 1848, after the Mexican-American war, the United States and Mexico signed the Treaty of Hidalgo.[9] Under the treaty, Mexicans residing in Mexican lands surrendered to the United States were given the option to remain in the U.S. and become United States citizens, remain but declare their intention to remain Mexican citizens, or depart to

8. There are a number of books and articles that discuss Mexican immigration to the United States, a number of them are cited in this article. Many however concentrate on temporary or undocumented Mexican immigration to the United States. *E.g.*, Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

9. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922 (hereinafter referred to as "Treaty of Hidalgo").

Mexico.[10] If they did not decide within one year, it was presumed that they had decided to become U.S. citizens and the American government treated them as such.[11] A similar provision was included a few years later when United States negotiated the 1853 Gadsden Purchase of additional land in the Southwest.[12]

These two treaties significantly altered the immigration status of individuals of Mexican descent residing in the Southwest. During most of the 19th century, permanent immigrants needed to only be listed on the ship's manifest they travelled to the United States in order to acquire legal status. There were no systems to record land entries, and therefore immigrants entering the United States through the Southwest did not have a means to establish lawful admission. Yet, the U.S.-Mexico treaties not only created lawful Mexican immigrants, they created a large newly minted American citizenry of Mexican descent. Since Mexican-American families had ties on both sides of the border, the treaties forever joined the southern part of the United States to the northern part of Mexico. The unity of the region was reinforced by the fact that there was no federal border enforcement or other visible reminders that the region was split between two countries. The first fence between Nogales, Arizona and Nogales, Mexico was not erected until 1910.[13]

Due to these treaties and the lack of any established port of entry, many Mexican immigrants intending to make the United States side of the border their permanent home settled without any formal admission.[14] Others would migrate temporarily from their homes in Mexico to work in the mining and agricultural industries of the United States.[15] Before 1910 immigration inspectors ignored Mexican immigrants, deeming the Southwest to be the "natural habitat" of Mexican nationals.[16]

In 1875, the United States Congress began to impose immigration procedures and controls at the ports.[17] Port Collectors were required to inspect arriving immigrants and determine if an arriving immigrant should be excluded as a criminal or prostitute.[18] In 1882, the Chinese Exclusion Act and the Immigration Act of August 3, 1882, provided for a head tax to be placed on all immigrants; however, Mexican and Canadian immigrants were initially exempted from this tax.[19] These acts also provided additional

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10. *See* Treaty of Hidalgo, art. VIII, at 5-6.

11. *See* Treaty of Hidalgo, art. VIII, at 6.

12. *See* Treaty of Gadsden Purchase, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031.

13. *Nogales History*, PIMERIA ALTA MUSEUM, http://www.nogaleshistory.com/nogales_history.html (last visited Oct. 14, 2010).

14. Guadalupe Salinas & Isaias D. Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 868-869 (1976).

15. Andrew Silverman, *An Historical and Legal Perspective of Mexican Migration*, 1988 ARIZ. J. INT'L & COMP. L. 138, 139 (1988).

16. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States 1921-1965*, 21 LAW & HIST. REV. 69, 82 (2003).

17. Act of March 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974) (established the policy of direct federal regulation of immigration by prohibiting for the first time entry to undesirable immigrants, excluding criminals and prostitutes).

18. *Id.*

19. Immigrant Fund Act, ch. 376, 22 Stat. 214, 214-215 (1882) (repealed 1974); s*ee also* James F. Smith, *A Nation That Welcomes Immigrant? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 230 (1995).

criteria by which an intending immigrant could be excluded, specifically prohibiting the entrance of idiots, lunatics, convicts, and persons likely to become public charges.[20]

Shortly thereafter, the United States further expanded grounds of exclusion and enacted laws to exclude immigrants under a contract labor law that made it unlawful to import aliens into the United States under contract for the performance of labor or services of any kind.[21] This new exclusion was enacted with the purpose of preventing an influx of cheap foreign labor.[22] Following the enactment, the federal government began hiring immigration border patrolmen, including a Texas Ranger named Jeff Milton who patrolled the Nogales, Arizona region in the late 1880s.[23] The patrolmen were charged with keeping excludable persons, especially the Chinese, out of the United States.[24] They patrolled the border until the creation of the Border Patrol in 1924.[25]

Mexican nationals wanting to obtain lawful immigrant status in the United States at this point in history would have faced procedural difficulties in gaining lawful permanent status. Immigrants needed to show up and pass inspection at the port of entry, but there were no formal ports of entry along the Mexico-United States border where intending immigrants from Mexico could be inspected. It was not until 1890 that the United States established formal open ports of entry along the Mexico-United States border. This created the opportunity for Mexican nationals to apply and gain lawful permanent entry into the United States through land entries. Although keeping statistics of admission along the Mexican border was not required until 1906,[26] the little data that exists tends to indicate that a fair number of Mexican nationals entered the United States as legal permanent residents in the years that followed the enactment of exclusion grounds.[27]

In 1917, the United States toughened the grounds of exclusion to bar illiterates:[28] persons who were "over sixteen years of age who were physically able to read but did not read English or some other language or dialect."[29] The additional illiteracy grounds of exclusion made it difficult for many Mexicans to obtain permanent status in the United States.[30] At that time, the Mexican state of Michoacán, a major source of immigration, had an 85% illiteracy rate, making it impossible for the majority of residents from the largest source of Mexican immigrants to become permanent legal residents.[31] While there was a slight increase in legal permanent immigration at this time, the vast majority of Mexicans were excluded and sought to enter through other means.[32] In addition to the

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20. Immigrant Fund Act, ch 376 §1-4, 22 Stat. 214, 214-215 (1882) (repealed 1974).

21. *See* Alien Contract Labor Act of 1885, ch. 164, §§ 1-6, 23 Stat. 332, 332-33 (repealed 1952).

22. *Id*.

23. *See supra* note 13.

24. *Id*.

25. *Border Patrol History*, U.S. DEP'T OF HOMELAND SEC., BORDER PATROL HISTORY (Jan. 5, 2010), http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml (last visited Oct. 14, 2010).

26. U.S. NAT'L ARCHIVES & RECORDS ADMIN., MEXICAN BORDER CROSSING RECORDS, http://www.archives.gov/research/immigration/border-mexico.html (last visited Oct. 14, 2010).

27. *Id*.

28. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876 (repealed 1952).

29. Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66 (1975).

30. FRANCISCO ARTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN-AMERICAN CIVIL RIGHTS MOVEMENT 43 (2nd ed. 1997).

31. *Id*.

32. *Id*.

literacy requirement, the 1917 Act also doubled the head tax to eight dollars.[33] This essentially priced out many Mexicans from entering as immigrants, and forced them to enter as temporary laborers.

Because of Mexico's proximity to the United States and history of cross border migration, United States policy viewed Mexican immigrants as nomadic laborers rather than intending permanent immigrants.[34] Therefore, the inability of Mexicans to overcome exclusion grounds was seen as an opportunity to import them as temporary laborers that could be forced to return to Mexico when not needed.[35] In 1918, the United States created the first Bracero program, then called "Departmental Order of 1918," which waived the literacy requirement and permitted Mexican laborers to enter as legal temporary workers.[36] Consequently, temporary and undocumented immigrants from Mexico outnumbered legal permanent immigrants.[37] In a recurring theme throughout the twentieth century, Mexicans were seen as desirable for their labor, but not as residents or citizens of the United States.

Deportation Dangers

The threat of deportation has always loomed over efforts by Mexican immigrants to make a permanent home in the United States. Early on the threat came from local militias emboldened by frontier culture and the backing of anti-immigrant politicians and union busting employers.[38] With the advent of federal removal enforcement, the federal government began to play an ever enlarging role.[39] Today immigration enforcement is the largest part of the Department of Homeland Security budget[40] and Mexican nationals are the largest population of removed immigrants.[41]

The risk of the U.S. government deporting Mexican noncitizens was minimal in

33. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-78 (repealed 1952).

34. Cardenas, *supra* note 29, at 69-71.

35. *Id.*; *see also* ROSALES *supra* note 30, at 43.

36. Cardenas *supra* note 29, at 66, 68.

37. OFFICE OF IMMIGRATION STATISTICS *supra* note 7, at 6-11, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf (A chart published by the Department of Homeland Security indicates that between 1910 and 1929, nearly 700,000 Mexicans became lawful permanent residents.); Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 Harv. J. ON LEGIS. 417, 426 (2005) (Between 1917 and 1921, 72,000 Mexicans entered as part of the temporary worker program.). This is nearly on par with the average yearly number of Mexicans who became permanent residents. Combined with the large number of Mexicans who entered undocumented due to illiteracy and to avoid the difficult process of obtaining permission as a temporary worker, the number of temporary workers and undocumented workers most certainly was greater than the permanent resident population.; "Between 1821 and 1991, approximately 3.3 million documented migrants entered the United States; since the 1920s somewhere between 6 and 9 million undocumented immigrants have also entered." Gloria Sandrino-Glaser, *Los Confundidos: Deconflating Latino/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 79 (1998).

38. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 29 (Temple University Press 2004).

39. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States 1921-1965*, 21 LAW & HIST. REV. 69, 86 (2003).

40. U.S. DEP'T OF HOMELAND SECURITY ANNUAL FINANCIAL REPORT, FISCAL YEAR 2009, *available at* http://www.dhs.gov/xlibrary/assets/cfo_afrfy2009_vol1.pdf (Border Patrol accounts for 20% of the Budget with ICE accounting for an additional 10%).

41. U.S. DEP'T OF HOMELAND SECURITY 2009 ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2009, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf (Mexicans constituted 86% of all removals in 2009).

1917. The 1882 immigration statute did not address the removal of individuals from the United States; it only addressed the bars to admission at a designated entry port.[42] The 1885-1891 immigration statutes minimally addressed interior enforcement by authorizing the removal of excludable aliens up to a year after their entry into the country.[43] The immigration control efforts at the time were concentrated on admissions at entry points; therefore individuals who entered through unsupervised areas, and evaded immigration inspection, were able to settle by avoiding detection and blend into established communities. These individuals were unable to naturalize[44] but otherwise could remain in the United States with little fear of removal by the federal government. In 1917, Congress enlarged the class of aliens subject to removal by increasing the exclusion statute of limitations to three years,[45] and requiring the deportation of any person who within five years of entry became public charge or was convicted of a certain crimes.[46] However, enforcement was sporadic, often only targeting specific migrant populations such as Chinese or immigrant union organizers.[47]

The 1924 Immigration Act sought to end relaxed enforcement by eliminating the statute of limitations, permitting for the deportation at any time of any person entering after July 1, 1924 without a valid visa or inspection.[48] Congress then enacted additional amendments making it a felony for a person to enter illegally and creating penalties for re-entering after deportation.[49] The new limits on immigration and expanded concept of deportation were coupled with more law enforcement to monitor the borders and ensure that the grounds for exclusion and removal were enforced. In accordance with these goals, the 1924 Act created the Border Patrol.[50] The majority of the original border patrol employees were former cowboys, militia, and military veterans.[51]

The 1930s saw the largest Mexican deportation effort ever undertaken in the United States. Although Mexicans were only one percent of the U.S. population, they made up for over forty-six percent of the persons deported during the decade.[52] The border patrol would comb through neighborhoods arresting ethnic Mexicans without necessarily distinguishing those who were U.S. born from those who were not. Often individuals were persuaded to take voluntary departure instead of fighting removal. This practice was so prevalent that many consuls felt obligated to condemn the process. [53]

However, federal immigration enforcement was not the sole means for the massive deportation effort. Rumors of upcoming raids and threats of violence against suspected

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42. Act of August 3, 1882, ch. 376, 622 Stat. 214 (repealed 1974).

43. Act of February 26, 1885, ch. 164, § 2, 23 Stat. 332 (repealed 1952); Act of February 23, 1887, 24 Stat. 414 (repealed 1952); Act of October 19, 1888 (repealed 1952), 25 Stat. 566; Immigration Act of March 3, 1891, 26 Stat. 1084.

44. Act of February 5, 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (repealed 1952).

45. *Id*. at ch. 29, § 19.

46. *Id*.

47. HING, *supra* note 38, at 29.

48. Act of May 26, 1924, ch. 190, § 14, 43 Stat. 162 (repealed 1952).

49. Act of March 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (repealed 1952).

50. CUSTOM AND BORDER PATROL, U.S. BORDER PATROL-PROTECTING OUR SOVEREIGN BORDERS, *available at* http://www.cbp.gov/xp/cgov/about/history/legacy/history2.xml.

51. Ngai, *supra* note 16, at 86.

52. FRANCISCO BALDERRAMA AND RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930'S 53 (University of New Mexico Press 1995).

53. *Id*. at 55-63.

undocumented Mexicans drove many to self-deport, even if American-born.[54] Public and private agencies across the country mobilized to institute repatriation programs for Mexicans.[55]

> Whenever possible H.L. Doherty and other companies paid the cost of the trip or funds were solicited from public agencies and private donors. The chief expense was food, which ranged from fifty cents a day for children to one dollar for adults. The voyage home was a difficulty [sic] trip at best, for the tankers and cargo vessels were not equipped to handle large numbers of passengers. Women with babies and small children were given priority in the limited number of cabins available. Other repatriates found whatever accommodations they could in the empty holds or on the open decks. Galleys and heads (kitchen and rest-room facilities) were strained to the maximum. Many wondered if they had made a mistake in accepting passage on the rusty ships. Mercifully, the trips as a rule were of short duration.[56]

In the early fifties the issue of illegal immigration became the focus of media attention.[57] The interest on illegal immigration from Mexico was further heightened by a visit to the Southwest border by Attorney General Herbert Brownell who considered the situation "shocking" and lobbied to increase the border patrol numbers significantly.[58] Over a million Mexican nationals and Mexican-Americans, nearly one-sixth of the 1954 Mexican origin population,[59] were deported from the United States in 1954 during what is commonly known as "Operation Wetback."[60] In fact, 99% of all deportable persons arrested in 1954 were Mexican.[61] Operation Wetback was described by the 1955 Immigration and Naturalization Service's Annual report as:

> A large scale task force operation in the Southwest . . . . Light planes were used in locating illegal aliens and directing ground teams in jeeps to effect apprehensions. Transport planes were used to airlift aliens to staking areas for prompt return to Mexico. . . . These activities were followed by mopping up operations in the interior . . . . [62]

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54. *Id*.

55. *Id.* at 99; HING *supra* note 38, at 125-126.

56. BALDERRAMA & RODRIGUEZ *supra* note 52, at 100; FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 100 (University of New Mexico Press 1995).

57. Congressional Research Service, *U.S. Immigration Law and Policy: 1952-1979*, 3 IMMIGR. & NAT'LITY L. REV. 95, 132-33 (1980).

58. *Id*.

59. Cardenas *supra* note 29, at 66, 81.

60. *See generally* JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (Greenwood Press 1980).

61. HING *supra* note 38, at 144.

62. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 14-15 (1955), *cited in* Congressional Research Service, *U.S. Immigration Law and Policy:1952-1979*, 3 IMMIGR. & NAT'LITY L. REV. 95, 133 (1980).

Operation Wetback marked the beginning of over half a century of continual internal immigration enforcement. During the sixties and seventies the INS was under pressure by organized labor, growers, and politicians to remove undocumented farm labor.[63] This led to a stream of dragnet raids by INS at factories or farm labor camps.[64] In 1982 Operation Jobs netted over five thousand deportations of mostly Latinos through raids conducted in nine metropolitan areas.[65] The Silva Roundups that same year involved the removal of individual class members who had not been accorded visas through an otherwise successful lawsuit challenging the misappropriation of Western hemisphere visas by the INS.[66]

Today, workplace enforcement and merging of criminal and immigration enforcement operations have all but laid bare the vulnerability of ethnic Mexicans to deportation, often at the whim of public opinion, economic forces, and political gain. The 2008 Postville, Iowa raids where 400 meat processing workers were simultaneously prosecuted for identity theft and immigration violations are a prime example of modern day enforcement.[67]

The vulnerability to mass deportation experienced by Mexicans led them to seek a legal footing in the United States resulting in the emergence of Latino civil rights organizations, such as the League of United Latin American Citizens (LULAC) in 1929[68] and Mexican American Legal Defense and Education Fund (MALDEF) in 1968.[69] These organizations have made progress in protecting lawful Mexican residents from deportation sweeps and civil rights violations. However, the ability to gain lawful immigration status has often proven elusive to Mexicans as the rest of this paper explains.

Immigrant Visas

Today, most immigration admissions of permanent legal residents are through the immigrant visa. This was not always the case. Prior to the 1924 Act, immigrants simply had to be inspected at a port of entry and not be considered inadmissible for one of the enumerated grounds. This changed drastically with the implementation of the immigrant visa program. From inception, the ability of a person to obtain an immigrant visa was tied to a person's place of origin and his/her admissibility. Jerry Lopez argues that before 1921 the goal of immigration law was to keep out those unfit to join the community, and that between 1921 and 1965 it was to ensure that the composition of the American population retained its statistical "balance."[70] Continuing Professor Lopez's timeline into the latest part of the 20th century and the present, we find that although the reunifying

63. Cardenas *supra* note 29, at 66, 88.

64. Robert S. Catz, *Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution*, 3 IMMIGR. & NAT'LITY L. REV 419, 420 (1980).

65. HING *supra* note 38, at 99.

66. *Id*. at 98.

67. *See generally* Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47 (2010).

68. *LULAC History-All for One and One for All*, LEAGUE OF UNITED LATIN AMERICAN CITIZENS http://lulac.org/about/history/ (last visited Jan 4, 2011).

69. *Mission Statement*, MALDEF, http://www.maldef.org/about/mission/index.html (last visited Jan 4, 2011).

70. Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 626 (1981).

families is hailed as the top priority for visa allocation by political leaders, it is often mere rhetoric sidestepped by origin priorities and admissibility interchangeably. Nevertheless, the immigrant visa process remains today in existence and is the main process by which intending immigrants can secure lawful permanent status in the United States.

The 1920's Quota System

In 1921, the United States adopted a quota program to regulate immigration to the United States based on nationality.[71] The 1921 program used census data to calculate the number of persons from any given country that would be admitted in a year, limiting the number of available visas for aliens of any nationality to 3% of the foreign-born persons of that nationality who lived in the U.S. in 1910.[72] This new quota did not apply to residents of Canada, Newfoundland, Cuba, Mexico, countries of Central or South America or adjacent islands, an area also known as the Western Hemisphere.[73]

The 1924 Act continued the national origin quota system introduced in the 1921 Act. However, the 1924 Act used the 1890 census enumeration instead of the 1910 data and reduced the total per-country limits from 3% down to 2% of the 1890 census enumeration.[74] Thus, the 1921 Act's restricted admissions of 350,000 per year went down to only 150,000 per year under the 1924 Act.[75] Western Hemisphere residents or citizens continued to not be subject to the numeric restriction, and faced little impact from the quota changes.[76]

Under the 1924 Act, the State Department's consular offices maintained a system for registration of visa applicants and managed any waiting list.[77] This implementation of consular processing, together with the imposition of quotas, signaled a major change in the immigration process. Aliens could no longer board a ship, arrive in the U.S., and be admitted. Aliens had to apply for a visa and then wait because of the backlog caused by the quota system. Mexican nationals seeking to enter the United States as permanent legal residents had to apply for the visa at a U.S. consulate in Mexico, but were not subject to a waiting period based on their non-quota status.[78]

The new immigrant visa quota system included procedural monitoring and controls. No more than 10% of the available visas could be distributed in any given month.[79] To obtain a visa, an applicant needed to complete a detailed application.[80] The consular

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71. Immigration Act of 1921, ch. 8, 42 Stat. 5 (1921) (repealed 1952).

72. Ch. 8, § 2(a)-(b), 42 Stat. 5 (repealed 1952). The quota did allow for aliens returning from a temporary visit abroad and aliens who were professional artist, nurses, ministers, professors to be admitted notwithstanding the maximums set per nationality. Ch. 8 §2(d), 42 Stat. 5, 6 (1921) (repealed 1952).

73. Ch 8, §2(7), 42 Stat. 5 (1921) (repealed 1952).

74. Immigration Act of 1924, ch. 190, §5, 43 Stat. 153, 155 (1924) (repealed 1952).

75. Immigration Act of 1924, ch. 190, §11, 43 Stat. 153, 159 (1924) (repealed 1952).

76. §4(c), 43 Stat. 153,155 (1924) (repealed 1952).

77. §2, 43 Stat. 153, 153 (1924); *see also*. 22 C.F.R. § 42.305 (1949).

78. The 1924 quota exemptions were only available to persons born in the Western Hemisphere and no longer available to those who had resided in the Western Hemisphere for a year as provided under the 1921 Act. Ch. 190, §4(c), 43 Stat.153, 155 (1924) (repealed 1952).

79. 22 C.F.R. § 42.20 (1958).

80. 8 U.S.C. § 202(b) (1946).

officer examined the individuals to determine if they were excludable. If the person was not excludable and a visa was available, the person would be permitted to present himself at a port of entry for admission as a permanent resident. The consular officer's visa ineligibility determinations were absolute.[81] The consuls successfully frustrated the ability of Mexican nationals, who were not subject to the quota restrictions, to obtain permanent immigrant visas by ordering stringent enforcement of the head tax, literacy test, contract labor provision, and the public charge grounds of exclusion.[82] Strict enforcement of these provisions not only allowed the United States to prevent permanent Mexican immigration, but also allowed the importation of as much temporary cheap labor from Mexico in the form of temporary workers and then force them back to Mexico when they were no longer needed.

Mexican legal immigrants then faced a second inspection at the border. European immigrants and Mexicans arriving in first class trains were exempt from border inspections. Mexican nationals who did not fit in the exemption were subjected to humiliating inspection procedures that entailed forced baths, naked inspections, and fumigations of their belongings.[83]

Due to the new limits on immigration and the expanded concept of deportation, more law enforcement was required in order to monitor the borders and ensure that the grounds for exclusion were enforced. In accordance with these goals, the 1924 Act also created the Border Patrol.[84] The early border patrol was young, not very professional, and often abused authority.[85]

The statute of limitations for deportation was eliminated, providing for the deportation at any time of any person entering after July 1, 1924 without a valid visa or inspection.[86] Individuals who entered before that date were subject to the exclusion grounds under the 1917 Act. The Act of 1929 made it a felony for a person to enter illegally and created penalties for re-entering following a deportation order.[87] As one author has explained, "the undocumented alien's status was transformed from that of a migratory worker whose presence was seldom questioned to that of a fugitive constantly in fear of apprehension."[88]

The concern over deportation led Mexican nationals who could immigrate to return to border entry points to seek legal permanent immigration status.[89] However, Mexicans were often denied admission based on the literacy and public charge grounds.[90] For

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81. London v. Phelps, 22 F.2d 288, 290 (2nd Cir. 1927).

82. 72 Cong. Rec. 7111 (1930).

83. Ngai, *supra* note 16, at 85-86.

84. *U.S. Customs Service – More Than 200 Years of History*, CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SECURITY , http://www.cbp.gov/xp/cgov/about/history/legacy/bp_historcut.xml (last visited Oct. 14, 2010).

85. Ngai, *supra* note 16, at 86.

86. Act of May 26, 1924, ch. 190 § 14, 43 Stat. 162; United States *ex rel.* London v. Phelps, 22 F.2d 288, 289-90 (2d. Cir. 1927).

87. Act of March 4, 1929, Ch. 690, 45 Stat. 1551 § (a) (repealed 1952).

88. Guadalupe Salinas & Isaias D. Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 873 (1976).

89. R. McLean, *Tightening the Mexican Border*, 64 SURVEY 29 (1930), *construed in* Cardenas, *supra* note 29, at 74, n.39.

90. ROSALES, *supra* note 30, at 43.

many, the head tax was an insurmountable expenditure.[91] Nevertheless, legal Mexican migration steadily increased until 1930.[92]

During the Great Depression, more Mexican nationals left the United States than entered.[93] Many left due to the economic situation in the United States, but others, including citizens, were driven out by law enforcement and vigilantes who believed that the immigrants were displacing American workers.[94] By some estimates, Mexican nationals accounted for half of all deportees and over 80% of all voluntary departures in the late 1920s.[95] Following the war, the United States created the Bracero program to import temporary workers from Mexico to fulfill the needs of the postwar economy.[96] However, permanent legal Mexican immigration continued to be discouraged.

The 1952 Act

In 1947, Congress began to study an overhaul of immigration laws.[97] The congressional committee produced a nine-hundred page report, and over four-hundred persons testified before the special Judiciary subcommittee.[98] The desire to modify the immigration process was prompted in part by the events of World War II and a post-war economy. As a result, new preference categories favoring skilled workers were adopted for the quota system and all racial bars were eliminated.[99] Total Hemisphere quotas replaced per-country quotas based on population.[100] The Western Hemisphere, which included Mexico and Central America, was exempt from the quota.[101]

In June 1952, Congress enacted the McCarran-Walter Bill, despite a veto by then-President Truman.[102] More commonly known as the 1952 Immigration and Nationality Act, it brought the immigration process under one statutory scheme. Many preexisting

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91. *Id*.

92. OFFICE OF IMMIGRATION STATISTICS, *supra* note 7, at 6-11.

93. *Id*. (From 1920 to 1929, over 400,000 Mexicans became permanent residents. Between 1930 and 1939, just over 30,000 Mexicans became permanent residents.); Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 171 (2005) (Mass deportations of Mexicans during the depression are estimated to be between 500,000 and 2 million, many of which were residents, and thousands of others returned on their own.).

94. Guadalupe Salinas & Isaias D. Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 873-74 (1976).

95. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 90 (1999).

96. Act of August 4, 1942, 56 Stat. 1759, *as amended*, Act of April 26, 1943, 57 Stat. 1152.

97. S. Res. 137, 80th Cong. (1947).

98. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (1996).

99. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101).

100 . *Id*.

101. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 § 101(a)(27)(C) (1952) (codified as amended at 8 U.S.C. § 1101).

102 . Immigrant Fund Act, ch. 376, §§1-4, 22 Stat. 214, 214-215 (1882) (repealed 1974); *see also* James F. Smith, *A Nation That Welcomes Immigrant? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 230 (1995); *See also* James F. Smith, *A Nation That Welcomes Immigrant? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 230 (1995).

procedures, interpretations, and rules remained the same, but numerous significant changes were made, including modifications to the immigrant visa process.

Under the new quota system, 50% of the quota visas were reserved for those who were "urgently needed" because of special skill or training, and their families.[103] The next 30% was reserved for parents of citizens, and the remaining 20% was reserved for spouses and children of resident aliens.[104] Twenty percent of any unused visas were made available to the children and the siblings of U.S. citizens, and any remaining visas were made available to any qualified non-preference immigrant.[105] Again the Western Hemisphere was exempt from the quota limits. However, the exemption did not concern immigration restrictionists since strict enforcement of the grounds of exclusion provided an effective mechanism to limit the admission of undesirable immigrants.[106]

There were an ever-increasing number of ways to prevent a person from immigrating. The 1952 Act included thirty-one exclusion grounds.[107] The grounds of exclusion included "physical and mental defectives," "criminal and immoral persons," "subversives," "aliens likely to become a public charge," and other grounds, such as polygamists, illiterates, smugglers for gain, and previously deported aliens.[108] Although a means for individuals who had entered legally into the United States was devised to allow them to adjust to lawful permanent status in the United States, Canadians and Mexicans were not eligible for adjustment.[109] Mexicans had no choice other than to continue to face heightened screening at the U.S. consulates, and often risked exile from their U.S. homes after travelling to the U.S. consulate and failing to secure immigrant visas.[110]

Even if a person was issued a visa by the consulate office, he or she still was subject to the inspection process at the border, where the immigration officer had to determine "clearly and beyond a doubt" that the alien was not excludable.[111] If the immigration officer's finding was questioned by another officer, the alien had to be detained for further interrogation.[112] All arriving aliens, despite having a consulate clearance, were given a physical and mental examination.[113]

The 1965 Act

The 1965 Immigration Act created a quota for the Western Hemisphere starting in 1968.[114] One-hundred and seventy thousand visas were reserved for the Eastern

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103. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 §203(a) (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

104. *Id.*

105. *Id.*

106. Ngai, *supra* note 16, at 106.

107. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 §212(a) (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

108. *Id.*

109. 8 U.S.C. § 1255(c), Pub. L. No. 85-700, 72 Stat. 699 (1958).

110. Ngai, *supra* note 16, at 106.

111. 8 U.S.C. § 1225(b) (1958).

112. *Id.*

113. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 §212(a)(7) (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

114. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

Hemisphere and 120,000 for the Western Hemisphere.[115] The quotas were applied using a preference system different from that instituted by the 1952 Act. The new system prioritized reunification of families over skilled labor.[116] While the preference system was not applied to Western Hemisphere immigrants until 1968, all immigrants from this region, with the exception of parents, spouses, and children of U.S. citizens and permanent residents, were required to obtain labor certification in order to immigrate during the transition period.[117] In order to obtain a labor certification, the immigrant needed to obtain a certificate from the Department of Labor stating there were no sufficient able and qualified workers in the United States and the alien would not adversely affect wages and working conditions.[118] The intent of the provision was to limit the types and number of immigrants from the Western Hemisphere before the quota took effect.[119] Mexican immigration did in fact drop slightly during the transition.[120]

The 1952 Act had permitted U.S. citizens to petition parents so long as they were over the age of 21.[121] The minimum age requirement was removed in 1959,[122] opening a door for undocumented parents to immigrate through their minor children. However, the 1965 Immigration Act closed this opening.[123]

Although the Mexican spouses and children of United States citizens and permanent residents were not subject to the quota or labor certification, the available visas were insufficient to meet the visa demands from quota Mexicans.[124] Even congressional representatives admitted that the number of visas allocated to the Western Hemisphere was insufficient.[125] The waiting list grew even longer when in 1976 the quota distribution was changed from a hemisphere basis back to a per-country basis.[126] Under the new quota program, all countries, regardless of prior immigration patterns and population, were granted 20,000 visas.[127] In 1978, the Eastern and Western Hemisphere quotas were combined for a total worldwide limit of 290,000.[128] Once this quota went into effect for the Western Hemisphere, Mexicans faced a steeper road to admission to the United States. Mexican immigration was now limited to a fraction of what it previously had been.[129]

All Western Hemisphere immigrants were required to obtain a visa at the consulate. European applicants who entered the United States pursuant to a nonimmigrant visa or

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115. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 921 § 21(e) (repealed 1976).

116. Charles B. Keely, *Effects of the Immigration Act of 1965 on Selected Population Characteristics of Immigrants to the United States*, 8 DEMOGRAPHY 157, 160 (1971).

117. *Id*. at 160-61.

118. *Id.* at 159-60.

119. *Id.* at 161.

120. The subgroup most affected was the brothers and sisters of United States citizens. However, because unskilled labor visas were available a number of Mexicans immigrated as household workers. *Id.* at 164-68.

121. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 178 (1952).

122. Pub. L. No. 86-363, 73 Stat. 644 (1959) (codified as amended at 8 U.S.C. § 1153).

123. Pub. L. No. 86-236, 79 Stat. 912 (1965).

124. Samuel W. Betty, *A proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT'L L.J. 93, 109 (2001).

125. 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Gonzalez).

126. Betty, *supra* note 124, at 109.

127. *Id*.

128. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (Oct. 5, 1978).

129. Betty, *supra* note 124, at 109.

parole could apply for an immigrant visa within the United States.[130] It was not until 1976 that hemispheric bars to adjustment of status were finally removed.[131] However, adjustment of status remains limited primarily to individuals who enter lawfully into the United States and to other selected immigrants.[132]

The Immigration Act of 1990

In 1990, Congress once again changed the allocation of immigrant visas. Employment visas were segregated from family visas.[133] Two-hundred and twenty-six thousand visas were allocated to family immigration.[134] The spouses and minor children of lawful permanent residents were exempt from the per-country visa limits, but any visas granted to that group in a year would be subtracted from the overall cap of annual visas the following year.

These changes did nothing to relieve the backlog from Mexico. The 226,000 visa limit continues today with each country awarded 7% of the total number of available visas, typically around 15,820 visas per country.[135] The system does not take into account the sending country's size nor historical connection to the United States. This means that people from Mexico will have to wait nearly a decade longer to obtain an immigrant visa than someone from Luxembourg. As one commentator has noted, Luxembourg has the same number of visas as Mexico.[136] This was done by design, as congress imposed a ceiling on Western Hemisphere immigrants due to a fear of massive Latin American immigration.[137]

This modern exclusion of Mexican immigrants is also found in employment-based immigration. Similar to family based visas, each country is permitted 7% of the total number of visas, in this case a paltry 140,000.[138] Based on this system, each country, including Mexico, receives 9,800 employment based visas per year. But the greatest exclusion results from the preference categories in the employment-based system. More than half of these visas are reserved for priority workers, or persons with advanced degrees or extraordinary ability.[139] The next category reserves 28.6% of employment visas for "skilled workers, professionals, and other workers."[140] This means that there are a total of 2,800 visas available per year to Mexicans who do not possess advanced degrees or extraordinary ability. Because of this limited availability, there is currently a nine year wait for the skilled workers, professionals, and other workers, while the priority workers, persons with advanced degrees or extraordinary ability are current, and need not

130. 8 U.S.C. § 1255(a) (1958).
131. *Id*.
132. 8 U.S.C. § 1255(a) (2006).
133. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 201(c) & (d).
134. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 201(c) & (d).
135. Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 715 (2000).
136. *Id.*
137. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 12 (2009).
138. Trujillo, *supra* note 135, at 715.
139. *See Visa Bulletin for November 2010*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/bulletin/bulletin_5172.html.
140. *Id.*

wait at all for their visa.[141]

Modern Challenges to Obtaining an Immigrant Visa

The 21st century brings with it a new set of challenges for undocumented Mexican immigrants living in the United States. Today, of the 3.5 million pending immigrant visa applications, 1.2 million are from Mexican relatives of U.S citizens and lawful permanent residents.[142] In addition to long backlogs, the enumerated grounds that bar individuals from immigrating were severely increased as part of the immigration reform in 1996.[143] In 1996, Congress added numerous immigration penalties linked to illegal residence in the United States.[144] Two additional grounds, in particular, that punish unlawful presence in the United States, and another that imposes strict income guidelines for petitioners, present a tremendous hurdle for intending legal immigrants from Mexico.

Unlawful presence impairs the ability of family members living illegally in the United States to obtain family-based immigrant visas.[145] Unlawful presence accumulates anytime an alien is present in the United States without lawful immigration status.[146] This can mean people who entered the country illegally, or those who entered with a visa, but the visa has since expired. Aliens who are unlawfully present in the United States for a continuous period of more than 180 days, but less than a year, and are removed or depart from the United States following the unlawful presence, are inadmissible for three years.[147] Aliens who reside for a continuous period longer than a year, and subsequently depart or are removed from the United States, are inadmissible for ten years.[148] Moreover, individuals who have been present in the United States without status for a cumulative total of a period of a year, then depart or are deported from the United States, and subsequently re-enter illegally are permanently inadmissible.[149]

Once they depart and trigger the unlawful presence bar, they are inadmissible and require a waiver for their immigrant visa to be approved.[150] This can be very difficult, and requires proof of extreme hardship to their U.S. citizen or lawful permanent resident spouse or parent. The alien traveling abroad for adjudication of his visa petition faces the possibility of a lengthy wait while the request for a waiver of the unlawful presence bar is

141. *Id.*

142. National Visa Center Report, Immigration as of November 2009, IMMIGRATION.COM, http://www.immigration.com/ sites/default/files/annual_report_Immvisa_applicants.pdf (last visited January 17, 2011).

143. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, div. C, tit. I,, 110 Stat. 3009-546, 3009-546-575 (codified as amended at 8 U.S.C. § 1101, 1182 (2006)).

144. *Id.* at § 307 (codified as amended at 8 U.S.C. § 1182).

145. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C.§ 1182(a)(9)(B)(iii)(III) (2006).

146. 8 U.S.C. 1182(a)(9)(B)(i) (exempts minors, bona fide asylum applicants, battered women, trafficking victims, and family unity recipients from accumulating unlawful presence); 8 U.S.C. 1182(a)(9)(B)(iii).

147. 8 U.S.C. § 1182(a)(9)(B)(i)(I).

148. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

149. 8 U.S.C. § 1182(a)(9)(C).

150. 8 U.S.C. § 1182(a)(9)(B)(v).

adjudicated, without assurances that it will be granted.[151] There is a clear danger that departing the United States could result in permanent separation if the waiver is denied.[152] The beneficiary is not permitted to return to the U.S. without a grant of immigrant status and is permanently barred from immigrating if he or she crosses back illegally to the U.S.[153]

It was not that long ago that Mexicans floated between the United States and Mexico without concerns about restrictions. In fact, as noted earlier in the essay, Mexicans were often pushed or encouraged to utilize temporary or illegal means of entering the United States instead of permanent legal ones. Moreover, the historical interconnection of the region lends itself to familial patterns where individuals come to the United States for labor with an intention to return to Mexico and back again when economic opportunities present themselves. This is a difficult position for undocumented Mexicans and very common for them. Many entered the U.S. as young adults or even as children with their parents and have lived here for years. As Mexican Consul-General Luis Herrera-Lasso noted, "Although the U.S. often argues that immigration law is part of a global policy (one not directly aimed at Mexico), those most affected by this legislation are Mexicans."[154]

The Affidavit of Support Requirement

The public charge exclusion was a way to exclude Mexicans when racial exclusions did not apply to them.[155] The fear that poor immigrants arrive in the U.S. and consume the already scarce resources allocated to public assistance programs is deeply rooted in immigration restrictionists' minds and is evidenced by laws passed by state and the federal government. In 1994, California voters passed Proposition 187, which denied

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151. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (Any alien who has been unlawfully present in the United States for more than 180 days but less than one year is inadmissible and subject to a three year bar); 8 U.S.C. § 1182(a)(9)(B)(i)(II) (they have more than one year of unlawful presence they are subject to a ten year bar); 8 U.S.C. § 1182(a)(9)(B)(v) (Inadmissibility due to unlawful presence can be waived); 9 FAM 40.101 N2.1 (Dep't of State, 2010), *available at* http://www.state.gov/documents/organization/87172.pdf (The Department of State requires the waiver to be submitted at the consulate in the alien's country of citizenship to be adjudicated by a consular officer.); 8 U.S.C. § 1182(a)(9)(C) (The alien must depart to submit the waiver which triggers the three or ten year bar, and the waiver can take several months to process and is difficult to obtain. They must wait for the waiver to be adjudicated. If they return they will face a permanent bar). Many aliens do not believe the possible consequences of departing to submit the waiver are worth the risk.

152. Worldwide, just over half of those immigrant visa applicants that are inadmissible due to unlawful presence are able to obtain a waiver and receive a visa. *See* U.S. DEP'T OF STATE, IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES, REPORT OF THE VISA OFFICE 2008, tbl. XX, *available at* http://www.travel.state.gov/pdf/FY08-AR-TableXX.pdf (this leaves just under half of the aliens who depart the country to seek a waiver who are then forced to remain in their home country, separated from their families in the U.S.). The numbers are very similar for the waivers submitted in the U.S. consulate in Juarez, Mexico. The Juarez consulate has created a pilot program where clearly approvable waivers are processed within a few days of when they are submitted. These clearly approvable waivers constitute 50% of the waivers submitted. The other 50% are set aside to be reviewed and adjudicated, typically within four months but difficult cases could potentially take longer. *See* Ombudsman Liaison Unit, *U.S. Dep't of Homeland Sec., I-601 Waivers – CIS Ombudsman Teleconference, August 26, 2006*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 14, 2010), http://www.uscis.gov/ (query for "Teleconference Q&As" and follow link, select by date).

153. 8 U.S.C. §1182(a)(9)(C).

154. Luis Herrera-Lasso, *The Impact of U.S. Immigration Policy on U.S.-Mexico Relations*, 3 UCLA J. INT'L L. & FOREIGN AFF. 357, 365 (1998-1999).

155. Kevin R. Johnson and Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1386 (2005).

almost all public services, including primary and secondary education, to undocumented immigrants.[156] Proposition 187 never went into effect, but shortly thereafter, Congress followed suit with a reform that terminated many public benefits to recent legal immigrants.[157] As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA/IRA), Congress enacted a new income requirement for petitioners that substantially limits the ability of low-income legal U.S. residents to petition family members. Under the Immigration and Nationality Act, all family-based visa petitions must be accompanied by an affidavit of support completed by the sponsor.[158] The purpose of this affidavit is to prove to the government that the intending immigrant will not become a public charge once they are in the United States.[159] The affidavit must prove that the sponsor will support the intending immigrant at 125% of the poverty level, typically proven by proof of current employment, pay stubs, and tax forms.[160] The requirement of an affidavit of support is in addition to the already existing ground of inadmissibility of a public charge.[161] In theory, because these are two separate requirements, an intending immigrant could meet the requirements of affidavit of support, and still be denied an immigrant visa in the discretion of the consular officer as a public charge.

The requirement of an affidavit of support places an undocumented immigrant in a difficult position, not unlike the head taxes charged in the 19th and early 20th centuries. It is one more thing the government can use to exclude certain intending immigrants from ever being able to obtain an immigrant visa. Many Mexicans, otherwise eligible to adjust status, may be unable to immigrate because they either have no relatives in the U.S. to submit the affidavit of support, or their relatives do not meet the income requirements. Their sponsors must be able to prove that they have income of at least 125% of the poverty level.[162] This may prove difficult for many Mexicans due to the depressed wages they receive. Mexicans often work in low skill industries, and make 40-50% less than documented workers and citizens.[163] In many situations, this requirement prevents immigration completely because the petitioner does not make enough money.

Relief from Removal in the Courts

The visa admission process does not tell the whole story of Mexican legal immigration to the United States. The United States Congress and several agencies have implemented avenues for long term undocumented residents of the United States to

156. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law* Enforcement, Law & CONTEMP PROB 1, 12 (2009).

157. *Id.*

158. 8 U.S.C. § 1183(a) (2006).

159. *Id*.

160. *Id*.

161. 8 U.S.C. § 1182(a)(4).

162. U.S. CITIZENSHIP & IMMIGRATION SERV., U.S. DEP'T OF HOMELAND SEC., OMB NO. 1615-0075, AFFIDAVIT OF SUPPORT (FORM I-864) (2010), *available at* http://www.uscis.gov/files/form/i-864.pdf.

163. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER 30 (2005), *available at* http://pewhispanic.org/files/reports/46.pdf.

regularize their immigration status. Mexican nationals seeking to obtain legal immigration status have benefited at different degrees from these programs.

Administrative Relief

Prior to 1940, there was no statutory relief from deportation. In the 1930s, Secretary of Labor Frances Perkins and Immigration and Naturalization Service's (INS) Immigration Commissioner Daniel W. MacCormack attempted to persuade Congress to provide for deportation relief but failed.[164] After their failure, Perkins and MacCormack pursued alternative administrative solutions. They interpreted the Immigration Act of 1917[165] to permit aliens without status to regularize through a suspension of their deportation, and then permitted the person to exit and re-enter the United States as a lawful permanent resident.[166]

In addition, they used the "pre-examination" procedures to permit undocumented noncitizens to obtain status. The "pre-examination" procedures were originally designed as re-entry permits for lawfully residing noncitizens of the U.S. travelling to Canada for a visit. In 1935, the Immigration and Naturalization Service[167] (INS) allowed "pre-examined" undocumented Canadians to voluntarily depart to the American consulate in Canada where they would be given a visa for permanent residence, after which they could re-enter the United States as lawful permanent residents. Attempts to utilize the "pre-examination" process for Mexican nationals along the southern border failed after the American Consul in Juarez systematically found "pre-examined" Mexican nationals ineligible for visas based on public charge and slowed the processing of their applications to a crawl in order to limit the number of grants.[168] Eventually, the INS abandoned the idea of allowing for "pre-examination" in Mexico. The program died out by 1959.

In 1940, Congress officially authorized the Attorney General to grant voluntary departure to deportable noncitizens. The 1940 Act also permitted the Attorney General to grant an alternative relief of suspension of deportation where the deportation of the alien would "result in serious economic detriment to a citizen or legally resident alien, who is the spouse, parent, or minor child of such deportable alien."[169] The Attorney General's decision could only be overturned if Congress disapproved through a concurrent resolution. Less than 8% of suspensions involved Mexican nationals. In 1948, suspension of deportation was modified to permit anyone who had resided in the United

164. Ngai, *supra* note 16, at 98-99.

165. Immigration Act of 1917, Seventh Proviso to Section 3, "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted the discretion of the Attorney general and under such conditions as he may prescribe" 39 Stat. 874, Pub. L. No. 64-301, ch. 29, sec. 3, 39 Stat. 874, 878 (1917).

166. Ngai, *supra* note 16, at 100.

167. The INS was created in 1933 by consolidating the Bureau of Immigration and the Bureau of Naturalization. David Jones, *U.S. Immigration —A Legacy of Reform and Reorganization: Problems and Possible Solutions*, 11 FLA. J. INT'L L. 409, 412 (1997).

168. Memoranda from Grover C. Wilmoth, District Director, El Paso INS, to [Daniel W. MacCormick], Commissioner General (Nov. 3 1938), from William Blocker, American Consul, Juarez, to [Frances Perkins], Secretary of State (Nov. 3 1938), from Wilmoth to Henry Hull, Commissioner General (Nov. 29, 1938) (on file with INS, file 55819/402C, box 75, accession 58A734), *construed in* Ngai, *supra* note 16, at 103, n.110.

169. Act of June 28, 1940, Pub. L. 76-670, ch. 439, sec. 19(a), § 20(c)(2), 54 Stat. 671, 672 (amending Immigration Act of 1917, 39 Stat. 889, codified at 8 U.S.C. § 155(c)).

States for seven years to qualify, regardless of family hardship.[170] The ability to grant suspension, however, came with oversight, as Congress had to validate any grant of suspension.

The 1952 Act changed suspension of deportation significantly. The hardship requirement was raised. An applicant had to demonstrate that deportation would result in exceptional and extremely unusual hardship to the alien or his U.S. citizen or lawful permanent resident family.[171] In addition to demonstrating good moral character and hardship, applicants had to fit into one of the five statutory classes described in the 1952 Act.[172] They then had to show that they had been physically present in the U.S. for a continuous period of five or ten years, depending on what class the individual applicant met. Applicants who needed to establish ten years of continuous residence also had to obtain a Congressional resolution of approval. Congressional approval was relegated to members of the immigration subcommittees or their staff.[173] All other favorable grants of suspensions automatically granted permanent legal residence to the applicant unless Congress specifically acted to overturn the grant. Both the 1940 and 1952 Immigration Acts charged the grants of suspension of deportation against the particular country's quota.[174]

The 1965 Act maintained the same standards and requirements for suspension of deportation that were instituted by the 1952 Act. It was further stressed that the relief of suspension of deportation was not just a matter of eligibility, but an exercise of the discretion of the Attorney General.[175] This same framework for relief from deportation, first established in 1952, remained virtually unchanged for more than four decades until the enactment of the 1996 Act.[176]

In 1996, Congress severely restricted the ability of the immigration courts to suspend the deportation of long-term undocumented aliens. Applicants had to demonstrate continuous presence in the United States for ten years,[177] and establish that removal would cause "extreme and unusual" hardship to his or her U.S. citizen or lawful

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170. Act of July 1, 1948, Pub. L. 80-863, ch. 783, sec. 19(c), 62 Stat. 1206, 1206 (amending Immigration Act of 1917, 54 Stat. 671, § 19(c)(2)(b) (codified at 8 U.S.C. § 155)).

171. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, ch. 477, § 244(a), 66 Stat. 163, 214-16 (1952) (codified as amended at 8 U.S.C. §§ 1101, 1254 (§ 1254 repealed 1996)).

172. The Classes were: I. aliens who last entered the U.S. before June 26, 1950, and who are deportable for reasons other than criminal or subversive activities and who apply for suspension prior to December 24, 1957; II. aliens who entered after June 26, 1950 and who enter legally but are deportable solely for excludability ground other than visa fraud; III. aliens who entered after June 26, 1950 and who are deportable for minor crimes after last entry; IV. aliens who were excludable at entry as criminals or subversives, or who entered without proper inspection or documents. Applicants in this class and the next class were required to show good moral character and continuous physical presence for ten years instead of five; V. aliens who entered the U.S. prior to June 26, 1950 who are deportable for serious criminal acts or an immigration violation such as failure to register, or visa overstay. Immigration and Nationality Act, § 244(a).

173. Kenneth W. Graham Jr., *Immigration and Naturalization—Suspension of Deportation—A look at Benevolent Aspects of the McCarran-Walter Act*, 61 MICH. L. REV. 352, 355 (1962-1963).

174. *Id*. at 358.

175. Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1036-37 (2010); *see also* United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

176. *Id*.

177. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [*hereinafter* IIRIRA], Pub. L. 104–208, div. C, § 301(a)(9)(A)(ii)(II), 110 Stat. 3009-546, 3009-576 (1996) (codified as amended at 8 U.S.C. §§ 1101, 1182(a), 1229b(1)(A) (2006)).

permanent resident parent, spouse or child.[178] An annual grant cap was also established.[179] Applicants could no longer rely on the hardship to themselves, and the new "extreme and unusual" standard became too high a bar for a number of applicants who would have been able to gain relief under the prior standard.

Suspension of deportation and cancellation of removal have provided an opportunity for undocumented Mexicans residing in the U.S. to obtain lawful permanent residence, but are not without their challenges. Many Mexican people struggle to meet the ten year continuous presence requirement, because they often travel back and forth between the U.S. and Mexico, breaking the chain of continuous presence. Additionally, this relief may only be sought once the alien is in immigration proceedings in immigration court. Finally, the ability of many Mexicans in the United States to maintain cultural and familial ties with Mexico has been used as a counterweight to the hardship that removal will have on the applicant.

Through Regularization

When we talk about the possibility of a regularization program or amnesty, we often compare any proposals to the 1986 Immigration Relief Control Act (IRCA) provisions. The truth is that the 1986 amnesty is not the only regularization program the United States has enacted. Failure to establish programs that adequately manage the admission and removal of immigrants have led to Congressional actions to regularize the immigration status of long term undocumented residents at numerous points in our history.

On March 2, 1929, Congress passed the first Registration of Aliens Act.[180] The Act allowed undocumented persons who were of good moral character, non-deportable, eligible for citizenship, and capable of demonstrating that they had entered and resided continuously in the United States prior to June 3, 1921, to obtain lawful permanent status. A hundred-thousand to a hundred-and-fifteen-thousand undocumented immigrants applied under the registry program. Although many undocumented Mexicans residing in the United States qualified, few applied. Undocumented Mexican immigrants did not know or understand the process, and often did not have the funds to pay for the application fee.[181]

In 1939, the Registry Act was amended to permit undocumented persons that entered prior to July 1, 1924, to qualify for lawful permanent status. The registry date was last updated through IRCA from June 30, 1948, to January 1, 1972.[182] Many undocumented

178. IIRIRA, § 304 at 3009-577 (codified as amended at 8 U.S.C. §§ 1101, 1182(a), 1229b(1)(D)).

179. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, ch. 477, § 240A(e), 66 Stat. 163, 214-16 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537); IIRIRA, Pub. L. 104-208, sec. 240A(e), § 304, 110 Stat. 3009, 3009-596 (codified as amended 8 U.S.C. 1229(a) (2006)).

180. Registry Act of 1929, Pub. L. 70-962, sec. 1, § 1(a), 45 Stat. 1512, 1512-13 (repealed 1940).

181. Paul S. Taylor, *Mexican Labor in the U.S.: Dimmit County, Winter Garden District, South Texas*, U.C. PUBLICATIONS ECON., 1928-30, at 322, *construed in* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States 1921-1965*, 21 LAW & HIST. REV. 69, 98 & n.91 (2003).

182. Immigration Reform and Control Act of 1986, Pub. L. 99-603, sec. 249, § 203(a), 100 Stat. 3359, 3405 (hereinafter IRCA) (codified as amended at 8 U.S.C. § 1259(a) (2006)).

Mexicans residing in the United States benefited from the 1972 registry, bypassing the long lines in the immigrant visa quotas.

Despite the limitations to the immigrant visa program discussed earlier, the number of Mexican legal immigrants continued to grow in the last twenty years of the 20th century.[183] The growth was in some part facilitated by the IRCA regularization programs. The well-known amnesty included in the IRCA statute permitted undocumented persons present in the United States on January 1, 1982, to obtain lawful permanent resident status.[184] The applicants had to apply by May 1997, demonstrate continuous presence in the United States since November 6, 1986, admissibility, and either attend English classes or demonstrate knowledge of the English language. The application process was a two-step process. Upon establishing a prima facie case, the INS granted the applicant temporary status. The person was then required to complete the application process within thirty-one months or lose status completely.

IRCA also included a regularization program for agricultural workers called Special Agricultural Worker (SAW).[185] Applicants had to provide proof of having worked in the fields for ninety days per year between 1984 and 1986. Like the amnesty program, SAW applicants were given temporary status and eventually permanent status. A lesser known program, Registered Agricultural Workers (RAW), permitted certain seasonal agricultural workers to work in the United States as temporary laborers between 1990 and 1993.[186] At the end of the period, lawful permanent status was granted to RAW workers who had performed at least ninety days of qualified agricultural work during the three years.

There was a lot of confusion and problems regarding certain provisions of the IRCA program, resulting in years of litigation by Latino civil-rights organizations such as the League of Latin American Citizens (LULAC). One of the most well-known cases, *LULAC v. INS*,[187] challenged the INS's interpretation of the IRCA's continuous presence requirement.[188] The INS had adopted a practice of denying applicants amnesty benefits if the applicant traveled outside of the country after January 1, 1982, without obtaining prior permission and returned with documentation, such as a visitor's visa.[189] The court held that the INS' interpretation of "continuous presence" was unlawful, allowing those who failed to apply a six-month extension from the original application deadline.[190] LULAC also successfully challenged the INS' interpretation of the anti-discrimination provision in IRCA, protecting millions of foreign workers from being discharged for

183. From 1990 to 1999, nearly 2.8 million Mexicans became lawful permanent residents, which nearly triple the preceding decade. OFFICE OF IMMIGRATION STATISTICS, *supra* note 7; U.S. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2009, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ ois_yb_2009.pdf.

184. IRCA, Pub. L. 99-603, sec. 245A(a), § 201, 100 Stat. 3359, 3394 (codified as amended 8 U.S.C. §1255a(b) (1988)).

185. IRCA, sec. 210A, § 303(a), 100 Stat. 3359, 3422 (codified as amended at 8 U.S.C. § 1161 (2006)).

186. IRCA, Pub. L. 99-603, 100 Stat. 3359, 3426 (1986) (codified as amended 8 U.S.C. § 1160(a) (1988)).

187. League of United Latin Am. Citizens v. INS, No. 87-4757-WDK(JRX), 1989 WL 252578, at *1 (C.D. Cal. Aug. 12, 1989) *consolidated on appeal with* Catholic Soc. Services v. Thornburgh, 956 F.2d 914 (1992).

188. *Id.*

189. *Id.*

190. *Id.* at *4.

providing a faulty social security card when eligible for amnesty under IRCA.[191] Many other lawsuits successfully challenged several restrictive agency interpretations of IRCA, resulting in more favorable interpretations for applicants.[192]

Despite the problems with the administration of the IRCA programs, roughly two million Mexicans were able to regularize their status. However, the benefits of IRCA were temporary. The program did not address future immigrant flows, nor create any new paths that would correct the problems that had led to the influx of undocumented immigrants. At the same time, it punished future undocumented immigrants by requiring proof of lawful immigration status in order to secure employment.[193]

Final Comments and Observations on Legal Permanent Mexican Immigration

Gerald Lopez wrote in 1981 that,

> Despite years of continual contact, most Mexican migrants remain uninterested in permanent relocation. Although migration has raised many migrants' economic expectations, most remain part of a household that wants nothing more than to remain together, to survive in Mexico.[194]

While this may be true, a desire for "temporary" migration to the United States does not mean that the admission of Mexicans to the United States should be funneled to temporary programs only. Many immigrants to the United States have expressed an interest in returning to their country of birth after a temporary residence in the United States. For instance, J. P. Xenides, writing about Greeks in America, noted the expressed interest by many Greeks to return. Quoting one Greek leader of the time, "Their [Greeks in the U.S.] wish and hope is always to return some day to their homes."[195] Even as waves of immigrants were arriving to the United States in the 18th and 19th centuries, a number of earlier immigrants would return to their country of birth after temporarily residing in the United States.[196] The difference between these immigrants and Mexican

191. League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist., 662 F.Supp. 443, 451 (S.D. Tex. 1987).

192. Haitian Refugee Ctr. v. Nelson, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom.* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (successful class action challenge to denial of SAW applicants' due process right to fair adjudication process); *see also* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C.Cir. 1989); Ayuda, Inc. v. Reno, 7 F.3d 246 (D.C. Cir. 1993) (class action challenge INS restrictive interpretation of "known to the government" requirement); Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992) (successful class action challenge to "special rule" regarding the "public charge" ground of bar on eligibility); Legalization Assistance Project v. INS, 976 F.2d 1198 (9th Cir. 1992); Immigrant Assistance Project v. INS, 306 F.3d 842 (9th Cir. 2002) (class action challenge overturning INS's "known to the government" requirement).

193. Kitty Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986*, 11 LAW & POL'Y 17, 42 (1989).

194. Gerald Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 692 (1981).

195. J.P. XENIDES, THE GREEKS IN AMERICA 78 (1922).

196. MARK WYMAN, ROUND-TRIP TO AMERICA: THE IMMIGRANTS RETURN TO EUROPE 1880-1930 2-14 (1993) (discussing the millions of immigrants who left the U.S. and repatriated their homeland).

immigrants was the closeness of their native home and a loyalty to Mexican citizenship.[197]

Yet, the United States did not try to funnel European migrants into temporary labor programs. Mexican immigrants' desire to permanently immigrate, on the other hand, has been routinely ignored. When the Rodino Bill to limit the visa allocation for Mexico to 20,000 visas annually was being debated, Congressman Eilberg dismissed the impact of the proposal on permanent immigration from Mexico because, "a considerable number of Mexicans enter this country solely for the purpose of employment, frequently for a limited period of time, and a large number have no intention of moving here permanently."[198]

There is no static and monolithic definition of Mexican immigrants. Due to the long history between the two neighboring countries and the importation of Mexican labor, there is an ever changing composition of Mexicans residing in the United States.[199] Moreover, of those residing in the United States, some want temporary permission to reside, others want permanent status, and some have been U.S. citizens since the Hidalgo treaty but may be part of mixed-status families.

The failure by the United States to account for the complexity of the Mexican immigrant has resulted in drastic policy errors. Categorizing all Mexican immigrants as nomadic and temporary led Congress to intentionally ignore or propel the recruitment of temporary laborers and undocumented workers during economic booms, and suppress meaningful methods for permanent lawful admissions from Mexico. As Gilberto Cardenas explained in 1975, these patterns of active solicitation, followed by expulsion and exclusion, are to blame in the creation of the "illegal immigrant" problem in the United States.[200] The image of Mexican immigrants as temporary also meant that they could be seen as strangers in the land, not really belonging in America. As legal historian Mae N. Ngai points out, this view, coupled with the image of Mexican immigrants as the quintessential illegal immigrants, led to the belief that they were undeserving of regularization programs such as suspension of deportation and registry.[201]

In 1975, Professor Ronald Bonaparte noted that, "[o]ne of the primary reasons for the existing illegal immigration problem is the difficulty encountered by qualified aliens

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197. Until recently, Mexicans who became naturalized U.S. citizens were shunned and considered traitors, and given their own derogatory name. *See* Paula Gutierrez, *Mexico's Dual Nationality Amendments: They do Not Undermine U.S. Citizens' Allegiance and Loyalty or U.S. Political Sovereignty*, 19 LOY. L.A. INT'L & COMP. L.J. 999, 1007 & n.66 (1997).

198. HR Rep. No. 461, at 9-10 (1973).

199. A simple review on the U.S. Census website indicates that from 1990 -2000, the Mexican population in the U.S. increased by nearly 53% to 20.6 million people. *See* BETSY GUZMAN, CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE HISPANIC POPULATION: CENSUS 2000 BRIEF 2 (Pub. No. C2KBR/01-3, 2001).. By 2009, the Mexican population had reached nearly 32 million. The estimate included nearly 11 million undocumented Mexicans, but the exact number is difficult to determine because undocumented persons hesitate to participate in the Census and other data collections. The data also indicates that there is a small but steady increase in the percentage of Mexicans obtaining bachelors and advanced degrees, as well as becoming naturalized U.S. citizens. *See generally Data Sets*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_3&_lang=en&_ts =(last visited Oct. 14, 2010).

200. Cardenas, *supra* note 29, at 88-89.

201. Ngai, *supra* note 16, at 107.

in immigrating legally to the United States."[202] The statement remains true today. We make unlawful presence and reentry bars to immigration status, thereby punishing individuals for entering the United States to work, departing at the end of their work season, and then returning the next season or when jobs are abundant, a migratory practice we encouraged in the past, and one that remains imbedded in migrant communities. When these individuals attempt to regularize their status through family or other immigration relief, they are no longer able to do so, despite the fact that just a few years earlier they would not have had an impediment.

The past immigration policies impact the perceptions of proposals currently being debated in the halls of Congress. A number of Congressional representatives have advocated a "touch-back" prerequisite to regularization of undocumented persons in the United States.[203] Applicants residing illegally in the United States would be forced to return to their home country for completion of their immigration process. However, the past use of administrative immigration mechanisms to manipulate Mexican immigrant admissions has resulted in a historically-grounded distrust of consulates by Mexican nationals. Therefore, Mexican nationals would be wary of such a requirement and may not apply for status. Also, the fact that Mexican immigrants have so often been funneled into temporary status instead of permanent legal residency makes temporary labor programs such as AgJOBS unpalatable to many.[204]

The United States has been right in treating Mexico differently, but its policy calculus has been wrong. Policymakers convinced themselves that Mexicans were not immigrants, but rather temporary laborers. This conclusion was more out of convenience than reality, and hence resulted in the United States enforcing policies that went against the current. The energy and effort spent to enforce them only resulted in resentment and suspicion in the Mexican immigrant community. If the United States really wants to address the "Mexican illegal immigration problem" it needs to change course and enact policies that benefit both the United States and our neighbor to the south.

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202. Ronald Bonaparte, *The Rodino Bill: An Example of Prejudice Towards Mexican Immigration to the United States*, 2 CHICANO L. REV. 40, 49 (1975).

203. Comprehensive Enforcement and Immigration Reform Bill of 2005, S. 1438, 109th Cong. § 601 (2006).

204. AgJobs Act of 2009, H.R. 2414, 111th Cong. (2009); *Congressional Research Service Summary*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-2414&tab=summary(last visited Oct. 14, 2010).