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## Delegating Immigration Admission Powers to the States

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DELEGATING IMMIGRATION ADMISSION POWERS  
TO THE STATES

*Christian Vanderhooft\**

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## INTRODUCTION

Every month, Gallup asks Americans an open-ended question: “What do you think is the most important problem facing this country today?” From 1993 to 2005, the percentage of Americans who responded with “immigration” generally hovered around 3%.<sup>1</sup> But after steadily increasing for the last fifteen years, more than 20% of Americans now regularly identify immigration as their top concern, with a record-breaking plurality of 27% identifying it as the number one problem in July 2019.<sup>2</sup>

Few issues divide Americans like immigration. Recent polling shows Americans are almost equally divided in thirds as to whether the total number of legal immigrants allowed in the country each year should be increased, decreased, or kept the same.<sup>3</sup> Given such polarized views, it is unsurprising that for the last three decades the federal government has been mostly unable to alter the system, even though numerous major and minor reforms have been put forward by Democratic and Republican politicians over the years.<sup>4</sup>

In theory, the United States has a structure in place to deal with such gridlock: federalism. Federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”<sup>5</sup> The current U.S. immigration regime—complicated and intractable at the federal level—would clearly benefit from the flexibility, engagement, experimentation, and accountability that

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1. Jeffrey M. Jones, *New High in U.S. Say Immigration Most Important Problem*, GALLUP (June 21, 2019), <https://news.gallup.com/poll/259103/new-high-say-immigration-important-problem.aspx>.

2. *Id.* For comparison, in the same time period, only about 15% of Americans, on average, identified the economy as their chief concern. *See Most Important Problem*, GALLUP (Dec. 2019), <https://news.gallup.com/poll/1675/most-important-problem.aspx>.

3. Jones, *supra* note 1.

4. *See* Claire Felter & Danielle Renwick, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (July 25, 2019), <https://www.cfr.org/backgrounder/us-immigration-debate-0> (summarizing recent actions and proposals from both the executive and legislative branches to reform the U.S. immigration system); *see also infra* notes 13, 35, 42, and 73.

5. *Gregory v. Ashcroft*, 501 U.S. 452, 454 (1991).

federalism promises.

But in practice, based on long-held beliefs that the immigration powers are exclusively held by the federal government, the states have mostly been excluded from immigration decision-making: “Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress. [This] has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”<sup>6</sup>

This Article challenges these assumptions by advocating for an increased role for the states at the outset of the immigrant admission process. The authority to issue permanent and temporary visas should be devolved to the state governments. States would be empowered to adjust the types of visas that exist, varying their requirements, their lengths, and their availability. And while the federal government would still set a cap on the total number of visas available each year,<sup>7</sup> states could trade visas with one another, creating market incentives that, in the long-term, would provide Congress with tangible, verifiable data regarding the optimal number of visas to authorize.

Such a system would allow states to become the primary policy drivers in determining whether the United States should care more about family reunification or labor market needs or refugee resettlement. States could create entirely new visas for the graduates of in-state colleges or the victims of violence abroad. Or states could deploy visas to incentivize growth in new industries or the redevelopment of struggling regions. Rather than advocate any particular change in visa durations or types, this Article contends that a wider diversity of visas throughout the country is an invaluable end in and of itself.

The traditional view that immigration is a purely federal power should not be a barrier to this proposal. On the contrary, this Article demonstrates that delegating immigration powers to the states is both good policy and entirely consistent with the United States Constitution.<sup>8</sup>

While many scholars have examined the intersection of federalism and immigration policy, very few have ever advocated for states to take the lead in exercising immigrant admission powers. Instead, most articles have focused on the role that states should or should not play in enforcing existing immigration laws.<sup>9</sup> Others oppose any state involvement in the

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6. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

7. For a brief discussion of whether it would be preferable to abolish visa caps altogether, see *infra* notes 116-117 and accompanying text.

8. See *infra* Part IV.

9. See generally Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) (discussing the ability of states to control immigration through states' traditional police powers over family law and criminal law); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012) (arguing that

immigration arena whatsoever,<sup>10</sup> or recognize that although states will inevitably be involved in immigration policy, the benefits of such involvement are outweighed by the risks of state-led discrimination or mistreatment.<sup>11</sup>

Only one law review note has actively advocated delegating significant authority over immigrant admissions to the states. That proposal, however, was limited to employment visas.<sup>12</sup> Similarly, members of Congress and a few state legislatures have also occasionally floated the idea of involving states in the visa process, but again, these proposals have been limited to just a few categories of visas, typically involving temporary guestworkers.<sup>13</sup>

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states and localities that exercise immigration enforcement powers threaten immigrants' civil rights); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81 (2013) (arguing that courts have interpreted federal preemption too broadly in the context of immigration law, and that greater state involvement in immigration enforcement actions should be allowed); Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!*, 38 FORDHAM URB. L.J. 1 (2010) (advocating for the creation of regional, rather than state-based, immigration policies, subject to federal oversight); Anne B. Chandler, *Why is the Policeman Asking for my Visa?*, 15 TULSA J. COMP. & INT'L L. 209 (2008) (concluding that localities likely have the constitutional right to engage in immigration enforcement actions); Note, *States' Commandeered Convictions: States Should Get a Veto Over Crime-Based Deportation*, 132 HARV. L. REV. 2322 (2019) (arguing for an increased role for the states in preventing resident undocumented immigrants from being deported).

10. See generally Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011) (arguing that state involvement in immigration law does not lead to the benefits typically ascribed to state-based policymaking, such as experimentation or innovation); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing that federal immigration powers can never be constitutionally delegated to the states).

11. See Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 353, 402 (2016) (arguing that “nascent attempts at state engagement in refugee- and asylee-related rulemaking are precarious” and urging courts to recognize “firm constitutional limits that prevent states from promulgating laws and developing policies designed to exclude refugees”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 572 (2008) (arguing that an exclusively federal system “prevents us from harnessing the value of the federal-state-local dynamic on immigration matters,” while still acknowledging that “efficiency and coherence require federal control over the formal admissions and removal processes”); Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation*, 39 YALE J. INT'L L. 37, 79-81 (2014) (discussing efforts in Germany, Australia, and Canada to devolve immigrant admission powers to subfederal actors, and concluding that any increased role for states in the American system would require that “the federal government . . . retain[] ultimate responsibility for admissions determinations”).

12. See Davon Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL'Y REV. 349, 350 (2007) (calling on Congress to “affirmatively decentralize to the states administrative control over employment-based (EB) immigration decision-making”). A second law review article has called for an even more narrow delegation, allowing states to experiment with alternative types of agriculture guestworker visas. See Julia Jagow, Comment, *Dairy Farms and H-2A Harms: How Present Immigration Policy is Hurting Wisconsin and Immigrant Workers*, 2019 WIS. L. REV. 1269 (2019). To be clear, these proposals would represent good first steps. But by limiting the types of visas available, states would have limited flexibility. This Article, accordingly, seeks a more expansive decentralization.

13. State Sponsored Visa Pilot Program Act of 2019, H.R. 5174, 116th Cong. (2019); Jagow, *supra* note 12, at 1294 (“[T]hirteen different states have considered legislation that would create individual state-

This Article, by contrast, is a first-of-its-kind proposal to delegate power over nearly all types of visas, both permanent and temporary, to the states. Part I begins by reviewing the current immigration regime in the United States, with an emphasis on its flaws and the need for reform. Part II lays out a plan to replace the current visa system with one in which most types of visas are distributed to the states. The states can then disburse the visas to prospective immigrants as they see fit, or sell their allotment to other states if they prefer. In Part III, the Article turns to the ways in which this proposal's benefits are rooted in the principles of federalism and the free market. Finally, in Part IV, the Article addresses potential constitutional concerns and political critiques of the proposal.

### I. THE CURRENT IMMIGRATION SYSTEM AND ITS FLAWS

The United States Court of Appeals for the Second Circuit has complained that the federal immigration system bears a “striking resemblance” to “King Minos’s labyrinth in ancient Crete;” its structure demonstrates “Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”<sup>14</sup> Or, to borrow another ancient metaphor, the immigration system is like the unsolvable Gordian knot.<sup>15</sup> It is the unenviable task of this Part to try and untangle this existing immigration regime, discussing both how it functions currently and how—in the view of many—it falls short.<sup>16</sup>

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based guest worker programs for foreign workers and/or initiatives for undocumented residents to gain status through work in industries that traditionally attract guest workers, such as agriculture or the service industry.”). See also Alex Nowrasteh, *Why We Need State-Based Immigration Visas*, N.Y. DAILY NEWS (Nov. 20, 2019), <https://www.nydailynews.com/opinion/ny-oped-why-we-need-state-based-immigration-visas-20191120-2r2u6fcoxzdevkaidm2iifwhy-story.html>; David Bier, *State-Sponsored Visas: New Bill Lets States Invite Foreign Workers, Entrepreneurs, and Investors*, CATO INST. (May 11, 2017), <https://www.cato.org/publications/immigration-research-policy-brief/state-sponsored-visas-new-bill-lets-states-invite>.

14. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

15. *What's Next After an Immigration Deal Goes Bust?*, HOUS. CHRON. (Jan. 16, 2018), <https://www.houstonchronicle.com/opinion/editorials/article/What-s-next-after-an-immigration-deal-goes-bust-12501946.php> (“For a brief, shining moment it seemed as if Washington was on the verge of untangling the political Gordian Knot of immigration reform.”); Karen Grigsby Bates, *Undocumented Immigrants in Calif. Will Benefit From New Laws*, NPR (Oct. 7, 2013), <https://www.npr.org/sections/codeswitch/2013/10/07/230183623/undocumented-immigrants-in-calif-will-benefit-from-new-laws> (“The federal government remains shut down over a budget stalemate, but California’s Gov. Jerry Brown decided not to wait for Congress to make decisions on the Gordian knot that is U.S. immigration policy.”).

16. A lengthy article could be (and often has been) devoted to a single critique of a single type of visa. This Article does not take a normative position on the merits of any of the criticisms it highlights. Rather, it suggests that devolving the question to the states will allow different parts of the country to weigh each criticism and experiment with different solutions.

### A. *An Overview*

The United States currently issues over 200 different types of visas,<sup>17</sup> not including the status offered to asylees or refugees, who are governed by a separate system.<sup>18</sup> Visas come in two varieties: nonimmigrant and immigrant. Nonimmigrant visas are referred to in this Article as temporary visas, because they allow foreign nationals to enter the United States for only limited periods of time and for limited purposes. These visas can vary in length dramatically. On the low end, for example, the crewmembers who staff ships and planes may enter the United States for up to twenty-nine days (D visas) and the fiancés of U.S. citizens may remain here for ninety days (K visas). At the other extreme, certain temporary workers may stay in the United States for up to six years (H visas), while ambassadors, NATO personnel, and foreign representatives to the United Nations may remain in the United States for as long as their home government requests (A, C, NATO, and G visas).<sup>19</sup>

Immigrant visas, by contrast, have no time limit; therefore, this Article refers to them as permanent visas. The word “visa” technically refers only to the travel permit stamped into a passport,<sup>20</sup> but an immigrant who receives a permanent visa is also given a Green Card, which makes them a legal permanent resident (“LPR”).<sup>21</sup> As an LPR, they become eligible for U.S. citizenship after meeting certain time limit and background check requirements.<sup>22</sup> For ease, this Article uses “permanent visa” to refer to

17. 22 C.F.R. § 41.12 (2013); 22 C.F.R. § 42.11 (2014).

18. Compare 8 U.S.C. §§ 1151-1156 (governing immigrant visas) with 8 U.S.C. §§ 1157-1159 (governing refugees and asylum seekers).

19. See generally ILONA BRAY & RICHARD LINK, U.S. IMMIGRATION MADE EASY 184, 352-55, 357-61, 394 (NOLO 19th ed. 2019); see also ILONA BRAY, *How Long Will Your Visa Allow You to Stay?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-long-will-your-us-visa-allow-you-stay.html> (last visited Nov. 11, 2020).

20. Christine Chester & Amanda Cully, *Putting a Plug in America’s Brain Drain: A Proposal to Increase U.S. Retention of Foreign Students Post-Graduation*, 28 HOFSTRA LAB. & EMP. L.J. 385, 388 (2011) (“The term ‘visa’ refers to ‘a travel permit stamped into a [foreign] passport . . . that allows [an] alien . . . to travel to [and from the United States].’”) (alterations in original).

21. *Id.*; see also CARLA N. ARGUETA, CONG. RESEARCH SERV., R42048, NUMERICAL LIMITS ON PERMANENT EMPLOYMENT-BASED IMMIGRATION: ANALYSIS OF THE PER-COUNTRY CEILINGS 1 (2016) (using the terms “permanent immigrant” and “LPR” interchangeably, and generally discussing the division of duties between the State Department and the Department of Homeland Security for overseeing both the visa-issuing process and the Green-Card-issuing process); KATHERINE WITSMAN, OFF. IMMIGR. STAT., ANNUAL FLOW REPORT: LEGAL PERMANENT RESIDENTS 2 (2018) (“Once issued an immigrant visa, a foreign national may seek admission to the United States and become an LPR when admitted at a port of entry.”).

22. BRAY & LINK, *supra* note 19, at 50-51, 167, 170-73. Many of the individuals who become LPRs already live in the United States at the time they receive a Green Card because they are already in the country on a temporary visa or as a prospective asylum seeker. For these individuals, the process of becoming an LPR is referred to as an “adjustment of status.” See Chester & Cully, *supra* note 20, at 388; WITSMAN, *supra* note 21, at 2. The State Department is responsible for issuing and tracking visas issued

this entire process: the permission to travel to the United States, the LPR status, and, ultimately, citizenship.

While the sheer number of different types of visas can seem overwhelming, the vast majority of immigrants to the United States fall within just a few categories. The following Subparts address in more detail the number of visas distributed each year and the requirements for obtaining these visas.

## B. *Permanent Visas*

### 1. Visa Allocations

The federal government uses complex formulas to determine how many permanent visas to issue each year. In theory, Congress has authorized 675,000 permanent visas per year. But in practice, the number is always much higher because certain visa categories are not subject to any annual caps. The actual number of visas issued each year is typically about one million.<sup>23</sup>

More specifically, each year, the United States provides an unlimited number of permanent visas to the immediate family members of U.S. citizens (defined as spouses, minor children, and, in some cases, parents),

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to potential immigrants who are abroad, while the Department of Homeland Security is responsible for overseeing adjustments of status that occur internally, making it difficult to track the precise number of new LPRs each year. See ARGUETA, *supra* note 21, at 1 (for general information) & at 8 (for a discussion of inconsistencies between the State Department's numbers and the Department of Homeland Security's numbers). But for this Article's purposes, the distinction between visas issued abroad and adjustments of status occurring in the United States is irrelevant, except to note that under the current system, the number of adjustments of status are included when calculating how many visas are issued each year. So, for example, although approximately 140,000 permanent employment visas are authorized by law each year (see 8 U.S.C. § 1151(d)(1)(A)), the State Department reports that only 27,345 such visas were issued in 2018. U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2018, TABLE I IMMIGRANT AND NONIMMIGRANT VISAS ISSUED AT FOREIGN SERVICE POSTS FISCAL YEARS 2014-2018 (2018), available at <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableI.pdf>. But separately, the State Department confirmed that the number of visas combined with the number of adjustments of status equaled 139,483, or roughly the 140,000 authorized for that year. U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2018, TABLE V IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS FISCAL YEAR 2018 (2018), available at <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableV.pdf>. Accordingly, for convenience, this Article uses "permanent visas" to refer both to visas issued abroad and to adjustments of status issued at home when discussing the annual caps on visa categories.

23. See 8 U.S.C. § 1151(c)(1)(A)(1), (d)(1)(a), (e); see also ARGUETA, *supra* note 21, at 2. A more detailed explanation of how visa disbursements are calculated is provided in WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 2-7 (2018).

totaling an average of about 470,000 visas per year.<sup>24</sup> It then issues about 226,000 visas to non-immediate relatives, 140,000 visas to employer-sponsored immigrants, and 55,000 diversity visas to immigrants from historically underrepresented countries.<sup>25</sup>

Many of these categories are further subdivided. For example, of the 226,000 family-sponsored visas available, 23,400 are designated for the unmarried adult children of U.S. citizens; 23,400 are for the married adult children of U.S. citizens; 114,200 are for the spouses, minor children, and unmarried adult children of LPRs; and 65,000 are for the siblings of U.S. citizens.<sup>26</sup> Meanwhile, for employer-sponsored immigrants, 40,040 of the available visas go to immigrants with “extraordinary abilities”; 40,040 are for professionals with advanced degrees; 40,040 are for skilled or unskilled workers; 9,940 are for “special immigrants,” such as religious ministers; and 9,940 are for investors who agree to invest at least one million dollars in the U.S. economy.<sup>27</sup> Finally, diversity visas are reallocated each year based on the country of origin of immigrants who have been admitted to the United States over the last five years. “The formula generally results in the allocation of approximately 24,000 diversity visas for the European region, 20,000 for the African region, 7,000 for the Asian region, 2,500 for the Latin American and Caribbean region, less than 1,000 to the Oceania region, and 8 to the North American region.”<sup>28</sup>

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24. The number of immediate relative visas issued each year is not subject to any annual cap, *see* 8 U.S.C. § 1151(b)(2)(A)(i), meaning it fluctuates each year. On average, between 2001 and 2017, 471,807 immediate family members became LPRs each year. U.S. Dep’t HOMELAND SEC., OFF. IMMIGR. STAT., 2018 YEARBOOK OF IMMIGRATION STATISTICS (Oct. 2019), *available at* <https://www.dhs.gov/immigration-statistics/yearbook> (hereinafter “YEARBOOK”). The numbers ranged from a low of 331,286 in 2003 to a high of 580,348 in 2006. But 2003 represents a significant aberration—it is the only year in the period where the number fell below 400,000. *Id.*

25. These numbers are all set by statute in 8 U.S.C. § 1151(c)(1)(B)(ii), (d)(1)(a); & (e). Note that 226,000 visas per year is the *minimum* number of non-immediate relative visas allowed. The statute actually authorizes a maximum of 480,000 for this category each year. *Compare* 8 U.S.C. § 1151(c)(1)(A) with 8 U.S.C. § 1151(c)(1)(B). But visas beyond the minimum amount do not become available unless the number of immediate-relative visas issued in the same period falls below 254,000. As that has not occurred since at least 1996, the 226,000 minimum has also effectively become the annual maximum. YEARBOOK, *supra* note 24.

26. KANDEL, *supra* note 23, at 5.

27. *Id.* Note that while this Article occasionally uses the phrase “unskilled” workers, as is common in both the academic literature and the law itself, there are reasons to believe the phrase should be retired. *See, e.g.,* Brittany Bronson, *Do We Value Low-Skilled Work?*, N.Y. TIMES (Oct. 1, 2015), <https://www.nytimes.com/2015/10/01/opinion/do-we-value-low-skilled-work.html>; Allana Akhtar, *A Tweet from Alexandria Ocasio-Cortez Convinced Me I’ve been Using the Wrong Word to Describe Waitresses. Here’s Why I’ll Never Call Them ‘Unskilled’ Again*, BUS. INSIDER (July 28, 2019), <https://www.businessinsider.com/why-unskilled-labor-perpetuates-stereotypes-about-gender-education-2019-7>.

28. Andowah A. Newton, Note, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on its Impact on African Immigration to the United States*, 38 CORNELL INT’L L.J. 1049, 1055 (2005).

In addition to the above categories, a certain number of refugees and asylees become LPRs each year.<sup>29</sup> “Refugees are admitted to the United States from abroad while asylees are foreign nationals who request and receive asylum after having entered the United States. The number of refugees admitted each year is determined by the President in consultation with Congress. The number of asylees is not limited.”<sup>30</sup> On average, between 2001 and 2017, 95,000 refugees and 42,000 asylees became LPRs each year.<sup>31</sup>

Accordingly, in any given year, the United States may provide permanent visas as follows:<sup>32</sup>

Immediate family member visas	470,000	46%
Other family-sponsored visas	226,000	22%
Employer-sponsored visas	140,000	14%
Diversity visas	55,000	5%
Refugees	95,000	9%
Asylees	42,000	4%
<b>TOTAL:</b>	<b>1,028,000</b>	<b>100%</b>

29. As noted above, refugees and asylees are not generally treated as part of the immigrant visa regime. But because refugees and asylees are entitled to request LPR and ultimately become U.S. citizens, they are included here. *See supra* note 18.

30. *See* KANDEL, *supra* note 23, at 3 n.16.

31. *See* YEARBOOK, *supra* note 24. This reflects the number receiving LPR status each year, which is different from the number admitted to the country in a given year, as refugees and asylees must reside in the United States for one year before becoming LPRs. *See* WITSMAN, *supra* note 21, at 4. These averages are likely to be significantly lower in the coming years, due to both the lower refugee totals imposed by the Trump Administration for 2018 and 2019 (*see, e.g.*, Bobby Allyn, *Trump Administration Drastically Cuts Number Of Refugees Allowed To Enter the U.S.*, NPR (Sept. 16, 2019), <https://www.npr.org/2019/09/26/764839236/trump-administration-drastically-cuts-number-of-refugees-allowed-to-enter-the-u>), and its various policies limiting the number of asylees admitted each year (*see* Nicole Narea, *The Demise of America's Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp>). And immigration numbers for all categories are likely to be significantly lower in 2020 due to the federal government's response to the Covid-19 pandemic. *See* Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 29, 2020); Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 22, 2020).

32. These figures are necessarily an oversimplification. They represent a hypothetical allocation based on averages, rather than the raw numbers of any single year. They also only cover the most numerous permanent visa categories; if smaller visas were included, the percentages would change slightly. For example, about 20,000 SI and SQ visas were issued in 2017 to Iraqis and Afghans who cooperated with the United States during its wars in those countries. These represent about 1.5% of the total number of permanent visas issued that year. U.S. DEP'T HOMELAND SEC., OFF. IMMIGR. STAT., 2017 YEARBOOK OF IMMIGRATION STATISTICS 18-19, TABLE 6. PERSONS OBTAINING LAWFUL PERMANENT RESIDENT STATUS BY TYPE AND MAJOR CLASS OF ADMISSION: FISCAL YEARS 2015 TO 2017 (July 2019), available at <https://www.dhs.gov/immigration-statistics/yearbook/2017/table6>. Incorporating these relatively small numbers into the above analysis would reduce each of the percentages in the chart by about 0.25%.

Many critics argue these allocations are unwise. Perhaps the most common complaint is that the United States wrongfully prioritizes family-based immigration over employment or merit-based immigration. The Trump Administration, for example, proposed completely reorienting the system around employment: instead of allocating approximately 68% of visas to immediate family members and other relatives, it would have set aside only 33% for family reunification. Meanwhile, it would have increased employment-based visas to 57%, removed the diversity visa entirely, and reduced the number of refugee and asylee LPRs from 13% combined to 10% combined.<sup>33</sup> Notably, the bipartisan comprehensive immigration reform plan that passed the Senate in 2013 would have led to a similar, though less dramatic, readjustment from family visas to employment visas.<sup>34</sup>

Of course, there are others who advocate for either retaining or expanding family-centric immigration. For example, recent bills introduced by congressional Democrats have proposed moving the immediate relatives of LPRs, who are currently limited to 114,200 visas per year, to the same category as the immediate relatives of U.S. citizens, which is not subject to any cap. If this proposal were adopted, the number of immediate family member visas would increase, while the number of visas going to other relatives would remain roughly the same because visas that would have gone to the immediate relatives of LPRs would instead go to other non-immediate relative categories, such as adult children and siblings. The result would be a net increase in the number of family-based visas issued each year, both in terms of raw numbers and as a percentage of all visas issued.<sup>35</sup>

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33. Yamiche Alcindor, *What's in Trump's Immigration Proposal*, PBS (May 16, 2019), <https://www.pbs.org/newshour/politics/whats-in-trumps-immigration-proposal>; for an example of criticisms of this proposal, see John Fritze, *Trump Immigration Plan Sidesteps Immigrants Here Illegally, Draws Wide Criticism From Both Sides*, USA TODAY (May 16, 2019), <https://www.usatoday.com/story/news/politics/2019/05/16/donald-trump-immigration-plan-does-not-address-illegal-immigration/3692319002/>; Julie Grace Brufke, *Pelosi: Trump Immigration Plan is 'Dead on Arrival'*, THE HILL (May 16, 2019), <https://thehill.com/latino/444155-pelosi-trump-immigration-plan-is-dead-on-arrival>.

34. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). The bill would have reduced the number of family-sponsored visas from 226,000 to 161,000 (§ 2304) and would have eliminated the diversity visa entirely (§ 2303), while creating between 120,000 and 250,000 new merit-based visas for each year (in addition to the 140,000 employment visas that already exist), depending on the unemployment rate in the United States (§ 2301). After passing the Senate, the House of Representatives declined to take up the bill. See *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014), <https://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276>.

35. See Resolving Extended Limbo for Immigrant Employees and Families Act, S. 2603, 116th Cong. (2019); Reunited Families Act, H.R. 4944, 115th Cong. (2018). Allowing an unlimited number of visas for the immediate family members of LPRs was also contemplated by the 2013 Senate reform (see S. 744, 113th Cong. § 2305 (2013)), but as noted, that bill also would have reduced the number of other family-sponsored visas available and created more merit-based visas, so it most likely would not have led

These are just some of the most expansive changes that have been proposed. Many other smaller proposals have been put forward as well. Some want to see the percentage of diversity visas increased, even if it comes at the expense of family-based or employer-based visas.<sup>36</sup> Others argue that the United States should admit more skilled and unskilled workers, while reducing the number of visas reserved for workers with “extraordinary” skills or advanced professional degrees.<sup>37</sup> And some of the most contentious debates involve how many refugees the United States should accept.<sup>38</sup>

In addition to caps on certain categories of visas, many permanent visas are also subject to country-of-origin caps. No more than 7% of all family-based visas (excluding the immediate family members of U.S. citizens), employment-based visas, or diversity visas can go to immigrants from a single country in any given year. This is typically what Americans think of when referring to a “waiting list” or “backlog,” to legally enter the United States.<sup>39</sup> For example, as of December 2019, the State Department was still processing visa requests from the unmarried, adult children of U.S. citizens that were filed in May 2013 (for Chinese and Indian nationals), November 2008 (for Filipinos), and August 1997 (for Mexican applicants).<sup>40</sup> Other relatives, such as married children, must wait even

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to an overall increase in the percentage of visas going to family members.

36. See Newton, *supra* note 28, at 1078 (“[A] significantly larger amount of visas should be allocated to the diversity visa program. This can be accomplished by increasing the total amount of immigrant visas available or by reallocating some of the visas currently allocated for family and employment-based visas.”).

37. Kayleigh Scalzo, Note, *American Idol: The Domestic and International Implications of Preferring the Highly Educated and Highly Skilled in U.S. Immigration Law*, 79 GEO. WASH. L. REV. 926, 943-45 (2011) (criticizing the U.S. preference for highly skilled immigrants over unskilled workers); Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107, 139 (2016) (discussing how the focus on skilled immigrant workers favors male immigrants over women and children).

38. See David Kampf, *Keeping Refugees Out Makes the United States Less Safe*, FOREIGN POL’Y (Sept. 13, 2019), <https://foreignpolicy.com/2019/09/13/keeping-refugees-out-makes-the-united-states-less-safe/>; Stephen Yale-Loehr & Aaron El Sabrout, *Make America Great Again: Admit More Refugees to the U.S.*, CORNELL L. SCHOOL, <https://www.lawschool.cornell.edu/spotlights/Make-America-Great-Again-Admit-More-Refugees-to-the-US.cfm> (last visited Mar. 7, 2021); Andrew Vitelli, *Should the US Accept Syrian Refugees*, THE PERSPECTIVE (2019), <https://www.theperspective.com/debates/politics/us-accept-syrian-refugees/>; see also Allyn, *supra* note 31; Narea, *supra* note 31; Alcindor, *supra* note 33.

39. See, e.g., Nicole Nixon, *Why ‘Waiting In Line’ For Legal Immigration Status Can Take Years*, KUER 90.1 (Apr. 12, 2018, 8:30 AM), <https://www.kuer.org/post/why-waiting-line-legal-immigration-status-can-take-years#stream/0>; David Bier, *Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable*, CATO INST. (June 18, 2019), <https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long>; Adam Barsouk, *Illegal Immigrants Jump the Line, Making Legal Immigrants Wait*, WASH. EXAMINER (Feb. 02, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/illegal-immigrants-jump-the-line-making-legal-immigrants-wait>.

40. *Visas Bulletin*, DEP’T OF STATE (Dec. 2019), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_december2019.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_december2019.pdf). Note that although

longer: applications from China go back to 2007; applications from India go back to 2004; applications from the Philippines go back to 1998; and applications from Mexico go back to 1996. Meanwhile, for certain employment categories, the State Department is still processing applications from 2008 and 2009 for Chinese and Indian workers.<sup>41</sup>

There have been many calls to raise or eliminate the per-country caps altogether—even if the total number of visas issued each year remains unchanged—because these provisions disproportionately affect just a few countries. In late 2019, a bipartisan proposal to increase the caps from 7% to 15% in some categories, and to remove the caps entirely in other categories, passed the House of Representatives and appeared likely to become law. However, at the last moment, the bill failed to advance in the Senate.<sup>42</sup>

## 2. Visa Requirements

In addition to criticisms about the allocation of visas, there are also criticisms about the qualifications necessary to obtain certain visas.

For example, “immediate relatives”—the group receiving the most visas from the United States each year—refers only to “the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.”<sup>43</sup> Additionally, “children” is defined as an unmarried person under twenty-one years of age.<sup>44</sup> This means that a minor citizen cannot sponsor their parent and that the unmarried or married adult children of citizens, the siblings of citizens, and the spouses, children, and parents of LPRs are all excluded from the “immediate relative” definition. These potential immigrants must instead pursue other family-sponsored visas, which have strict annual caps.<sup>45</sup>

Perhaps the current definition of immediate relative is reasonable, but it is not the *only* reasonable definition. For example, some have argued that the current definition causes unfair problems for widows whose U.S.-

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the State Department refers to these as “F1” visas in the Visa Bulletin, that designation is not the official name; rather, they are F11 or B11 visas. See 22 C.F.R. § 41.12 (2013).

41. *Visas Bulletin*, *supra* note 40.

42. Fairness for High-Skilled Immigrants Act, H.R. 1044, 116th Cong. (2019); Fairness for High-Skilled Immigrants Act, S. 386, 116th Cong. (2019); Nicole Narea, *A Rare Bipartisan Agreement on Immigration Reform Has Tanked in the Senate*, VOX (Sept. 19, 2019), <https://www.vox.com/policy-and-politics/2019/9/19/20873985/bipartisan-immigration-green-card-bill-senate>; David Bier, *Fairness for High Skilled Immigrants Act: Wait Times and Green Card Grants*, CATO INST. (Sept. 30, 2019), <https://www.cato.org/blog/fairness-high-skilled-immigrants-act-wait-times-green-card-grants>.

43. 8 U.S.C. § 1151(b)(2)(A)(i).

44. 8 U.S.C. § 1101(b)(1).

45. 8 U.S.C. § 1153(a)(1)-(4).

citizen-spouse dies prematurely.<sup>46</sup> Others have argued that minor children should be allowed to sponsor their parents, which was permitted until 1976.<sup>47</sup> And there have been criticisms about how these definitions treat same-sex partners,<sup>48</sup> women in abusive relationships,<sup>49</sup> and stepfamilies.<sup>50</sup> More radically, some argue that the changing definition of “family” in the modern world requires a wholesale rethinking of the concept as it applies to immigration law, with child welfare being prioritized over biological ties.<sup>51</sup>

Or consider employee visas. Permanent employment visas, like family visas, are divided into different categories, with more visas available for those immigrants who qualify for categories that are seen as most beneficial to the United States’ economy:

First preference is reserved for what are commonly known as “priority workers,” more specifically, “persons of extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors or researchers; and multinational executives and managers.” Qualification as a person of extraordinary ability in one of these fields is “demonstrated by sustained national or international acclaim and . . . achievements [which] have been recognized in the field through extensive documentation.” Second preference is given to aliens “who are members of the professions holding advanced degrees or for persons with exceptional ability in the arts, sciences, or business.” Under this category, possession of a degree is evidence of exceptional ability, but is insufficient by itself. The third preference “is reserved for professionals, skilled workers, and other workers.” Fourth preference is afforded to “special immigrants,” including

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46. See, e.g., Shaina Elias, Note, *From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the “Widow Penalty,”* 77 GEO. WASH. L. REV. 172 (2008); Melanie Hui Lipana, Note, *The Reality for Noncitizen Widows*, 45 U.C. DAVIS L. REV. 1493 (2012).

47. See Maddali, *supra* note 37, at 170-71.

48. See Laura Figueroa & Angelica Jimenez, *The Slow, Yet Long-Anticipated Death of DOMA and its Impact on Immigration Law*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 547 (2014); JonCarlo Serna, Comment, *Same-Sex Bi-National Couples: The Benefits and Pitfalls of Judicial Evolution and the Validity of Marriage*, 17 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 591 (2015); Kate Shoemaker, Comment, *Post-Deportation Remedy and Windsor’s Promise*, 63 UCLA L. REV. 168 (2016).

49. See Margaret M.R. O’Herron, Note, *Ending the Abuse of the Marriage Fraud Act*, 7 GEO. IMMIGR. L.J. 549 (1993); Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1 (2014) (discussing generally the intersection of separation, divorce, and death with immigration law).

50. See Margaret M. Mahoney, *Stepfamilies in Federal Law*, 48 U. PITT. L. REV. 491, 514 (1987).

51. See Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Towards a Functional Definition of Family that Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS L. REV. 509, 510 (2010) (“[E]ven where the United States aims to further family unity, it fails to do so because U.S. immigration law reflects a legal construction of the ‘family’ concept that is largely premised on biology, is grounded in the traditional conception of a nuclear family, and excludes what this Article calls ‘functional’ families: formations which may not satisfy this narrow conception of family, but satisfy the care-taking needs of children.”). For a similar argument, see Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law*, 11 LEWIS & CLARK L. REV. 809 (2007).

“religious workers, employees of U.S. foreign service posts, [and] retired employees of international organizations.” The fifth and final preference category is reserved for investors.<sup>52</sup>

In each instance, an immigrant must meet the standards of the visa itself; e.g., must have “extraordinary ability” or have an “advanced degree” or be a “religious worker,” depending on the category for which they are applying. But those who are part of the second or third preference must also obtain a labor certification, meaning their employer-to-be must first file an application with the Department of Labor demonstrating that:

(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>53</sup>

These labor certifications have been criticized from all sides. Some argue that it is an unnecessarily burdensome process that ultimately does little to fulfill its stated purpose—protecting U.S. workers.<sup>54</sup> Others, by contrast, note that the Supreme Court has “often recognized that a ‘primary purpose in restricting immigration is to preserve jobs for American workers,’”<sup>55</sup> and that the labor certification process should be made more stringent in order to achieve that goal.<sup>56</sup>

52. Chester & Cully, *supra* note 20, at 392-93 (citations omitted).

53. 8 U.S.C. § 1182(a)(5)(A)(i)(I)-(II).

54. See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1310-11 (2012) (referring to the current labor requirements as “nonsensical”); Collins, *supra* note 12, at 358 (“[W]hile protecting American labor and ensuring that foreign labor is turned to only as a last resort can be seen as a reasonable, even laudable, goal, the system arguably fails even at that. While a rigorous and cumbersome labor certification system may protect domestic labor by discouraging applications and artificially keeping admissions below quota . . . , its complexity and susceptibility to employers willing to game the system fail to protect American workers.”). See also Shang-Tzu (Peter) Hwu, *Alien Labor Certification: A “Shell Game” for United States Workers*, 14 SUFFOLK TRANSNAT’L L.J. 367 (1991); Heather L. Brown, Comment, *The Paradoxical Nature of the Department of Labor’s Labor Certification Procedures as Applied to Self-Employed Aliens*, 16 HOUS. J. INT’L L. 43 (1993).

55. *INS v. Nat’l Ctr. for Immigrant Rights, Inc.*, 502 U.S. 183, 194 (1991).

56. Jessica Shaver, *Obama Administration Changes to H-2A Visa Program: A Temporary Fix to a Permanent Problem*, 24 GEO. IMMIGR. L.J. 97, 98-99 (2009) (summarizing criticisms of Bush Administration changes to the certification process that were considered insufficiently protective of American workers); Seth R. Leech & Emma Greenwood, *Keeping America Competitive: A Proposal to Eliminate the Employment-Based Immigrant Visa Quota*, 3 ALB. GOV’T L. REV. 322, 349-50 (2010) (warning that certain proposals to “remove[] the element of labor certification” could harm the “domestic labor force,” and arguing further that the labor certification process is superior to a points-based system at protecting American workers); Dean Baker, *Silicon Valley Needs to Quit Whining About H1-B Visas*, FORTUNE (Feb. 9, 2017), <https://fortune.com/2017/02/09/h1-b-silicon-valley-tech/> (suggesting, in the context of temporary visas, that tech companies should only be able to hire foreign workers if they first show that they have increased the number of African Americans and women working for their firms).

The fifth permanent employment visa category is the subject of debate as well. Some have called for the expansion of EB-5 investment visas<sup>57</sup> or for the creation of entirely new investor visas,<sup>58</sup> while others have called on Congress to tighten the requirements for investor visas so that rich foreigners cannot just “buy” American citizenship.<sup>59</sup>

Finally, no permanent immigrant category has been as controversial in recent years as the admission of refugees and asylees. One report criticized the Trump Administration for not only reducing the total number of refugees, but also for attempting to prioritize religious refugees while deprioritizing orphans, among other changes.<sup>60</sup> There have also been calls to create new refugee categories, such as for those fleeing climate change,<sup>61</sup> gender-based discrimination,<sup>62</sup> or violations of the Universal Declaration of Human Rights.<sup>63</sup> Similarly, in the asylum context, the Trump Administration moved to limit those seeking asylum based on domestic violence or gang violence, which sparked significant criticism.<sup>64</sup>

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57. Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera*, 3 ALB. GOV'T L. REV. 103, 147-48 (2010).

58. David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 794 (2009).

59. Taylor C. Byrley, Note, *Selling Citizenship to the Highest Bidder: A Proposal to Reform the United States EB-5 Investor Visa Program*, 27 IND. INT'L & COMP. L. REV. 79 (2017).

60. Kristie de Peña & Matthew La Corte, *The Devil is in the Details: Digging Deeper into 2020 Refugee Resettlement Changes*, THE NISKANEN CTR. (Nov. 18, 2019), <https://www.niskanencenter.org/the-devil-is-in-the-details-digging-deeper-into-2020-refugee-resettlement-changes/>.

61. Ryan Wangman, *Ed Markey Wants US to Admit At Least 50,000 Refugees a Year Fleeing Climate Change*, BOSTON GLOBE (Sept. 27, 2019), <https://www.bostonglobe.com/news/politics/2019/09/27/markey-wants-admit-least-refugees-year-fleeing-climate-change/gIufscMs1k6RLM3zCJPuDJ/story.html>; but see Kara K. Moberg, Note, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1131 (2009) (arguing that the current refugee and asylum system is ill-suited to deal with climate refugees).

62. Mattie L. Stevens, Note, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179 (1993).

63. Michael J. Parrish, Note, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. REV. 223 (2000).

64. Priscilla Alvarez, *DOJ Defends Rule Ending Asylum Protections for Domestic Violence Victims*, CNN (Dec. 9, 2019), <https://www.cnn.com/2019/12/09/politics/asylum-protections-domestic-violence-appeals-court/index.html>; Emily Moss, *Who Is a Refugee*, HARV. POL. REV. (Apr. 8, 2019), <https://harvardpolitics.com/united-states/who-is-a-refugee/>; Matt Zapotosky, *Judge Strikes Down Trump Administration Effort to Deny Asylum for Migrants Fleeing Gang Violence, Domestic Abuse*, WASH. POST (Dec. 19, 2018), [https://www.washingtonpost.com/world/national-security/judge-strikes-down-trump-administration-effort-to-deny-asylum-for-migrants-fleeing-gang-violence-domestic-abuse/2018/12/19/61687d00-03b1-11e9-b6a9-0aa5c2fcc9e4\\_story.html](https://www.washingtonpost.com/world/national-security/judge-strikes-down-trump-administration-effort-to-deny-asylum-for-migrants-fleeing-gang-violence-domestic-abuse/2018/12/19/61687d00-03b1-11e9-b6a9-0aa5c2fcc9e4_story.html).

### C. *Temporary Visas*

The situation with temporary visas is similar. Out of approximately nine million temporary visas issued in 2018, about 6.7 million were for tourists or short-term business visits (B visas), and another 300,000 were for brief entries by airplane and ship crewmembers (C and D visas).<sup>65</sup> Of the remaining two million temporary visas, about 1.1 million were for temporary work visas (H, J, or L visas) and another 400,000 were for students (F and M Visas). The remaining visas went, in decreasing order of prevalence, to: officials with foreign governments or international organizations like the United Nations, NATO, and NAFTA (A, G, I, NAFTA, and NATO visas); persons with “extraordinary” abilities in the sciences, arts, education, or business, as well as (less extraordinary) athletes and artists (O and P visas); treaty-specific trade workers (E visas); the fiancés of U.S. citizens (K visas); religious leaders (R visas); workers travelling to the Northern Mariana Islands (CW visas), cultural exchange visitors (Q visas); certain crime victims (U visas); and the victims of human trafficking (T visas).<sup>66</sup>

Like with permanent visas, there are many criticisms leveled against how temporary visas are allocated and who is eligible.<sup>67</sup> For example, few issues are as heavily debated as the appropriate number of temporary work visas. The number of H1-B visas for specialty workers (often used in the tech industry),<sup>68</sup> H2-A visas for temporary agricultural workers, and

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65. U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2018, TABLE XVI CLASSES OF NONIMMIGRANTS ISSUED VISAS (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2014-2018 (2018), [available at](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableXVIA.pdf) <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableXVIA.pdf>.

66. See *supra* note 65.

67. Reserving some visas for workers willing to live in the Northern Mariana Islands, a U.S. territory, represents a unique problem that may or may not fall within this Article’s proposal. On the one hand, there is no particular reason that U.S. territories could not be treated like states, receiving a share of visas to distribute as they see fit. On the other hand, given the unique relationship between territories and the federal government, it would be unsurprising if the federal government insisted on maintaining control over territory-specific visas.

68. See Roger Waldinger & Christopher L. Erickson, *Temporarily Foreign? The Labor Market for Migrant Professionals in High-Tech at the Peak of the Boom*, 24 COMP. LAB. L. & POL’Y J. 463 (2003); Leah Phelps Carpenter, Comment, *The Status of H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT’L L. 553, 578 (2003) (summarizing criticisms of the H-1B visa); Stephen Moore, *U.S. Needs More Brainiac Immigrants, So Let’s Boost H1B Visas*, DALL. MORNING NEWS (Apr. 19, 2019), <https://www.dallasnews.com/opinion/commentary/2019/04/19/stephen-moore-u-s-needs-more-brainiac-immigrants-so-let-s-boost-h1b-visas/> (calling for more H1-B visas); L. Francis Cissna, *New Regulation Will Make H-1B Visa Program More Effective*, CNN (Feb. 12, 2019), <https://www.cnn.com/2019/02/12/opinions/regulation-will-make-h-1b-program-more-effective-cissna/index.html> (calling for H1-B visas to be allocated primarily to graduates of U.S. schools); Michael Hiltzik, *Stephen Moore, Trump’s Pick for the Fed, Just Got a Key Immigration Program Dead Wrong*, L.A. TIMES (Apr. 22, 2019), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-moore-fed-visas-20190422-story.html> (calling the H1-B program a “cynical sham” because it takes jobs from Americans).

H2-B visas for unskilled workers are debated year after year.<sup>69</sup> There have also been calls for stricter minimum wages for guestworkers;<sup>70</sup> limiting the number of visas available to tech companies unless they first make progress in hiring more women and people of color;<sup>71</sup> expanding labor protections for farmworkers;<sup>72</sup> and allowing greater flexibility for temporary workers to switch jobs without having to leave the United States and start the process over.<sup>73</sup>

The student visa system is also a subject of discussion. Some advocate an easier process for international students to apply to U.S. college programs or for keeping students in the United States, even on a temporary basis, after they graduate.<sup>74</sup> Others have criticized the system for imposing barriers that prevent poorer students from participating in the program.<sup>75</sup> But the student visa system has also been attacked for being exploited by some of the terrorists involved in the September 11, 2001 attacks and for providing an avenue for the theft of U.S. trade secrets.<sup>76</sup> There have also been highly publicized scandals regarding

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69. ANDORRA BRUNO, CONG. RESEARCH SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES (2020) (providing a summary of how the H-2A program works and what policy considerations are involved in determining qualifications for the visa); Bruce Talbott, *Our Fruit is Rotting in the Trees as Laborers are Kept out of the Country*, WASH. POST (Aug. 24, 2018), [https://www.washingtonpost.com/opinions/our-fruit-is-rotting-in-the-trees-as-laborers-are-kept-out-of-the-country/2018/08/24/bf119ad6-a6e6-11e8-8fac-12e98c13528d\\_story.html](https://www.washingtonpost.com/opinions/our-fruit-is-rotting-in-the-trees-as-laborers-are-kept-out-of-the-country/2018/08/24/bf119ad6-a6e6-11e8-8fac-12e98c13528d_story.html) (calling for an increase in the number of temporary agricultural workers allowed each year); Camilla Benoni & Ben Bira, *Open Forum: H-2A Visa Helps Farmers but also Widens Door for Labor Abuses*, S.F. CHRON. (Apr. 24, 2019), <https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-H-2A-visa-helps-farmers-but-also-13789929.php> (criticizing the lack of safeguards in the H-2A program); Alex Nowrasteh, *Offer More Visas to People Coming Across the Southern Border*, N.Y. DAILY NEWS (Aug. 20, 2019), <https://www.nydailynews.com/opinion/ny-oped-offer-more-visas-to-people-coming-across-the-southern-border-20190820-cxvqjuky5ralngcgtcu2b6f2ky-story.html> (calling for additional visas to be allocated to El Salvador, Guatemala, and Honduras to stem the flow of illegal border crossings).

70. See Kate Cimini, *This Trump Rule Change Will Mean Lower Wages for Farmworkers*, CAL MATTERS (Oct. 16, 2019), <https://calmatters.org/california-divide/2019/10/this-trump-rule-change-will-mean-lower-wages-for-farmworkers/>.

71. Baker, *supra* note 56.

72. See Alison K. Guernsey, Note, *Double Denial: How Both the DOL and Organized Labor Fair Domestic Agricultural Workers in the Face of H-2A*, 93 IOWA L. REV. 277 (2007).

73. See Charles C. Mathes, Note, *The Department of Labor's Changing Policies Toward the H-2B Temporary Worker Program: Primarily for the Benefit of Nobody*, 80 FORDHAM L. REV. 1801 (2012) (calling for visa portability for temporary workers); see also Agricultural Guestworker Act, H.R. 4092, 115th Cong. (2018); Farm Workforce Modernization Act, H.R. 5038, 116th Cong. (2019).

74. See Marnette Federis, *Visa Rules are Restricting the Future of International Students in the US*, PRI (June 20, 2019), <https://www.pri.org/stories/2019-06-20/visa-rules-are-restricting-future-international-students-us>; Alia Wong, *Colleges Face Growing International Student-Visa Issues*, THE ATLANTIC (Sept. 6, 2019), <https://www.theatlantic.com/education/archive/2019/09/how-harvard-and-other-colleges-grapple-student-visa-problems/597409/>; Chester, *supra* note 20.

75. See Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 257-58 (1994).

76. See Erin N. Grubbs, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C. J. L. & TECH. ON. 235 (2019);

diploma mills used to help foreign students illegitimately enter the country, as well as fake schools established by the United States itself to ensnare foreign students in fraud claims.<sup>77</sup>

In fact, virtually every temporary visa category comes with criticisms or proposed reforms, including fiancé visas,<sup>78</sup> athlete and artist visas,<sup>79</sup> and religious worker visas.<sup>80</sup>

Accordingly, as with permanent visas, there are more proposals for changes to the temporary visa system than Congress can plausibly debate, let alone enact.<sup>81</sup> The purpose of this Article is not to endorse or oppose any of these proposals. Rather, the goal is to emphasize that our current system has proven ill-equipped to address *any* of these complaints, whatever normative position one takes on them, and that a change to a state-based system would at least plausibly provide an opportunity to experiment with some of these ideas.

## II. THE PROPOSAL

What if most immigrant admissions decisions—what types of visas to issue, what requirements to impose for each visa, and how to allocate visas among different groups of applicants—were instead made by the individual states? While King Minos's labyrinth and the Gordian knot are useful allegories to express that something is a complicated or impenetrable problem, the moral of each story is actually that the simplest

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Topher Greene, Note, *The Importance of Improving U.S. Immigration Law and the Changes Made Since 9-11*, 4 REGENT J. INT'L L. 101, 120 (2006).

77. See Christopher S. Collins & T. Richmond McPherson, III, *How Tri-Valley University Fell Off the Diploma Mill: Student Immigration and Façade Education*, 38 J.C. & U.L. 525 (2012); Elizabeth Redden, *A Fake University*, INSIDE HIGHER ED (Dec. 10, 2019), <https://www.insidehighered.com/news/2019/12/10/who-went-fake-university-farmington-and-why>.

78. See Christina L. Pollard, *Here Come Many More Mail-Order Brides: Why IMBRA Fails Women Escaping the Russian Federation*, 46 CAP. U. L. REV. 609 (2018) (calling for greater restrictions on fiancé visas to prevent mail-order bride abuses); Ivan A. Pavlenko, Note, *Statutory Purpose and Deferring to Agency Interpretations of Laws: The Immigrant Law Paradigm: Aged Out*, 63 SYRACUSE L. REV. 147 (2012) (discussing the challenges faced by minor children who seek to accompany parents who have received a fiancé visas).

79. See Kevin K. McCormick, Note, *Extraordinary Ability and the English Premier League: The Immigration, Adjudication, and Place of Alien Athletes in American and English Society*, 39 VAL. U. L. REV. 541 (2004); Heather E. Morrow, Comment, *The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into U.S. Professional Sports*, 26 HOUS. J. INT'L L. 649 (2004); Marissa Crespo, *The Final Curtain Call: Administrative Challenges in the United States O-Visa Process for Foreign Artists and Performers*, 36 COLUM. J. L. & ARTS 101 (2012); Scalzo, *supra* note 37.

80. See Greene, *supra* note 76 (arguing that the religious worker visa is susceptible to fraud by would-be terrorists); Carlos Ortiz Miranda, *Immigration Reform*, 35 CATH. LAW. 259, 267 (1994) (questioning whether religious worker visas could be used to hire employees for private hospitals or parochial schools).

81. For examples of states innovating in areas where Congress has declined to legislate, see *infra* note 113.

solution is often the best way through the morass.<sup>82</sup> Although there may be no easy answer to all that ails the United States' immigration system, devolving a portion of the federal government's immigration powers to the states is at least one plausible solution that could cut through the inertia. This Part lays out the details of how this proposal would work in practice and provides examples of the likely benefits of such a radically different system.

### A. *Permanent Visas*

The proposal is relatively straightforward. Congress would establish a set number of permanent immigrant visas to be issued each year and would then allocate a share of those visas to each state, to distribute, trade, or let expire as that state pleases.

This Article does not take a position on the exact formula to be used for the initial distribution among the states. Each state could start with the same amount, or it could be based on population, state GDP, immigration history, or some other calculation.<sup>83</sup> The precise formula is not important because, under this proposal, no matter how the visas are initially distributed, they will end up in the right place. So long as states have the right to sell their visas to one another, the states with the greatest need or desire for visas will ultimately get them.<sup>84</sup>

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82. In the former myth, Theseus escaped the labyrinth by unraveling a ball of thread as he walked, allowing him to later retrace his steps out. Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CALIF. L. REV. 541, 564 n.130 (2004). In the latter myth, "Alexander the Great . . . , frustrated with his inability to untangle the knot, simply sliced through it with his sword." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 HARV. L. & POL'Y REV. 149, 151 n.3 (2010).

83. The pilot program for employment visas proposed by Rep. John Curtis, for example, would give each state a base of 5,000 visas, while dividing an additional 245,000 visas among the states based on total population. See Bier, *supra* note 13. Davon Collins' employment devolution proposal, by contrast, suggests distributing the visas based on either population or past immigration levels. See Collins, *supra* note 12, at 361 ("A system of initial visa distribution based on population would disadvantage states that currently receive a disproportionate share of immigrants, such as California. However, the precise manner of distribution is not critical to the proposal, as long as the system is widely considered to be fair and equitable. (Thus, another option could be to base distribution on past immigration levels.)").

84. This is, essentially, a restatement of the Coase theorem, which has been described as "the single greatest intellectual event in the modern law & economics movement." Herbert Hovenkamp, *The Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 782 (1989-90). Stated briefly:

[T]he Coase theorem admits of no singular definition . . . If one can, however, speak of a "typical" statement of the Coase theorem, it might go something like this: If transaction costs are zero and property rights over the relevant resources are well-defined, parties involved in an externality situation will bargain to an efficient and invariant resolution, regardless of to whom the property rights are initially assigned. So stated, the theorem embodies two assumptions and two conclusions. The theorem embodies the assumptions that property rights are well defined and the costs of transacting are zero. The conclusions that emerge are that the resulting allocation of resources will be efficient and that this result will be invariant across alternative assignments of rights.

Once the initial allocation is made, the states would be free to determine how to distribute those visas. One state could prioritize family reunification, another could prioritize employment, a third could prioritize diversity visas, and a fourth could prioritize refugees. Perhaps even more radically, the states could change the requirements for the visas altogether. Assume, for example, that State A, State B, and State C all want to continue issuing visas in roughly the same ratio as they are issued now, meaning that about 50% of all permanent visas go to the immediate family members of U.S. citizens. State A could change the definition of “immediate relative” to include a broader range of family members, such as the parents of minor citizens or a citizen’s married or unmarried adult children. State B could expand the definition to include the immediate relatives of LPRs. Meanwhile, State C could expand the definition of immediate relative to encompass those who fall outside the historical model of nuclear families: unmarried partners, widows and widowers, stepfamily members, or women who would have been eligible for a visa but for a divorce necessitated by domestic violence.

Similar possibilities exist in the employment context. One state could abolish the requirement that businesses try to hire an American before making a job offer to a foreign worker based on a belief that doing so would create a fairer, more open, and more competitive labor market. Another state could do the opposite—out of a desire to prevent immigrants from undercutting American labor, it could require that businesses pay exorbitant fees to get employee visas or mandate a significant salary and benefits package to any foreign worker, thereby incentivizing the hiring of Americans. Or, to be even more aggressive, one state could designate a certain number of visas to a specific industry to try and lure businesses from another state. Nevada, for example, could set aside a certain number of employment visas for new corporations, as part of its ongoing effort to lure corporations away from Delaware;

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Steven G. Medema, *Juris Prudence: Calabresi’s Uneasy Relationship with the Coase Theorem*, 77 LAW & CONTEMP. PROBS. 65, 66 (2014). Of course, the Coase theorem is not without its critics. See, e.g., Hovenkamp, *supra*, at 786 nn.11 & 12; see also Daniel Q. Posin, *The Coase Theorem: Through a Glass Darkly*, 61 TENN. L. REV. 797 (1994). While the Coase theorem suggests that it does not really matter how visas are initially distributed, so long as the property right—the right to buy or sell visas—is clearly defined, the best starting point for the allocation of visas would likely be past immigration levels. This would allow Congress to estimate, as closely as possible, each state’s potential need or desire for immigrants. Any proposal that veers too far from such an allocation would cause an economic windfall to the states with more limited interests in immigration. For example, if 10% of all new immigrants from the last five years settled in State A, and 0.5% of all new immigrants settled in State B, it would make little sense to allocate the same number of visas to each of these states. Otherwise, State A would have essentially no choice but to purchase visas from other states just to match the immigration levels it enjoyed before the decentralization of the visa program. For more information about the intersection between the ability of states to purchase or sell visas and the likely distribution of immigrants throughout the United States, see *infra* Part IV(B)(1)-(2).

Georgia could provide visas for the film industry, as part of its ongoing competition with Hollywood.<sup>85</sup>

States could also move certain visas from the temporary category to the permanent category. For example, in 1999, Congress created a specific guestworker visa for nurses, but imposed so many limits on who could apply and how many visas could be issued that, as a practical matter, only a handful of new nurses were admitted to the United States.<sup>86</sup> In a Note calling for states to be in charge of such visas, Davon Collins persuasively argued that if employment visa determinations were made at the state level, states like Florida, “with large, growing populations of retirees” could “decid[e] that recruiting nurses was a long-term goal” and could prioritize providing permanent visas to “the global supply of willing immigrant nurses and trainees.”<sup>87</sup>

Other states could create entirely new permanent visas. One state could provide a temporary visa to students attending in-state colleges, with a promise that a permanent visa would automatically be available upon graduation. Other states could harness immigration incentives to combat rural flight by promising a permanent immigration visa to those who agree to live or work for a certain number of years in an economically depressed region.<sup>88</sup>

Perhaps most importantly, under this proposal, the burden would fall on the states, rather than the federal government, to address the ongoing limbo of undocumented immigrants already in the United States. It would be up to the states to finally decide whether it is more important to admit new immigrants or to provide permanent visas (with the associated benefits of LPR status and, eventually, citizenship) to undocumented immigrants already here. One state could provide visas only to the undocumented immigrants known as “Dreamers,” meaning young immigrants who were illegally brought into the United States when they were minors.<sup>89</sup> Another could allocate some or all of its permanent visas to undocumented immigrants who have lived in the state for one, two, or five years in an effort, however slow, to provide stability and status for

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85. See J. Weston Phippen, *Nevada, a Tax Haven for Only \$174*, THE ATLANTIC (Apr. 6, 2016), <https://www.theatlantic.com/national/archive/2016/04/panama-papers-nevada/476994/>; Eliana Dockterman, *How Georgia Became the Hollywood of the South*, TIME (July 26, 2018), <https://time.com/longform/hollywood-in-georgia/>.

86. See Collins, *supra* note 12, at 376-77.

87. *Id.*

88. For more on this type of proposal, see Silva Mathema, Nicole Prchal Svajlenka, & Anneliese Hermann, *Revival and Opportunity*, CTR. FOR AM. PROGRESS (Sept. 2, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/09/02/455269/revival-and-opportunity/>.

89. See Joanna Walters, *What is DACA and Who are the Dreamers?*, THE GUARDIAN (Sept. 14, 2017), <https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers>.

undocumented immigrants. Or perhaps no state would support any type of pathway to citizenship for undocumented immigrants, in which case—if nothing else—we would better understand our real priorities as a nation.<sup>90</sup>

This list is not meant to be exhaustive. On the contrary, the benefit of devolving immigrant admission decisions to the states is that each state could pursue its own priorities and innovate to determine what works best for them. Any number of proposals—not just the above—could be tried by states who have the political will or economic need to do so.

### B. *Temporary Visas*

This Article's proposal for temporary visas is essentially identical to its proposal for permanent visas, with one important difference relating to duration. Temporary visas, as they currently exist, vary dramatically in terms of length. In the guestworker context, H1-B visas have a three-year term, with a possible extension to six years; H1-C visas have a three-year term with no possibility of extension; and H2-A and H2-B visas have a one-year term, with a possible extension to three years. Meanwhile, academic exchange programs—J visas—last anywhere from six months to five years, depending on the program. And athletes under a P visa have a ten-year maximum, while artists under the same visa have no maximum.<sup>91</sup>

Because of these variations, it would be difficult for the federal government to simply give states a set number of temporary visas to hand out. One main goal of federalism is increased flexibility, which means states need to have the discretion to change the amount of time available for certain visas. One state may want to give fiancés a year-long visa; others may want to cap student visas at four years or six years. But if a state were simply given 1,000 temporary visas and told to allocate them as it wished, a state could turn all 1,000 visas into ninety-nine-year-long “temporary” visas, effectively cheating the system and expanding its pool of permanent visas.<sup>92</sup>

This Article's solution is to allocate to the states not a specific number of visas, but a specific number of months. Suppose, for example, that State A and State B were each given 1,000 months to be distributed

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90. See *infra* Part IV(B)(3).

91. See *supra* note 19.

92. Of course, allowing states to pursue this option would still provide Congress with useful information about the states' needs or desires for more permanent immigrants. Accordingly, while ways to avoid this outcome are discussed next, a proposal that allowed states to have this much flexibility could also be workable.

through any number of temporary visas.<sup>93</sup> State A could take just under half of those months (480) and divvy them up into four-year visas for students (e.g., it would issue ten visas lasting forty-eight months each). State A could then take most of the remaining months—504, to be specific—and divvy them up into three-year visas for temporary workers (e.g., it would issue fourteen visas lasting thirty-six months each). The remaining sixteen months could then be distributed for shorter durations, such as for foreign professors seeking to teach for a single semester, or they could be sold to other states.

State B, by contrast, could decide that no temporary visa, regardless of category, should last longer than twelve months. It could issue eighty-three visas, each lasting twelve months. Students who want to continue their education or workers who want to remain at their jobs would then have to reapply each year to get an additional twelve-month visa. In this hypothetical, State B would be left with four extra months, which could be sold or used for other limited purposes.

Aside from this distinction—giving the states months rather than visas—the proposal for temporary visas is the same as the proposal for permanent visas. States could use trial and error to determine how many temporary farmworkers they need versus how many temporary technology workers. They could adjust or abolish rules that limit guestworkers from working for multiple employers, allowing greater flexibility for immigrants to stay in the United States while seeking new jobs. They could expand or restrict what programs qualify for student visas. In short, our immigration system would become much more responsive to the needs of individual states and the political desires of local communities.

### C. *Other Practical Considerations*

This Subpart briefly addresses certain practical questions that could, at least potentially, impede implementation of the proposal for a state-controlled immigration system.

#### 1. What Role Would the Federal Government Continue to Play in this System?

While the stated goal of this Article is to delegate as much power as possible to the states with respect to immigrant admissions, there would clearly need to be a continued role for the federal government in several

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93. Again, the actual number of months to be allocated is up for debate, but would ideally be linked to the number of temporary visa holders previously residing in the state. *See supra* notes 83-84.

areas. This Subpart examines the distribution of certain duties between the federal government and the states.

### *i. Background Checks*

At present, the federal government has certain standards that apply to all visa applicants: they must pass a Department of Homeland Security background check that reviews things like whether they have committed any crimes, whether they are likely to spread any dangerous diseases, or whether they have ever been affiliated with terrorist organizations.<sup>94</sup> This inquiry, which is closely related to the safety and security of the United States writ large, could continue to be undertaken by the federal government.<sup>95</sup>

But it also currently falls to the federal government to ensure that each applicant meets the requirements of their particular visa. The federal government examines, for example, whether employers have completed the labor certification process, whether a marriage is legitimate, and whether a person meets the definition of a refugee. Going forward, these determinations should instead be made by the states. Once a state decides that someone meets the qualifications it has set for a visa, the federal government would honor that choice, issuing whatever temporary visa or permanent visa—with its concomitant LPR status and eventual right to citizenship—the state requests, rather than conduct its own independent investigation into whether the immigrant has satisfied the relevant visa requirements.

### *ii. Control over Certain Types of Visas*

Second, some visa categories would necessarily need to stay within the control of the federal government. Most obviously, the requirements for obtaining a tourist visa are deeply entangled with foreign policy, with different requirements existing for citizens of different countries.<sup>96</sup> And even without those foreign policy hurdles, it would be exceedingly

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94. See BRAY & LINK, *supra* note 19, at 50-51, 167, 170-73.

95. Under the current system, those who fail their background check may still be entitled to a waiver in some instances. See BRAY & LINK, *supra* note 19, at 34-35, 62-63. Purely in terms of what is most politically palatable, it would make sense under this proposal to continue reserving to the federal government the power to issue such waivers. But it would also be possible to create a system where the federal government simply informs the sponsoring state of any background check problems, and then lets the state decide whether a waiver is appropriate.

96. At present, 39 countries participate in the Visa Waiver Program, which allows tourists from those nations to travel to the United States without a visa. See Visa Waiver Program, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> (last visited Apr. 9, 2021).

burdensome for an individual from Sweden hoping to visit the Grand Canyon, Las Vegas, and Disneyland all in one trip to obtain a tourist visa from Arizona, Nevada, and California, respectively. Visas for foreign officials, ambassadors, trade representatives, and sea and air crewmembers are, like tourist visas, so entangled with foreign policy and international bureaucracy that state involvement would be a hindrance, rather than a benefit. Those visas should continue to be administered by the federal government.

Another category of immigrants that is particularly difficult to incorporate into this system is asylum seekers. Because asylees must first enter the United States before seeking relief (as opposed to refugees, who are vetted abroad before receiving a visa),<sup>97</sup> devolving asylum decisions to the states would impose a significant burden on states along the Mexican border, where most asylees arrive,<sup>98</sup> as these states would be under significant pressure to allocate a portion of their visas to asylees, while other states would feel no pressure to do so.

To resolve this problem, the federal government should continue to maintain responsibility for overseeing asylum requests. After all, under this proposal, nothing would change regarding the role of Customs and Border Protection in managing the United States' ports of entry. And as discussed in the next Subpart, enforcement—including removal proceedings through the Department of Justice's immigration courts—would also remain the same. It would therefore make sense that when asylees present themselves to United States officials, the federal government would be responsible for determining whether the individuals are allowed to remain.

Importantly, creating this carve out for asylum seekers would not prevent states from implementing their own, more generous visa programs for the same category of individuals. For example, the Trump Administration was heavily criticized for barring victims of domestic violence or gang violence from obtaining asylum.<sup>99</sup> Under this Article's proposal, although the federal government would still be primarily

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97. KANDEL, *supra* note 23, at 3.

98. Asylum requests may be made either affirmatively or defensively. Affirmative asylum requests occur when asylees voluntarily submit applications directly to asylum officials. Defensive asylum requests occur when undocumented aliens are placed in removal proceedings and make an asylum request for the first time as a defense to that process. See NADWA MOSSAD, OFF. IMMIGR. STAT. ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2018 5 (Oct. 2019). In 2018, a total of 105,500 affirmative asylum applications were filed with the Department of Homeland Security. *Id.* at 6. Of these 92,959—or 88%—were made at the U.S./Mexican border. See *Claims of Fear*, U.S. CUSTOMS & BORDER PATROL (Oct. 23, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear>. Data showing the origins of aliens making defensive asylum claims is unavailable, but is presumably less concentrated in the border states, because such claims are made by individuals who have been in the United States for a longer period of time.

99. See *supra* note 64.

responsible for asylum claims, a state that believed victims of domestic violence or gang violence should receive protection could counteract unpopular federal restrictions by setting aside some of its own visas for such immigrants. In short, keeping the federal government involved ensures that no single state is burdened with asylum requests due to events beyond their control—namely their geography—while still providing states the freedom to embrace additional asylees, beyond the number admitted by the federal government, if their legislatures choose to do so.

## 2. Would States Have to be Responsible for Enforcement?

In discussions about devolving immigration powers to the states, the most controversial issue is typically the ability of states to enforce federal immigration laws. While few law review articles have addressed whether states could take a more active role in immigrant selection,<sup>100</sup> many have debated the normative merits and constitutional questions around state involvement in immigration enforcement, up to and including deportation.<sup>101</sup>

Interrogating all the issues that arise in the context of sub-federal immigration enforcement is beyond the scope of this Article. Suffice it to say, for those wary of state-based enforcement—a position this Author shares—there is no apparent reason why devolving admission powers would also require devolving enforcement powers. Under this proposal, the actual visas would still be issued by the State Department; it would simply be up to the states to decide who qualified for those visas. Additionally, all visa recipients would still be required to submit to a federal background check. In other words, the federal government would have roughly the same information it already has—the identities of immigrants with visas and information about the length and terms of those visas. It is true that, under this proposal, the federal government would need to remain apprised of the visa requirements imposed by the states to determine whether an immigrant no longer qualifies for a previously issued visa. But as discussed in more detail below, the federal government already engages in such work under the current system.<sup>102</sup>

In sum, the federal government would effectively be in the same position it currently holds with respect to enforcement, so there would be no need to permit (or mandate) state-based enforcement of immigration policy beyond the status quo. Legitimate concerns raised by other scholars about state-based enforcement should not be a barrier to

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100. See *supra* notes 11-12.

101. See *supra* notes 9-10.

102. See text accompanying *infra* notes 160-164 (discussing the many ways in which state laws—such as family or criminal law—impact whether individuals may be deported).

embracing state-based admissions policies.

### 3. What Would Happen to Immigrants Currently on the Waitlist?

Finally, perhaps the most significant practical challenge to implementing this proposal is determining what to do with immigrants currently on visa waitlists. As discussed above, immigrants from some countries have been on these waitlists since the late 1990s. By one estimate, if nothing is done, some 675,000 immigrants-to-be will die before their application is processed.<sup>103</sup>

There may be no legal impediment to simply starting the system over from scratch and ignoring those who have waited so long. But pretending the waitlist never existed and forcing every applicant on the list to start over would be exceedingly unfair. There are no easy solutions to this issue, but three imperfect ways of handling the waitlist are identified below.

First, the simplest solution would be to clear the entire waitlist by temporarily (and dramatically) increasing the number of visas available for a period of approximately five years.<sup>104</sup> Afterward, it would be up to the states to either craft systems that make waitlists unnecessary (by, for example, removing per-country caps) or administering their own waitlists.

The second solution is a slower version of the above, except that it does not require a dramatic increase in immigration. A certain number of existing visas could be set aside for the federal government to continue issuing each year. The sole purpose of these visas would be to eliminate the waitlist. Depending on how it is structured, how many visas remain in federal control, and how many individuals abandon the waitlist in favor of applying instead for new visas made available by the states, the waitlist could theoretically be exhausted within about eight years.<sup>105</sup> The problem here, however, is that without increasing the total number of visas, fewer

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103. See Bier, *supra* note 39.

104. That was essentially how the problem would have been dealt with in the Senate's 2013 comprehensive reform bill. See, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2302(c)-(e) (2013); see also *A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, AM. IMMIGR. COUNCIL (July 10, 2013), <https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill>.

105. Simply removing per-country caps without otherwise increasing the number of visas available is estimated to eliminate the waitlist in eight to ten years. See Fairness for High-Skilled Immigrants Act, H.R. 1044, 116th Cong. (2019); see also Stuart Anderson, *Bill Aims to End Decades-Long Waits for High-Skilled Immigrants*, FORBES (Feb. 15, 2019), <https://www.forbes.com/sites/stuartanderson/2019/02/15/bill-aims-to-end-decades-long-waits-for-high-skilled-immigrants/#2edd8de77b85> (explaining that this bill would end the employee visa backlog about five years after an initial three-year transition period).

visas would be available to allocate to the states, limiting states' flexibility to create their own programs.

Finally, and perhaps most realistically, the federal government could simply abandon the waitlist while mandating that any immigrant on the list who files a new application for a state visa obtain priority.

Consider, for example, an unmarried Mexican adult who applied to be reunited with their U.S. citizen parents in 2000. As of December 2019, the State Department was reviewing applications for Mexican nationals in that category from 1997,<sup>106</sup> so our hypothetical immigrant is close to finally getting a visa after more than twenty years on the waiting list. But if the reforms proposed in this Article had been enacted on January 1, 2020, they would have to start all over in their family's state of residence. The federal government could nevertheless mandate that their prior position on the waitlist be taken into account when they apply again. If State A, where the citizen-parents live, decides to issue only employment-based visas, our hypothetical immigrant is simply out of luck. The best option would be for the parents to move to another state with a more pro-family visa program.<sup>107</sup> So the parents move to State B, which allocates a significant portion of its visas to family reunification, but continues to adhere to the 7% per country cap that currently exists under federal law. The immigrant would be free to submit an application in State B, and State B would be required to put that application ahead of most other applicants. But if enough other prospective immigrants from Mexico with long-delayed applications *also* applied in that state, the 7% rule could delay for another year or two when the application would be granted. So the parents instead move to State C, which is eager to provide family-based visas and has no per-country cap. If the immigrant submitted their application in State C, that state would be required to treat that application as having been filed before nearly all other visas, and they would finally be permitted to come to the United States.

This system would not be perfect. An immigrant about to get off the federal waiting list would almost certainly feel robbed if they had to start over again at the state level—especially if, depending on the regime created by each state, their opportunity to immigrate decreases. But it is worth noting that such a risk already exists under the status quo: a sponsoring relative could die prematurely or a prospective employer

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106. See Visa Bulletin, *supra* note 40.

107. While this would be a major inconvenience, both for the waiting immigrant and for their parents, it is also—at least theoretically—how federalism is supposed to work. The idea that individuals can “vote with their feet” is a well-established principle of federalism. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism “makes government more responsive by putting the States in competition for a mobile citizenry”). Accordingly, this may actually be a benefit of the proposal, as it forces states to compete for the support of citizens with divergent views on the ideal immigration scheme.

could go bankrupt, making a pending immigration application moot, no matter how long the immigrant had been on the waiting list.<sup>108</sup> At least this option would provide some measure of opportunity to waiting applicants.

Even if this Article has no perfect solution to the waitlist, it is still superior to keeping the current system. The primary cause of the waitlist is the per-country caps, which Congress, despite occasional proposals, has been unable to repeal.<sup>109</sup> But it is likely that at least some states, depending on their needs, would eliminate this cap if they had the power to do so. Therefore, while this is admittedly a thorny issue, this Article's proposal would still allow some states to enact a partial fix.

### III. THEORETICAL UNDERPINNINGS OF THE PROPOSAL

Even though this Article's proposal would represent a radical change in U.S. immigration law, it is based on concepts long embraced by the United States: federalism and a free market.

First, this proposal embodies many of the benefits historically ascribed to our federalist system of government. It would, for example, allow "the states and the nation to remould, through experimentation, . . . our economic practices and institutions to meet changing social and economic needs," turning states into the laboratories of democracy once envisioned by Justice Brandeis.<sup>110</sup> And it creates greater accountability by moving decision-making powers to a more local level:

The . . . major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process. The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking. This participation, in turn, provides myriad benefits: it trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process.<sup>111</sup>

This increased activity at the local level is generally characterized as a

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108. Immigration officials have some discretion to consider an immigration application even after the death of a sponsoring family member, but this applies to only a few types of applicants. *See* Antognini, *supra* note 49, at 37-42. Additionally, the American Competitiveness in the 21st Century Act of 2000 increased the portability of certain employment visas, meaning that there are some protections for immigrants that lose a job while on the waiting list, but even those protections are only available if the immigrant is first able to obtain a new job offer. *See* Kristen Ness Ayers & Scott D. Syfert, *U.S. Visa Options and Strategies for the Information Technology Industry*, 27 N.C. J. INT'L L. & COM. REG. 301, 325-36, 330-31 (2001).

109. H.R. 4944, 115th Cong. (2018).

110. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

111. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy*, 88 COLUM. L. REV. 1, 7-8 (1988) (internal citations omitted).

good in and of itself—a way to enhance our democracy. Less charitably, and more cynically, moving power to states and local governments may insulate the federal government from the worst impulses of anti-immigrant constituents. After all, limiting such sentiment to the state level might be preferable to allowing anti-immigrant sentiment to flourish at the federal level:

Federalism can also function as a steam-valve. In the immigration context, [Professor] Spiro has described this steam-valve effect as the capacity of ‘those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest on their part to seek national legislation to similarly restrictionist ends.’ The absence of such a steam-valve in the immigration arena has been thought by some to be a contributing factor to the flashes of anti-immigration legislation at the national level, such as those that prompted the Chinese Exclusion Act. Presumably, areas with high anti-immigrant sentiment are unable to affect change at the local level, and thus forced to seek immigration restrictions in Congress. And due to the nature of political logrolling, a small interest group with an intense preference pitted against the neutral posture of other, larger groups may prevail in the legislature.<sup>112</sup>

Finally, as discussed at length above, there is no shortage of ideas regarding how the United States could restructure its immigration system, but it is incredibly rare for such changes to actually be adopted. Giving power to the states increases the likelihood of at least some of these proposals being implemented.<sup>113</sup>

Just as importantly, this Article’s proposal calls for visas to be traded among the states. Therefore, in addition to all the other benefits of federalism, the proposal would bring market pressure to bear on the immigration system.<sup>114</sup>

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112. Collins, *supra* note 12, at 386 (quoting Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1637-38 (1994)).

113. Merritt, *supra* note 111, at 6 (“[S]tate and local governments check federal authority by regulating areas that the federal government chooses to ignore. When President Reagan vetoed a bill designed to alleviate the high rate of unemployment among American youth, cities and states around the country created more than thirty programs to employ teenagers in productive tasks. Similarly, when the federal Food and Drug Administration refused to require fast-food chains to label their ingredients, New York and several other states compelled the chains to disclose that information. And, although both the Department of Justice and the United States Commission on Civil Rights have rejected the concept of comparable worth, at least five states have adopted comparable-worth legislation and twenty-four others have shown interest in the idea.”) (internal citations omitted).

114. Many argue that this kind of market competition is at the heart of federalism: “The model of *competitive federalism*, for instance, asserts that the core substance of ‘American federalism’ is the protection of markets. . . . Adherents believe that ‘by harnessing competition among jurisdictions, federalism secures in the political arena the advantages of economic markets—consumer choice and satisfaction, innovation, superior products at lower prices.’” Christian B. Sundquist, *Positive Education Federalism: The Promise of Equality After The Every Student Succeeds Act*, 68 MERCER L. REV. 351, 359 (2017) (quoting MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 18-

While the fact that our immigration system has become a quagmire is primarily a political failure, it could also be characterized as a market failure. The very existence of millions of undocumented immigrants in the United States, and of millions of potential immigrants on waiting lists hoping to immigrate legally,<sup>115</sup> suggests problems with the supply and demand of accessible visas. In other words, the current system is suffering from an economically inefficient design.

Economic inefficiency has been cited as major argument in favor of a completely open-borders policy, at least in the employment context:

The [visa] backlog exists because more people apply for visas every year than there are visas available. If there were no quota and visas were issued according to market demand, then there would be no delay other than processing. There would be little issue accommodating the future flow of immigrants because such a system would not attempt to manage it. Visas would simply be issued as qualifying people apply.<sup>116</sup>

However, an open borders policy is dead-on-arrival, politically speaking.<sup>117</sup> Moreover, there are important reasons to be skeptical of open borders. If the immigration system's sole purpose was to serve

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25, 3 (1999)).

115. The Pew Research Center estimates there were 11 million undocumented immigrants in the United States in 2015, while the Department of Homeland Security estimates that the figure is closer to 12 million. Compare Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew Research Center Counts Unauthorized Immigrants in the U.S.*, PEW RES. CENTER (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/>, with BRYAN BAKER, OFF. IMMIGR. STAT., POPULATION ESTIMATES (Dec. 2018). Meanwhile, approximately 1.1 million immigrants become LPRs each year and about 4.7 million applicants are currently on waiting lists. See RYAN BAUGH, OFF. IMMIGR. STAT., ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS (Oct. 2019); see also Bier, *supra* note 39.

116. Zachary J. Carls, Comment, *American Immigration: A Path of Return to a Pre-Modern Ideal of Open Immigration Policy*, 7 PENN. ST. J.L. & INT'L AFF. 187, 218-19 (2019). See also Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy 2* (COASE-SANDOR INST. FOR L. & ECON., WORKING PAPER NO. 10,1992), available at <https://pdfs.semanticscholar.org/486e/14c83f773bdb8372236713a94ba532c7f959.pdf> ("The curtailment of the temporary workers program in the United States may have much to do with the growth of illegal immigration. It is difficult to fashion a persuasive economic argument against an open door policy toward temporary workers with employer sponsorship, and thus illegal immigration may be in large part the result of economically unsound U.S. policies. . . . Absent an appropriate policy regarding the admission of temporary workers, illegal immigration may be a 'second best' response to the resulting economic inefficiencies."); see also Gordon H. Hanson, *The Economic Logic of Illegal Immigration*, COUNCIL ON FOREIGN REL. 33 (Apr. 2007), [https://cdn.cfr.org/sites/default/files/pdf/2007/04/ImmigrationCSR26.pdf?\\_ga=2.262811212.198702938.8.1577413232-1782123223.1576985770](https://cdn.cfr.org/sites/default/files/pdf/2007/04/ImmigrationCSR26.pdf?_ga=2.262811212.198702938.8.1577413232-1782123223.1576985770) ("Keeping the number of visas fixed over time, as is the case now, means that during boom times U.S. employers have a stronger incentive to seek out illegal labor.")

117. Danielle Kurtzleben, *What the Latest Immigration Polls Do (And Don't) Say*, NPR (Jan. 23, 2018), <https://www.npr.org/2018/01/23/580037717/what-the-latest-immigration-polls-do-and-dont-say> ("Given the choice between 'open borders' — a position that no mainstream political leaders are proposing — and a 'secure border,' which is current U.S. policy, 79 percent of Americans agreed that the U.S. needs 'secure borders.'").

economic ends, then perhaps an open border would be appropriate. But Americans are likely willing to sacrifice some economic efficiency in exchange for other perceived benefits, such as artificially inflating the wages of American workers, or for more abstract principles, such as a belief that limited immigration allows for greater assimilation.<sup>118</sup> After all, in a democracy, it is the people's prerogative to put other policy priorities above the supposed benefits of a completely unbridled, uncontrolled free market.

Allowing states to craft their own visa programs, and to buy and sell visas from one another, would introduce a measurable supply and demand tool into the immigration system, creating at least some greater economic efficiency, without completely eliminating room for American voters to rank other values above the kind of efficient labor market that would arguably emerge from an open-border reform. In this way, the proposal is somewhat analogous to cap-and-trade proposals to reduce greenhouse gas emissions:

Cap-and-trade . . . is designed to correct a market failure. In the absence of the regulation of emissions, emitters do not pay the full social cost of their activities; those costs are instead borne by those harmed by climate change. By capping emissions at a level thought necessary to reduce the effects of climate change and then distributing allowances to allow emissions up to the amount of the cap, allowance prices should reflect the marginal cost of abatement and emitters should find the means to reduce emissions that fall below that cost.<sup>119</sup>

This Article's proposal similarly strives to solve a market failure in the current immigration system.<sup>120</sup> Of course, a cap-and-trade system is distinct in that it accepts as an essential precept that greenhouse gases are bad and should be reduced. In the immigration context, by contrast, Americans are sharply divided over whether immigration should be reduced or increased.<sup>121</sup> But even setting aside this dispute over goals, cap-and-trade still provides important lessons for how this Article's

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118. For articles criticizing the concept of assimilation, *see, e.g.*, Peter Skerry, *Do We Really Want Immigrants to Assimilate?*, BROOKINGS INST. (Mar. 1, 2000), <https://www.brookings.edu/articles/do-we-really-want-immigrants-to-assimilate/>; Tom Gjelten, *Should Immigration Require Assimilation?*, THE ATLANTIC (Oct. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/10/should-immigration-require-assimilation/406759/>; Glenn Llopis, *Yet Another Call for Assimilation in America, but Assimilation to What?*, FORBES (Jan. 29, 2019), <https://www.forbes.com/sites/glennllopis/2019/01/29/yet-another-call-for-assimilation-in-america-but-assimilation-to-what/#16fc84283e07>.

119. Ann E. Carlson, *Designing Effective Climate Policy: Cap-And-Trade and Complementary Policies*, 49 HARV. J. ON LEGIS. 207, 214 (2012).

120. *See supra* notes 115-116 and accompanying text.

121. Jones, *supra* note 1. For an explanation of why this proposal is likely to lead to an increase in the total number of lawful immigrants, *see infra* Part IV(B)(1).

proposal would work. The cap-and-trade system recognizes that, even if most people generally agree that pollution should be reduced in the abstract, they do not want it reduced in exactly the same way in every industry or every community because the benefits of decreasing pollution are outweighed in some situations by the costs of shutting down entire factories or eliminating entire businesses. Cap-and-trade seeks to solve that problem by quantifying, through market mechanisms, the costs and benefits of allowing or limiting pollution in any given situation, rather than focusing only on across-the-board decreases.

Similarly, people disagree as to whether immigration is a net cost or a net benefit. Regardless of whether they are correct, the current system provides no real outlet for expressing those beliefs through effective policymaking. For example, many conservatives bemoan the costs and dangers of immigration.<sup>122</sup> But there has rarely been an opportunity for conservatives to, for lack of a better phrase, put their money where their mouth is and embrace the sort of stark, restrictionist policies they endorse.<sup>123</sup> And there is at least some reason to believe that, if put to the test, Republican-led states would be more pro-immigrant than their rhetoric sometimes suggests. In 2015, thirty Republican governors and one Democratic governor issued symbolic, but powerless, statements opposing the resettlement of Syrian refugees in their states.<sup>124</sup> On

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122. See, e.g., Matt O'Brien & Spencer Raley, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FAIR (Sept. 27, 2017), <https://www.fairus.org/issue/publications-resources/fiscal-burden-illegal-immigration-united-states-taxpayers>; David Simcox, John L. Martin, & Rosemary Jenks, *The Costs of Immigration*, CTR. FOR IMMIGR. STUD. (Sept. 1, 1994), <https://cis.org/Report/Costs-Immigration>; Kristin Tate, *Your Taxpayer Dollars are Footing the Spiraling Costs of Illegal Immigration*, THE HILL (Apr. 21, 2019), <https://thehill.com/opinion/immigration/439930-your-taxpayer-dollars-are-footing-the-spiraling-costs-of-illegal-immigration>.

For a few responses to the claim that immigration is a burden, see Alex Nowrasteh, *FAIR's "Fiscal Burden of Illegal Immigration" Study is Fatally Flawed*, CATO INST. (Sept. 29, 2017), <https://www.cato.org/blog/fairs-fiscal-burden-illegal-immigration-study-fatally-flawed>; Miriam Valverde, *Do Immigrants Cost U.S. Taxpayers \$300 Billion Annually?*, POLITIFACT (Jan. 23, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/jan/23/donald-trump/does-immigration-policy-impose-300-billion-annually/>.

123. Even President Trump's anti-immigrant policies—however painful for individuals who have borne the brunt of his actions—have had only modest impacts on the immigration system as whole. The total number of deportations under President Trump were actually lower than under President Obama, his efforts to build a border wall were mostly stymied by Congress and the courts, and his policies on refugees and asylees—the area where he had the most unilateral discretion—affected only a small subset of the total number of immigrants in the United States. See Zack Budryk, *Deportations Lower Under Trump Administration Than Obama: Report*, THE HILL (Nov. 18, 2019), <https://thehill.com/latino/470900-deportations-lower-under-trump-than-obama-report>; Miriam Valverde, *Donald Trump's Border Wall: How Much Has Been Built?*, POLITIFACT (Aug. 30, 2019), <https://www.politifact.com/truth-o-meter/article/2019/aug/30/donald-trumps-border-wall-how-much-has-really-been/>; see also text accompanying *supra* note 32.

124. Ashley Fantz & Ben Brumfield, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015), <https://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html>.

September 26, 2019, President Trump issued an executive order that would have, for the first time, allowed states to block refugee resettlement.<sup>125</sup> But over the next four months, almost all states declined to do so.<sup>126</sup> In other words, while some politicians may have taken rhetorical positions against refugees, few have been willing to actually risk the political or economic consequences of excluding them entirely when given the opportunity to do so.<sup>127</sup>

On the other hand, most liberals—though, as with conservatives, not all—claim that immigration is beneficial, and have expressed a desire to undertake greater state and local action to demonstrate that support.<sup>128</sup> As with conservatives, there is at least some reason to believe liberal policies may not match liberal rhetoric. It is worth noting, for example, that one of the bulwarks of the Democratic Party in the United States—the labor union movement—has been historically opposed to increased immigration levels, and in some instances has even stymied comprehensive immigration reform efforts.<sup>129</sup> In any event, like

125. Exec. Order No. 13,888, 84 Fed. Reg. 52,355 (Sept. 26, 2019).

126. As of January 14, 2020, 42 governors, including 19 Republicans, had confirmed that they intended to resettle refugees for the next year. Texas was the only state to announce it would reject refugees. Nomaan Merchant, *Texas Governor to Reject New Refugees, First Under Trump*, AP (Jan. 14, 2020), <https://apnews.com/7329dbc3dcbf32534689831455fa4246>. The remaining seven governors would have had until January 21, 2020, to decide whether to accept refugees, but on January 15, 2020, a court enjoined enforcement of the executive order, mooted the issue. See *HIAS, Inc. v. Trump*, Civil No. PJM 19-3346, 2020 WL 218646 (D. Md. Jan. 15, 2020). As of November 2020, that injunction remains in effect pending an ongoing appeal. See *HIAS, Inc. v. Trump*, Appeal No. 20-1160 (4th Cir.) (docket last reviewed Nov. 10, 2020).

127. See, e.g., Julie Watson & David Sharp, *Trump Lets States, Cities Refuse Refugees for 1st Time in U.S.*, PBS (Oct. 2, 2019), <https://www.pbs.org/newshour/nation/trump-lets-states-cities-refuse-refugees-for-1st-time-in-u-s> (discussing the economic benefits of refugees in North Dakota); Paighen Harkins, *Gov. Gary Herbert Wants More Refugees to Resettle in Utah*, SALT LAKE TRIB. (Nov. 1, 2019), <https://www.sltrib.com/news/2019/11/01/utah-governor-asks-trump/> (discussing a letter from the Republican governor of Utah to the Trump Administration asking that additional refugees be settled in Utah); John Hudak, Elaine Kamarck, & Christine Stenglein, *Trump Threatened Sanctuary Cities, and They Shrugged—Here's Why*, BROOKINGS INST. (May 1, 2019), <https://www.brookings.edu/blog/fixgov/2019/05/01/trump-threatened-sanctuary-cities-and-they-shrugged-heres-why/> (concluding that asylees “contributed \$63 billion more in government revenues than they cost.”).

128. For example, in mid-2019, President Trump stated, apparently as a threat, that he would begin releasing detained undocumented immigrants into communities that identified as sanctuary cities. Democratic mayors from Chicago, Seattle, and Philadelphia, among other places, all responded by saying that they would welcome these immigrants into their communities. See Graham Vyse, *Sanctuary City Mayors Respond to Trump's Threat 'With Open Arms'*, GOVERNING (Apr. 15, 2019), <https://www.governing.com/topics/public-justice-safety/gov-mayors-sanctuary-cities-trump.html>.

129. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 553-58 (2007) (discussing the history of anti-immigrant sentiment among unions and recent moves away from those positions); Julia Preston & Steven Greenhouse, *Immigration Accord by Labor Boosts Obama Effort*, N.Y. TIMES (Apr. 13, 2009), <https://www.nytimes.com/2009/04/14/us/14immig.html> (discussing divisions among organized labor regarding the proposed 2007 comprehensive immigration reform efforts, and

conservatives, liberals are also mostly limited in their ability to act on their stated support for increased immigration under the current system.<sup>130</sup>

Introducing a market for visas would put conservative and liberal beliefs about immigration to the test because states would more directly bear the costs of their decisions. States that view immigration either as a moral good or an economic boon could purchase visas from other states in order to direct more immigration to their communities. States opposed to immigration could essentially put a price on their anti-immigrant beliefs, preferring the certainty of cash to the more abstract (though likely more sizeable) economic and cultural benefits of increased immigration.<sup>131</sup>

In reality, under this Article's proposal, no state is particularly likely to engage in absolutist immigration policymaking. It would be financially impossible for a pro-immigrant state to buy every visa from every other state. At some point, other states would stop selling their visas, no matter the price offered, because those states also want to see the benefits of immigration. By the same token, even the least immigrant-friendly state government would be unlikely to support a complete stop to immigration to their state once they realize the economic consequences of such a decision.

Most importantly, regardless of how absolutist any particular state becomes in their immigration policies, as is true with free market systems generally, the expectation is that supply and demand would allocate immigrants more equitably throughout the country over time, in proportion to the value—economic, moral, civic, or otherwise—that each community places on immigration.<sup>132</sup>

#### IV. POTENTIAL CRITICISMS

Of course, significant pushback would be expected for such a large-scale change to the U.S. immigration system. This final Part addresses some of the most likely criticisms.

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noting that while unions had agreed to support some reforms in 2009, they continued to oppose any expansion of guestworker programs).

130. See, e.g., Clint Hendler, *The 'Sanctuary City' Scam*, COLUM. JOURNALISM REV. (Nov. 6, 2007), [https://archives.cjr.org/campaign\\_desk/the\\_sanctuary\\_city\\_scam.php](https://archives.cjr.org/campaign_desk/the_sanctuary_city_scam.php) (discussing how sanctuary cities, one of the more common liberal reactions to the Trump Administration's anti-immigrant policies, are typically more symbolic than substantive).

131. See Nowrasteh, *supra* note 122; Valverde, *supra* note 122; Gretchen Frazee, *4 Myths About How Immigrants Affect the U.S. Economy*, PBS (Nov. 2, 2018), <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy>.

132. See *supra* note 84. For a discussion of whether this Article's proposal would ultimately lead to increased immigrant segregation, see *infra* Part IV(B)(2).

### A. *Constitutionality of the Proposal*

Perhaps the most important question facing this proposal is whether devolving immigration powers to the states is even constitutional. After all, for most of the last century, it has been widely accepted that the federal government has unlimited and exclusive power over immigration policy.<sup>133</sup>

Scholars have undertaken important work to challenge this premise. It has become increasingly clear that, in the eighteenth and nineteenth centuries, states set their own immigration policies.<sup>134</sup> But whatever the merits of recognizing this history, it has had little bearing on judicial interpretations of the federal immigration power in the modern era. As recently as 2012, the Supreme Court reiterated that the federal government “has broad, undoubted power over the subject of immigration” and that the “federal power to determine immigration policy is well settled.”<sup>135</sup>

This plenary federal power is often seen as the primary barrier to state involvement in immigration policy,<sup>136</sup> and this power raises at least three constitutional questions regarding devolution. First, is such a delegation even possible, given the federal government’s inherent sovereign powers and the Constitution’s Naturalization clause? Second, even if it may be devolved, how much discretion could states exercise over immigrant admissions in light of the Equal Protection Clause of the Fourteenth Amendment? Finally, would the delegation of powers to the states violate the anti-commandeering doctrine?

133. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

134. Stumpf, *supra* note 9, at 1566-78; *see also* Ryan Terrence Chin, Comment, *Moving Toward Subfederal Involvement in Federal Immigration Law: Defining the Outsider*, 58 UCLA L. REV. 1859, 1881-89 (2011) (explaining that before 1875, states, rather than the federal government, were primarily responsible for enacting immigration statutes).

135. *Arizona v. United States*, 567 U.S. 387, 394-95 (2012); *but see id.* at 419 (Scalia, J., concurring in part and dissenting in part) (“[I]n the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in Southern States) freed blacks.”).

136. For example, several groups filed a lawsuit challenging President Trump’s executive order permitting states to bar refugee resettlement in their jurisdiction. Among other things, the plaintiffs asserted that “[t]he Executive Order and Defendants’ implementation of it seek to delegate to state and local governments authority that the Constitution vested exclusively with the federal government.” *See* Complaint, ¶¶ 144-145, *Hias, Inc. v. Donald Trump*, Case No. 8:19-cv-3346 (D. Md. Nov. 21, 2019). On January 15, 2020, Judge Peter Messitte granted the plaintiffs’ motion for preliminary injunction, finding that they would most likely prevail in showing that the executive order violated existing law. *Hias, Inc. v. Trump*, Civil No. PJM 19-3346, 2020 WL 218646 (D. Md. Jan. 15, 2020). But notably, with respect to the constitutional issues presented, Judge Messitte’s findings were limited to the issue of federal preemption, which is consistent with the Supreme Court’s framing of the issue in *Arizona v. United States*, 567 U.S. at 399. *See infra* notes 144-146 and accompanying text. He did not suggest that the Constitution inherently prohibited this type of delegation. *Id.*

### 1. Federal Supremacy: Can Congress Devolve Its Immigration Powers?

In 2001, Professor Michael Wishnie asserted that “the immigration power is an exclusively federal one that Congress may not devolve by statute to the states.”<sup>137</sup> Professor Wishnie argued that this conclusion was rooted in three constitutional provisions and one extra-constitutional concept: (1) the Naturalization Clause, which states that “[t]he Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization”;<sup>138</sup> (2) the Foreign Affairs Clauses, which vest the federal government with the power to negotiate treaties and go to war;<sup>139</sup> (3) the Foreign Commerce Clause, which gives Congress the power to “regulate Commerce with foreign Nations”;<sup>140</sup> and (4) the more abstract concept of national sovereignty.<sup>141</sup> Professor Wishnie argued that any devolution of immigration power to the states would necessarily violate the uniformity requirement of the Naturalization Clause, would set the states on collision courses with foreign nations that disagreed with individual states’ immigration policies, and would dilute the sovereignty of the federal government.<sup>142</sup>

But these concerns are generally overstated. The United States has a long history of states enacting immigration provisions, which has posed no apparent threat to foreign policy or federal sovereignty.<sup>143</sup> And Professor Peter J. Spiro has argued that, in today’s world, states already exercise significant foreign policy powers:

Like it or not, state governments have become increasingly active on the international stage. . . . State officials now have routine dealings with foreign governments (both national and subnational) on cultural and economic matters, and almost all have established trade and tourism offices in various locations abroad. Dozens of state and local governments have

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137. See Wishnie, *supra* note 10, at 497.

138. U.S. CONST. art. I, § 8, cl. 4.

139. U.S. CONST. art. I, § 8, cl. 10 (“To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations. . . .”); U.S. CONST. art. I, § 8, cl. 11 (“To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. . . .”); U.S. CONST. art. II, § 2, cl. 2 (stating that President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors”).

140. U.S. CONST. art. I, § 8, cl. 3.

141. See Wishnie, *supra* note 10, at 532 n.209 (citing, among other sources, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), which held that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”).

142. Wishnie, *supra* note 10 at 533-35, 548-52.

143. See Stumpf, *supra* note 9; Chin, *supra* note 134.

in recent years taken formal action, evidently motivated by traditional foreign policy concerns. These developments appear irreversible, at least in the short run. The federal government can no longer perform the function of the gatekeeper between domestic and international realms as breaches in the wall between the two inescapably widen. The notion that the federal government now has or will any time soon restore a monopoly over U.S. foreign relations is a fiction[.]<sup>144</sup>

Importantly, nothing about the Supreme Court's handling of immigration cases suggests it would agree with Professor Wishnie's position. In *Arizona v. United States*, one of the Supreme Court's most important immigration decisions in decades, the majority held that certain Arizona immigration laws were preempted by federal law.<sup>145</sup> Although the court struck down Arizona's laws, it did so based on their apparent conflict with federal laws enacted by Congress, rather than by invoking more general Constitutional limitations.<sup>146</sup>

In *Arizona v. United States*, the Court began by recounting familiar preemption principles: (1) that "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision"; (2) that state law may be displaced by "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'"; and (3) that state laws "are preempted when they conflict with federal law."<sup>147</sup> None of these principles would prevent Congress from delegating immigrant admission decisions to the states. If Congress did so, it would not be expressly preempting state conduct and it would not be regulating an area so pervasively as to prevent state conduct. It would, in fact, be doing the exact opposite by allowing states to regulate in that field. And although immigration policy generally appears to be a "federal interest so dominant" that preemption might otherwise be "assumed," it would be much harder for a court to make that assumption if Congress affirmatively passed legislation to delegate some of its immigration powers. Finally, as with all interactions between the federal government and the states, it would be up to the states to pass laws that fell within the parameters permitted by the federal government; any law beyond that would be subject to normal federal preemption analysis.

Justice Scalia's partial concurrence in *Arizona* goes even further, arguing at length that states have a sovereign right to be involved in

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144. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161-62 (1994).

145. *Arizona v. U.S.*, 567 U.S. 387, 399 (2012).

146. *Id.* at 398-400.

147. *Id.* at 399.

immigration decisions. Justice Scalia acknowledged that “state regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.”<sup>148</sup> But it follows, under this logic, that if the federal government delegated to the states the power to make admission decisions, states exercising that power would not be “admit[ting] those whom federal regulation would exclude.”

Relatedly, Justice Thomas has noted that the most straightforward reading of the Naturalization Clause is that it allows, but does not mandate, Congress to create a uniform rule of naturalization. In other words, Congress is free to depart from the rule of uniformity and allow the states to create variable naturalization schemes:

Even after the Constitution gave Congress the power to “establish an uniform Rule of Naturalization . . . throughout the United States,” Art. I, § 8, cl. 4, Congress was under no obligation to do so, and the Framers surely expected state law to continue in full force unless and until Congress acted.  
 . . .

Even when Congress enacted the first federal naturalization law in 1790, it left open the possibility that the individual States could establish more lenient standards of their own for admitting people to citizenship. While Hamilton had suggested that Congress’ power to “establish an Uniform Rule” logically precluded the States from deviating downward from the rule that Congress established, see *The Federalist* No. 32, at 199, the early cases on this question took the opposite view. See *Collet v. Collet*, 2 Dall. 294, 296, 1 L.Ed. 387 (CC Pa. 1792) (Wilson, Blair, and Peters, JJ.). States therefore continued to enact naturalization laws of their own until 1795, when Congress passed an exclusive naturalization law. See J. Kettner, *Development of American Citizenship, 1608-1870*, pp. 242-243 (1978).<sup>149</sup>

In sum, the relevant case law supports the conclusion that immigrant admission powers could be constitutionally delegated to the states.

## 2. The Equal Protection Clause: How Much Discretion Would States Have to Exercise Immigration Powers?

In many ways, the more difficult question concerns the level of discretion states would have in crafting their visa programs, assuming Congress decided to delegate immigrant admission powers to them. There has been a sharp divide between state courts and federal courts on

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148. *Id.* at 422 (Scalia, J., concurring in part and dissenting in part).

149. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 872, 872 n.13 (1995) (Thomas, J., dissenting).

this question, and for this Article's proposal to work, it would almost certainly be necessary for the Supreme Court to ultimately come down on the side of the federal courts.

In the 1970s, the Supreme Court held that the federal government was permitted to discriminate against different classes of aliens (for example, based on their length of residency in the United States) so long as the discriminatory law could survive rational basis review; by contrast, states could discriminate on the basis of alienage only if their discriminatory laws were able to survive strict scrutiny.<sup>150</sup> This different treatment arose from the fact that, when reviewing federal laws, the Supreme Court had to balance the intrinsic federal power over immigration against the requirements of the Equal Protection Clause, while only the Equal Protection Clause was relevant when it reviewed state laws.<sup>151</sup>

But what if the states were authorized to engage in such discrimination by the federal government? In *Graham v. Richardson*, which first subjected state policies to strict scrutiny, the Supreme Court explicitly warned in dicta that, because of the Naturalization Clause, “[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.”<sup>152</sup> However, the Supreme Court's subsequent decision in *Mathews v. Diaz*<sup>153</sup> complicated things by concluding that federal immigration laws would only be subject to rational basis review. At least one scholar (and several courts) have concluded that, under *Mathews*, if “the states are carrying out an explicit congressional policy,” then “the resulting classifications should be seen as incidents of *federal* policy, not state policy, and should thus receive rational basis review.”<sup>154</sup>

The Supreme Court has never resolved the tension between *Graham* and *Mathews*. Nevertheless, the issue was litigated in state courts and the federal circuit courts following the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) in 1996.

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150. Compare *Graham v. Richardson*, 403 U.S. 365 (1971) with *Mathews v. Diaz*, 426 U.S. 67 (1976).

151. *Mathews*, 426 U.S. at 84-85.

152. *Graham*, 402 U.S. at 382.

153. *Mathews*, 426 U.S. at 82-86.

154. *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2247, 2253 (2005); see also *id.* at 2267 (“If the immigration power is rooted in the nation’s inherent sovereign powers, the case for a congressional power to delegate is even stronger. Congress should be able, in the exercise of inherent sovereign powers, to authorize states to classify on the basis of alienage in whatever manner they choose.”). See also *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) and *Korab v. Fink*, 797 F.3d 572, 581 (9th Cir. 2014).

Among other things, PRWORA authorized states to limit the classes of immigrants that could receive benefits from certain federal welfare programs.<sup>155</sup> Many states responded by imposing limitations on the availability of welfare for immigrants. State courts in New York, Arizona, and Massachusetts struck down these limitations.<sup>156</sup> Each of the courts held that, notwithstanding Congress's delegation of power to the states in PRWORA, *Graham* was still the appropriate rule. In other words, each state's laws permitting some, but not all, immigrants to receive welfare benefits were subject to strict scrutiny, and in each case, the laws were struck down on the ground that the states were unconstitutionally discriminating on the basis of alienage.

If the rule from these three state courts was applied to this Article's proposal, states would be significantly inhibited from creating their own visa regimes. At least hypothetically, an immigrant already legally living in the United States under a temporary visa—and who is therefore covered by the Equal Protection Clause<sup>157</sup>—could argue that any policy granting a permanent visa to a new immigrant from abroad, rather than to the immigrant already present, would have to be defended under strict scrutiny. True, states might be able to satisfy that burden in some exceptional cases. A state could show, for example, that it had a compelling interest in admitting a refugee from a life-threatening danger, and that the least restrictive means of accomplishing that goal was to grant the refugee a permanent visa, even though that meant no permanent visa was available for a student or a guestworker on a temporary visa already living in the United States. However, the need to justify each policy under strict scrutiny would still dramatically limit states' abilities to experiment with programs unique to their respective needs. Suddenly, courts would be called on to second-guess every visa issued, and the benefits of the program—democratic accountability, innovation, market efficiency—would mostly vanish.

Luckily, this is not the only, or even the most likely, possible outcome. Federal courts have also addressed PRWORA and have explicitly disagreed with these state court cases, concluding instead that state laws enacted under PRWORA were only subject to rational basis review. In *Soskin v. Reinertson*, the Tenth Circuit concluded that PRWORA reflected a “national policy that Congress has the constitutional power to enact” and that “a state's exercise of discretion [under PRWORA] can

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155. See Pub. L. 104-193, 110 Stat. 2105 (1996); 8 U.S.C. §§ 1611-1613.

156. *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001), *Kurti v. Maricopa Cnty.*, 33 P.3d 499 (Ariz. Ct. App. 2001), and *Finch v. Commonwealth Health Ins. Connector Authority*, 959 N.E.2d 970 (Mass. 2012).

157. *Plyler v. Doe*, 457 U.S. 202, 210-13 (1982).

also effectuate national policy.”<sup>158</sup> This meant that the rational basis deference generally afforded federal alienage laws extended to the states as well.<sup>159</sup> The Ninth Circuit later endorsed the same reading in *Korab v. Fink*.<sup>160</sup>

These cases are not, by themselves, a guarantee that rational basis review would be extended to the states if this proposal was adopted. Most troublingly, the Tenth Circuit’s decision was based, at least in part, on the fact that PRWORA had “no direct relationship to the naturalization process” because it was limited to welfare benefit decisions.<sup>161</sup> This Article’s proposal, by contrast, is much more closely related to naturalization: the permanent visas issued by the states would entitle recipients to LPR status and, ultimately, citizenship.

Nevertheless, there are reasons to believe that courts evaluating this Article’s proposal would reach the same result as the *Soskin* and *Korab* courts. Even under the existing immigration regime, states play a significant role in determining whether an immigrant obtains the benefits of naturalization. For example, when marriage is relevant to determining admissibility, the United States looks to whether “the qualifying marriage was entered into in accordance with the laws of the place where the marriage took place.”<sup>162</sup> Different marital requirements in different states (such as the existence of common law marriage) can therefore affect an individual’s eligibility for a permanent visa. Additionally, certain juvenile immigrants may become LPRs if they have “been declared dependent on a juvenile court located in the United States . . . [and] reunification with [one] or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”<sup>163</sup> Yet the ability of juveniles to invoke this provision varies widely depending on their state of residence.<sup>164</sup> Finally, courts have held that an individual can be deported for violating a criminal statute even if the same conduct is legal in a neighboring jurisdiction.<sup>165</sup> In short, “while immigration law is often described as the archetypical uniform national

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158. *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

159. *Id.*

160. *Korab v. Fink*, 797 F.3d 572, 581 (9th Cir. 2014).

161. *Soskin*, 353 F.3d at 1256.

162. 8 U.S.C. § 1186a(d)(1)(A)(i)(I).

163. 8 U.S.C. § 1101(a)(27)(J)(i).

164. *Compare In re S.A.R.D.*, 182 So.3d 897 (Fla. 2016) (interpreting the Special Immigrant Juvenile Status laws narrowly) *with* *Bianka M. v. Superior Court*, 423 P.3d 334 (Cal. 2018) (interpreting the same laws expansively). State approaches to the Special Immigrant Juvenile Status provisions vary widely; some state courts have gone so far as to refuse to participate in the process altogether. For a summary of the positions taken by various states, see Petition for Writ of Certiorari, *Juarez v. Ky. Cabinet for Health & Family Servs.* (2019) No. 19-638.

165. *Petition of Lee Wee*, 143 F. Supp. 736 (S.D. Cal. 1956).

policy—the federal government often claims in court that its power to regulate migration comes from Congress’s authority to create a ‘uniform rule of naturalization’—immigration law in practice varies from state to state.”<sup>166</sup>

The Ninth Circuit has recognized this dichotomy:

In *Hanover National Bank v. Moyses*, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113 (1902), the Court considered a challenge to the 1898 Bankruptcy Act on the ground that its incorporation of divergent state laws failed to “establish uniform laws on the subject of bankruptcies” and unconstitutionally “delegate[d] certain legislative powers to the several states.” *Id.* at 183, 22 S.Ct. 857. The Court held that the incorporation of state laws “is, in the constitutional sense, uniform throughout the United States” because the “general operation of the law is uniform although it may result in certain particulars differently in different states.” *Id.* at 190, 22 S.Ct. 857.

The principle that “uniformity does not require the elimination of any differences among the States” has equal traction here [in the immigration context]. *Ry. Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 469, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). As in the bankruptcy context, although the “particulars” are different in different states, the basic operation of [PRWORA] is uniform throughout the United States. *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 62 L.Ed. 507 (1918) (holding that bankruptcy law may be uniform and yet “may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states”).<sup>167</sup>

It is therefore reasonable to conclude that a national scheme by Congress to delegate immigrant admission powers to the states would be constitutional and would allow states to adopt visa regimes that (as expressions of federal policy) would be subject to rational basis review, the same standard applied to admission decisions made by the federal government itself. This would allow states the maximum level of flexibility necessary to create visa regimes that meet the needs of each particular state.

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166. Cox & Posner, *supra* note 54, at 1332 (footnote omitted); see also Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 473-74 (2018) (“[O]ver the past thirty years, Congress increasingly has devolved considerable authority to states over decisions that affect immigration regulation. . . . Congress has granted power to the states to define and identify key terms of the immigration statute in areas where the states traditionally hold such powers (licensing, criminal law, and family regulation, for example).”).

167. *Korab v. Fink*, 797 F.3d 572, 581-82 (9th Cir. 2014). See also *Nehme v. INS*, 252 F.3d 415, 429 (5th Cir. 2001) (“[T]he Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state.”).

### 3. Impact of the Anti-Commandeering Doctrine

Although federal supremacy and equal protection are the greatest constitutional threats to this Article's proposal, the anti-commandeering doctrine must also be briefly addressed.

The Supreme Court has held that it is unconstitutional for "federal legislation [to] commande[] a State's legislative or administrative apparatus for federal purposes."<sup>168</sup> Davon Collins, in proposing a narrower delegation program in which states could issue temporary employment visas, expressed concern about whether state-based visas would run afoul of the anti-commandeering doctrine.<sup>169</sup> He sought to obviate this issue by emphasizing that his program was voluntary: only states that wanted to participate would do so, and the federal government would not force any state to be involved.<sup>170</sup>

This Article's proposal is less voluntary than Mr. Collins' proposal in that all states would automatically receive a distribution of visas. But it is unlikely to raise any commandeering concerns because no state would actually be forced to issue visas or otherwise build up an immigrant admissions infrastructure. A state could instead sell all of its visas, if it wanted, or it could simply let them go unused, leading to their expiration at the end of the year. Accordingly, the federal government would not be forcing the states to engage in any immigration functions against their will.<sup>171</sup>

Nor should state officials who become responsible for administering the system be seen as state officials doing federal work. Again, creating an application system, vetting applicants, and forwarding requests to the State Department to issue travel permits, would all be undertaken by the states only if they chose to do so. State officials involved in this work would no more be doing federal work than the county clerk or justice of the peace that performed a marriage between a U.S. citizen and a foreign national, or the police officer, district attorney, and state court judge who caused an immigrant to be found guilty of a crime, even though such conduct has direct consequences on an individual's ability to obtain a

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168. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).

169. *See Collins*, *supra* note 12, at 369.

170. *Id.*

171. Somewhat analogously, in response to the Special Juvenile Immigrant Status program, which instructs state courts to make findings relevant to juvenile immigrant applications (see text accompanying *supra* note 162), some state courts have simply declined to make the requested findings, on the ground only the state legislatures, not Congress, can provide them with the jurisdiction to engage in such work. *See generally* *Petition for Writ of Certiorari*, *supra* note 162; *see also* *Canales v. Torres Orellana*, 800 S.E.2d 208, 217 (Va. Ct. App. 2017) (en banc); *de Rubio v. Rubio Herrera*, 541 S.W.3d 564 (Mo. Ct. App. 2017); *Commonwealth v. N.B.D.*, 577 S.W.3d 73 (Ky. 2019).

visa.<sup>172</sup>

Accordingly, for all the reasons stated above, this Article's proposal would most likely pass constitutional muster.

### B. *Political Impediments*

Of course, whether a given proposal is constitutional ultimately has very little to do with whether it is good policy. This Subpart therefore addresses the three most difficult political questions likely to be raised by this Article's proposal.

#### 1. Would the Proposal Increase or Decrease the Total Number of Legal Immigrants to the United States?

In theory, this Article's proposal is disconnected from the question of how many immigrants America should accept each year. Congress could double the number of visas and then let states distribute them; or Congress could slash the number of visas in half and then let states distribute those visas. Either way, devolution to the states would be valuable because of the increased opportunities for experimentation, greater democratic accountability for the policies created, and a distribution of immigrants throughout the country that better reflects the will of local political communities.

That said, realistically, the politicians tasked with enacting this proposal are likely to be most interested in whether the proposal would lead to increased or decreased immigration.

##### *i. Possible Short-Term Decreases*

If this Article's proposal were enacted, it is at least plausible that, in the short-term, the total number of immigrants coming to the United States would decrease.

First, there currently is no cap on the number of visas available for several categories, including immediate family members, temporary farmworkers, and students. Instead, the number of visas for those categories is capped only by the number of individuals who qualify.<sup>173</sup> In

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172. Similarly, Julia Jagow has argued that giving states additional power to regulate guestworker visas would be no different than delegating to states oversight over Medicaid and certain Clean Air Act emissions standards. See Jagow, *supra* note 12. But for a contrasting view, see *States' Commandeered Convictions*, *supra* note 9 (contending that using state convictions as a basis for deportation violates anti-commandeering principles).

173. That is not to say these categories are totally disconnected from the cap system. Often, the number of visas issued for one category can lead to a decrease in the number of visas issued in a different category. See KANDEL, *supra* note 23.

order to transition to a system where states are in charge of issuing visas, and where states can adjust the types and qualifications of each visa, such open-ended categories would need to be eliminated. Instead, there would need to be a specific, total number of permanent visas and a specific, total number of months for temporary visas available each year across all categories.

In establishing this total number, Congress could theoretically take the opportunity to increase the levels of legal immigration, as has repeatedly been proposed.<sup>174</sup> For example, the number of permanent visas could be set at 1,266,129, which is the largest number of permanent visas issued in any one year in the last two decades.<sup>175</sup> However, it would likely be more politically palatable to set the number at about 1,050,000, which is close to the average number of visas issued over the last twenty years.<sup>176</sup> Adopting an average would mean that it is less than the number admitted in certain years, leading to a short-term decrease in the number of legal immigrants. On the other hand, the use of an average also means that the number of admitted immigrants is higher than the number admitted in other years; and over the long-term, the total number of immigrants admitted would be the same as if no cap had been introduced.

Second, there is a risk that certain states would simply refuse to issue the visas allocated to them, leading to a net decrease in the number of immigrants entering the United States each year, even if the number of available visas was the same.

While this possibility cannot be completely dismissed, it should be viewed skeptically. As an initial matter, states that are opposed to increased levels of immigration would be able to profit by selling their visas to other states. Given this incentive, it seems far more likely that states would sell visas, allowing them to be used elsewhere, rather than simply sit on visas and let them expire out of a pique of anti-immigrant sentiment. Moreover, even if there were states that occasionally insisted on neither issuing nor selling their share of the visas, a good reallocation system would prevent any one state from having an outsized impact for more than a few years. As noted above, this Article does not take a position on how the visas should be allocated each year—by total population, by economic size, by history of immigration, or by some other metric. However, under almost any system, states that consistently refuse to issue or sell their visas would eventually receive a smaller and smaller share of visas to distribute at the outset of each new year.<sup>177</sup> The result is

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174. *See supra* note 35.

175. *See* YEARBOOK, *supra* note 24.

176. *Id.* Similarly, the number of months available for temporary visas would ideally be calculated based on the number of temporary visas issued over the last few years.

177. *See supra* notes 83-84 and accompanying text. A system that allocates exactly the same

that no one state, by itself, would have the power to create a long-term decrease in immigration levels.

Finally, it is worth reiterating that anti-immigration sentiment at the state level might still be preferable to anti-immigration sentiment at the federal level. Setting caps on all visas may seem to bode ill for immigration rates, but there would also be some political benefits to that decision. For example, since the decision to admit refugees would be made by the states, this Article's proposal would prevent an anti-immigration president from unilaterally and dramatically reducing the annual number of refugees admitted, since that decision would instead be made by the states.<sup>178</sup> And members of Congress would feel less pressure from anti-immigrant constituents to limit immigration nationally if those same constituents were able to limit immigration at the state level:

By allowing the states individually to let off their steam, however scalding it may be, the nation need not visit the same sins. . . . It is plausible that greater state-level discretion could help build a more durable foundation for a more consistently benign federal posture toward aliens, their admission, and their legal status relative to the citizenry.<sup>179</sup>

Thus, at least arguably, the risks of certain states seeking to reduce the total number of immigrants may still be preferable to the current system.

### *ii. Likely Long-Term Increases*

Notwithstanding the foregoing, it is likely this Article's proposal would lead to a long-term increase in the total number of legal visas authorized each year. By creating a market-based distribution system for visas, states that desire increased immigration will be able to get it by purchasing visas from states that do not want a growing immigrant population. If some states want more visas, even after having exhausted their ability to purchase visas from other states—a likely assumption, given the current demand for immigration<sup>180</sup>—it would be politically easier for their senators and representatives to convince their more recalcitrant colleagues to oblige them. Senators and representatives from states that are opposed to increased immigration could justify supporting an increase in the number of visas by reassuring their constituents—or themselves—

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number of visas to each state, regardless of size or other factors, is the one exception. Under that system, a state that refused to either issue or sell its visas could independently cause an overall decrease in immigration rates to the United States. But as discussed above, *see supra* note 84, such a system would be an exceedingly inefficient allocation, and so should be avoided even apart from the possible ramifications such a distribution would have on net immigration levels.

178. *See Allyn, supra* note 31.

179. *Spiro, supra* note 143, at 173-74.

180. *See supra* notes 115-116 and accompanying text.

that their state would have a direct financial interest in allowing for more visas (because their share of the visas could be sold), without actually risking any influx of new immigrants to their own state.<sup>181</sup>

Accordingly, although there may be legitimate concerns that setting a total cap on the number of visas and allowing states a say in immigrant-admission decisions would lead to a decrease in the number of immigrants to the United States, in the long-term, this proposal could provide the political environment necessary for Congress to increase the number of visas available annually.

### *iii. Fluctuations Due to Increased Bureaucracy*

The above concerns are focused on government conduct: how high a cap Congress will set and how aggressively states will pursue pro-immigrant or anti-immigrant policies. A separate question relates to immigrants themselves. Those in favor of increased immigration could be reasonably concerned that a new, fifty-state visa system would impose such an increase of bureaucratic burdens that would-be immigrants could become discouraged from applying at all. Immigrants with family members in multiple states or job offers in different markets could be forced to do more paperwork to apply for a visa in each of those states, rather than through the unified federal system that exists presently. And to the extent that one state's system is vastly different from other states, the added confusion could be foreboding.

This is a legitimate concern, but its effect would most likely be marginal. After all, immigrants already navigate complex, competing systems to obtain visas. Prospective students, for example, must apply to numerous universities before ever beginning the immigration process.<sup>182</sup> Yet every year, hundreds of thousands of immigrants successfully make it through this process. And of course, the same is true in the employment context. As with applying for school, it can be confusing and exhausting

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181. Economic data shows that even though LPRs may theoretically move anywhere in the United States, they rarely do so. In 2018, only 2.3% of noncitizen immigrants moved from one state to another. The statistics for immigrants that have become U.S. citizens were even lower: just 1.5% moved from one state to another. By contrast, about 2.4% of native-born citizens moved from one state to another in 2018. A spreadsheet summarizing this data is in the possession of the author and may be reviewed upon request. For the raw data, see U.S. CENSUS BUREAU, TABLE B07007: GEOGRAPHICAL MOBILITY IN THE PAST YEAR BY CITIZENSHIP STATUS FOR CURRENT RESIDENCE IN THE UNITED STATES (2019), available at <https://data.census.gov/cedsci/table?q=b07007&g=0100000US&tid=ACSDT1Y2019.B07007&hidePreview=true>.

182. See Chester & Cully, *supra* note 20, at 395 (“To begin the process of obtaining an F-1 Nonimmigrant Student Visa, the student must first apply to a USCIS-approved U.S. academic institution. Upon acceptance, there is a long checklist that the alien student must complete which includes, inter alia, obtaining a Certificate of Eligibility from the school, payment of fees, completion of the visa application itself, and assembling important documents such as birth certificate, transcripts, and passport.”).

to apply to numerous companies before finally obtaining a job, yet this is a necessary prerequisite to obtaining an employment visa.<sup>183</sup>

In short, concerns about increased bureaucracy are understandable but not so serious as to doom this proposal. Delegating powers to the states might create an added burden for immigrants who must navigate multiple states' application and approval processes. But these added costs are, on the whole, likely to be relatively minor. The federal government already delegates significant aspects of the immigration system to employers, sponsoring family members, schools, religious institutions, refugee resettlement agencies, and even the states.<sup>184</sup> Despite these hurdles, immigrants have successfully managed this balkanized system in the past. The creation of state-based visas is unlikely to significantly exacerbate the already existing problems of bureaucracy, and therefore is unlikely to lead to any decrease in the total number of foreign nationals seeking to enter the United States each year.

## 2. Would the Proposal Increase or Decrease Immigrant Segregation?

Under this proposal, pro-immigrant states would be likely to purchase an increasing share of visas, and once immigrants arrive in a particular state, they are likely to stay there.<sup>185</sup> Accordingly, this proposal has the potential to increase the immigrant populations of certain pro-immigrant states while other states stagnate, leading to increasingly segregated immigrant communities.

This risk of increased segregation has been identified as one of the key reasons *not* to allow state involvement in immigration decisions. As one commentator has noted:

[A]llowing states to engage in experiments that either welcome or repel immigrants threatens to undermine national cohesion in a number of ways. . . . [S]tate immigration laws generate three separate divisions that fall along racial and ethnic lines: (1) profiling and selective enforcement; (2) the actual movement of immigrants, most of whom are Latino, away from restrictionist states; and (3) public attitudes about these trends. These developments threaten to shake loose the nation's basic conception of a shared identity.<sup>186</sup>

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183. While the immigrant is responsible for finding a job, once a position is secured, it is the prospective employer, not the immigrant, who takes the lead in working through the visa application system. *Id.* at 391 ("Forms detailing the position and salary, as well as information regarding salaries of U.S. employees in similar positions, and any necessary fees are submitted to USCIS by the employer, not by the potential employee.").

184. Cox & Posner, *supra* note 54.

185. See U.S. CENSUS BUREAU, *supra* note 179.

186. See Cunningham-Parmeter *supra* note 10, at 1720-21; see also Wishnie, *supra* note 10 (warning that devolution will necessarily lead to increased anti-immigrant discrimination); Burch Elias,

But there are reasons to be skeptical of this conclusion. First, immigrants are already segregated: most immigrants have sorted themselves into just a few corners of the country.<sup>187</sup> This proposal may bring some light to this already-existing structure, as some states seek an increasing share of the visas and others sell their visas off, but it is unlikely to dramatically exacerbate the problem. On the contrary, immigration to historically underrepresented regions might actually increase if states decide to create visa programs that are explicitly designed to entice immigrants to settle in depopulating areas.<sup>188</sup>

Second, it is not necessarily apparent that this type of sorting is as big a threat to social cohesion as some suggest. Professor Cristina Rodríguez, for example, has noted that:

[T]he processes of absorbing [immigrants] into the body politic may ultimately benefit from a bit of regulatory competition or from population sorting in which immigrants settle in welcoming communities. Such competition might make for better integration in the long run: immigrants, like citizens, will sort themselves out, settling where they are more likely to fit in and be welcomed into public institutions.<sup>189</sup>

For these reasons, if immigrant admission powers were devolved the states, an increase in immigrant segregation would be unlikely to occur. And even if it did occur, it would not necessarily be a cause for concern.

### 3. The Question of Amnesty

Finally, another benefit of this Article's proposal is that states could choose whether to provide a permanent visa—and, eventually, the citizenship that follows—to undocumented immigrants already in the country.<sup>190</sup> But as this would likely be a particularly politically-charged

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*supra* note 11, at 407 (warning that, if states were allowed a greater say in refugee resettlement, “it is all too easy to imagine lawmakers seeking to appeal to voters by engaging in ever more draconian measures against vulnerable asylee and refugee populations in their states”).

187. Of the 22 million noncitizen immigrants living in the United States in 2018, 54% lived in just four states: California, Texas, Florida, and New York. In comparison, those same four states represent just 33% of the total U.S. population. In fact, 80% of non-citizen immigrants live in just 14 states, and 90% live in just 23 states. Again, for comparison, those states represent 61% and 79% of the total U.S. population, respectively. Perhaps even more shockingly, 51% of noncitizen immigrants live in just eight metropolitan areas: New York City, Los Angeles, San Francisco, Miami, Houston, Chicago, Dallas, and Washington, D.C. Together, these cities only represent about 28% of the total U.S. population. *See* U.S. CENSUS BUREAU, *supra* note 179.

188. *See* Mathema, Svajlenka & Hermann, *supra* note 88; *See also* Jagow, *supra* note 12, at 1292 (noting that Canada's “Provincial Nominee Program has proved essential because it helps to spread out the benefits of immigration to all provinces and territories instead of just to major cities, like Toronto, Montreal and Vancouver.”).

189. Rodríguez, *supra* note 11, at 639.

190. *See supra* note 89 and accompanying text.

issue, it is worth briefly examining in more detail how that would work.

Even under this proposal, it is expected that the federal government would continue to be responsible for running background checks on those to whom the states have decided to issue visas.<sup>191</sup> This raises a difficult question as to whether an individual unlawfully in the United States could pass such a background check.

Congress would almost certainly have to deal with this issue in the same legislation used to create this new program. It could do so in several ways. First, to make this Article's proposal as effective as possible, Congress could expressly legislate that an unlawful crossing or visa overstay, by itself, would not be enough to deny a subsequent permanent visa to an immigrant if that immigrant has otherwise been approved for a visa by a state. In other words, entering or remaining in the United States without a visa would still be illegal, and an undocumented immigrant could still be deported by the United States if they are unable to obtain a visa from any of the states, but a state could provide visas and a path to citizenship to undocumented immigrants if it wanted to, without interference from the federal government.

Alternatively, Congress could provide discretion to federal officials within the Department of Homeland Security to decide, on a case-by-case or class-by-class basis, whether undocumented applicants should pass their background checks. This raises significant concerns about arbitrary decision-making at the federal level, but may be more politically palatable to a federal government that is often hesitant—if not downright resistant—to divesting itself of its own power. Under this scenario, one presidential administration could permit certain favorable classes of undocumented immigrants (agricultural workers, Dreamers, or foreign students graduating from U.S. colleges, for example) to pass their background checks and obtain permanent visas from a state that authorized visas to such individuals, while still vetoing permanent immigration status for other undocumented immigrants, regardless of the willingness of certain states to authorize permanent visas for those individuals. A later presidential administration, on the other hand, could reverse course and prohibit *any* undocumented immigrants from obtaining a permanent visa, regardless of the desires of individual states. Although far from ideal, this would still be a big step forward from the status quo, in which some eleven million people are living in an endless legal limbo, because it would at least allow for the possibility of occasional relief for some subset of the undocumented population.<sup>192</sup>

Third, Congress could of course delegate immigrant admission powers

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191. *See supra* note 94.

192. *See supra* note 115.

to the states while simply prohibiting them from providing any permanent visas to undocumented immigrants.<sup>193</sup> While this would leave the biggest immigration issue in the United States unresolved, this Article's proposal would still be valuable even if political realities meant that states were prevented from engaging in any conduct that resembled an amnesty program. After all, this proposal is most likely, in the long-term, to lead to higher levels of legal immigration, which is itself a partial solution to the problem of illegal border crossings and visa overstays.<sup>194</sup> In other words, the benefits of the proposal do not live or die on the question of a path to legal citizenship.

### CONCLUSION

The United States immigration system is "broken." Or, at least, so says Donald Trump,<sup>195</sup> Barack Obama,<sup>196</sup> George W. Bush,<sup>197</sup> Hillary Clinton,<sup>198</sup> Mitt Romney,<sup>199</sup> John McCain,<sup>200</sup> Nancy Pelosi,<sup>201</sup> and Paul Ryan,<sup>202</sup> to name just a few bipartisan critics of the status quo.

Acknowledging the problem over and over again, however, has not led to any concrete reforms, even though many possible solutions—or, at least, plausible ideas worth trying—exist. If the political will to enact

193. Even if this were the case, one would hope Congress would still allow states to provide temporary visas (which come with no possibility of citizenship) for undocumented immigrants, as two recent proposals have called for. See Agricultural Guestworker Act, H.R. 4092, 115th Cong. (2018); Farm Workforce Modernization Act, H.R. 5038, 116th Cong. (2019).

194. See *supra* note 116.

195. *President Donald J. Trump's State of the Union Address*, THE WHITE HOUSE (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

196. *President Barack Obama's State of the Union Address*, THE WHITE HOUSE (Jan. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

197. N.Y. Times, *George W. Bush on Immigration: 'The System Is Broken'*, YOUTUBE (Jul. 10, 2013), <https://www.youtube.com/watch?v=f1WaojCCqXA>.

198. *Immigration Reform*, HILLARY CLINTON, <https://www.hillaryclinton.com/issues/immigration-reform/> (last visited Nov. 11, 2020).

199. Ezra Klein, *Mitt Romney's Immigration Plan: The Full Text*, WASH. POST (June 22, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/06/22/mitt-romneys-immigration-plan-the-full-text/>.

200. John McCain, *U.S. Sen. John McCain: Will Support Policies to Grow the Economy and Alleviate Some Financial Strain on Arizona Families*, TUCSON.COM (Jan. 6, 2013), [https://tucson.com/news/opinion/jobs-gun-violence-immigration-top-agenda-for-our-senators-representatives/article\\_f80445b2-3819-56f5-9d10-7f812f1e408c.html](https://tucson.com/news/opinion/jobs-gun-violence-immigration-top-agenda-for-our-senators-representatives/article_f80445b2-3819-56f5-9d10-7f812f1e408c.html).

201. Bloomberg Businessweek, *Pelosi 'Not Giving Up Hope' on Immigration Overhaul*, BLOOMBERG (Dec. 4, 2014), <https://www.bloomberg.com/news/videos/2014-12-04/pelosi-not-giving-up-hope-on-immigration-overhaul-video>.

202. Sandra McElwaine, *Immigration's Odd Couple: Two Puerto Rican Congressmen Forge a Deal*, THE DAILY BEAST (Jul. 11, 2017), <https://www.thedailybeast.com/immigrations-odd-couple-two-puerto-rican-congressmen-forge-a-deal>.

such changes cannot be found at the federal level, states should be given an opportunity to step into the breach. After all, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>203</sup> By devolving immigrant admission powers to the states, paralyzed politicians could finally find their way out of the immigration labyrinth, and could finally cut the Gordian knot that is the modern U.S. immigration regime.

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203. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).