

THE TEMPEST TOSSED-ASIDE: HOW POLITICIZING IMMIGRATION POLICY HAS STALLED REFORM AND *DEHUMANIZED* IMMIGRANTS

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INTRODUCTION

*"Give me your tired, your poor,
Your huddled masses yearning to breathe free;
The wretched refuse of your teeming shore—
Send these, the homeless, tempest-tost to me—
I lift my lamp beside the golden door!"¹*

Lady Liberty, formerly a gatekeeper to the sovereign soil of the United States, has these immortal words emblazoned at her feet. The New Colossus was a sonnet written in 1883 by Emma Lazarus to raise money for the statue's construction; the sonnet was cast onto a bronze plaque at her feet in 1903. In theory, these words are the ideal—the picturesque example of what should define America's stance on immigration: we will take anyone from anywhere; not just the social elites, but even the "wretched refuse" or "homeless, tempest-tost."² Now nearly inconceivable in today's legal and political climate, this sonnet came about during an era of immigration law when the U.S. essentially had an open border. However, we have had a far fall from this idealized perception of immigration and just exactly who we will give the honor of touching American soil. Instead, fiery and accusatory rhetoric as well as unfulfilled campaign promises now mark immigration policy in the U.S. The immigration issue has become highly politicized. Now, immigrants' primary role in political discourse is as a pawn for political points. Democrats tend to

1. Emma Lazarus, *The New Colossus*, in CATALOGUE OF THE PEDESTAL FUND ART LOAN EXHIBITION, AT THE NATIONAL ACADEMY OF DESIGN 9 (1883).

2. *Id.*

make lofty promises of immigration reform with little to show for it,³ while Republicans play immigrants up to be nothing short of an invading foreign force.⁴ As such, the chief source of the issue in immigration policy today lies in the dehumanization of immigrants. I will argue that the politicization of the immigration issue has further dehumanized immigrants, stunted effective immigration policy, and worsened the situation at the border. The solution to this problem is comprehensive immigration reform.

II. BACKGROUND

A. *A Brief History of Immigration Law*

To properly understand where the law stands and how it functions, it is supremely important to understand the long, often unknown, history of immigration law and policy in the U.S. Before that, it is important to note how immigration law is administered. The Constitution elucidates that Congress has the power to “establish [a] uniform Rule of Naturalization”⁵ From this power, the Court has found that Congress has an, arguably unenumerated, plenary power over immigration law.⁶ The Executive also has a measure of this plenary power that is based on its power over foreign relations that comes with being a

3. See Ted Hesson, Dave Graham & Humeysra Pamuk, *Exclusive: Biden urges Mexico to take migrants under COVID expulsion order he vowed to end*, REUTERS (Sept. 15, 2022, 2:47 PM), <https://www.reuters.com/world/americas/exclusive-biden-urges-mexico-take-migrants-under-covid-expulsion-order-he-2022-09-14/#:~:text=WASHINGTON%2FMEXICO%20CITY%2C%20Sept%2013,to%20end%2C%20seven%20U.S.%20> (stating that the Biden administration officials view expulsions as a means to discourage migration despite contradicting the party’s “welcoming message” of inclusivity and promising an end to Title 42).

4. See Joel Rose, *A Majority of Americans See an ‘Invasion’ at the Southern Border*, NPR Poll Finds, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds> (describing a poll that found three-quarters of Republicans believe the country is “experiencing an invasion” along the border with Mexico).

5. U.S. CONST. art. I, § 8, cl. 4.

6. See *Ping v. United States*, 130 U.S. 581, 609 (1889) (noting that the legislative branch in the United States has total control to exclude aliens from the country).

sovereign.⁷ As such, the courts have often been very quick to defer to the Legislature's administration of the laws in the immigration field.⁸ On the ground, the Executive regulates through various administrative agencies that handle everything from the adjudication to the enforcement of immigration laws in the U.S.⁹

There are three primary eras of immigration policy that we will walk through to better understand the depth of the problem and the potential for solutions. These eras are: Open Immigration, Numeric Quotas, and the Modern Era. Each era, with some of its most prominent and relevant statutes, will be addressed below.

1. An Era of Open Immigration

The first major era of immigration law is considered the era of Open Immigration. Though this title is a slight misnomer, it is essentially correct. As will be apparent, immigration laws in the United States are colored by an uncomfortable and blatant history of racial discrimination.¹⁰ However, during this period that began at the country's founding, there were very few statutes barring entrance into the U.S.¹¹ The Naturalization Act of 1790

7. *See id.* at 605–07 (asserting the U.S. national government and executive branch has jurisdiction over many general subjects of sovereignty, such as foreign relations of the nation, and power to keep foreigners out of the country).

8. *See id.* at 597, 603 (asserting that immigration legislation was entrusted to government discretion and allows the legislative branch to act to exclude “aliens from its territory”).

9. *See, e.g., Secure U.S. Borders and Manage Safe, Orderly, and Humane Immigration Processes*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/secure-us-borders-and-approaches> (last visited Aug. 29, 2023) (providing that Department of Homeland Security works on removal procedures for individuals illegally migrating to the United States under U.S. law).

10. *See* Naturalization Act of 1790, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20 (“[A]ny Alien, being a free white person, who shall have resided within the limits and under the jurisdictions of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record . . .”).

11. *See generally* D’Vera Cohn, *How U.S. immigration laws and rules have changed through history*, PEW RSCH. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/> (noting the 1790 Naturalization Act was the first law to actually describe who could become a United States citizen).

was the first real immigration law in the U.S., giving “free white persons” the right to naturalize.¹² The Alien and Sedition Acts of 1798 were pieces of legislation that set the tone for viewing immigration through a more exclusive lens.¹³ These were four acts passed on the brink of a French invasion and were intended to quell concerns that national security was at risk.¹⁴ Among other things, these acts granted the ability to remove noncitizens who were citizens or subjects of countries that the United States was at war with and deport any noncitizen who was dangerous to the peace and safety of the United States.¹⁵ Eventually, these increasing restrictions began to be based on where the noncitizen was from; thus, the Chinese Exclusion Act of 1882 was the first major legislation that posed a bar to certain immigrants—specifically on the grounds of the noncitizen’s country of origin.¹⁶ The Chinese Exclusion Act was the focus of a foundational Supreme Court opinion, holding that Congress possesses plenary power over not just the naturalization of immigrants, but even over who may and may not enter the country.¹⁷

2. The Era of Numeric Quotas

The next era of immigration law was defined by numeric quotas for each country. Notably, the Immigration Act of 1924 extended a similar act from 1921, the Emergency Quota Act of 1921, establishing that immigration quotas for each country be calculated based on two percent of each nationality’s proportion

12. See *id.*; see Naturalization Act of 1790, 1 Stat. 103–04.

13. See, e.g., Alien Act, 1 Stat. 570–71 (1798) (indicating the expiration of the Act).

14. Ken Drexler, *Alien and Sedition Acts: Primary Documents in American History*, LIBRARY OF CONGRESS (Sept. 27, 2019), <https://guides.loc.gov/alien-and-sedition-acts>.

15. See, e.g., Alien Enemies Act, 1 Stat. 577 (1798) (“[A]ll natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies”).

16. Chinese Exclusion Act, Pub. L. No. 47–126, 22 Stat. 58 (1882) (repealed 1943).

17. See *Ping*, 130 U.S. at 606–07 (1889) (noting that neither the executive nor the legislative branch has ever denied the power of the government to exclude people from outside the country when the government determines public interest requires such exclusion).

of the foreign-born U.S. population in 1890.¹⁸ Though this seems like a random year to begin the calculation, it was likely due to the large influx of Southern and Eastern Europeans that entered the country after this date.¹⁹ “Circular migration” began to grow during this era as well.²⁰ There was consistent migration of Mexican agriculture workers who immigrated to work the harvest and then returned to their families in the off-season.²¹ These migrant workers were met with little to no border enforcement as we currently consider it.²² Further, America’s immigration policy reflected a posture that was more open to some of the “tempest-tost”²³ during this era, after World War II. Specifically, the U.S. passed the Displaced Persons Act of 1948,²⁴ the Refugee Relief Act of 1953,²⁵ and the Migration and Refugee Assistance Act of 1962.²⁶ The Displaced Persons Act of 1948 allowed over 200,000 refugees displaced from their European homeland by

18. See Immigration Act of 1924, Pub. L. No. 68–139, ch. 190, 43 Stat. 153 (repealed 1965); *Closing the Door on Immigration*, NAT’L PARK SERV. (July 18, 2017), <https://www.nps.gov/articles/closing-the-door-on-immigration.htm#:~:text=The%20Emergency%20Quota%20Act%20of,the%20quotas%20stricter%20and%20permanent> (“The Emergency Quota Act of 1921 established the nation’s first numerical limits on the number of immigrants who could enter the United States. The Immigration Act of 1924, also known as the National Origins Act, made the quotas stricter and permanent”).

19. See Philip Martin, *The Global Challenge of Managing Migration*, 68 POPULATION BUREAU, Nov. 2013, at 1, 5–6 (highlighting that more than 20 million Europeans immigrated to the United States between 1880 and 1914, an average of 650,000 people a year at a time when the U.S. had a total of 75 million residents, and this wave of immigration was slowed by numerical quotas implemented during the 1920s).

20. Jeffrey Passel et al., *Net Migration from Mexico Falls To Zero – And Perhaps Less* PEW HISPANIC CTR., PEW RSCH CTR. 1, 19 (2012), <https://www.pewresearch.org/hispanic/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/> (“For the past century, a large share of Mexican migration has been temporary, so-called circular migration, in which Mexicans (mainly men) came to the U.S. for work, often in agriculture, and returned to their families in Mexico during the off-season”).

21. *Id.*

22. *Id.*

23. Lazarus, *supra* note 1.

24. Displaced Persons Act of 1948, Pub. L. No. 774, ch. 647, 62 Stat. 1009 (amended 1951).

25. Refugee Relief Act of 1953, Pub. L. No. 203, ch. 336, 67 Stat. 400 (amended 1954).

26. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87–510, 76 Stat. 121.

Nazi persecution entrance into the U.S.²⁷ The Refugee Relief Act of 1953 authorized the admission of 205,000 refugees fleeing persecution from Europe.²⁸ Finally, the Migration and Refugee Assistance Act of 1962 gave funds to support Cubans fleeing persecution because of Communism.²⁹ These acts indicate that the immigration policies of the day addressed the global crises that furthered immigrant issues. However, these acts sought to give relief based on various, specific situations.³⁰

3. The Modern Era

The modern era of immigration law saw a dramatic change in several different ways. Different from the quota system of the past, the Immigration and Nationality Act of 1965³¹ created a preference system based on seven different categories—with family reunification being the primary category.³² Each preference category had numerical limits, except for immediate relatives of U.S. citizens.³³ Importantly, Western hemisphere immigrants were given 120,000 visas to share.³⁴ The Refugee Act of 1980 set the framework for admitting refugees from abroad and

27. See Displaced Persons Act §§ 2–3.

28. See Refugee Relief Act §§ 2–3.

29. See generally Migration and Refugee Assistance Act; See also *Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERV. (February 7, 2023), <https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline#:~:text=1962&text=The%20Migration%20and%20Refugee%20Assistance,from%20Cold%20War%20communist%20countries>.

30. See Cohn, *supra* note 11 (“[L]aws since enacted have reflected the politics and migrant flows of the times.”).

31. See Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (amended 1986); see also Andrew Kohut, *In ‘60s, Americans gave thumbs-up to immigration law that changed the nation*, PEW RSCH. CTR. (Sept. 20, 2019), <https://www.pewresearch.org/short-reads/2019/09/20/in-1965-majority-of-americans-favored-immigration-and-nationality-act-2/>.

32. See Immigration and Nationality Act; see also Philip E. Wolgin, *The Immigration and Nationality Act of 1965 Turns 50*, CTR. FOR AM. PROGRESS (Oct. 5, 2015), <https://www.americanprogress.org/article/the-immigration-and-nationality-act-of-1965-turns-50/>.

33. Wolgin, *supra* note 32.

34. *Id.*

immigrants who entered the U.S. seeking asylum.³⁵ Arguably the last pro-immigrant legislation was the Immigration Reform and Control Act passed under Ronald Reagan in 1986.³⁶ Notably, this Act granted “amnesty” to a select group of undocumented immigrants.³⁷ This amnesty ended up putting several million undocumented people on a path to legal status in the U.S. This measure was counter-balanced with assurances to enhance border security³⁸ and civil and criminal penalties for employers who knowingly employed undocumented immigrants.³⁹

Still in this era, the Immigration Act of 1990 nearly tripled the number of employment visas the U.S. issued, from 54,000 prior to the passage of the Act, to 140,000.⁴⁰ And finally, the most recent and substantial, piece of immigration legislation is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁴¹ This Clinton-era Act created what are known as bars of inadmissibility that prohibit people who unlawfully reside in the U.S. from returning for either three or ten years based on how long they resided in the U.S. unlawfully.⁴² Further, the Act expedited removal proceedings for immigrants and permit agreements with state and local law enforcement to enforce

35. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102.

36. See Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359.

37. Immigration Reform and Control Act (IRCA) (1986), IMMIGR. HIST., <https://immigrationhistory.org/item/1986-immigration-reform-and-control-act/>; see Immigration Reform and Control Act of 1986.

38. See Immigration Reform and Control Act of 1986, *supra* note 37.

39. *Id.* § 274A.

40. See Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978; Daniel Costa, *Temporary Migrant Workers Or Immigrants? The Question For U.S. Labor Migration*, 6 RUSSEL SAGE FOUND. J. SOC. SCIS. 18, 21 (2020), <https://muse.jhu.edu/pub/207/article/777518/pdf>.

41. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–120, 110 Stat. 300–546.

42. Illegal Immigration Reform and Immigrant Responsibility Act §301(B); Stephanie Torres, Catherine DeCarlo Santiago, Maryse H. Richards & Katherine Kaufka Walts, *The Impact of Immigration Policy On Latino Families: A Call To Action For Psychologists*, SOC’Y OF CLINICAL PSYCH. (2018), <https://div12.org/the-impact-of-immigration-policy-on-latino-families-a-call-to-action-for-psychologists/#~:text=For%20example%2C%20the%20Illegal%20Immigration,from%20entering%20the%20U.S.%20again.>

immigration laws.⁴³ Given the strain that immigration enforcement exerts on the federal system, these permit agreements with state and local bodies are crucial for increasing the amount of interior enforcement that takes place. In fact, the often-covered “sanctuary cities” are simply cities where the local authorities have refused to help federal officials enforce immigration laws.⁴⁴

Other important developments during this era were the North American Free Trade Agreement (NAFTA) and the September 11th terrorist attacks.⁴⁵ Similar in essence to the European Union (E.U.), NAFTA made trade substantially easier between Mexico, the U.S., and Canada; however, it was distinct in that it did not allow the citizens of the three nations to travel freely between each other—what the E.U. calls “free movement.”⁴⁶ The Agreement quickly made Mexican agriculture less competitive compared to the United States, yet it did not give Mexican agricultural workers the freedom to legally cross over to work in the U.S. as an alternative.⁴⁷ Additionally, the September 11th

43. Illegal Immigration Reform and Immigrant Responsibility Act §302; Muzaffar Chishti & Jessica Bolter, *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*, MIGRATION POL’Y INST. (Sept. 22, 2021), <https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security#:~:text=Immediately%20after%209%2F11%2C%20U.S.,as%20potential%20national%20security%20threats>.

44. *What are Sanctuary Cities and Why Do They Exist?*, LUTHERAN IMMIGRATION AND REFUGEE SERV., (July 12, 2021), <https://www.lirs.org/what-are-sanctuary-cities-why-do-they-exist/#:~:text=Sanctuary%20cities%20today%20refer%20to,city%20to%20claim%20this%20status>.

45. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (highlighting the passage of a major treaty between the United States and Mexico that coincided with a period of immigration reform in the United States); Peter L. Bergen, *September 11 attacks*, BRITANNICA (Aug. 28, 2023), <https://www.britannica.com/event/September-11-attacks> (highlighting a major event in U.S. history that impacted and coincided with a period of immigration reform in the United States).

46. *Free movement – EU nationals*, EUR. COMM’N, <https://ec.europa.eu/social/main.jsp?catId=457> (last visited Aug. 28, 2023) (explaining that the European Union is a group of 27 countries in Europe that formed a partnership to make things better, easier, and safer for their citizens by working together as one entity).

47. Natalie Sears, Comment, *NAFTA and its Twenty-Year Effect on Immigration*, 20 L. & BUS. REV. AMS. 669, 672 (2014).

attacks transformed the modern era of immigration law.⁴⁸ A catastrophic event in so many ways, the attacks shaped the U.S.'s immigration policy by shifting how the public viewed the issue.⁴⁹ Primarily, the attacks made immigration policy, above all things, a question of national security.⁵⁰ As a result of the attacks, the Department of Homeland Security (DHS)⁵¹ was created. DHS houses both the U.S. Citizenship and Immigration Services (USCIS)⁵² and the U.S. Customs and Border Protection (CBP).⁵³ Framing immigration as chiefly a question of national security drastically shaped the ways that pundits, and more importantly, candidates, discussed the issue.

B. The Prominence of Immigration in Political Discourse

When assessing voter concern about immigration, it's important to consider that in the post-9/11 world, this also includes "terrorism." Undoubtedly, not all of what voters were thinking about when it came to "terrorism" was immigration policy, but the two are inextricably linked. The most effective way to combat terrorism, in most people's minds, was to ratchet down on immigration enforcement.⁵⁴ The discussion became less about how immigrants can boost an economy or take away jobs and more about how any immigrant has the potential to cause another 9/11.⁵⁵ Admittedly, this is a completely reasonable reaction given the severity of the event. However, this concern furthered the

48. Bergen, *supra* note 45.

49. Muzaffar Chishti & Jessica Bolter, *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*, MIGRATION POL'Y INST. (Sept. 22, 2021), <https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security#:~:text=Immediately%20after%209%2F11%2C%20U.S.,as%20potential%20national%20security%20threats>.

50. *Id.*

51. *Creation of the Department of Homeland Security*, DEPT OF HOMELAND SEC., <https://www.dhs.gov/creation-department-homeland-security> (last visited Sept. 2, 2023).

52. *Who Joined DHS*, DEPT OF HOMELAND SEC., <https://www.dhs.gov/who-joined-dhs> (last visited Aug. 26, 2023).

53. *Id.*

54. See Chishti & Bolter, *supra* note 43.

55. *Id.*

politicization of the immigration issue.⁵⁶ Immigrants begin to become viewed as dangerous intruders instead of wandering sojourners coming to our borders seeking refuge and a new life.⁵⁷

The prominence of immigration in political discourse can be traced by how important it has been to voters; this prominence has grown sharply as a result of the September 11th attacks and the emotional significance that immigration now holds to many voters.⁵⁸ The Pew Research Center (Pew Research) has been evaluating statistics regarding voter sentiment for decades.⁵⁹ The data that they present, beginning in 2008, is the percentage of voters saying that the topic is “very important” to their vote in the respective presidential election.⁶⁰ To begin, in its analysis of the 2000 election, Pew Research fails to even mention either terrorism or immigration as being notably relevant to voters.⁶¹ However, 9/11 occurred between the 2000 and 2004 elections. As such, polls from Pew Research and Gallup point to a growth in the issue’s importance, with Gallup claiming that the economy and terrorism were tied for the issues that were “extremely important” in the 2004 election.⁶² In 2008, Pew Research began tracking immigration as an issue and found that 52% of voters felt that immigration was “very important” to their vote.⁶³

56. *See id.*

57. *Id.*

58. *See infra* Figure 1.

59. *See, e.g.*, PEW RSCH. CTR. FOR THE PEOPLE & THE PRESS, PEW RSCH. CTR., *RETRO POLITICS 1* (Pew Rsch. Ctr., 3rd ed. 1999).

60. *See, e.g.*, PEW FORUM ON RELIGION & PUBLIC LIFE, PEW RSCH. CTR. FOR THE PEOPLE & THE PRESS, *SOME SOCIAL CONSERVATIVE DISSOLUTIONMENT: MORE AMERICANS QUESTION RELIGION’S ROLE IN POLITICS 24–27* (Pew Rsch. Ctr., 2008) [hereinafter PEW FORUM ON RELIGION].

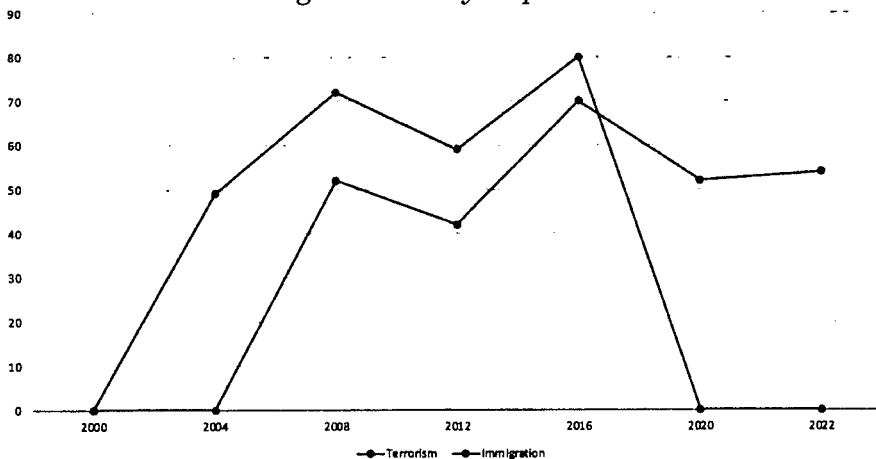
61. *Id.* at 48–53.

62. *See* PEW RSCH. CTR. FOR THE PEOPLE & THE PRESS, *THE 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED 7, 11, 27–28, 33, 73–74* (Pew Rsch. Ctr., 2003); Joseph Carroll, *Economy, Terrorism Top Issues in 2004 Election Vote*, GALLUP (Sept. 25, 2003), <https://news.gallup.com/poll/9337/economy-terrorism-top-issues-2004-election-vote.aspx> (showing 49% of voters say that both the economy and terrorism were “extremely important” to their vote, and there is no mention of immigration as a voting issue).

63. PEW FORUM ON RELIGION, *supra* note 60 at 24.

Terrorism was also found to be very important to 72% of voters.⁶⁴ Moving on to 2012, terrorism and immigration both dropped significantly in the role that they play in the minds of the voters with only 59% and 42%, respectively, stating that the issues were “very important” to their votes.⁶⁵ These drops are both more than 10% from the previous midterm election.⁶⁶ This is likely due to the economic crisis of 2008 that grabbed the attention of voters in 2012. However, data from the 2016 election showcased a monumental shift. In this election, the percentage of voters who believe that terrorism is “very important” moves from 59% to 80%, a 21% increase, while the prominence of immigration moves from 42% to 70%, a shocking 28% increase from the 2012 election.⁶⁷

Figure 1—Percentage of Voters Who Found Terrorism or Immigration “Very Important”⁶⁸



This dramatic increase in the relevance of immigration and terrorism can realistically be related to the stoking of the fire by

64. *Id.*

65. PEW RSCH. CTR. FOR THE PEOPLE & THE PRESS, SOCIAL ISSUES RANK AS LOWEST PRIORITIES WITH VOTERS FOCUSED ON ECONOMY, OBAMA LEAD NARROWS 11 (Pew Rsch. Ctr., 2012).

66. *See id.*

67. *Id.* at 11 (citing 2012 polling on immigration and terrorism); PEW RSCH. CTR., 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 31 (2016).

68. *See infra* Section II.B.

Donald Trump.⁶⁹ As many know, two of former President Trump's primary platform considerations were both the "Build the Wall" campaign for building a border wall on the U.S.-Mexico border and his self-proclaimed "Muslim Ban."⁷⁰ Knowing that these were of heavy importance to his voters, Trump enacted two executive orders within his first seven days in office about each issue.⁷¹ These issues were embroiled with fiery, accusatory language, lobbed primarily at the immigrants themselves.⁷² However, between the 2016 and 2020 elections, the COVID-19 pandemic, its effect on the economy, and the growing conversation around race relations in the U.S., stripped much of the growing importance of immigration, terrorism, and national security discussions in the U.S.⁷³ Unsurprisingly, this led to a decrease in the prominence of the issue in the 2020 election cycle with immigration reverting to only having 52% of voters consider it "very important" while terrorism fell off the list of top issues altogether.⁷⁴ With that, there has been a pathetic effort from the Biden administration to reform or change the immigration system.⁷⁵ As will be discussed further, the current administration

69. See generally Brian Duignan, *Presidential election of 2016 of Donald Trump*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Donald-Trump/Presidential-election-of-2016> (last updated Aug. 23, 2022) (highlighting Donald Trump's campaign issues such as immigration and inflammatory remarks by Trump, including racist remarks).

70. *Id.*; Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says—and ordered a commission to do it 'legally'*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/> (reporting Trump called his personal lawyer, Rudy Giuliani, about wanting a "Muslim ban").

71. See Avalon Zoppo, et al., *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS (Oct. 17, 2017), <https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796>.

72. See, e.g., Michael Monday, *Donald Trump: Mexico is Bringing Drugs, Crime and Rapists to the US*, USA TODAY (June 25, 2015), <https://www.usatoday.com/videos/news/2015/06/25/29292957/>.

73. *Important Issues in the 2020 Election*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/>.

74. *Id.*

75. Andy J. Semotiuk, *Biden's Immigration Reforms: New Initiatives Replace Early Setbacks*, FORBES (Aug. 23, 2023), <https://www.forbes.com/sites/andysemotiuk/2023/>

has shown zero urgency in creating any lasting change or reform, and that is likely due to the few political points it now carries in the modern climate.⁷⁶ The issue is clearly politicized based on just how polarized it is. Pew Research's data demonstrates that only 54% of voters found immigration "very important" to their vote in the 2022 midterm elections; however, when split between the political parties, the importance was 76% among Republicans and a mere 36% among Democrats.⁷⁷ As such, Biden, seeking to appease his voting base, has no need to seek any urgent immigration reform because his constituents and voters see no drastic need either. This is all happening while the number of nationwide encounters at the Southern Border are astronomically high.⁷⁸ As will be addressed later, there are certain reasons that those numbers may be inflated (though that inflation is ironically due to the total absence of immigration reform). Even so, while Republicans have been riled up by fiery and often racially discriminatory rhetoric, Democrats have certainly turned a blind eye to the issue.⁷⁹

C. *Why Immigration is Distinct*

A final piece of context to consider before evaluating the current state of immigration policy is the parties and interests involved. The U.S. and its citizens rightfully celebrate the privilege of having a say in the laws of the land that affect them on a day-to-day basis. However, immigration law is distinct in this respect because the people who are affected by the law have

08/22/bidens-immigration-reforms-new-initiatives-replace-early-setbacks/?sh=4498d9ee11de.

76. Katherine Schaeffer & Ted Van Green, *Key Facts About U.S. Voter Priorities Ahead of the 2022 Midterm Elections*, PEW RSCH. CTR. (Nov. 3, 2022), <https://www.pewresearch.org/fact-tank/2022/11/03/key-facts-about-u-s-voter-priorities-ahead-of-the-2022-midterm-elections/>.

77. *Id.*

78. *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last modified Feb. 6, 2023).

79. See Mike Debonis, *Democrats in tough races revolt over Biden administration border move*, WASH. POST (Apr. 15, 2022), <https://www.washingtonpost.com/politics/2022/04/15/biden-border-democrats/>.

no say over it.⁸⁰ Naturally, this makes sense. It is in fact a privilege to have a say over what the law is, and that privilege should not extend to just anyone. Importantly, this relationship goes both ways. The people deciding what the law should be for immigrants are never directly affected by it because they are not immigrants.⁸¹

Though this seems straightforward, this mentality is a driver of the policy that stands today; often those who want the most restrictions on immigration are the ones who also want the most say over immigration laws.⁸² These voters want to sharply restrict immigration, whatever the cost, due to what little effect it has on them.⁸³ In fact, these voters are clearly far removed from the immigrant community as demonstrated by their tendency to view immigrants as “invaders” or “intruders” as opposed to “neighbors.”⁸⁴

Rightfully or not, immigrants in or attempting to enter the U.S. find themselves in a state of perpetual disenfranchisement over issues that affect them deeply and personally.⁸⁵ This factor is relevant to consider while analyzing the system as it stands and the need for citizens to consider the needs of those on our “teeming shore.”⁸⁶

80. See, e.g., *Who Can and Can't Vote in U.S. Elections*, USAGOV, <https://www.usa.gov/who-can-vote> (last visited Sep. 22, 2023).

81. See, e.g., *Immigration and Citizenship*, USAGOV (Sep. 22, 2023), <https://www.usa.gov/immigration-and-citizenship> [hereinafter *Immigration and Citizenship*] (giving examples of various matters in the immigration system that per se do not involve citizens).

82. Emily Ekins & David Kemp, *Poll: 72% of Americans Say Immigrants Come to the United States for Jobs and to Improve Their Lives*, CATO INST. (Apr. 27, 2021, 9:22 AM), <https://www.cato.org/blog/poll-72-americans-say-immigrants-come-us-jobs-improve-their-lives-53-say-ability-immigrate>.

83. *Id.*

84. *Id.*

85. *Immigration and Citizenship*, *supra* note 81.

86. Lazarus, *supra* note 1.

III. ANALYSIS

A. *The Problem*

As immigration policy appears increasingly impotent, the main obstacle in the way of reform is how highly political the issue has become. Simply put, immigration has become an issue that voters now care about.⁸⁷ An issue that is classically, if not inherently, political, is the economy.⁸⁸ A political candidate's stance on the economy can, depending on their constituents, curry favor with voters.⁸⁹ As was discussed, immigration only recently began to carry this sort of weight with voters.⁹⁰ This politicization has dehumanized immigrants, further perpetuating the problem.

Immigration is politicized not only when politicians run on immigration issues, but also when candidates attempt to boil down solutions into something simple that a campaign can run on. Republicans often use simple slogans when running on immigration, with former President Donald Trump being a well-known example.⁹¹ Democrats, with President Biden being no exception, are quick to make pro-immigrant promises without much action.⁹² Immigration, as a highly nuanced issue, cannot

87. See Schaeffer & Van Green, *supra* note 76.

88. Jeffry Frieden, *The Political Economy of Economic Policy*, INT'L MONETARY FUND (June 2020), <https://www.imf.org/en/Publications/fandd/issues/2020/06/political-economy-of-economic-policy-jeff-frieden>.

89. See Lydia Saad, *Economy Is Top Election Issue; Abortion and Crime Next*, GALLUP (Oct. 31, 2022), <https://news.gallup.com/poll/404243/economy-top-election-issue-abortion-crime-next.aspx>.

90. See Figure 1.

91. See Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, THE N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html>.

92. *One Year In: The Biden Administration's Promises on Immigration Remain Unfulfilled*, AM. IMMIGR. COUNCIL (Jan. 19, 2022), <https://www.americanimmigrationcouncil.org/news/one-year-biden-administrations-promises-immigration-remain-unfulfilled>.

sufficiently be solved with something like “building a wall;”⁹³ rather, it demands something more.

The chink in the armor of politicization and the polarized approaches taken by either side is that neither will truly solve the problem. Neither side will acknowledge the dignity or humanity of the immigrants, which dehumanizes those attempting to enter the country. So long as solutions do not consider the immigrants as people, they will not be effective.

Both parties have examples of ways that they dehumanize immigrants—Republicans by villainizing them⁹⁴ and Democrats by using them only to gain political points.⁹⁵ Republicans have villainized immigrants in a variety of ways: sending immigrants across the country in buses to various locations,⁹⁶ portraying them poorly in the media, and using harmful rhetoric when describing them.⁹⁷ When Governors DeSantis and Abbott ship off these immigrants, it’s not to provide any sort of remedy to the immigration issue—it is simply a publicity stunt. Ostensibly, this stunt was intended to get the word out about the crisis at the border; but certainly, it was a way to get

93. Gretchen Frazee & Joshua Barajas, *Trump says walls work. It’s much more complicated*, PBS (Jan. 9th, 2019, 7:36 PM), <https://www.pbs.org/newshour/nation/trump-says-walls-work-its-much-more-complicated>.

94. Joel Rose, *Talk of ‘Invasion’ Move From the Fringe to the Mainstream of GOP Immigration Message*, NPR NEWS (Aug. 3, 2022, 5:10 AM), <https://www.npr.org/2022/08/03/1115175247/talk-of-invasion-moves-from-the-fringe-to-the-mainstream-of-gop-immigration-mess>.

95. AM. IMMIGR. COUNCIL, *supra* note 92; see also Reuters, *Report: Biden Urges Mexico to Take Migrants Under COVID Expulsion Order He Vowed to End*, VOICE OF AM. (Sept. 15, 2022, 10:10 AM), <https://www.voanews.com/a/report-biden-urges-mexico-to-take-migrants-under-covid-expulsion-order-he-promised-to-end-6748748.html> (expressing a refugee advocate’s sentiment that the Biden administration’s use of deportation as a means of border crossing deterrence betrays its previous commitments to refugee protection).

96. *Operation Lone Star Spotlights Sanctuary City Hypocrisy, Buses Over 11,000 Migrants*, OFF. OF THE TEX. GOVERNOR (Sept. 16, 2022), https://gov.texas.gov/news/post/operation-lone-star-spotlights-sanctuary-city-hypocrisy-buses-over-11000-migrants?utm_source=substack&utm_medium=email; Jessica Chasmar, *Ron DeSantis Sends Two Planes of Illegal Immigrants to Martha’s Vineyard*, FOX NEWS (Sept. 14, 2022, 7:10 PM), <https://www.foxnews.com/politics/ron-desantis-sends-two-planes-illegal-immigrants-marthas-vineyard>.

97. Rose, *supra* note 4.

both governors coverage on Fox News to help their future campaigns.

Furthermore, the coverage by conservative outlets about immigrants has been starkly negative yet unfortunately accurate in representing the feelings of many Republicans.⁹⁸ As mentioned previously, those who want to drastically restrict immigration are the ones more likely to view immigrants as “invaders” or “intruders.”⁹⁹ This, coupled with the coverage from Fox News about the border situation makes it seem more like enemy insurgence as opposed to the humanitarian crisis that it is. Naturally, there is no real urge to find a humane solution to the immigration issue when they are viewed as foes rather than friends.¹⁰⁰ Thus, by dehumanizing immigrants in this way, the issue is perpetuated and citizens are drawn even further apart, and further from a solution, on the issue.

Unfortunately, though the Democrats claim to be advocates and allies for our immigrant neighbors, even under Democratic administrations, the efforts to remedy issues with long-term solutions have been ineffective at best and dishonest at worst. Admittedly, it is worth noting that the Biden administration has not been wholly agnostic in its immigration policy. There have been efforts—often lackluster—for this cause, but it clearly has been outweighed in the balances of political importance by other issues.

Initially, Biden presented an immigration reform bill on his first day in office—the U.S. Citizenship Act of 2021.¹⁰¹ However,

98. Cf. Ekins & Kemp, *supra* note 82.

99. *Id.*

100. See *id.* (showing there is a correlation between respondents who want to restrict immigration and those who consider immigrants to be “intruders” or “invaders in polls; also indicating that both Republican and Democrat respondents viewed immigrants negatively if they joined the opposing political party; also indicating that respondents who desire high levels of commonality with neighbors tend to desire a decrease in immigration levels); see also Elizabeth Fussell, *Warmth of the Welcome: Attitudes towards Immigrants and Immigration Policy*, 40 ANN. REV. SOCIO. 479, 485 (2014) (“Those who think immigrants mostly cause problems want to decrease immigration levels, whereas those who welcome immigrants want to raise or maintain current levels”).

101. Aline Barros, *Biden's First Year Brings Modest Changes to Immigration Policy*, VOICE OF AM. (Dec. 27, 2021, 5:07 AM), <https://www.voanews.com/a/biden-s-first-year-brings-modest-changes-to-immigration-policy/6367512.html>.

this Act stalled out and was effectively dead on arrival.¹⁰² This Act took a backseat to the Inflation Reduction Act, which was Biden's seminal piece of legislation in the first half of his presidency.¹⁰³ Entering his office at a time of economic crisis, it is understandable that this legislation would have felt more pressing, and certainly more relevant to his voters.

Secondly, the Biden administration has done *some* things in an effort to undo Trump-era border and immigration policies.¹⁰⁴ Specifically, he did end the construction of the Southern Border wall early in his administration,¹⁰⁵ though this was more of a superficial fix than anything substantive. Further, his Department of Justice has fought to end some of Trump's anti-immigrant policies.¹⁰⁶ But though it is important to give credit where it is due, the efforts of his administration have been largely ineffective and importantly without any sense of urgency.

Biden's administration and immigration policy have an embarrassing and inexcusable black eye—Title 42. Titled “Suspension of entries and imports from designated places to prevent spread of communicable diseases,” 42 U.S.C. § 265 (Title

102. *Id.*

103. *Inflation Reduction Act Guidebook*, THE WHITE HOUSE, <https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/> (last visited Mar. 2, 2023) (referring to the Inflation Reduction Act as “the most significant action Congress has taken on clean energy and climate change in the nation’s history”); See Deepa Shivaram, *What is in the Inflation Reduction Act?*, NPR (Aug. 12, 2022, 5:42 PM), <https://www.npr.org/2022/08/07/1116190180/democrats-are-set-to-pass-a-major-climate-health-and-tax-bill-heres-whats-in-it>.

104. See Alyssa Aquino, *Immigration Courts are Closing ‘Historic’ Number of Cases*, LAW 360 (Sept. 19, 2022, 7:39 PM), https://www.law360.com/articles/1531649?utm_source=ios&utm_medium=ios&utm_campaign=ios-shared; Aline Barrows, *Biden Administration to Remove ‘Public Charge’ Immigration Hurdles*, VOICE OF AM. (Sept. 09, 2022, 12:48 PM), <https://www.voanews.com/a/biden-administration-to-remove-public-charge-immigration-hurdles/6738354.html>.

105. Barros, *supra* note 101.

106. See, e.g., Amna Nawaz & Saher Khan, *Biden Vowed to Fix America’s Immigration System. Here’s What He Achieved in His First Year*, PBS (Jan. 20, 2022, 6:40 PM), <https://www.pbs.org/newshour/show/biden-vowed-to-fix-americas-immigration-system-heres-what-he-achieved-in-his-first-year>; see also Jaclyn Diaz, *Justice Department Rescinds Trump’s ‘Zero Tolerance’ Immigration Policy*, NPR (Jan. 27, 2021, 5:07 AM), <https://www.npr.org/2021/01/27/961048895/justice-department-rescinds-trumps-zero-tolerance-immigration-policy>.

42) provides, in relevant part, that the Director of the CDC “shall have the power to prohibit . . . the introduction of persons . . . in order to avert [the danger of communicable disease].”¹⁰⁷ On March 20, 2020, President Trump stated in remarks that the CDC would be enacting this policy in order to prevent the spread of COVID-19.¹⁰⁸ Despite being a public health law, Title 42 has uniquely negative effects on the application of immigration and asylum law.¹⁰⁹ First, it allows border agents to turn away immigrants seeking asylum in the U.S. without offering them a chance to even apply for asylum.¹¹⁰ Secondly, an expulsion under Title 42 is not considered a “deportation” under immigration law, allowing the immigrant to quickly attempt re-entry.¹¹¹ This has proved to make the border a “revolving door,”¹¹² throwing immigrants back into border communities that are woefully under-resourced and dangerous.¹¹³ As a result of the policy, over 2 million immigrants have been turned away at the border.¹¹⁴

107. 42 U.S.C. § 265 (1944); KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10874, COVID-RELATED RESTRICTIONS ON ENTRY INTO THE UNITED STATES UNDER TITLE 42: LITIGATION AND LEGAL CONSIDERATIONS 1–2 (explaining that the Surgeon General’s authority was transferred to the Department of Health and Human Services which then delegated this authority to the CDC Director.).

108. Camilo Montoya-Galvez, *What is Title 42, the COVID border policy used to expel migrants?*, CBS NEWS (Jan. 2, 2023, 1:58 PM), <https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/>.

109. *See id.*

110. *Id.*; Collen Long, *Title 42 has ended. Here’s what it did, and how US immigration policy is changing*, AP NEWS (May 12, 2023, 3:14 AM), <https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbebf798d>.

111. Montoya-Galvez, *supra* note 108.

112. Reena Diamante, *Critics Argue Title 42 has Created a Revolving Door at the U.S.-Mexico Border*, SPECTRUM NEWS 1 (Sept. 8, 2022, 12:04 PM), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2022/09/08/critics-argue-title-42-has-created-a-revolving-door-at-the-u-s--mexico-border->.

113. Camilo Montoya-Galvez, *U.S. Border Enforcement Chief Acknowledges “Human Cost” of Title 42 Migrant Expulsions*, CBS NEWS (Aug. 18, 2022, 8:57 PM), <https://www.cbsnews.com/news/immigration-chris-magnus-customs-and-border-protection-commissioner-cbp-title-42/>.

114. Julia Ainsley & Rebecca Shabad, *Judge Blocks Trump-Era Border Rule Known as Title 42 that Expelled Migrants at U.S. Border*, NBC NEWS (Nov. 15, 2022, 9:30 PM), <https://www.nbcnews.com/politics/immigration/judge-blocks-trump-border-rule-title-42-expelled-migrants-rcna57379>.

Though the Biden administration took early swipes at certain policies, they made no early efforts to stop using Title 42 as an immigration policy, applying it for over a year of his presidency without any efforts to stop it.¹¹⁵ Finally, however, in April 2022, DHS Secretary Alejandro Mayorkas announced that Title 42 would end in May.¹¹⁶ Naturally, several conservative states filed suit to oppose lifting the policy¹¹⁷ and a U.S. district judge subsequently granted a preliminary injunction, keeping the policy in place.¹¹⁸ In November of 2022, a district judge vacated Title 42, citing that it was arbitrary and capricious under the Administrative Procedure Act.¹¹⁹ Demonstrating its indifference to the situation, the Biden administration agreed to allow Title 42 to end, but requested that the policy not end until late December to give it time to prepare for the policy's termination.¹²⁰ Though this was likely a wise decision, it demonstrated that the administration was not preparing for the policy to end, and it was likely an issue it put on the back burner. Thus, the end of Title 42 was emblematic of Biden's work in immigration policy and reform. It was done with the administration acquiescing to a judge's orders and asking for more time to prepare for its termination.¹²¹ Biden ended Title 42, a policy that had to end, with reluctance and without preparation, instead of being a champion of immigrant rights.

In a confusing paradox for Republicans, on one hand, they argued that the pandemic had been over for months, while

115. Diamante, *supra* note 112.

116. Julia Ainsley, *Biden Admin will Officially End Covid Restriction at Border on May 23*, NBC NEWS (April 1, 2022, 1:40 PM), <https://www.nbcnews.com/politics/immigration/biden-admin-will-officially-end-title-42-covid-restriction-border-may-rcna22610>.

117. Zoë Richards, *Judge Block Biden From Ending Trump-Era Covid Restrictions for Migrants at Border*, NBC NEWS (May 20, 2022, 7:00 PM), <https://www.nbcnews.com/politics/immigration/judge-blocks-biden-ending-trump-imposed-covid-restrictions-migrants-bo-rcna29905>.

118. *Id.*

119. Ainsley & Shabad, *supra* note 114.

120. *Id.*

121. Anisha Kohli, *Here's What to Know About Title 42 and What Could Happen If It Ends*, TIME (Dec. 8, 2022, 4:20 PM), <https://time.com/6238508/what-is-title-42-biden-administration/>.

simultaneously insisting that a public health law, in use *because of the pandemic*, continues to be used to police immigration flows at our Southern Border. This type of cognitive dissonance resembles the current state of immigration policy: two sides so deeply partisan that they have no problem being blatantly contradictory in their views. This political gridlock has allowed for no middle ground, no opportunity for nuance, and thus no solutions to a monumental problem. Instead, several GOP states sued the government requesting to keep Title 42.¹²² For months the heavily litigated matter sat at the Supreme Court, awaiting an oral argument on a standing question involving the states that brought the suit.¹²³ It seemed a fitting destination for this notorious problem: caught in the currents of the American court system only to make it to the Supreme Court on a question of procedure. After the Court granted certiorari and kept Title 42 in place, Justice Gorsuch wrote a bipartisan dissent joined by Justices Kagan, Sotomayor, and Jackson.¹²⁴ In his dissent, Justice Gorsuch notes that it does not make any sense to grant a stay on a “case concerning emergency decrees that have outlived their shelf life.”¹²⁵ The whole situation is head-scratching, which comes out in the dissent. It did not make sense to decide a question of standing for an order where the reason for the order was likely moot. The states that brought the suit, however, hardly hide the ball. They acknowledge the fact that “they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it.”¹²⁶ Justice Gorsuch doubles down on the true source of the issue, closing his dissent

122. Richards, *supra* note 117.

123. Josh Gerstein & Myah Ward, *Supreme Court Cancels Oral Arguments in Trump-Era Immigration Policy Case*, POLITICO (Feb. 16, 2023, 4:21 PM), <https://www.politico.com/news/2023/02/16/supreme-court-cancels-oral-arguments-in-title-42-case-00083316>; Ian Millhiser, *The Supreme Court is Manipulating its own Calendar to Lock GOP Policies in Place*, VOX (Dec. 29, 2022, 3:05 PM), <https://www.vox.com/policy-and-politics/2022/12/29/23530842/supreme-court-arizona-mayorkas-title-42-mexican-border-immigration>.

124. *Arizona v. Mayorkas*, 214 L. Ed. 2d 312 (U.S. 2022) (Gorsuch, J., dissenting).

125. *Id.* at 313.

126. *Id.*

with the line, “We are a court of law, not policymakers of last resort.”¹²⁷

The Title 42 case was a perfect paradigm for the state of immigration policy: it was contradictory, confusing, and in an unnecessary state of delay. Fortunately, the Department of Justice (DOJ) argued that the case would be moot by May 11, 2023, when President Biden declared the pandemic over, and the Supreme Court removed the case from its oral argument calendar.¹²⁸ This was only a small victory. The problem yet remains to be addressed. There is a desperate need for a solution to the inadequacies of immigration policy, and the solution lies in comprehensive immigration reform.

B. The Solution

Comprehensive immigration reform as an idea is not wholly novel. It has become a catchphrase of those who seek to convey the idea of reform for immigration issues that satisfies both sides of the aisle. Even as the Biden administration began to take steps in the right direction at the beginning of 2023,¹²⁹ these steps are generally a band-aid on a bullet wound—woefully insufficient. My proposal for reform hinges on four factors: asylum reform, amnesty, border protection, and the immigration court system.

1. Asylum Reform

Most immigrants who arrive at the border of the U.S. simply do not qualify for asylum.¹³⁰ As is, the asylum statutes do not provide reliable relief for immigrants who are moving just to seek a better life or even escaping circumstances like domestic or gang violence, turning on a classification of a “particular social

127. *Id.* at 314.

128. Gerstein & Ward, *supra* note 123.

129. See, e.g., Myah Ward, *Biden Announces New Program to Curb Illegal Migration as He Prepares for Visit to Border*, POLITICO (Jan. 5, 2023, 4:51 PM), <https://www.politico.com/news/2023/01/05/biden-border-plan-illegal-crossings-00076519>.

130. See Andrew R. Arthur, *Most Illegal Immigrants do not Qualify for US Asylum*, CTR. FOR IMMIGR. STUD. (Aug. 16, 2022), <https://cis.org/Oped/Most-illegal-immigrants-do-not-qualify-US-asylum>.

group.”¹³¹ Instead, the statute grants relief in circumstances that often require a type of harm or situation that is not necessarily unprecedented, but too strict. A specific fix would be to extend the use of things like “humanitarian asylum” which involves a grant of asylum for broader grounds than standard asylum.¹³² Alternatively, the statute itself should be amended to provide more relief for more immigrants. As is, a high percentage of immigrants are denied asylum *in absentia* because they fail to show up to their court date.¹³³ One likely reason for this is that the immigrants rightfully know that the odds that their claim will be granted are effectively hopeless.¹³⁴ If an asylum claim did not appear to an immigrant to be a *per se* denial upon application, likely the number of denials *in absentia* would decrease.

Changing the asylum statute would harken back to Emma Lazarus’ poem, back to an era of immigration policy not too far removed in time but severely far removed in terms of policy. Changing the standard has the potential to provide relief for millions more immigrants a year who desperately need it and appreciate the U.S. and the opportunities it provides for a better life. These people, though not immediately worthy of every guarantee of citizenship, are worthy to be treated like their claims and their lives matter, and “humanitarian asylum” relief would be an effective way to carry out that aim.

2. Amnesty

Amnesty, though it sounds extreme to some, is an essential aspect of comprehensive immigration reform. Clearly, the issue of the border is the most pressing and acute problem in the field of immigration; however, legislation should be tailored to be forward-looking and solve the problems of today and tomorrow.

131. Joel Rose, *The Justice Department Overturns Policy that Limited Asylum for Survivors of Violence*, NPR (June 16, 2021, 6:51 PM), <https://www.npr.org/2021/06/16/1007277888/the-justice-department-overturns-rules-that-limited-asylum-for-survivors-of-viol>.

132. See CLINIC, REPRESENTING CLIENTS IN IMMIGRATION COURT 322–325 (Amer. Immigr. Lawyers Ass’n, 6th ed. 2021).

133. Arthur, *supra* note 130.

134. *Id.*

As such, something must be done about the approximately 11 million undocumented immigrants already within our borders.¹³⁵

Despite how this sounds to some conservatives, the idea of amnesty is not novel. The Immigration Reform and Control Act, mentioned previously, provided amnesty to approximately 2.7 million undocumented immigrants under Ronald Reagan, no less.¹³⁶ This Act tempered this relief with an increase in border security measures.¹³⁷ Further, President George W. Bush pushed for a similar bill, the Comprehensive Immigration Reform Act of 2007, that would have put 12 million undocumented immigrants on a path to citizenship while enhancing border security as well.¹³⁸

Even though granting an amnesty measure may sound unfair to some, it would not be unprecedented. It would be the only way to truly turn the whole system around; the American DNA cries for change when 11 million people (60% of whom have been here for ten years or longer)¹³⁹ do not have status or rights within America's borders.

3. Border Protection

Border protection measures are crucial for comprehensive immigration reform because it would have to involve some sort of compromise. It would be unrealistic to expect a bill to pass that solely granted more rights and status to immigrants without providing for countermeasures to ensure that the border remains

135. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> (last visited Oct. 7, 2023) [hereinafter *Profile of the Unauthorized Population*].

136. Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan?*, WASH. POST (Nov. 26, 2014, 10:06 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/>.

137. See, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 111-113, 100 Stat. 3359 (1986).

138. Donna Smith, *Senate Kills Bush Immigration Reform Bill*, REUTERS (June 28, 2007, 6:55 PM), <https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629>; Comprehensive Immigration Reform Act of 2007, §§ 106-111, S. 1348, 110th Cong. (2007).

139. *Profile of the Unauthorized Population*, *supra* note 135.

relatively secure. In fact, the examples described above evidence the fact that this compromise is common in any sincere effort at immigration reform.

It is worth noting at this point that, at least in terms of the border, it is not wholly unreasonable to consider immigration policy or border protection in terms of national security. Though immigration policy is often seen too much through the lens of national security, to claim that there is no benefit from a more secure Southern Border would be ignorant. The primary benefits of enhanced border protection are twofold: it protects U.S. border communities from the influx of drugs, and it can enhance foreign relations with Mexico.

Firstly, there are examples of catching true career criminals as they attempt to enter our nation.¹⁴⁰ Though these examples are not the majority, to overlook them would be disingenuous. Even more, there were reports of 319,000, 192,000, and 98,000 pounds of marijuana, methamphetamine, and cocaine, respectively, being confiscated at the Southern Border in 2021 alone.¹⁴¹ These numbers are shocking but point out how these border towns—which end up being primary markets for these drugs¹⁴²—could benefit from beefed-up border security.

Additionally, enhanced border protection can benefit foreign relations with Mexico because guns from the U.S. are often smuggled across the border into Mexico and have arguably led to an increase in gun violence in the country.¹⁴³ So much so, that Mexico has actually sued U.S. gun manufacturers for supplying

140. See, e.g., Adam Shaw & Bill Melugin, *Border Patrol Agents Nab a Dozen People on Terror Watchlist at Southern Border in August*, FOX NEWS, <https://www.foxnews.com/politics/border-patrol-agents-nab-dozen-suspected-terrorists-southern-border-august> (Sept. 20, 2022 1:20 PM).

141. CFR.org Editors, *Mexico's Long War: Drugs, Crimes, and the Cartels*, COUNCIL ON FOREIGN REL. (Sept. 7 2022, 2:45 PM), <https://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels>.

142. National Drug Intelligence Center, *South Texas High Intensity Drug Trafficking Area Market Analysis*, NAT'L DRUG INTEL. CT.R., <https://www.justice.gov/archive/ndic/pubs27/27513/border.htm> (last visited Sept. 2, 2023).

143. See Toya Sarno Jordan & Stephania Corpi, *Mexican Government Vows to Continue Legal Fight Against U.S. Gun Manufacturers*, TEX. PUB. RADIO (Oct. 10, 2022, 11:19 AM), <https://www.tpr.org/border-immigration/2022-10-10/mexican-government-vows-to-continue-legal-fight-against-u-s-gun-manufacturers>.

cartel members with assault rifle-style guns.¹⁴⁴ As such, our currently shaky relationship with Mexico could benefit from assurances that measures are taken to keep the border more secure.

Though too often overstated, there is a need for increased border protection. Border protection measures could benefit the U.S. in many ways and would likely be essential if an immigration policy reform bill had any chance of being passed.

4. The Immigration Court System

The immigration court system is one of the most poorly run and embarrassingly underfunded sectors of the U.S. government. In an effort to reform the system and address the staggering case backlog,¹⁴⁵ the system desperately needs more immigration judges (IJs). The immigration court system—or Executive Office of Immigration Review (EOIR)—is actually an administrative agency under the DOJ.¹⁴⁶ With that, IJs do not have nearly the funding or staff in comparison to a federal district court judge but can at times have dockets that are five times the size.¹⁴⁷ There are several ways that this issue can be addressed, but the primary way would be funding.

The American solution for most things extends also to the immigration courts: throw money at it. With funding, the EOIR could add more IJs. This would in turn decrease docket size and allow IJs to give more time to their cases individually. Additionally, more funding would allow IJs to have more staff and court clerks. As is, an IJ has marginal staff compared to federal

144. *Id.*

145. See *Executive Office for Immigration Review Adjudication Statistics*, DEP'T. OF JUST. (July. 13, 2022), <https://www.justice.gov/eoir/page/file/1242166/download>.

146. *Organization, Mission, and Functions Manual*, DEP'T OF JUST., https://www.justice.gov/doj/organization-mission-and-functions-manual__ (last visited Sept. 24, 2023).

147. *Compare Federal Judicial Caseload Statistics*, U.S. COURTS (Mar. 31, 2022), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022> (decrease in cases filed overall), with *Executive Office for Immigration Review Adjudication Statistics*, *supra* note 145 (depicting charts that show the drastic difference between cases filed in immigration courts and all federal district courts).

district court judges. One way to potentially secure these funds—though it would require a Herculean congressional effort on its own—would be to make IJs into regular, Article III judges. This would per se grant them the funding, staff, and clerks that any other district court judge would have.

Another primary way to reform this system would be to bar the government from appealing decisions in immigration court. Though immigration court proceedings have similar stakes to a criminal court proceeding, distinct from a criminal court setting, the government can appeal a decision in the immigrant's favor.¹⁴⁸ This perpetuates injustice and also allows for cases that should be closed to go on for years longer, further muddling the already over-burdened immigration court system.

Overall, the EOIR and the positions of IJs across the country are ripe for expansive reform that would not only allow for more expediency in immigration court proceedings, but enhanced rights and justice as well.

IV. CONCLUSION

Despite traditional views of immigrants as hopeful opportunists seeking a better life and opportunity, those views have changed dramatically over the history of immigration policy. As it stands, politics and partisanship have kept any meaningful change from happening in this area of the law for decades. The blinders politicians have put on have stunted reform and left immigrants as political pawns without true advocates willing to fight for change. The policies and systems that make up the world of immigration are in desperate need of change, but this change will only come when each side can accept compromise and see the dignity and humanity of those "yearning to breathe free."¹⁴⁹

148. CLINIC, *supra* note 132, at 54.

149. Lazarus, *supra* note 1.

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