

THE 1965 IMMIGRATION ACT:  
FAMILY UNIFICATION AND  
NON-DISCRIMINATION FIFTY YEARS LATER

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ABSTRACT

*In 1965, Congress passed the Immigration and Nationality Act and revolutionized immigration law by not only eliminating national origins quotas but also by establishing family ties as the primary means of immigrating to the United States. By promoting a policy of family unification, the 1965 Immigration Act enabled millions of U.S. citizens and lawful permanent residents to bring their families to the United States. Notably, it also helped to significantly change the racial and ethnic make-up of our country.*

*On the eve of the fiftieth anniversary of the 1965 Immigration Act, this Chapter reflects on and evaluates the impact that this law had on American families. It argues that the 1965 Immigration Act should be celebrated for promoting family unification and racial diversity. Yet, this celebration should be done with caution. Family unification has not been meaningfully realized by millions of U.S. citizens and lawful permanent residents and their families. Many families continue to be separated as a result of the visa backlog. Both the 1965 Immigration Act's achievements and shortcomings should be explored as we consider the ways in which immigration law could be reformed to ensure a more effective policy of family unification.*

INTRODUCTION

Time has not been on the side of Rosalina Cuellar De Osorio. Sixteen years ago, on May 5, 1998, Rosalina's mother, a U.S. citizen, submitted a petition to the United States Customs and Immigration Enforcement (USCIS) to bring in Rosalina as a lawful permanent resident under the Immigration and Nationality Act's (INA) family-sponsored preference program.<sup>1</sup> In particular, this program allows U.S. citizens to sponsor their spouses, parents, children, adult sons and daughters, and siblings (and their families) to immigrate to the

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<sup>1</sup> Complaint for Declaratory, Mandamus and Injunctive Relief at 11, *Zhang v. Napolitano*, 663 F. Supp. 2d 913 (C.D. Cal. 2009) (No. EDCV 08-840 JVS(SHx)), 2008 WL 2723887.

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U.S.<sup>2</sup> Because Rosalina was married, her mother petitioned her under the relevant category for Rosalina: third-preference family category,<sup>3</sup> which is reserved for married sons or daughters of U.S. citizens.<sup>4</sup> In addition, the petition included Rosalina’s thirteen-year old child, Melvin,<sup>5</sup> for under the INA’s family-based program, the principal beneficiary’s spouse (if still married) and child, defined as a person who is under 21 years old, may be included as a derivative beneficiaries.<sup>6</sup>

It only took about two months for the petition to be approved.<sup>7</sup> After that, time began to work against Rosalina’s favor. The petition’s approval did not mean that Rosalina and Melvin would be able to immigrate to the United States immediately. Instead, they needed to wait until visas will be available for them.<sup>8</sup> The availability of visas under the family-based preference program depends on a complicated formula comprised of, among other things, numerical caps on the number of visas available per year and limits on the number of immigrants from a particular country per year.<sup>9</sup> Critically, this template that demonstrates how the family-based preference program actually works in practice has led to a significant visa backlog and lengthy delays among family members before they can be reunited.<sup>10</sup> Thus, Rosalina and Melvin waited. And waited. They waited seven years.<sup>11</sup> Unfortunately, by the time visas became available—on November 11, 2005—Melvin had already turned 21 years old and has thus “aged out” (i.e., no longer a “child” of a principal beneficiary).<sup>12</sup> Accordingly, Melvin became ineligible for a visa as a derivative beneficiary under Rosalina’s mother’s petition.<sup>13</sup> Faced with the choice of immigrating to the U.S. to reunite with her mother or stay in El Salvador to be with her son, Rosalina made the difficult decision of immigrating to the U.S.<sup>14</sup> Thus, in August 2006, Rosalina left El Salvador and

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<sup>2</sup> See 8 U.S.C. § 1182(a)(3)(D)(iv) (2012).

<sup>3</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11.

<sup>4</sup> See 8 U.S.C. § 1153(a)(3).

<sup>5</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11.

<sup>6</sup> See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196–97 (2014) (noting, however, that in order for a beneficiary to actually obtain a visa, in addition to having their petition approved, there must also be a visa available).

<sup>7</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11..

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *Scialabba*, 134 S. Ct. at 2197–99 (describing the mechanics per-country quotas in the United States’ immigration regulation scheme).

<sup>10</sup> See Part III *infra*.

<sup>11</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11.

<sup>12</sup> *Id.*; see *Scialabba*, 134 S. Ct. at 2196–97, 2202.

<sup>13</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11; see *Scialabba*, 134 S. Ct. at 2202.

<sup>14</sup> *Id.*

was admitted to the United States as a lawful permanent resident (“LPR”).<sup>15</sup> As an LPR or green-card holder, Rosalina would need to submit a separate petition to sponsor Melvin under the second-preference family category (unmarried adult son or daughter of a lawful permanent resident or F2B category).<sup>16</sup> As of today, the current waiting time for a visa to be available under that category is six years.<sup>17</sup> Thus, Rosalina must wait several more years before she can be reunited with her son.

The Cuellar de Osorio family’s story offers a useful launching off point for exploring the contemporary family-based immigration law program and the law upon which such program is based—the Immigration and Nationality Act of 1965 (“1965 Immigration Act”).<sup>18</sup> Fifty years ago, Congress passed the 1965 Immigration Act and revolutionized immigration law<sup>19</sup> in at least two ways: by eliminating racially discriminatory immigration quotas that had been in place since the 1920s<sup>20</sup> and establishing family ties as the primary means of immigrating to the United States.<sup>21</sup> In so doing, Congress advanced two normative values and goals through immigration law: the promotion of a race-neutral policy in the immigration admissions process and family unification. Data from the last five decades indicate that these normative goals have been achieved.<sup>22</sup> That is, without doubt, millions of Americans and their immigrant families have been reunited and, notably, since 1965, the immigrant stream has been more racially diverse.<sup>23</sup> Such racial diversity represents a sea change from a century-old formal policy of restricting immigrants on the basis of race.<sup>24</sup> For these reasons, the 1965 Immigration Act should rightly be hailed as an

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<sup>15</sup> Complaint for Declaratory, Mandamus and Injunctive Relief, *supra* note 1, at 11–12.

<sup>16</sup> Cf. 8 U.S.C. § 1153(a)(2)(B) (2012) (authorizing LPRs to submit a visa petition benefiting their unmarried adult sons or daughters).

<sup>17</sup> See 9 U.S. BUREAU OF CONSULAR AFFAIRS, DEP’T OF STATE, VISA BULLETIN, NO. 74, available at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-november-2014.html>.

<sup>18</sup> See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). It is also known as the Hart-Celler Act. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C.L. REV. 273, 297 (1996) (pointing out that the Immigration and Nationality Act of 1965 is also known as the Hart-Celler Act).

<sup>19</sup> *But see* President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 Pub. Papers 1037, 1038 (Oct. 3, 1965) (stating that “This is not a revolutionary bill. It will not reshape the structure of our daily lives” when he signed the Hart-Celler Act).

<sup>20</sup> See *id.* at 297 (explaining that the Hart-Celler Act was revolutionary by adopting race-neutrality as a principle).

<sup>21</sup> See Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 14 (2013) (stating that the Hart-Celler Act established our contemporary system of family-based law).

<sup>22</sup> See Part II *infra*.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

important civil rights achievement. Indeed, as Jack Chin has argued,<sup>25</sup> the 1965 Immigration Act was passed by the essentially the same Congress that enacted the 1964 Civil Rights Act<sup>26</sup> and 1965 Voting Rights Act<sup>27</sup> and should thus be considered as a path breaking civil rights law as well.

Yet, as Rosalina and Melvin's story demonstrates, the achievements of the 1965 Immigration Act should be qualified. Despite the asserted goal of family unification undergirding the 1965 Immigration Act, many Americans today continue to be separated from their families.<sup>28</sup> The lengthy delays and visa backlogs show that many families, especially those from China, Philippines and India must wait between ten to twenty-years before family unification may be realized.<sup>29</sup> Additionally, the 1965 Immigration Act privileges only certain family relationships—spousal, parent and child and sibling—and rules out other family relationships such as aunt and nephew<sup>30</sup> or grandmother and grandchild.<sup>31</sup>

On the eve of the fiftieth anniversary of the 1965 Immigration Act, this Chapter reflects on and evaluates both the law's normative goals and its impact on the racial make-up of the immigration population and American families today. In so doing, it makes three points. First, this Article argues that the 1965 Immigration Act was an important civil rights law that utilized immigration law to promote family unification, which ultimately facilitated racial diversity. By establishing a norm of non-discrimination in immigration law, the 1965 Immigration Act enabled the reunification of millions of U.S. citizens and lawful permanent residents with family members who would have faced barriers to immigration under the pre-1965, national-origins quotas-based system.<sup>32</sup> In so doing, the 1965 Immigration Act broadened the American family both literally and figuratively. The substantial number of immigrants from Asia, Africa and Latin countries led to more rapid demographic changes to the racial make-up of the United States than experienced in previous years.<sup>33</sup>

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<sup>25</sup> See Chin, *supra* note 18, at 317-18.

<sup>26</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>27</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

<sup>28</sup> See Part III *infra*.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See Part I *infra*.

<sup>33</sup> BILL ONG HING, DEPORTING OUR SOULS 119 (2006) (“[o]ver time, Asian and Latin immigrants came to dominate most of the immigration to the United States”).

Second, this Chapter maintains that any celebration of the 1965 Immigration Act should be done with caution. Despite the law's professed policy of family unification, millions of U.S. citizens and lawful permanent residents—the majority of whom are people of color—continue to experience years of separation from their families.

Third, it reconsiders the values undergirding the 1965 Immigration Act—promoting race neutrality and family unification—and argues that, as a normative matter, such values should continue to animate immigration law today. Using this normative position as a baseline, this Article analyzes recent congressional proposals that seek to reform, among other areas, our family-based immigration system. Specifically, it examines two bills—one introduced in the U.S. House of Representatives and the other in the Senate—during the 113<sup>th</sup> Congress. Notably, both bills sought to limit family based immigration law to the nuclear family. Such efforts, this Chapter maintains, will have an adverse impact on Mexican Americans and Asian Americans and their families. Although neither bill became law, they are likely to serve as blueprints for proposed legislation in the future. Accordingly, understanding the consequence that a contraction of the family-based immigration law program would have on families and the immigrant stream is critical as Congress and policy makers continue to contemplate on how to reform immigration law.

Part I briefly discusses the history of the 1965 Immigration Act's family-based program and explains its current structure that privileges marital ties, the nuclear family and parent-child relationships. Part II underscores the ways in which immigration law has facilitated reunification of families. Next, Part III complicates the "success" story of the 1965 Immigration Act by highlighting cases in which families have not been able to fully benefit from immigration law's policy of family unification. Part IV considers two recent congressional bills that propose to limit family-based immigration system to the nuclear family only. Part V briefly concludes.

#### I. 1965 IMMIGRATION ACT AND FAMILY-BASED IMMIGRATION PROGRAM

The creation of the system of family-based preferences in immigration law was, as Kerry Abrams noted, "not a carefully thought-out decision on Congress's part."<sup>34</sup> By contrast, Congress had, for years, sought to limit immigration to the United States on the basis of race, which had gendered and class consequences that impacted American families. It is against this racial history that the impact of the 1965 Immigration Act should be examined.

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<sup>34</sup> See Kerry Abrams, *What Makes Family Special?*, 80 U. CHI. L. REV. 7, 10 (2013).

*A. Brief History of Family Preferences in Immigration Law Before the 1965 Act*

Although the ability of non-citizens to immigrate to the United States based on familial relationship to a citizen dates as far back as the late nineteenth century,<sup>35</sup> it was not until the 1920s that Congress explicitly created a system that privileged family membership as a preferential basis for immigration.<sup>36</sup> Specifically, in 1921, Congress passed the Emergency Quota Act and expressly allowed U.S. citizens to bring their family members to the United States.<sup>37</sup> Not all family members were treated equally, however. Although children of U.S. citizens who were under eighteen years old were excluded from the quotas (that is, they could immigrate without numerical limitation), the other family members were subjected to the quota limits.<sup>38</sup> The gendered nature of the 1921 law was evident for it defined family members to include “wives, parents, brothers, sisters, children, [and] fiancées.”<sup>39</sup> Moreover, the 1921 Emergency Quota Act discriminated against Asians and Eastern and Southern Europeans by imposing national origins quotas that were based on the population of non-citizens in the U.S. in 1910.<sup>40</sup> By 1921, a series of other laws—the Page Act,<sup>41</sup> Chinese Exclusion Act,<sup>42</sup> and the

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<sup>35</sup> See, e.g., Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, ch. 551, 26 Stat. 1084 (1891) (allowing “persons living in the United States [to send] for a relative” to immigrate to the United States); see also Abrams, *supra* note 34, at 10-11 (describing the incorporation of the concept of coverture into early immigration laws which allowed immigrant husbands to bring their wives into the United States); Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 595-600 (2004) (same).

<sup>36</sup> To be sure, Congress had enacted other immigration laws before the 1900s that impacted the family. For instance, in 1891, it passed a law that made polygamists excludable from the United States. See Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, ch. 551, § 1, 26 Stat. 1084, 1084 (1891). Moreover, in 1917, it prohibited non-citizens from the Asiatic Barred Zone, which covered the “entire area of Afghanistan to the Pacific, save for Japan,” from immigrating to the United States. See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 37 (2005).

<sup>37</sup> See Emergency Quota Act, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6 (1921) (“[I]n the enforcement of this Act preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancées [of United States citizens and legal residents].”).

<sup>38</sup> See *id.* §§ 2(a), (d), 42 Stat. at 5, 6.

<sup>39</sup> See *id.*; Abrams, *supra* note 34, at 10-11.

<sup>40</sup> See Emergency Quota Act § 2(a), 42 Stat. at 5 (providing “[t]hat the number of aliens of any nationality who may be admitted under the immigration laws of the United States [annually] shall be limited to 3 per centum of the number or foreign-born persons of such nationality resident of the United States as determined by the United States census of 1910”).

<sup>41</sup> See Page Act of 1875, ch. 141, 18 Stat. 477 (prohibiting the immigration of prostitutes, contract laborers and convicts from “China, Japan, or any Oriental country” from the United States, which had the intended effect of precluding Chinese from immigrating). For

Immigration Act of 1917 (which created the Asiatic Barred Zone)<sup>43</sup>—had virtually prohibited Chinese and other Asians from immigrating to the United States and thus, the Asian population in 1910 was significantly low.<sup>44</sup> Additionally, several barriers made it difficult for Eastern and Southern Europeans to enter the United States in the early 1900s, which led to their low population in 1910 as well. Moreover, many of the Asian and Southern and Eastern European countries were allotted minimal quotas. Consequently, for those non-citizens coming from countries that were allotted few quotas, the family-based preference system did very little to reunify them with their families.<sup>45</sup>

Congress would continue on its path of limiting immigration along racial and cultural lines until 1965. It passed the Immigration Act of 1924,<sup>46</sup> which modified the national origins system as well as the family-based immigration program established under the 1921 Act. Again, the family-preference system that Congress created had racial distinctions by limiting the quotas allotted to Asian and Southern and Eastern European countries.<sup>47</sup> The 1924 Act also had gendered differences. For instance, wives of U.S. citizens, along with their children, were not subjected to quota limitations.<sup>48</sup> Husbands, parents and children under the age of twenty-one years old of U.S. citizen women,

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explorations of how the Page Act sought to exclude Chinese women, see Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 692-702 (2005) (contending that the Page Act was enacted to prohibit Chinese women to enter the U.S.); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage*, 53 UCLA L. REV. 405, 432-42 (2005) (same).

<sup>42</sup> See Act to Execute Certain Treaty Stipulations Relating to Chinese (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (1882) (precluding Chinese from immigrating to the United States);

<sup>43</sup> Immigration Act of 1917, Pub. L. No. 64-301, § 3. 39 Stat. 874, 875-78 (creating the “Asiatic Barred Zone”).

<sup>44</sup> See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States* tbl. A-13 (U.S. Census Bureau, Working Paper No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/tabA-13.pdf>. Note that Japanese were not excluded from entering the United States as a result of the Gentlemen’s Agreement. Filipinos were also not barred from entering because the Philippines was a territory of the United States between 1898 and 1946 and Filipino nationals were considered subjects of the U.S. and not “aliens.” See *Toyota v. United States*, 268 U.S. 402, 410-11 (1925).

<sup>45</sup> See Abrams, *supra* note 34, at 12.

<sup>46</sup> Pub. L. No. 68-139, 43 Stat. 153.

<sup>47</sup> See *id.* § 8, 43 Stat. 153, 155 (limiting the annual quota to two percent of the number of foreign-born individuals of such nationality in the United States as of 1890 and providing for a minimum quota of one hundred individuals per nationality); see also Office of the Historian, U.S. Dep’t of State, *The Immigration Act of 1924 (The Johnson-Reed Act)*, <http://history.state.gov/milestones/1921-1936/immigration-act> (last visited Sept. 17, 2014) (discussing the limited quotas available to Asians and Southern and Eastern Europeans).

<sup>48</sup> Immigration Act of 1924 § 4(a), 43 Stat. 153, 155.

however, were placed in numerically limited preference categories.<sup>49</sup> This meant that relatives whose immigration petitions were filed by female U.S. citizens had to wait much longer than those whose petitions were filed by male citizens.<sup>50</sup> Notably, the 1924 Act limited family-based immigration law to the nuclear family by cutting out preference categories for adult children and siblings of U.S. citizens that were previously part of the 1921 Act.<sup>51</sup>

Over twenty-five years later, Congress overhauled immigration law and enacted the Immigration and Nationality Act of 1952 (1952 INA).<sup>52</sup> It abolished racial restrictions to naturalization, which was previously only available to whites (beginning in 1790) and persons of African ancestry (1870) and, more recently, to Chinese, Filipinos and Indians. The abolition of racial restrictions to citizenship had important implications to families. From 1924 until 1952, persons who were racially ineligible for citizenship were inadmissible to the United States. As I have written elsewhere, the combination of racial citizenship restrictions and inadmissibility provisions prevented thousands of Japanese women and American soldiers were unable to reside together in the United States because Japanese were not eligible for naturalization and thus inadmissible.<sup>53</sup> Indeed, military leaders relied on these citizenship restrictions to discourage and, in many cases, prevent American soldiers from marrying Japanese women.<sup>54</sup> Children of interracial couples also faced tremendous barriers to immigrating to the United States because of significant barriers to immigration for children born out of wedlock.<sup>55</sup> Thus, the elimination of provisions that people who were racial restrictions on citizenship (ideally) made family unification for many mixed citizen/non-citizen status families a possibility.

The 1952 Act also promulgated a number of changes to the previous immigration laws. In particular, it allowed U.S. citizen women to have the same right to sponsor their family members as U.S. citizen men.<sup>56</sup> Additionally, children and spouses were once again considered non-quota

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<sup>49</sup> See *id.* § 6(a)(1), 43 Stat. 153, 155.

<sup>50</sup> See Abrams, *supra* note 34, at 12.

<sup>51</sup> See *id.* at 13.

<sup>52</sup> See Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered section of 8 U.S.C.).

<sup>53</sup> See generally Rose Cuison Villazor, *The Other Loving: Uncovering the Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011)

<sup>54</sup> See *id.* at 1403-16.

<sup>55</sup> See *id.* at 1432-35.

<sup>56</sup> See McCarran-Walter Act § 101(a)(27)(A), 66 Stat. 163, 169 (defining a “nonquota immigrant” as “the spouse of a citizen of the United States”, thus abrogating the distinction between husbands and wives).

immigrants.<sup>57</sup> Thirty percent of the visas were set-aside for parents of citizens and twenty percent were allocated to spouses and children of lawful permanent residents. Moreover, the 1952 Act brought back categories for siblings and adult children<sup>58</sup> and it also created preference categories for spouses and children of lawful permanent residents.<sup>59</sup>

It should be emphasized, however, that although Congress might appear to have expanded the family-based immigration program by creating preference categories for extended family members, it merely implemented symbolic changes. Siblings and adult children were placed at the bottom of the preference categories and were not guaranteed visa slots but instead were entitled only to any unused visas.<sup>60</sup> Importantly, Congress maintained national origins quotas disadvantaging Asians and other disfavored groups.<sup>61</sup> This ensured that the family-preference system would continue to racially discriminate against many Asians and Asian Americans.<sup>62</sup>

### B. 1965 Family Based Immigration System

The 1960s implemented radical legal and changes by passing major civil rights legislation, including the 1965 Immigration and Nationality Act.<sup>63</sup> In the 1965 Act, Congress explicitly prohibited discrimination on the basis of “race, sex, nationality, place of birth, or place of residence.”<sup>64</sup> In place of the national origins quota system, the 1965 Act created a worldwide limit of 170,000 visas for the Eastern Hemisphere and 120,000 for the Western Hemisphere.<sup>65</sup> It allotted to each country in the Eastern Hemisphere up to 20,000 visas but did

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<sup>57</sup> *See id.*

<sup>58</sup> *See id.* § 203(a)(4), 66 Stat. 178-79.

<sup>59</sup> *See id.* § 203(a)(3), 66 Stat. 178.

<sup>60</sup> *See id.* § 203(a)(4), 182 Stat. 178-79 (providing that “[a]ny portion of the quota for each quota area for [a given] year not required for the issuance of visas to [all other preference classes]” shall be made available to siblings and adult children).

<sup>61</sup> *See id.* at §201 (maintaining the quota system in place from the Immigration Act of 1924); *see also* Samuel W. Bettwy, *A Proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT’L L.J. 93, 106 (2001)(acknowledging the continued bias of 1952 Act due to the continuation of the national origins quota system); Jonathon Zitney, *The State of Illegal Immigration in California and the Potential Effects of H.R. 4437: An Analysis of Human Rights Repercussions and Economic Consequences*, 34 W. ST. U. L. REV. 207, 209 (2007)(noting that the 1952 Act affirmed the national origins quota system).

<sup>62</sup> *See* Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 398-99 (1997) (stating that Congress’s failure to do away with the national origins quota system indicates that Congress ignored the inherent racial bias that such a system placed on Asians).

<sup>63</sup> Immigration and Nationality (Hart-Celler) Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

<sup>64</sup> *Id.*, sec. 2, § 202(a), 79 Stat. 911, 911.

<sup>65</sup> *See id.*, sec. 1, § 201(a)(ii), 79 Stat. 911, 911. Today, the cap is 480,000 visas per year. *See* 8 U.S.C. § 1151 (2012).

not impose an annual per country cap on countries in the Western Hemisphere.<sup>66</sup>

Critically, the 1965 Act established family ties as the principal way of immigrating to the United States. Family members eligible to immigrate were classified as either “immediate relatives” or family-sponsored immigrants. It provided that “immediate relatives” — children, spouses, and parents of citizens<sup>67</sup> — would be exempted from numerical limitations.<sup>68</sup> That is, there will be unlimited visas for immediate relatives. Additionally, it set aside the majority of the 170,000 visas (75 percent) for relatives of U.S. citizens and lawful permanent residents, rather than based on employment or job skills.<sup>69</sup>

Importantly, the 1965 Immigration Act established a preferences system that determines a non-citizen’s eligibility for a visa based on her family relationship to a U.S. citizen or lawful permanent resident. The top of the hierarchy comprises of married sons and daughters of U.S. citizens. Up to twenty percent of the visas would be first allocated to them.<sup>70</sup> The next available visas (not to exceed twenty percent) would then be given to spouses and unmarried sons or daughters of lawful permanent residents.<sup>71</sup> Taking a break from family-preferences, the next set of visas (not to exceed ten percent) would then be made available to those members of the profession who “because of their exceptional ability in the sciences or arts will substantially benefit” the United States.<sup>72</sup> The Act then returns to privileging family members by setting aside the next set of visas (not to exceed 10 percent) to married sons or daughters of U.S. citizens.<sup>73</sup> Next, no more than 24 percent of visas would then next be made available to brothers and sisters of U.S. citizens.<sup>74</sup> Once again shifting away from family preferences and towards employment based, the next set of visas (up to ten percent) would be made

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<sup>66</sup> See *id.*, sec. 2, § 202(a), 79 Stat. 911, 911. Countries in the Western Hemisphere did not have numerical limits. In 1976, Congress passed an amendment to the Immigration and Nationality Act that imposed a 20,000 per country quota on countries in the Western Hemisphere. See Immigration and Nationality Act Amendments of 1976, sec. 3, § 202(e), Pub. L. No. 94-571, 90 Stat. 2703, 2704.

<sup>67</sup> 8 U.S.C. § 1152.

<sup>68</sup> See Hart-Celler Act, sec. 1, §201(a), 79 Stat. 911, 911.

<sup>69</sup> See *id.*, sec. 3, §203(a), 79 Stat. 911, 912-15 (specifying the allotment of visas that are to go to family preference categories); Aubry Holland, *The Modern Family Unit: Toward A More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1060-61 (2008) (stressing family unification as a primary focus of the Hart-Celler Act and describing the applicable familial categories).

<sup>70</sup> See Hart-Celler Act, sec. 3, §203(a)(1).

<sup>71</sup> See *id.*, §203(a)(2).

<sup>72</sup> See *id.*, §203(a)(3).

<sup>73</sup> See *id.*, §203(a)(4).

<sup>74</sup> See *id.*, §203(a)(5).

available to immigrants “who are capable of performing specified skilled or unskilled labor” that are not temporary in nature.<sup>75</sup>

The blueprint for family-based immigration under the 1965 Immigration Act eventually led to the more complicated immigration system that we have today. Currently, there is a formula that determines admission to the United States as an immigrant, particularly for those family members who fall under the preference system. To begin, there is an annual worldwide level of 675,000 visas per year<sup>76</sup> and each country is limited to 7 percent of the worldwide level.<sup>77</sup> Of the worldwide level, 480,000 visas are allocated for immediate relatives and family-sponsored petitions.<sup>78</sup> The INA provides that the family-sponsored preference system may not fall below 226,000,<sup>79</sup> leaving 254,000 visas for immediate relatives.<sup>80</sup> The allocation of 226,000 visas for family-sponsored immigrants is subdivided as follows: 23,400 (F1 or first preference); 114,200 (F2 or second preference, with 77 percent reserved for spouses and children of lawful permanent residents); 23,400 (F3 or third preference); and 65,000 (F4 or fourth preference).<sup>81</sup>

**Figure 1**

<b>Preference Category</b>	<b>Familial Relationship</b>
F1	Unmarried children of U.S. Citizens
F2	Spouses and unmarried children of Permanent Resident Aliens
F3	Married Children of U.S. Citizens
F4	Siblings of U.S. Citizens

In sum, privileging a non-citizen’s ties to a U.S. citizen or lawful

<sup>75</sup> See *id.*, §203(a)(6).

<sup>76</sup> The 675,000 visa “cap” is the sum of family-sponsored visas (480,000), employment-based visas (140,000), “diversity immigrant” visas (55,000). See generally 8 U.S.C. § 1151(a) (2012).

<sup>77</sup> See *id.* § 1152(a)(2). There are two exceptions to the per-country ceiling. See *id.* § 1152(a)(4). 75 percent of the visas for spouses and children of lawful permanent residents are not subject to the per-country ceiling. See *id.* § 1152(a)(4)(A).

<sup>78</sup> *Id.* § 1151(c)(1)(A)(i). Additionally, any unused employment-based visas from the prior year are added to the number set-aside for immediate relatives and family-sponsored immigrants (480,000). See *id.* § 1151(c)(1)(A)(iii).

<sup>79</sup> See *id.* § 1151(c)(1)(B)(ii)

<sup>80</sup> In reality, family immigration often exceeds the 480,000 level because there are more than 254,000 immediate relatives that immigrate to the United States every year.

<sup>81</sup> Note that any unused visas in each preference are then added to the next lower preferential group.

permanent resident, the system that the 1965 Immigration Act established sought to promote the integrity of the family unencumbered by racial restrictions as prior immigration laws and policies have done. Through a combination of factors including a preference system, per-country limits, and caps per family category, the family-based immigration law program under the 1965 Immigration Act provided a workable framework for uniting U.S. citizens and lawful permanent residents with their families.

## II. IMMIGRATION ACT OF 1965: THE PROMOTION OF FAMILY UNIFICATION AND RACIAL DIVERSITY

Without doubt, the Immigration Act of 1965's creation of equal access to immigration has led to remarkable results in terms of reunifying family members. Such achievements in family unification correlated with the changing racial make-up of our country. That is, through family-based immigration law, the population of immigrants of color has increased such that by 2043 if not sooner, the United States will be a majority minority nation.<sup>82</sup>

### *A. Family Unification*

The U.S. Department of Homeland Security's Office of Immigration Statistics ("OIS") has been publishing annual reports on immigration to the United States since 1996.<sup>83</sup> Such data from the OIS provides a valuable window through which we can evaluate how the 1965 Immigration Act has facilitated family unification between U.S. citizens and lawful permanent residents and their families.

As Figure 2 shows, most immigration visas went to those who were sponsored under the family preferences program or because they were immediate relatives of U.S. citizens.<sup>84</sup> On average during this ten-year period, 65 percent of immigrants who became lawful permanent residents acquired their status through family ties.<sup>85</sup> To be sure, the 1965 Immigration Act, as already discussed, was designed with family unification in mind.<sup>86</sup> Nevertheless, it is helpful to see actual numbers to gain a deeper appreciation

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<sup>82</sup> See Press Release, U.S. Census Bureau, U.S. Census Projections Show a Slower Growing, Older, More Diverse Nation a Half a Century from Now (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html>,

<sup>83</sup> See *Archives: Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/archives#1> (last modified Sept. 13, 2012).

<sup>84</sup> See *infra* Figure 1. The remainder of non-citizens who immigrated to the United States did so through employment-based, diversity, refugee and asylum and other programs. See *Archives: Yearbook of Immigration Statistics*, *supra* note 83.

<sup>85</sup> See *infra* Figure 1.

<sup>86</sup> See generally *supra* Part I.

of the impact that the law has had in the United States.

**Figure 2**

	<b>Total Immigrants</b>	<b>Family Sponsored</b>	<b>Immediate Relatives</b>	<b>Combined</b>	<b>Percent out of Total Immigrants</b>
2003	703,542	158,796	331,286	490,082	69%
2004	957,883	214,355	417,815	632,170	66%
2005	1,122,257	212,970	436,115	649,085	58%
2006	1,266,129	222,229	580,348	802,577	63%
2007	1,052,415	194,900	494,920	689,820	66%
2008	1,107,126	227,761	488,483	716,244	65%
2009	1,130,818	211,859	535,554	747,413	66%
2010	1,042,625	214,589	476,414	691,003	66%
2011	1,062,040	234,931	453,158	688,089	65%
2012	1,031,631	202,019	478,780	680,799	66%

Among all non-citizens who were petitioned by a family member, immediate relatives garnered the most visas.<sup>87</sup> Such numbers should not be surprising given that there are no numerical caps on immediate relatives<sup>88</sup> — as many as are eligible can come. Figure 3 shows that between 2003 and 2012, an average of 44.9 percent of all immigrants entered the United States because they were spouses, children or parents of U.S. citizens.<sup>89</sup> Among this group, spouses of U.S. citizens obtained the most visas, garnering an average of 57 percent of all visas allocated to immediate relatives.<sup>90</sup>

**Figure 3**

	<b>Total Immigrants</b>	<b>Immediate Relatives</b>	<b>Percent of Immediate Relatives out of Total Immigrants</b>	<b>Spouses</b>	<b>Percent out of Total Immediate Relatives</b>
2003	703,542	331,286	47%	183,796	55%
2004	957,883	417,815	44%	252,193	60%
2005	1,122,257	436,115	39%	259,144	59%
2006	1,266,129	580,348	46%	339,843	59%

<sup>87</sup> See *supra* Figure 2.

<sup>88</sup> 8 U.S.C. § 1151(b)(2)(A) (2012).

<sup>89</sup> See *infra* Figure 3.

<sup>90</sup> See *id.*

2007	1,052,415	494,920	47%	274,358	55%
2008	1,107,126	488,483	44%	265,671	54%
2009	1,130,818	535,554	47%	317,129	59%
2010	1,042,625	476,414	46%	271,909	57%
2011	1,062,040	453,158	43%	258,320	57%
2012	1,031,631	478,780	46%	273,429	57%

The foregoing numbers underscore the extent to which the 1965 Immigration Act has been able to effectively facilitate family unification. It should be noted, however, that the concept of “family reunification” comes in at least two different types. One type of family unification refers to those families who have been physically separated by national borders and who are eventually reunited as a family in the United States.<sup>91</sup> Non-citizens who are reunited with these families under this type of family unification are referred to as “new arrivals.”<sup>92</sup> The second type of family unification gestures to those families who are *physically* together in the United States but who may or may not be legally authorized to remain together in the United States. That is, some non-citizen family members may be residing in the United States under a temporary status, which means that at the expiration of their visas, they are required, in principle, to return to their home countries.<sup>93</sup> Other non-citizen family members may be living in the United States without authorized status.<sup>94</sup> Immigration law’s family-based program allows U.S. citizens and lawful permanent residents to sponsor these non-immigrants on temporary status, which would enable them to adjust their status to LPR status.<sup>95</sup> By acquiring

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<sup>91</sup> Cf. Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2012*, U.S. DEPT OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS 2 (Mar. 8, 2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_fr\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf) [hereinafter *2012 LPR Report*] (defining “new arrivals” as LPRs who become LPRs upon admission from a foreign nation into the United States at a port of entry).

<sup>92</sup> Cf. *id.*

<sup>93</sup> Cf. *Immigrant vs. Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/72/~/immigrant-visas-vs.-nonimmigrant-visas](https://help.cbp.gov/app/answers/detail/a_id/72/~/immigrant-visas-vs.-nonimmigrant-visas) (last updated Sept. 4, 2014) (defining nonimmigrant visas as temporary for a limited period of time).

<sup>94</sup> See Patricia Hatch, *U.S. Immigration Policy: Family Reunification*, LEAGUE OF WOMEN VOTERS (last visited Sept. 17, 2014), <http://www.lwv.org/content/us-immigration-policy-family-reunification> (noting a significant percentage of estimated unauthorized immigrants in the U.S. are family members of “anchor relatives”).

<sup>95</sup> See *Green Card for a Family Member of a Permanent Resident*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-through-family/green-card-family-member-us-citizen> (last updated Aug. 29, 2013); *Green Card for a Family Member of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-through-family/green-card-family-member-us-citizen> (last updated Aug. 29, 2013); *Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen>.

LPR status, these previous temporary non-immigrants are then considered to have reunified with their U.S. citizen or LPR family members.<sup>96</sup>

The distinction between “new arrivals” and those who “adjusted” their status is helpful in further understanding the impact of the 1965 Immigration Act on American families. As Figure 3 demonstrates, a significant number of “new arrivals” (an approximate average of 35 percent) between 2003 and 2012 became LPRs because they fell in the categories of immediate relatives or family-sponsored preferences.<sup>97</sup> Moreover, “new arrivals” who are considered “immediate relatives” outnumbered those who fell in the “family-sponsored preferences” category.<sup>98</sup>

**Figure 4**

	<b>Total Immigrants</b>	<b>New Arrivals of Family-Sponsored</b>	<b>New Arrivals of Immediate Relatives</b>	<b>New Arrivals Based on Family Membership/Percent out of Total Immigrants</b>
2003	703,542	129,764	154,094	283,858 (40 %)
2004	957,883	149,928	147,851	297,779 (31%)
2005	1,122,257	142,511	169,264	311,775 (28%)
2006	1,266,129	142,520	223,221	365,741 (29%)
2007	1,052,415	142,841	217,732	360,573 (34%)
2008	1,107,126	170,862	237,393	398,553 (36%)
2009	1,130,818	172,072	226,481	398,553 (35%)
2010	1,042,625	188,310	223,572	411,882 (40%)
2011	1,062,040	206,585	209,984	416,569 (39%)

<sup>96</sup> See *Green Card for a Family Member of a Permanent Resident*, supra note 95 (describing steps to LPR status for family members and its purpose as “[t]o promote family unity”); *Green Card for a Family Member of a U.S. Citizen*, supra note 95 (same); *Green Card for an Immediate Relative of a U.S. Citizen*, supra note 95 (same).

<sup>97</sup> See *infra* Figure 3.

<sup>98</sup> See *id.*

2012	1,031,631	183,459	238,794	422,253 (41%)
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By comparison, as Figure 5 illuminates, there were, on average, about 29.7 percent of non-citizens who adjusted their status to lawful permanent residents based on their connection to a U.S. citizen or a LPR.<sup>99</sup> Although the numbers are lower than “new arrivals,” they nevertheless underscore the ways in which immigration law has enabled families to remain together in the United States. For those non-citizens who were previously undocumented, the ability to come out of the shadows and adjust their status to lawful permanent residents is incredibly important.<sup>100</sup>

**Figure 5**

	<b>Total Immigrants</b>	<b>Adjustment of Status of Family-Sponsored</b>	<b>Adjustment of Status of Immediate Relatives</b>	<b>Total Adjustment of Status Based on Family Membership/Percent out of Total Immigrants</b>
2003	703,542	29,032	177,192	206,224 (29%)
2004	957,883	64,427	269,964	334,39 (35%)
2005	1,122,257	70,459	266,851	337,310 (30%)
2006	1,266,129	79,709	357,127	436,836 (35 %)
2007	1,052,415	52,059	277,188	329,247 (31%)
2008	1,107,126	56,899	251,090	307,989 (28%)
2009	1,130,818	39,787	309,073	348,860 (31%)
2010	1,042,625	26,279	252,842	279,121 (27%)
2011	1,062,040	28,346	243,174	271,520 (26%)

<sup>99</sup> See *infra* Figure 5.

<sup>100</sup> Cf. Hatch, *supra* note 94 (discussing unauthorized immigrants who learn about bar to legal permanent residence choosing to remain undocumented rather than risk visa process for fear of separating from family again).

2012	1,031,631	18,560	239,986	258,546 (25%)
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As of this writing, the most recent annual statistical data from OIS is from the year 2013. Similar to the previous years, 2013 shows the ways in which the 1965 Immigration Act has helped to reunite families. Specifically, in 2013, approximately 990,553 persons became legal permanent residents.<sup>101</sup> To be sure, this was the lowest number of total immigrants in one given year since 2004.<sup>102</sup> As Figure 4 shows, during that year, 957,883 non-citizens immigrated to the United States.<sup>103</sup> Since 2005, there have been well over 1,000,000 non-citizens who immigrated to the United States as lawful permanent residents each year.<sup>104</sup>

Yet, despite the decrease in the overall number of LPRs, percentage wise, the total number of LPRs who immigrated to the United States based on family ties, consistent with prior years, was at 65 percent (or 649,763 people).<sup>105</sup> Of this group, the majority—439,460 (or 44 percent of total LPRs)—was composed of immediate relatives.<sup>106</sup> The remainder of this group—210,303 (or 21 percent of total LPRs)—was composed of family members of lawful permanent residents.<sup>107</sup> By comparison, the largest group of immigrants after the family-based immigration system—employment-based immigrants—was composed of 161,110 immigrants or about 16 percent of lawful permanent residents in 2013.<sup>108</sup>

Figure 6 provides a further examination of the 2013 data. It demonstrates that, as in the past, spouses of U.S. citizens garnered the most visas (248,332) followed by parents of U.S. citizens (119,746) and children of U.S. citizens (71,382).<sup>109</sup> By comparison, the family preference immigrants' breakdown is as follows (in order of preferences): 24,358 (unmarried sons and daughters of

<sup>101</sup> See Randall Monger & James Yankay, *U.S. Lawful Permanent Residents: 2013*, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS 1 (May 29, 2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf) [hereinafter *2013 LPR Report*].

<sup>102</sup> See *supra* Figure 5.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 3 tbl.2. The total number of lawful permanent residents (990,553) may be divided into two general groups: persons who were new arrivals to the United States (459,751) and persons who were already present in the United States and adjusted their status (530,802). See *id.* at 2 tbl.1.

<sup>106</sup> See *id.* at 3 tbl.2.

<sup>107</sup> See *id.* The other lawful permanent residents obtained their status through the other legal channels, including employment, diversity, refugee and asylum. See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *infra* Figure 6; see also Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 3 tbl.2.

U.S. citizens), 99,115 (spouses and children of LPRs), 21,294 (married sons and daughters of U.S. citizens) and 65,536 (siblings of U.S. citizens).<sup>110</sup>

**Figure 6: 2013 Data**

<b>Immediate Relatives</b>	<b>Total</b>	<b>Percent of Total</b>
Spouses of U.S. Citizens	248,332	57%
Parents of U.S. Citizens	119,746	27%
Children of U.S. Citizens	71,382	16%
Total Immediate Relatives	439,460	
<b>Family Sponsored Preferences</b>		
1 <sup>st</sup> Pref: Unmarried Sons and Daughters of U.S. Citizens	24,358	12%
2 <sup>nd</sup> Pref: Spouses and Children of LPRs	99,115	47%
3 <sup>rd</sup> Pref: Married Sons and Daughters of U.S. Citizens	21,294	10%
4 <sup>th</sup> Pref: Siblings of U.S. Citizens	65,536	31%
Total Family-Sponsored Preference	210,303	

In contrast to the significant numbers of immigrants who became new LPRs in 2013 based on their ties to a U.S. citizen or LPR, the number of people who became LPRs under either employment-based preferences, diversity programs or refugee and asylum program were not as high. As noted earlier, 161,110 immigrants (about 16 percent of total LPRs) acquired LPR status through the employment-based preference program.<sup>111</sup> Refugees and asylees were given 119,630 visas (12 percent) and immigrants under the diversity or “lottery” program received 45,618 visas (4 percent).<sup>112</sup>

In brief, the foregoing data from the last ten years provides a meaningful way of understanding the impact of the 1965 Immigration Act. When set against the backdrop of the history of racially exclusionary immigration laws, which did not formally end until 1965, these numbers reflect the ways in which the law’s goal of family unification has been achieved.

### *B. Racial Diversity*

The 1965 Immigration Act’s promotion of family unification cannot be fully appreciated without examining its role in increasing racial diversity in the

<sup>110</sup> See *infra* Figure 6; see also Monger & Yankay, 2013 LPR Report, *supra* note 101, at 3 tbl.2.

<sup>111</sup> See *supra* note 108 and accompanying text.

<sup>112</sup> See Monger & Yankay, 2013 LPR Report, *supra* note 101, at 3 tbl.2.

United States. This is not to suggest that the Immigration Act of 1965 completely erased racial barriers to immigration. As scholars have argued, despite the 1965 Immigration Act’s goal of race-neutrality, it had racially discriminatory consequences.<sup>113</sup> Yet, as Jack Chin and other legal scholars and historians have also pointed out, the lifting of national origins quotas facilitated the reunification of family members of U.S. citizens and lawful permanent residents who would have otherwise been separated from their families under the previous immigration law.<sup>114</sup>

Data from the U.S. Department of Homeland Security’s Office of Immigration Statistics (“OIS”) illustrate the ways in which the 1965 Immigration Act prompted a remarkable change in the racial demographics of immigrants between 1820 and 2012.<sup>115</sup> From 1820 until 1919, the majority of immigrants hailed from Europe.<sup>116</sup> As Figure 6 shows, the total percentage of European immigrants ranged between 75 percent of all immigrants during the decade between 1820 to 1829 at its lowest to 96 percent during the last decade before the end of the 19<sup>th</sup> century.<sup>117</sup>

**Figure 7**

	<b>TOTAL IMMIGRANTS PER DECADE</b>	<b>TOTAL IMMIGRANTS FROM EUROPE</b>	<b>PERCENT OF TOTAL IMMIGRANTS</b>
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<sup>113</sup> See, e.g., Kevin R. Johnson, *The Beginning of the End: Anti-Latina/o Sentiment, the Immigration Act of 1965, and the Emergence of Modern Border Enforcement*, in LEGISLATING A NEW AMERICA: THE IMMIGRATION AND NATIONALITY ACT OF 1965 AND ITS CONTRIBUTIONS TO AMERICAN LAW AND SOCIETY \_\_ (forthcoming 2015) (hereinafter LEGISLATING A NEW AMERICA); Bill Ong Hing, *African Immigration to the United States: Assigned to the Back of the Bus*, in LEGISLATING A NEW AMERICA \_\_\_\_.

<sup>114</sup> See Chin, *supra* note 18, at 317-18; see, e.g., MARCELO M. SUÁREZ-OROZCO, CAROLA SUÁREZ-OROZCO & DESIRÉE QIN-HILLIARD, *THE NEW IMMIGRANT AND THE AMERICAN FAMILY: INTERDISCIPLINARY PERSPECTIVES ON THE NEW IMMIGRATION* 172 (2014) (stating Immigration Act of 1965 with its family reunification focus and abolishment of national origins quota system led to immigration of Chinese as family groups); Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 363 (2001) (noting large number of minority descent is due to lifting of national origins quota system); cf. Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1316 (2012) (stating family reunification is a core feature of immigration law in current times when it only played a minor role when the national origins quota system was in place).

<sup>115</sup> See *2012 Yearbook of Immigration Statistics*, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS 6-11 (Sept. 6, 2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf) [hereinafter *2012 Immigration Statistics*].

<sup>116</sup> See *id.* at 6-7.

<sup>117</sup> See *infra* Figure 7; see also *2012 Immigration Statistics*, *supra* note 115, at 6-7.

			<b>FROM EUROPE</b>
1820-1829	128,502	99,618	75 percent
1830-1839	538,381	422,853	78 percent
1840-1849	1,427,337	1,369,423	95 percent
1850-1859	2,814,554	2,622,617	93 percent
1860-1869	2,081,261	1,880,389	90 percent
1870-1879	2,742,137	2,252,050	82 percent
1880-1889	5,248,568	4,638,684	88 percent
1890-1899	3,694,294	3,576,411	96 percent
1900-1909	8,202,388	7,572,569	92 percent
1910-1919	6,347,380	4,985,411	78 percent

The same data shows that Asians had been immigrating to the United States since 1820 (3 from China, 9 from India, and 19 from Turkey during the 1820-1829 decade) and began coming in more significant numbers beginning the decade between 1850 and 1859.<sup>118</sup> During that decade, 36,080 Asian immigrants arrived, which included 35,933 Chinese.<sup>119</sup> That number shows a huge increase from the prior decade when only 32 Chinese immigrated to the United States.<sup>120</sup> Yet, it should be noted that the total number of Asian immigrants during the 1850 to 1859 decade represented only 1 percent of the total number of immigrants during that decade compared to 93 percent Europeans).<sup>121</sup> Indeed, subsequent decades indicate the same trend of limited immigration from Asia compared to Europe as Figure 8 illustrates.<sup>122</sup>

### Figure 8

<sup>118</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 6.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> Compare *id.* (listing 36,080 Asian immigrants out of a total of 2,814,554, or 1 percent, during the 1850 to 1859 decade), with *id.* (listing 2,622,617 European immigrants out of a total of 2,814,554, or 93 percent, during the 1850 to 1859 decade).

<sup>122</sup> See *infra* Figure 8.

	<b>TOTAL IMMIGRANTS PER DECADE</b>	<b>TOTAL IMMIGRANTS FROM ASIA</b>	<b>PERCENT OF TOTAL IMMIGRANTS FROM ASIA COMPARED WITH EUROPE</b>
1860-1869	2,081,261	54,408	3 percent vs. 90 percent
1870-1879	2,742,137	134,071	5 percent vs. 82 percent
1880-1889	5,248,568	71,152	1 percent vs. 88 percent
1890-1899	3,694,294	61,304	2 percent vs. 96 percent
1900-1909	8,202,388	300,441	4 percent vs. 92 percent
1910-1919	6,347,380	269,736	4 percent vs. 78 percent

The low number of Asian immigrants to the United States during the foregoing period (1820-1919) was, of course, purposeful. As explained previously, Congress enacted several measures, including the Chinese Exclusion Act, during this period to prevent Asians from immigrating to the United States.<sup>123</sup> Congress continued to pass laws during the subsequent decade (1920-1929), particularly the National Origins Quota Act, which further reduced the number of Asian immigrants as well as southern and eastern Europeans.<sup>124</sup> The numbers during that decade shows the impact of such intentional discrimination.<sup>125</sup> Out of the 4,295,510 non-citizens who immigrated during that decade, 126,740 came from Asia (3 percent).<sup>126</sup>

<sup>123</sup> See *supra* notes 35-45 and accompanying text.

<sup>124</sup> See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153. The National Origins Quota Act was also known as the Immigration Act of 1924. See Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 738 n.38 (1997).

<sup>125</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 8.

<sup>126</sup> See *id.* The National Origins Quotas was also designed to deter southern and eastern Europeans from immigrating to the United States, as these numbers demonstrate. See Chin, *supra* note 18, at 279, 327 n.258.

2,560,340 came from Europe, which represented the lowest percentage of European immigrants (60 percent) since 1820.<sup>127</sup>

Immigration to the United States dropped significantly between 1930 and 1950.<sup>128</sup> Specifically, only 699,375 non-citizens immigrated during the 1930-1939 decade and 856,608 immigrated during the 1940-1949 decade.<sup>129</sup> During the 1930-1939 decade, 64 percent immigrated from Europe and 3 percent from Asia, and during the 1940-1949 decade, 55 percent immigrants hailed from Europe and 4 percent came from Asia.<sup>130</sup>

Immigration in the following decade (1950-1959) bounced back to well over 2 million.<sup>131</sup> Specifically, during that decade 2,499,268 non-citizens immigrated to the United States.<sup>132</sup> The majority of Europeans, as in the past, came from Europe (approximately 56 percent).<sup>133</sup> And, consistent with previous decades, the number of Asian immigrants was low—only 5 percent out of the total population of new immigrants..<sup>134</sup>

It was not until the decade beginning with 1960 that the United States experienced a sea change in immigration. Without a doubt, this change can be attributed to the elimination of the ongoing quota restrictions for Asian immigrants that the 1965 Immigration Act prompted. Indeed, during the 1960-1969 decade, migration from Asia reached double digits (11 percent of the total number of immigrants) for the first time.<sup>135</sup> The percentage of European immigrants dwindled to 35 percent.<sup>136</sup> The trend would continue in the decades leading up to the 21<sup>st</sup> century as indicated by the following chart.<sup>137</sup>

### Figure 9

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<sup>127</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 6-8.

<sup>128</sup> See *id.* at 8.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* (recording 444,404 European immigrants out of 699,375 total, or 64 percent, during 1930-1939; 19,292 Asian immigrants out of 699,375 total, or 3 percent, during 1930-1939; 472,524 European immigrants out of 856,608 total, or 55 percent, during 1940-1949; and 34,532 Asian immigrants out of 856,608 total, or 4 percent, during 1940-1949).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* (recording 1,404,973 European immigrants out of 2,499,268 total, or approximately 56 percent).

<sup>134</sup> See *id.* (recording 135,844 Asian immigrants out of 2,499,268 total, or 5 percent).

<sup>135</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 8 (recording 358,563 Asian immigrants out of a total of 3,213,749, or 11 percent).

<sup>136</sup> See *id.* (recording 1,133,442 European immigrants out of 3,213,749 total, or 35 percent).

<sup>137</sup> See *infra* Figure 9; see also 2012 *Immigration Statistics*, *supra* note 115, at 8, 10.

	<b>TOTAL IMMIGRANTS</b>	<b>EUROPEAN IMMIGRANTS</b>	<b>ASIAN IMMIGRANTS</b>
1970- 1979	4,248,203	826,327 (19 percent)	1,406,526 (33 percent)
1980- 1989	6,244,379	669,694 (10 percent)	2,391,356 (38 percent)
1990- 1999	9,775,398	1,349,919 (13 percent)	2,859,899 (29 percent)
2000- 2009	10,299,430	1,349,609 (13 percent)	3,470,835 (34 percent)

Indeed, as the data from 2010, 2011 and 2012 indicate, the overall number of European immigrants continued to decrease while those from Asia increased to about 40 percent.<sup>138</sup>

**Figure 10**

	<b>TOTAL IMMIGRANTS</b>	<b>EUROPEAN IMMIGRANTS</b>	<b>ASIAN IMMIGRANTS</b>
2010	1,042,625	95,429 (9 percent)	410,209 (39 percent)
2011	1,062,040	90,712 (8.5 percent)	438,580 (41 percent)
2012	1,031,631	86,956 (8 percent)	416,488 (40 percent)
2013	990,553	86,556 (8.7 percent)	400,548 (40.4 percent)

Most notable, perhaps, in the radical changes precipitated by the 1965 Immigration Act is the increase in immigrants from North America, particularly Mexico. To be sure, Mexicans, like immigrants from Asian countries, have been immigrating to the United States since well before 1965.<sup>139</sup> The OIS data shows, for example, that in the decade between 1820 and 1829, there were 3,835 Mexican nationals who became lawful permanent residents during that decade.<sup>140</sup> This represented 3 percent of the overall immigrants from Mexico during that decade, which constituted the *highest* percentage rate of immigration from Mexico for the next one hundred years.<sup>141</sup>

<sup>139</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 6, 8.

<sup>140</sup> See *id.* at 6.

<sup>141</sup> See *id.* at 6, 8 (recording 3,835 Mexican immigrants out of 128,502 total, or 3 percent, during 1820-1829 and recording the number of Mexican immigrants for the next one hundred years).

As Figure 10 shows, for most of that period, less than 1 percent permanently immigrated from Mexico.<sup>142</sup> Between 1820 and 1920, Mexican immigration reached its lowest point during the 1890 to 1899 decade (734 immigrants, which represents .0002 percent of the overall lawful permanent residents during that decade) and highest during the 1910 to 1920 decade (185,334 or .03 percent during that decade).<sup>143</sup>

**Figure 11**

	<b>TOTAL IMMIGRANTS PER DECADE</b>	<b>TOTAL IMMIGRANTS FROM MEXICO</b>	<b>PERCENT OF TOTAL IMMIGRANTS FROM MEXICO</b>
1820-1829	128,502	3,835	3 percent
1830-1839	538,381	7,187	1 percent
1840-1849	1,427,337	3,069	.0021 percent
1850-1859	2,814,554	3,446	.0012 percent
1860-1869	2,081,261	1,957	.0009 percent
1870-1879	2,742,137	5,133	.0018 percent
1880-1889	5,248,568	2,405	.0004 percent
1890-1899	3,694,294	734	.0002 percent
1900-1909	8,202,388	31,188	.0038 percent
1910-1919	6,347,380	185,334	.03 percent

During the following decades, the number of Mexican immigrants fluctuated tremendously. In the 1920-1929 decade, the number of Mexican immigrants jumped to 498,945—more than double the numbers from previous decade.<sup>144</sup> This represented 12 percent of the total immigration from that decade (4,295,510) and was the highest percentage of Mexican immigrants since 1820.<sup>145</sup> However, the numbers dropped drastically to 32,709 (or 5 percent of 699,375 total immigrants) during the 1930-1939 decade.<sup>146</sup> It increased slightly to 56,158 (or 7 percent of 856,608 total immigrants) during

<sup>142</sup> See *infra* Figure 11.

<sup>143</sup> See *id.*

<sup>144</sup> See 2012 *Immigration Statistics*, *supra* note 115, at 8.

<sup>145</sup> See *id.* at 6, 8.

<sup>146</sup> See *id.* at 8.

the 1940-1949 decade and more than quadrupled to 273,847 (or 11 percent of the 2,499,268 total immigrants) during the 1950-1959 decade.<sup>147</sup>

Notably, this 11-percent rate of overall immigration during the 1950 to 1959 decade constitutes the lowest in the latter half of the twentieth century. With the help of the 1965 Immigration Act, the population of lawful permanent residents from Mexico since then continued to rise, as Figure 12 demonstrates.<sup>148</sup> It rose from 13 percent of overall immigration in the 1960s to as high as 28 percent in the 1990s.<sup>149</sup>

**Figure 12**

	<b>TOTAL IMMIGRANTS</b>	<b>IMMIGRANTS FROM AMERICA</b>	<b>MEXICAN IMMIGRANTS</b>
1960-1969	3,213,749	1,674,185 (52 percent)	441,824 (13 percent)
1970-1979	4,248,203	1,903,636 (44 percent)	621,218 (14 percent)
1980-1989	6,244,379	2,694,504 (43 percent)	1,009,586 (16 percent)
1990-1999	9,775,398	5,137,142 (52 percent)	2,757,418 (28 percent)
2000-2009	10,299,430	4,441,529 (43 percent)	1,704,166 (17 percent)

OIS has more specific data of non-citizens who became lawful permanent residents beginning in 2010.<sup>150</sup> The data evidences a dip in the population of new immigrants from North America, including Mexico. Specifically, between 2010 and 2012, the number of immigrants from the Americas remained at 40 percent, which is lower than the 43 percent average during the 2000-2009 decade.<sup>151</sup> Immigration from Mexico decreased to 13 percent in 2010 and 2011 but then increased to 14 percent in 2012.<sup>152</sup>

**Figure 13**

	<b>TOTAL</b>	<b>IMMIGRANTS</b>	<b>MEXICAN</b>
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<sup>147</sup> See *id.* at 8.

<sup>148</sup> See *infra* Figure 12.

<sup>149</sup> See *id.*

<sup>150</sup> See *2012 Immigration Statistics*, *supra* note 115, at 10-11.

<sup>151</sup> See *infra* Figure 13; see also *2012 Immigration Statistics*, *supra* note 115, at 10.

<sup>152</sup> See *infra* Figure 13; see also *2012 Immigration Statistics*, *supra* note 115, at 10.

	<b>IMMIGRANTS</b>	<b>FROM AMERICA</b>	<b>IMMIGRANTS OUT OF TOTAL IMMIGRANTS</b>
2010	1,042,625	426,981 (40 percent)	138,717 (13 percent)
2011	1,062,040	423,277 (40 percent)	142,823 (13 percent)
2012	1,031,631	409,664 (40 percent)	145,326 (14 percent)

The most recent OIS data (2013) shows the continuing pace of immigration from Mexico. Out of the 900,553 immigrants, 135,028 (or 13.6 percent) came from Mexico.<sup>153</sup> Mexico dominated the field as the top country of origin in 2013.<sup>154</sup> The country that came the closest to Mexico is China, which composed 7.2 percent of the total number of immigrants.<sup>155</sup> Indeed, Mexico had sent the most immigrants out of any other country since 1960.<sup>156</sup>

**Figure 14**

<b>COUNTRY</b>	<b>TOTAL IMMIGRANTS FROM THAT COUNTRY</b>	<b>PERCENTAGE</b>
Mexico	135,028	13.6 percent
China	71,798	7.2 percent
India	68,458	6.9 percent
Philippines	54,466	5.5 percent
Dominican Republic	41,311	4.2 percent

Demographers have long been noting that whites are to become a minority by the year 2040.<sup>157</sup> This should not come as a surprise given that the majority of immigrants in the last several years are people of color. For instance, in 2013, 40 percent of immigrants came from Asia (400,548 immigrants),

<sup>153</sup> See Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3; *infra* Figure 14.

<sup>154</sup> See Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3; *infra* Figure 14.

<sup>155</sup> See Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3; *infra* Figure 14.

<sup>156</sup> Compare *2012 Immigration Statistics*, *supra* note 115, at 8, 10 (listing number of Mexican immigrants from 1960 to 2012), and Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3 (listing number of Mexican immigrants in 2013), with *2012 Immigration Statistics*, *supra* note 115, at 8-11 (listing number of immigrants from other countries from 1960 to 2012), and Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3 (listing number of immigrants from other countries in 2013).

<sup>157</sup> See, e.g., *supra* note 82.

followed by 31.9 percent from North America, which includes Mexico, Central America and the Caribbean.<sup>158</sup> By contrast, Europe garnered 86,556 visas or 8.7 percent of total LPRs.<sup>159</sup>

In sum, as both Parts A and B demonstrated, the combination of an immigration system that primarily privileged family-ties and a norm of non-discrimination essentially led to a more diverse immigration stream in the last fifty years.<sup>160</sup> It is important to recognize and celebrate these achievements prompted by the 1965 Immigration Act. The United States would not be on a path to a more racially diverse country without the assistance of the 1965 Immigration Act.

### III. ONGOING FAMILY SEPARATION

Although we ought to celebrate the 1965 Immigration Act for its achievements, as Part II highlighted, it is equally important to recognize its flaws. In particular, as this Part discusses, the 1965 Immigration Act may also be described as a law that has facilitated the separation of families. The combination of caps on overall visas per year, limits on the number of visas available per family-sponsored preferences categories, and per country limits has resulted in an extremely long visa backlog. In other words, the structure of immigration law itself has ironically delayed, if not obstructed, family unification.

#### A. Sponsoring Family Members

Sponsoring a non-citizen family member to immigrate to the United States requires two distinct steps. First, their visa application must be approved.<sup>161</sup> Second, there must be a visa available that would enable the non-citizen to immigrate to the United States.<sup>162</sup> A delay in the ability of the non-citizen may take place at either step in the process, but especially during the second stage.<sup>163</sup>

<sup>158</sup> See Monger & Yankay, *2013 LPR Report*, *supra* note 101, at 4 tbl.3.

<sup>159</sup> See *id.*

<sup>160</sup> See *supra* Part II.A.

<sup>161</sup> See *Green Card for a Family Member of a Permanent Resident*, *supra* note 95 (describing steps to LPR status for family members); *Green Card for a Family Member of a U.S. Citizen*, *supra* note 95 (same); *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* note 95 (same).

<sup>162</sup> See *Green Card for a Family Member of a Permanent Resident*, *supra* note 95 (describing steps to LPR status for family members); *Green Card for a Family Member of a U.S. Citizen*, *supra* note 95 (same); *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* note 95 (same).

<sup>163</sup> See, e.g., Gene Demby, *For Asian-Americans, Immigration Backlogs Are A Major Hurdle*, NPR (Jan. 31, 2013, 12:50 PM), <http://www.npr.org/blogs/itsallpolitics/2013/01/31/170744897/for-asian-americans->

There are several factors governing the approval of a U.S. citizen or lawful permanent resident's petition to sponsor a non-citizen to immigrate to the United States. These include evidence of family relationship, financial support for the non-citizen, and that the non-citizen is not inadmissible. Assuming that the petition is approved, the next requirement for immigrating is the availability of a visa. For immediate relatives, a visa is immediately available.<sup>164</sup> As explained in Part II, there are no caps imposed on immediate relatives and thus, when the petition is approved, it also means that the visa is available for the non-citizen to enter the United States as a new arrival or, if she is already in the United States, she may then adjust her status to that of a lawful permanent resident.<sup>165</sup>

By contrast, the process of immigrating to the United States for non-citizens who submitted petitions under the family-sponsored preferences program takes much longer. Like the immediate relative process, a visa application must first be approved. However, unlike immediate relatives, non-citizens do not have visas immediately available. As discussed earlier, there are limits on how many non-citizens may enter the United States on a given year.<sup>166</sup> For family-sponsored preferences, there is a minimum of 226,000 visas available, which are further subdivided among the various family preference categories. Additionally, there is a per-country cap of 7 percent imposed on almost all of the categories.

Finally, visa availability also depends on when the visa application was submitted before the "cut-off date" — the date when the demand for visas exceeded the available visas and the country is deemed oversubscribed. The "cut-off date" becomes the "priority date" for those who filed their applications before the visas ran out during a particular period and would thus be given priority over other applicants in the same family category.<sup>167</sup> The combination of all of these factors has led to a backlog in family-sponsored visa availability.<sup>168</sup> That is, although the immigration petitions may have been approved, there are no visas yet available for many of the family members — they must wait for visas to become available.

To be sure, as discussed *supra*, a significant number of new immigrants

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immigration-backlogs-are-becoming-a-major-hurdle. [Have there been any empirical studies on this to cite to?]

<sup>164</sup> *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* note 95.

<sup>165</sup> See *supra* Part II.A.

<sup>166</sup> See *supra* notes 76-81 and accompanying text.

<sup>167</sup> See 8 C.F.R. § 204.2 (2014).

<sup>168</sup> *Cf.* Demby, *supra* note 163.

have become lawful permanent residents each year as a result of the 1965 Immigration Act. Yet, these numbers obscure a critical reality for many U.S. citizens, lawful permanent residents, and their families today: the number of years it took for family unification to actually take place. Some have had to wait two years to be reunited. Others have had to wait almost twenty years. As explained next, the delay is due to a backlog of available visas for the millions of eligible and approved visa applicants.

*B. Backlogs and Family Separation*

The U.S. Department of State issues a monthly Visa Bulletin to inform the public on the current “cut-off dates” to alert those who submitted under either family-based preferences and employment-based preferences before the “cut-off date” that a visa is available.<sup>169</sup> The “cut-off” dates are different for each program. Indeed, the “cut-off” date is different per category. Notably, for some countries, especially Mexico and Philippines, the “cut-off” dates are almost always earlier,<sup>170</sup> which means that non-citizens from these countries have a much longer wait.

These long waiting periods are evidenced in the most current visa bulletin as of this writing—December 2014. Specifically, it shows that for all countries but Mexico and Philippines, those with the shortest waiting period are the spouses and children of lawful permanent residents. The cut-off date for them is May 1, 2012, which means that they have had to wait a little over two years before their visas were available. Those with the longest waiting period are the siblings of U.S. citizens. Currently, the “cut-off” date is January 1, 2002, which means that, thus far, they have had to wait over 12 years.

**Figure 15: Department of State, Visa Bulletin, December 2014**

Family Spon-sored	Worldwide	China	India	Mexico	Philippines
F1 <sup>171</sup>	June 22, 2007	June 22, 2007	June 22, 2007	Aug. 15, 1994	Dec. 15, 2004
F2A <sup>172</sup>	March 22, 2013	March 22, 2013	March 22, 2013	Jan. 1, 2013	March 22, 2013

<sup>169</sup> See *Visa Bulletin*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html> (last visited Dec. 8, 2014).

<sup>170</sup> See *infra* Figure 15.

<sup>171</sup> See 8 U.S.C. § 1153(a)(1) (2012).

<sup>172</sup> See *id.* § 1153(a)(2)(A).

F2B <sup>173</sup>	Feb. 22, 2008	Feb. 22, 2008	Feb. 22, 2008	Oct. 1, 1994	Jan. 15, 2004
F3 <sup>174</sup>	Dec. 15, 2003	Dec. 15, 2003	Dec. 15, 2003	Nov. 15, 2003	June 22, 1993
F4 <sup>175</sup>	Feb. 22, 2002	Feb. 22, 2002	Feb. 22, 2002	March 1, 1997	June 1, 1991

As the above chart shows, immigrants from Mexico and Philippines, which are the two currently most oversubscribed countries, have had a much longer wait. For instance, the cut-off date for married sons and daughters of U.S. citizens who are coming from Mexico is November 15, 1993, which is a little over a 21-year wait. This represents that longest waiting period for Mexican nationals. Those with the shortest waiting period are the spouses and children of lawful permanent residents from Mexico, which is currently set at January 1, 2013, which, as of this writing (December 2014), is approximately a two year delay. Non-citizens from the Philippines similarly have much earlier cut-off dates than others. Filipino siblings of U.S. citizens have the longest waiting period. The current cut-off date for this group is June 1, 1991, which represents an approximately 23 year wait. Those with the shortest waiting period are the spouses and children of lawful permanent residents. Similar to countries other than Mexico, the cut-off date for them is March 22, 2013 or about one year and a half years of waiting for the visas to become available. In sum, as these dates indicate, for a significant number of U.S. citizens, lawful permanent residents and their families from Mexico and Philippines, unification under immigration law could take between two years to as long as 23 plus years.

The National Visa Center issued its most report detailing the total number of visa applicants currently waiting for their visas to be issued.<sup>176</sup> The numbers are staggering: as of November 1, 2014 there were a total of 4,331,750 visa applicants worldwide whose visa applications have been approved but have yet to receive a visa.<sup>177</sup> Of this group, more than 2 million—2,455,964 visa applicants—are siblings of U.S. citizens.<sup>178</sup> Recall that there is an annual visa cap of 65,000 for this category, which demonstrates that the demand for such

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<sup>173</sup> See *id.* § 1153(a)(2)(B).

<sup>174</sup> See *id.* § 1153(a)(3).

<sup>175</sup> See *id.* § 1153(a)(4).

<sup>176</sup> BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2014, available at <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf> [herein after ANNUAL REPORT].

<sup>177</sup> See *id.* at 2.

<sup>178</sup> See *id.* at 7.

visas far exceeds the number of visas available. The countries with the largest number of applicants from this group are: Mexico (741,233),<sup>179</sup> India (244,813),<sup>180</sup> Vietnam (174,111) and Philippines (159,538).<sup>181</sup> The next largest group of visa applicants is the third preference group (married sons and daughters of U.S. citizens), consisting of 805,627 applicants.<sup>182</sup> This preference group is capped at 23,400.<sup>183</sup> Once again, Mexicans (189,794) and Filipinos (144,590) have the largest number of visa applicants.<sup>184</sup>

Unsurprisingly, when broken down by country, the countries with the highest number of visa applicants are: Mexico (1,323,978), Philippines (428,765) and India (323,089).<sup>185</sup> Recall that there is a per-country limit of 7 percent per year and, as indicated by the number of visa applicants in these countries, the demand for visas from these countries far outnumbers the number of visas available per year. Thus, new applicants go to the back of a decades-long line.

In brief, although Part II underscored the extent to which the 1965 Immigration Act facilitated both family unity and racial diversity, it is important to qualify the law's achievements by recognizing that, for many families, family unification did not take place immediately. The significant years of separation, caused by the structure of the law itself, impose tremendous costs on many families.<sup>186</sup>

#### IV. PROPOSED IMMIGRATION REFORMS

Twenty years ago, President Bill Clinton appointed U.S. Representative Barbara Jordan to chair a commission on immigration reform (Jordan Commission).<sup>187</sup> In 1995, the Jordan Commission submitted its report, which includes several recommendations on how to change immigration law.<sup>188</sup> One

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<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> *See id.* at 6.

<sup>183</sup> 8 U.S.C. § 1153(a)(3) (2012).

<sup>184</sup> *See ANNUAL REPORT*, at 6.

<sup>185</sup> *See id.* at 3.

<sup>186</sup> Daniel Gonzalez, *Millions of Immigrants Waiting for Green Cards*, ARIZ. REPUBLIC, June 23, 2013, <http://www.azcentral.com/news/politics/articles/20130614immigration-green-card-waiting-list.html>.

<sup>187</sup> *Jordan Will Lead Study on Immigration*, Houston Chronicle, Dec. 15, 1993 (reporting on the presidential appointment of Barbara Jordan to lead a commission that would evaluate and recommend changes to immigration law).

<sup>188</sup> *See* U.S. COMM'N ON IMMIGRATION REFORM, *Executive Summary: Legal Immigration* xiii-xv (1995) (hereinafter JORDAN REPORT) (report by U.S. Commission that was chaired by U.S. Representative Barbara Jordan).

of its recommendations was the elimination of visa preferences for adult children and siblings of U.S. citizens.<sup>189</sup> Under the immigration law then and now, U.S. citizens may sponsor, without any numerical caps, their immediate relatives, including spouses, children (who are 21 years old or younger) and parents.<sup>190</sup> U.S. citizens may also sponsor their sons and daughters who are over 21 years old and they may also sponsor their siblings (who themselves may have their own spouses and children).<sup>191</sup> The Jordan Commission's proposal to eliminate the latter family categories was thus a purposeful desire to privilege the nuclear family. Doing so, according to the report, would help to reduce the number of legal immigrants to the United States by one-third.<sup>192</sup>

Adopting the Jordan Commission's recommendations to limit family-based categories, Texas Republican Representative Lamar Smith introduced H.R. 1915, "Immigration in the National Interest Act." Ultimately, the recommendations were not adopted. Yet, since then, several other Congressional leaders have introduced bills that sought to restrict which family members of non-citizens may immigrate to the United States.<sup>193</sup>

#### *A. Congressional Proposals*

The 113<sup>th</sup> Congress discussed, without much action, the possibility of comprehensively reforming immigration law.<sup>194</sup> The various proposals considered, among other things, revamping immigration law's family-based program. One of these was H.R. 477, "Nuclear Family Priority Act," which was introduced in 2013 by Georgia Republican Representative Phil Gingrey.<sup>195</sup> Another one was S. 744, which was introduced by a bipartisan group and ultimately passed the Senate.<sup>196</sup> Notably, both bills sought to limit who counts as family for purposes of immigration law. Importantly, these proposals would have had an adverse impact on Asian Americans and Mexican

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<sup>189</sup> See *id.* at xviii.

<sup>190</sup> See 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

<sup>191</sup> See *id.* § 1153(a).

<sup>192</sup> See JORDAN REPORT, *supra* note 188.

<sup>193</sup> See Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritarian Lawmaker*, 43 AM. J. COMP. L. 511, 513 (1995) (discussing that in 1995 the Commission on Immigration Reform recommended repealing the preference categories for unmarried sons and daughters, married sons and daughters, and siblings of citizens).

<sup>194</sup> See David Nakamura & Ed O'Keefe, *Immigration Reform Effectively Dead Until After Obama Leaves Office, Both Sides Say*, Wash. Post, June 26, 2014, available at [http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b\\_story.html](http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html).

<sup>195</sup> See H.R. 477, 113th Cong. (2013).

<sup>196</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013).

Americans. Although neither proposal led to law, they are worthy of examination because they may form the basis of legislative recommendations in the future.

### 1. H.R. 477, “Nuclear Family Priority Act”

To begin, H.R. 477, as its title suggests, aimed to limit family-based immigration law by redefining the definition of “immediate relatives” to mean the spouses and children or nuclear family members of U.S. citizens. By redefining the definition of “immediate relatives” in this way, it purposefully eliminates parents from the category.<sup>197</sup> In so proposing, H.R. 477 intended to go beyond the Jordan Commission’s recommendations, which would have allowed U.S. citizens to continue sponsoring their parents.<sup>198</sup> Instead, H.R. 477 created a new nonimmigrant status for parents of U.S. citizens.<sup>199</sup> The initial period of authorized admission for parents of U.S. citizens under this status would be five years, which can be extended as long as the U.S. citizen son or daughter resides in the U.S.<sup>200</sup>

Additionally, H.R. 477 also sought to limit the family-preferences program to spouses and children of lawful permanent residents. That is, it intended to eliminate unmarried and married sons and daughters of U.S. citizens and lawful permanent residents and siblings of U.S. citizens, all of which may be sponsored under the current law. In so recommending, H.R. 477 adopted the Jordan Commission’s suggestions of removing these categories from the family preferences program.<sup>201</sup> The bill’s sponsor, Congressman Phil Gingrey, made the purpose of his bill known: “I introduced [H.R. 477] to reduce the number of family-sponsored immigrant entrants.”<sup>202</sup>

Indeed, the bill sought to decrease the program not only by limiting it to certain members of the nuclear family but also by reducing the overall worldwide level of family-preferences to 88,000 per year.<sup>203</sup> As discussed in Part I, the worldwide allocation of visas for family members is currently set to 480,000.<sup>204</sup> The bill therefore aimed to decrease the present level by more than

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<sup>197</sup> See H.R. 477 § 2.

<sup>198</sup> See JORDAN REPORT, *supra* note 188.

<sup>199</sup> See H.R. 477 § 6.

<sup>200</sup> See *id.* § 6(b). The U.S. citizen son or daughter must also provide health insurance coverage to the parent during the parent’s stay in the U.S. in order for the parent to be eligible for the nonimmigrant status. See *id.*

<sup>201</sup> See JORDAN REPORT, *supra* note 188.

<sup>202</sup> Phil Gingrey, *Immigration*, CONGRESSMAN PHIL GINGREY, M.D., <http://gingrey.house.gov/issues/issue/?IssueID=1594> (last visited Dec. 30, 2014).

<sup>203</sup> Cf. H.R. 477 § 4.

<sup>204</sup> See § 1151(c)(1)(A)(i).

80 percent.

H.R. 477 ultimately did not pass Congress. When Representative Gingrey introduced the bill on February 4, 2013, it had sixteen co-sponsors.<sup>205</sup> The bill was referred to the Subcommittee on Immigration and Border Security on February 28, 2013 and did not make it out of the committee. Still, H.R. 477's quest to limit immigration law's family-based and family-preferences program to only nuclear family members gives insight into how some members of Congress desire to narrow who counts as family for purposes of immigration law.

2. S. 744, "Border Security, Economic Opportunity, and Immigration Modernization Act"

The Senate similarly called for reforming family-based immigration law, although its approach is more nuanced. On June 27, 2013, the U.S. Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act ("S. 744").<sup>206</sup> Proposed by a bipartisan group of senators,<sup>207</sup> S. 744 included a number of provisions that promote family reunification by, among other things, addressing the severe visa backlogs and ensuring that step and adopted children are treated like biological children. For instance, unlike the Jordan Commission and H.R. 477's approach, S. 744 sought to enlarge the group of family members considered "immediate relatives" by including in the group the spouse or minor child of lawful permanent residents.<sup>208</sup> Further, S. 744 aimed to equalize the treatment of stepchildren and biological children by allowing citizens and lawful permanent residents to petition for them up from the current age of 18 years old to 21 years old.<sup>209</sup> Additionally, adopted children—whose adoptions were previously cut-off at 16 years old—may be adopted up until the age of 18 years old.<sup>210</sup>

Moreover, S. 744 attempted to provide a more accommodating approach to families. This is perhaps best reflected in the bill's proposal to return to

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<sup>205</sup> See *H.R. 477 – Nuclear Family Priority Act*, CONGRESS.GOV, <http://beta.congress.gov/bill/113th-congress/house-bill/477> (last visited June 9, 2014).

<sup>206</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013).

<sup>207</sup> See, e.g., Rachel Weiner, *Immigration's Gang of 8: Who are They?*, WASH. POST, Jan. 28, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/>. In addition to Senator Schumer, the other members are Michael Bennet (D-CO), Richard Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Robert Menendez (D-NJ), and Marco Rubio (R-FL). *Id.*

<sup>208</sup> See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2305(a) (as passed by Senate, June 27, 2013).

<sup>209</sup> See *id.* § 2311.

<sup>210</sup> See *id.* § 2312.

immigration judges the ability to use their discretion to decline to remove a non-citizen if it would cause “substantial hardship” to the non-citizen or lawful permanent resident’s spouse, child or parent.<sup>211</sup> It further intended to confer to the Secretary of the Department of Homeland Security (“DHS”) discretion when deciding on whether to waive grounds for a non-citizen’s inadmissibility.<sup>212</sup> Additionally, S. 744 would direct the Secretary of DHS to consider “family concerns” when making a determination about a non-citizen’s repatriation or prosecution for violating immigration law.<sup>213</sup> Notably, S. 744 would give detained non-citizens the ability to have increased interactions with their minor children who will remain in the United States.<sup>214</sup> These proposals illustrated the extent to which S. 744 aimed to provide greater rights to non-citizens with family members.

On the other hand, S. 744 sought to limit family-based immigration. First, S. 744 would have abolished the 4<sup>th</sup> preference, which is the category for siblings of U.S. citizens.<sup>215</sup> In particular, S. 744 provided that 18 months after the enactment of the Act, the 4<sup>th</sup> preference category would be eliminated.<sup>216</sup>

Second, S. 744 removed married children who are over the age of 31 from the program. Section 2307 of S. 744 provided:

“(B) the married sons or married daughters of citizens of the United States who are 31 years of age or younger at the time of filing a petition under section 204 shall be allocated visas in a number not to exceed 25 percent of the worldwide level authorized in section 201(c), plus the number of any visas not required for the class specified in subparagraph (A) current fiscal year.[.]”<sup>217</sup>

The language of the previous provision underscored Congress’s intent to give preferences only to married sons or daughters of citizens who are *younger* than 31 years of age. In other words, any sons or daughters of citizens who are 31 years old would not be eligible to apply for admission under the family-based immigration system.

S. 744, as previously noted, received bipartisan support and passed the

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<sup>211</sup> See *id.* § 2314(b).

<sup>212</sup> See *id.*

<sup>213</sup> See *id.* § 1115(b)(1).

<sup>214</sup> This subtitle of S. 744 is referred to as the “‘Humane Enforcement and Legal Protections for Separated Children Act’ or the ‘HELP Separated Children Act.’” *Id.* § 3801; see generally *id.* §§ 3802-07 (giving immigrants apprehended for immigration violations the right to regularly visit their minor children and arrange for their care).

<sup>215</sup> See *id.* § 2307(a)(1).

<sup>216</sup> See *id.* § 2307(a)(3).

<sup>217</sup> See *id.* § 2307.

Senate. Yet, the failure of the House of Representatives to pass a bill ultimately meant that the 113<sup>th</sup> Congress was unable to submit a bill to the President that would have comprehensively reformed immigration law. Such an amendment would have included changing the family-based and family-preferences program in one way or another.

B. *Consequences of Proposals to Reduce or Eliminate Certain Family Categories*

Although efforts to pass comprehensive immigration reform were unsuccessful, many today are hopeful that Congress would eventually pass such a law in the future. Discussions of such a bill would almost certainly include discussions of whether to change the current structure of the family-based and family-preferences program. Without doubt, any recommendation that reduces the overall number of visas reserved for family members or eliminates certain categories for family members, including parents, older children and siblings, as H.R. 477 and S. 744 proposed, would have a considerable adverse impact on the number of immigrants who enter the United States every year from Mexico, China, Philippines and India and their families.

For starters, for many immigrants in these countries, the definition of family extends beyond the nuclear family.<sup>218</sup> Legislative efforts to narrow the meaning of the family would thus have a negative cultural impact on U.S. citizens and lawful permanent residents who wish to reunite with family members with whom they are close.<sup>219</sup>

Additionally, as explained *supra*, a significant number of immigrants—indeed, the majority—in the last several decades have hailed from Mexico, China, Philippines and India.<sup>220</sup> Millions of these immigrants were parents, unmarried and married sons and daughters, and siblings of U.S. citizens.<sup>221</sup> The elimination of these categories would therefore severely reduce the population of certain Asian groups and Mexicans non-citizens from becoming lawful permanent residents of this country. Certainly, such reduced numbers may lead to pre-1965 Immigration Act racial and ethnic annual immigration population.

Notably, these family members provide much needed support to their Asian American and Mexican American family members. Immigrant

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<sup>218</sup> See Karen Narasaki, *Testimony on the Immigration Reform Act of 1995 Before the Subcommittee on Immigration, U.S. Senate Judiciary Committee*, 10 Geo. Immigr. L.J. 77, 83-84 (1996).

<sup>219</sup> See *id.*

<sup>220</sup> See Part II *supra*.

<sup>221</sup> See *id.*

grandparents, for example, provide critical childcare for their grandchildren.<sup>222</sup> Indeed, thousands of grandparents who care for their grandchildren are undocumented and do not benefit from cancellation of removal from the United States under current immigration law.<sup>223</sup> Notably, Latino/a households have experienced an increase in reliance on grandparents as caregivers.<sup>224</sup> Thus, eliminating the ability of U.S. citizens to sponsor their parents would affect the stability of U.S. citizen and lawful permanent resident families that rely on grandparents for caregiving. Similarly, Asian American families rely on extended family members, including parents, adult children and siblings of U.S. citizens as well as adult children of lawful permanent residents, for childcare support. Such caregiving services enable family members to work outside the home.<sup>225</sup>

Indeed, as advocates have contended, these extended family members “are essential [not only] for the economic and overall well-being of U.S. citizen and legal permanent residents” but also the United States.<sup>226</sup> Many immigrants open their own businesses and are thus self-employed and the success of their businesses are dependent on family members’ ability to provide caregiving services.<sup>227</sup> These businesses in turn engage in activities that stimulate and support the U.S. economy. In brief, eliminating certain family categories from the family-based immigration law would have an adverse impact on Mexican Americans and Asian Americans as well as the U.S. economy.

## CONCLUSION

The passage of the 1965 Immigration Act revolutionized immigration law and the make-up of the American family. It did so by erasing national origins quotas and promoting race-neutrality as a principle for immigration law and policy. Additionally, it installed family-ties as the dominant method for gaining

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<sup>222</sup> Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. Davis L. Rev. 93, 205 (2009).

<sup>223</sup> See *id.* at 213-214 (discussing cases in which undocumented grandparents did not qualify for cancellation of removal).

<sup>224</sup> See Roy Grant, *The Special Needs of Children in Kinship Care*, 33 J. GERONTOLOGICAL SOC. WORK 17, 18 (2000).

<sup>225</sup> See Promoting Family Values and Immigration: Hearing on Role of Family-Based Immigration in the U.S. Immigration System Before the H. Judiciary Subcomm. on Immigration, 111th Cong. 7-10 (2007) (Testimony of Bill Ong Hing, Professor of Law and Asian American Studies, U.C. Davis); Asian American Justice Center, *Talking Points On H.R. 492: Nuclear Family Priority Act*, available at <http://www.advancingequality.org/news-media/publications/talking-points-hr-692-nuclear-family-priority-act>.

<sup>226</sup> See Asian American Justice Center, *Talking Points On H.R. 492: Nuclear Family Priority Act*, at 2.

<sup>227</sup> See Jimmy Sanders & Victor Nee, *Immigrant Self-Employment: The Family As Social Capital and the Value of Human Capital*, 61 American Sociological Review 231 (1996).

lawful permanent immigration to the United States. Both changes to immigration law effected incredible family unification and racial diversity and helped to promote values of non-discrimination and family unity. From this vantage point, the Immigration Act of 1965 should be celebrated as an important legislation designed to achieve civil rights. To be sure, the modern family-based immigration program is far from perfect and requires rethinking in order to meaningfully achieve the policy goal of family unification. Proposals in Congress to change the current blueprint of immigration law could undermine the civil rights gains in the last fifty years.