A question

I start with this question:

Should the United States adopt a policy toward Mexican migration that differs from U.S. policy toward migration from other sending countries?

Why ask this question?

Two reasons. First, it is a question of central significance in national debate and discussion about “comprehensive immigration reform.” Second, this question illuminates the past, present, and future role of country-specific immigration-related arrangements in U.S. immigration law and policy.

Why Mexico?

Many issues of immigration law and policy arise in the most prominent form as they relate to migration from Mexico.* The reasons include (1) Mexico’s nearly 130-year-old tradition of large-scale labor migration to the United States; (2) the functional integration of the U.S. and Mexican labor markets; and (3) the pervasive web of family ties binding Mexico to the United States. These factors produce extremely high demand for almost all visa categories by Mexican nationals. Given current limits on the number of immigrant admissions, the result is large backlogs and long waits.

The most effective and durable way to reduce unauthorized immigration may be to coordinate immigration policy with international economic and development assistance policy, especially for countries (like Mexico) that account for significant flows to the United States. Moreover, such a focus on economic development may be able to engage both the United States and Mexico most fully to address shared concerns about migration. Such engagement can reach beyond economic development to other country-specific or regional arrangements, including but not limited to return agreements and other ways to manage circular migration.

Viewing country-specific immigration arrangements in U.S. historical perspective

My (very short) presentation will address how a country-specific approach to migration from Mexico to the United States fits into the history of U.S. immigration law and policy.

Background

Consider these short draft excerpts from my book-in-progress, Immigration Outside the Law.

I.

Race and ethnicity have always been central to U.S. immigration history. The first naturalization statute in 1790 allowed only “free white persons” to become U.S. citizens.†

* I am grateful to Wayne Cornelius for his collaboration in developing some of the points here.

† See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.
The question of citizenship—or slavery—for African-Americans was the catalyst for the American Civil War. In 1870, “aliens of African nativity and to persons of African descent” became eligible to naturalize. Only in 1952 did Congress repeal all racial barriers to naturalization by Asian immigrants.

A central feature of immigration law has been exclusion based on race, ethnicity, and national origin. Examples include the Chinese exclusion laws in the late nineteenth century and the “national origins” system. The 1921 interim version limited annual immigration from countries outside Asia and the Western Hemisphere to three percent of “the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.” Because most immigrants from southern and eastern Europe did not come to the United States until after 1910, and because legislation in 1917 had already largely barred Asian immigration, this scheme ensured that most new immigrants would come from western and northern Europe.²

The 1921 law was superseded in 1924 by the National Origins Act, the first comprehensive permanent federal statute regulating the number of immigrants to the United States. Like the 1921 law, its purpose was to maintain a white, Anglo-Saxon America, the apparent superiority of which had been established by scientific research as incorporated into national policy through the Dillingham Commission report. To achieve this purpose, the Act capped immigrant admissions with nationality-based limits that reflected the existing U.S. population.³

The formulation of national quotas passed through several phases until a permanent system, adopted in 1929, based national quotas on the percentage of the U.S. population in 1920 that could trace their ancestry to that country. The national origins system did more than greatly favor immigrants from northern and western Europe over immigrants from southern and eastern Europe. It also sharply distinguished European immigrants from all other immigrants.

Overall immigration declined dramatically in the second quarter of the 20th century, due to not only the national origins system, but also the Great Depression and World War II. The combination of these events led to the emergence of sanguine views of immigrant assimilation into a dominant culture that was white, Anglo-Saxon, and Protestant.

II.

In 1965, Congress repealed the national origins system. The new admissions scheme applied the same limits to immigration from every country, thus bringing a certain formal equality into U.S. immigration law. For the first time, U.S. immigration law adopted a basic nondiscrimination principle. The 1965 amendments were closely linked to the basic movement toward civil rights in American public law that included the Civil Rights Act of 1964 and the Voting Rights Act of 1965.⁴ During the early 1960s, many in Congress expressed the view that the end of the national origins system was an essential part of an emerging civil rights program, just like the repeal of racial bars to naturalization in 1952.

In 1958, then-Senator John F. Kennedy called for an end to the national origins

² Act of May 19, 1921, ch. 8, §§ 2(a)(6), 3, 42 Stat. 5, 5–6.
system in his book, *A Nation of Immigrants*.5 After he was assassinated in 1963, his younger brother, Senator Ted Kennedy, took up the cause. When President Lyndon Johnson signed the 1965 amendments into law at the base of the Statue of Liberty, he declared that they “repair a deep and painful flaw in the fabric of American justice . . . . The days of unlimited immigration are past. But those who do come will come because of what they are, not because of the land from which they sprung.”6

With the national origins system out of the way, immigration from Asia increased dramatically. Even before 1965, Asian immigration had already begun to rise because demographic and economic pressures in Asia created a push for emigration, and because spouses and children of U.S. citizens of Asian ancestry were exempt from the limits imposed by the national origins system.7 The overall flow remained small, but when the national origins system ended, pre-1965 foothold communities were able to expand dramatically by using several new immigration categories that emphasized family reunification and expanded immigration based on education and employment.

As for Western Hemisphere immigration, prior law had no numerical limits, but part of the compromise that led to the end of the national origins system was a Western Hemisphere limit that took effect in 1968.8 But why did Latin America immigration increase in the face of the new limit? First, generations of lawful and unlawful Mexican immigration had created and institutionalized expectations on the part of sending communities, employers in the United States, and the migrants themselves. The Bracero program had provided a lawful avenue for labor migration from Mexico. It would have been naïve to think that the flow would simply stop when the Bracero program stopped, especially given the woes of the Mexican economy. Many Mexicans who could not come as Braceros became lawful immigrants before the new Western Hemisphere cap took effect. The Mexican government’s policy of developing border cities drew migrants to the border, and many did not stop there.

All of these pressures pushed Mexican migration up to the new caps, including a new annual limit of 20,000 immigrant visas in the preference categories (thus exempting immediate relatives of U.S. citizens) per sending country that took effect in 1976. When lawful admission was no longer possible, especially for employment-based immigration by immigrants with little skill or little formal education, migrants came outside the law.

**III.**

The racial restrictions in force until 1965 and the dramatic expansion of Asian and Latin American immigration after 1965—both within and outside the law—help explain the major role of race today in discussions of immigration. Some of the explanation is grounded in political culture. I have noted that the same political and ideological forces that led to the broadening of immigrant admissions and the end of the national origins system also led to the Civil Rights Act of 1964 and the Voting Rights Act of 1965. With this provenance, it is no accident that the social forces that 1965 immigration amendments

---

were perceived to unleash have become deeply tied to the politics of identity, diversity, multiculturalism, and affirmative action.

The explanation is also grounded in post-1965 demographic changes that were caused not only by changes in law but also by economic trends in sending countries. After 1965, the ethnic composition of the immigrant flow shifted dramatically. (The overall flow also increased dramatically.) In the decade from 1951 through 1960, 53 percent of new lawful immigrants came from Europe, and more than half of these came from Germany and the United Kingdom. In 2008, almost 76 percent of new lawful immigrants came from Asia and Latin America, and only 11 percent from Europe.9

IV.

One of the conceits of the past generation has been the belief that justice in immigration results from even-handed application of universal principles. This approach is the legacy of the struggle to end the national origins system and replace it with the apparently equal treatment of immigrants regardless of their country of origin.

During the 1965 debate, for example, many in Congress feared a dramatic increase in Latin American immigration and insisted on limiting Western Hemisphere immigration in exchange for the end of national origins. The reformers who were intent on abolishing national origins were unable to refute the logic that if the law would treat all countries equally, the overall numerical cap on immigration that had applied to the Eastern Hemisphere since the 1920s should apply to the Western Hemisphere as well.

V.

The 1965 amendments seem to represent the hard-won triumph of equality of treatment, especially as based on the ideas that universal principles should apply, and that immigration decisions should be based on law, not politics. But it is difficult to define equality in the context of immigration law and policy, especially if the real problems are not matters of immigration, but also of international economic development. It is likely that solutions will require ad hoc arrangements with high-volume sending countries with which the United States has specific historical and economic relationships. In fact, numerous situation-specific arrangements are part of current immigration law. For example, the “E” nonimmigrant category provides generous admission terms for traders, investors, and their employees if the United States has a trade or investment treaty with their country of nationality.10 Ad hoc arrangements with specific countries, especially trade agreements, are emerging with greater frequency.11 Moreover, such arrangements may lead to broader Executive Branch authority to produce and manage such arrangements, and narrower decisionmaking by courts and other institutions that purport to apply universal principles.

* * *

---