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The Shadow Immigration System

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THE SHADOW IMMIGRATION SYSTEM

DAVID RUSSELL

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INTRODUCTION

According to the Center for Migration Studies, the number of illegal immigrants currently present in the United States is slightly under 11 million.¹ This number has declined from the record high of over 12 million in 2007; however, it still equates to about 3.7 percent of the U.S. population.²

1. See Jerry Markon, *U.S. Illegal Immigrant Population Falls Below Eleven Million, Continuing Nearly Decade-Long Decline, Report Says*, WASH. POST (January 20, 2016), <https://www.washingtonpost.com/news/federal-eye/wp/2016/01/20/u-s-illegal-immigrant-population-falls-below-11-million-continuing-nearly-decade-long-decline-report-says/>. For the purposes of this paper, “illegal immigration” will be termed to mean immigrants that “either entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave.” See *Illegal Immigration*, CTR. FOR IMMIGR. STUD., <http://cis.org/Illegal> (last visited Dec. 16, 2016).

2. Markon, *supra* note 1. See also U.S. Census Bureau, *U.S. & World Population Clock*, U.S. CENSUS, <http://www.census.gov/popclock/> (last visited Dec. 16, 2016).

Though the issue of illegal immigration has taken a somewhat outsized role in the 2016 presidential election; the fact remains that legislators have haggled over illegal immigration for decades. At present, the debate over illegal immigration essentially distills down to two opposing views — deportation and earned citizenship.

The deportation view asserts that the government should fully comply with the Immigration and Nationality Act (“INA”), which states that any illegal immigrant is deportable.³ Looking at the deportation view objectively, one can think of it as framing illegal immigration as a political question. The executive branch is charged with enforcing the laws that Congress passed. While acknowledging that certain regulatory tools like big waiver and executive preemption give regulatory agencies quasi-lawmaking power, the deportation view takes an orthodox view of the separation of powers.⁴ Hence, in the deportation view’s opinion, using regulatory power to essentially opt out of congressional mandates violates the separation of powers and is thus unconstitutional.⁵ One can see a materialization of the deportation view in the recent Supreme Court case, *United States v. Texas*.⁶ *Texas* addressed the executive branch’s Deferred Action for Parents of Americans (“DAPA”) program.⁷ DAPA granted deferred action to illegal immigrants living in the United States since 2010 who have children who are either citizens or legal immigrants.⁸ With deferred action, these immigrants would be entitled to a three-year renewable work permit and exemption from deportation.⁹ According to the deportation view, DAPA is clearly unconstitutional, constituting an extrajudicial form of prosecutorial discretion violative of the separation of powers.¹⁰ As such, *Texas* frames the deportation view in political terms — deportation is correct not because immigrants are

3. See 8 U.S.C. § 1227 (a)(1)(A–C) (2008).

4. See generally Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869–71 (2008); See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 272–73 (2013). Executive preemption is when agency regulations preempt state law by extension of the federal statutes the agencies are charged with enforcing. See Young, *supra*, at 870. Big waiver is when Congress delegates the power to waive statutory provisions to administrative agencies either explicitly or implicitly. See Barron & Rakoff, *supra*, at 272 (citing JAMES M. LANDIS’ seminal piece, *THE ADMINISTRATIVE PROCESS*).

5. See Young, *supra* note 4.

6. See *United States v. Texas*, 579 U.S. ____ (2016) (per curiam) (affirming the lower court’s decision because this case resulted in a 4–4 split decisions due to Justice Scalia’s death).

7. See *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015); See also Alex Twinem, *The Curious Case of United States v. Texas*, THE STAN. DAILY (Apr. 20, 2016), <http://www.stanforddaily.com/2016/04/20/the-curious-case-of-united-states-vs-texas/>.

8. See Twinem, *supra* note 7.

9. See *Texas*, 787 F.3d at 745.

10. See *id.* at 745–46.

per se undesirable, but instead because it correctly interprets the Constitution's separation of powers.¹¹

More prominent to the deportation view, though, is its moral component. In the deportation view's eyes, illegal immigrants break the law by dint of their illegal status¹². Thus, the deportation view adopts an essentially retributivist conception of criminality that requires deportation of illegal immigrants as the proper mandate of justice.¹³

Much like the deportation view, the earned citizenship view understands illegal immigration as a moral question. The foundations of earned citizenship stem from the general failure of the Immigration Reform and Control Act of 1986 ("IRCA") to control illegal immigration.¹⁴ Specifically, IRCA provided one-time amnesty to all illegal immigrants assuming the satisfaction of minimal criteria.¹⁵ However, according to Muneer Ahmed, IRCA's goal of eliminating illegal immigration once and for all proved to be grossly optimistic.¹⁶ Instead, after IRCA illegal immigration did nothing but increase, leaving many politicians feeling like they had been duped — "legalization was the price to be paid for controlling undocumented immigration, and yet the growth of the undocumented population only accelerated."¹⁷ In the wake of IRCA's failure, amnesty became retooled into the concept of earned citizenship, framing earned citizenship in moral terms. Instead of amnesty, which detractors viewed as a giveaway, earned citizenship is framed on an exchange — illegal immigrants must do something to merit legalization, thus earning their citizenship.¹⁸ Earned citizenship anticipates that, over a period of years, illegal immigrants will merit citizenship by satisfying a number of economic, civic, and cultural goals structured in a series of stages.¹⁹ By moving through these stages, with each stage consti-

11. See *id.* at 746. Obviously, the deportation view also has significant connections to nativism and cultural conservatism. However, this paper asserts that the deportation view is not inherently nativist or monoculturalist in the same way that this paper asserts that earned citizenship is not multiculturalist despite many of its supporters being so.

12. See *supra* note 3.

13. See *Retributive Justice*, STAN. ENCYCLOPEDIA OF PHIL. (June 18, 2014), <https://plato.stanford.edu/entries/justice-retributive/>.

14. See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. (forthcoming 2017) (manuscript at 2) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852440.

15. See *id.* at 2, 12. ("The general legalization program . . . was available to those undocumented immigrants who could prove five years of continuous residence prior to January 1, 1982; paid a \$185 filing fee; and provided proof of financial responsibility.")

16. See *id.* at 14.

17. *Id.* (as a result, "IRCA legalization came to be understood as a giveaway rather than a tradeoff, and amnesty was transformed from a neutral term to a pejorative.")

18. See *id.*

19. *Id.* at 16. Understanding the stages that earned citizenship anticipates can be understood by looking at S. 774, the most clear piece of legislation advocating an earned citizenship view. According to Ahmed, S. 774 operates in the following way:

tuting a different form of legal status, illegal immigrants prove their merit for citizenship, absolving their initial illegality.²⁰ In this regard, earned citizenship is a moral position — illegal immigration is an act of moral wrong, which is rectified by positive moral acts that results in full community participation via citizenship.

Though the deportation and amnesty/earned citizenship views approach illegal immigration differently, and are often politically opposed, each share the same foundational premise — illegal immigrants operate outside of the immigration system. This foundational premise results in both views attempting to solve the illegal immigration “problem.” However, this paper argues that this foundational premise is wrong. As opposed to operating outside of the immigration system, illegal immigrants operate within a completely different immigration system — the “shadow immigration system.”

Part I offers a foundational premise necessary for understanding both Part II and Part III’s discussions of finance and immigration. Part II discusses an analog to the shadow immigration system, namely the shadow banking system, to show how regulatory frameworks can result in dual systems. Part III explains exactly what the shadow immigration system looks like. Part IV argues how dual system immigration clarifies our understanding of illegal immigration and helps the government address its externalities.

I. FOUNDATIONAL PREMISE: PRIMARY AND SECONDARY ACTORS

When discussing either finance or immigration, it’s very important to understand what role each party has in each system.

First, subject to certain exclusions, the program would grant [Registered Provisional Immigrant (“RPI”)] status to individuals who have been continuously present in the United States for at least two years, pay a fine and application fee, and pay outstanding federal income taxes. RPI status is renewable after six years but only if the individual can demonstrate the satisfaction of certain employment, income and education requirements, the payment of taxes, and application fee and a penalty. Renewal is necessary in order to progress because only upon ten years of RPI status may an individual transition from RPI to [Legal Permanent Resident (“LPR”)] status. Doing so requires that the individual has maintained continuous presence in the country; pays an additional penalty, additional application fees and tax liabilities; meets English language and U.S. civics and educational requirements; and does not otherwise become inadmissible by committing a crime or engaging in other prohibited conduct. Finally, after three years in LPR status, the individual may apply for U.S. citizenship according to the ordinary requirements of naturalization. Thus there are four distinct stages at which an application must satisfy certain substantive standards; initial RPI application; RPI renewal, adjustment from RPI to LPR status; and naturalization.

Id. at 18–19.

20. *See id.* at 19.

Finance is a relationship between investors and firms.²¹ The investors are the holders of surplus capital, otherwise known as the savers of funds.²² The firms in turn are the seekers of that surplus capital, otherwise known as the users of funds.²³ The key thing to understand about finance is that investors and firms operate through a series of contracts in which investors allocate their excess capital to firms that offer them a reason to risk it.²⁴ For example, a risk-averse investor is only going to give her capital to a risk-averse firm that, although the return for the investor is low, the safety of her capital is high. Conversely, a risk-seeking investor, seeking high returns on her capital, is going to give her capital to a risk-seeking firm. This is how finance works. In this regard finance's primary actors are investors and firms because they are necessary in order for finance to exist.²⁵

In regards to immigration, in the same way that finance revolves around capital, immigration revolves around employment. The main driver of immigration is the opportunity for employment. Although this assertion may at first appear unnecessarily specific, it's not when you look at immigration as a concept. For example, what is someone doing when they move to a different U.S. state? Even though that person remains in the same country that person is essentially immigrating to that state.²⁶ Furthermore, why do most people move to a different state? Employment.²⁷ This holds true in all contexts — immigration is a system in which human movement occurs because of employment.²⁸

21. See *Financial Intermediary*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/financialintermediary.asp> (last visited Dec. 16, 2016).

22. See Herbert B. Mayo, BASIC FINANCE: AN INTRODUCTION TO FINANCIAL INSTITUTIONS, INVESTMENT, AND MANAGEMENT 37 (Joe Sabatino et al. eds., 10th ed. 2012).

23. See *id.*

24. See *id.* at 5.

25. See generally *id.* at 37.

26. In this example different states are essentially like different countries (i.e. they have different governments, different cultures, different histories, different government benefits and responsibilities, etc.). Thus, this type of immigration is better thought of as intra-country, or intrastate, immigration, where states are different countries.

27. Kevin Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 234 (2003).

28. Obviously, when looking at immigration in an international context there are other reasons why a person would leave her country other than a lack of employment. For example, a person living in a war-torn country would likely be leaving her country for safety reasons. However, these situations are often the exception, not the rule. According to Kevin Johnson, the standard paradigm is that people immigrate because of employment opportunities. In terms of immigration to the United States:

Immigrants often see great economic benefits in the form of wages when they move to the United States. Economic opportunity is an important reason – often one of the primary motivations – for migrating. Many immigrants, particularly undocumented immigrants, come to this country for jobs that are higher paying than those available in their homeland, even if the wages for particular types of employment are low by U.S. standards.

Id.

Furthermore, even in situations in which the primary motivation for leaving one's country is non-employment related, the destination should still remain a primarily employment-driven decision.

Following from this, immigration is a relationship between employers and immigrants. Employers are the holders of job opportunities and immigrants are the seekers of job opportunities. Much like finance, these parties operate through a series of contracts in which employers allocate their jobs to immigrants that offer them a reason to risk their job opportunities. Furthermore, the risk-reward tradeoff is the same for immigration as it is for finance. Low-risk immigrants are legal immigrants, essentially fungible with citizens, different only for their unique skill set which results in them receiving employment over citizens.²⁹ The employer is bound to the same responsibilities with legal immigrants as it is with citizens such as taxes, benefits, health-care, and so on. But, in return for the low degree of benefit to hiring a legal immigrant, the employer also receives a low degree of risk because hiring a legal immigrant is just as legal as hiring a citizen³⁰. Conversely, high-risk immigrants are illegal immigrants who are fundamentally different than citizens. The employer receives significantly fewer responsibilities with illegal immigrants than with citizens, for example — avoiding minimum wage, working condition and health care requirements. But, in return for fewer responsibilities employers are subject to increased risks, such as the threat of a government suit for breaking the law by hiring illegal immigrants.

However, is it really true that some employers actually *prefer* illegal immigrants over legal immigrants? In the finance situation, the worst-case scenario for risk-seeking investors is that they lose their money — they are not generally subject to criminal liability³¹. Is it possible that a sizable amount of employers could be categorized as risk-seeking? According to Hiroshi Motomura, “[d]omestic economic growth in many sectors depends on the availability of workers to fill informal, temporary, low-wages jobs. This is not just a matter of employer preferences.”³² Consider the example of American-Mexican labor migration up to the mid-Twentieth Century. Up until the mid-Twentieth Century, labor moved relatively unimpeded between the United States and Mexico.³³ According to Kevin Johnson, during

A person leaving her country because it is war-torn is still going to want to go to a country with high employment opportunities over one with low employment opportunities. In this regard, this paper’s assertion about the centrality of jobs to immigration is proven. *See id.*

29. *See id.* at 228.

30. *See id.* at 234.

31. Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183, 202 (2009).

32. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 53–54 (Oxford Univ. Press 1st ed. 2014). Motomura further argues that the U.S. economy depends on the availability of illegal immigration to maintain our current lifestyles. According to Motomura, “[t]he demands originate throughout the population of the United States. Consumers want lower prices, which depend on minimizing labor costs . . . The result is broad, if controversial, acquiescence in unauthorized migration.”

33. *See* Johnson, *supra* note 27, at 230.

some periods, U.S. government actually promoted Mexican-American border migration.³⁴ Essentially, “Mexican workers look for higher wages in the United States than they can earn in Mexico while U.S. employers look for cheaper labor than they ordinarily can obtain in this country. Employers gain economically from cheap labor; U.S. consumers benefit from lower prices for goods”³⁵ Furthermore, according to Mae Ngai, agriculture’s inherently seasonal labor requirements “meant that the market determined wages and that Mexicans derived a certain leverage from their status as waged workers. To be sure, an overabundance of labor kept wages down, but the growers’ dependence upon Mexican labor also gave workers some room to negotiate.”³⁶ Thus, substantial evidence exists that some employers prefer illegal immigrants, specifically those that are most likely to employ seasonal labor.

If risk is allocated in immigration much like it is in finance then we see the following dichotomy. A risk-averse employer is only going to allocate her job to a low-risk immigrant, despite the low return on investment of employing that immigrant. Conversely, a risk-seeking employer is going to do the opposite, namely allocate her job opportunity to a high-risk immigrant in order to get a higher return on investment. This is fundamentally how immigration works. In this regard, immigration’s primary actors are employers and immigrants because they are necessary parties for immigration to exist.

If the preceding paragraph’s assertions are true then an obvious question arises — if those are the primary actors in each system are there any secondary actors? Yes, and in both systems the most central secondary actor is the government. First, the government is a secondary actor in both systems, as opposed to a primary actor, because the government is not a necessary party for either system to exist. Finance can exist without a government in the same way that immigration can exist without a government. As such, government, in each system, acts more like a facilitating participant — each system works better with the existence of government. Thus, the govern-

34. See *id.*

35. *Id.* Furthermore, according to Mae Ngai:

From the turn of the century to World War I, labor flowed more or less freely from Mexico into the United States. Mexican workers provided the human labor power for the region’s agricultural revolution and laid the infrastructure for the modern Southwest’s economy: they laid railroad tracks that connected the region to the national market, cleared ranch lands for farming, and dug irrigation canals.

MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 129 (Princeton Univ. Press 2014).

36. Ngai, *supra* note 35 at 133.

ment facilitates each system by creating a framework in which the primary actors operate.³⁷

II. THE SHADOW BANKING SYSTEM

A. *Traditional Banking System*

To understand the shadow banking system it is necessary to get a preliminary understanding of what the traditional banking system is — commercial banking. A commercial bank is the type of bank that most people think of when they think of a bank — it is the bank down the street.³⁸ A commercial bank takes deposits in return for a small rate of interest to the depositor.³⁹ The bank then takes these deposits and uses them to engage in a range of profit seeking activities like making loans.⁴⁰ Because consumers trust commercial banks with keeping their money safe, these banks are subject to a host of regulations that limit the riskiness of their investments.⁴¹ Such regulations may limit the type of investments a bank can make or how much money they need to keep on hand in order to meet regular demands for depositor funds.⁴² However, in return, commercial banks receive the right to access two key government programs.

First, commercial banks receive the right to access the Federal Reserve's (the "Fed's") discount window.⁴³ The discount window addresses a primary liquidity risk for commercial banks, namely that a depositor may withdraw her funds at any time.⁴⁴ This is why commercial bank deposits are called "demand deposits."⁴⁵ The Fed's discount window is a facility in which banks go to borrow funds directly from the Fed to give commercial banks easy access to liquidity in order to meet any depositor demands.⁴⁶ The Fed offers these funds at a discounted rate and often structures them like short-term secured loans.⁴⁷

37. Simply put, the government's role as a secondary actor would be that, for finance, the government prevents crashes and the like, and for immigration, the government establishes borders and security.

38. See *Commercial Banking*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/commercialbank.asp> (last visited Dec. 16, 2016).

39. See *id.*

40. See *id.*

41. See *id.*

42. See *Operations and management*, BRITANNICA, <https://www.britannica.com/topic/bank/Commercial-banks> (last visited Mar. 28, 2017).

43. *Discount Window*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/discountwindow.asp> (last visited Apr. 18, 2017).

44. See BRITANNICA, *supra* note 42.

45. *Id.*

46. INVESTOPEDIA, *supra* note 43.

47. *Id.*

Second, commercial banks receive the right to access deposit insurance from the Federal Deposit Insurance Corporation (“FDIC”).⁴⁸ Deposit insurance addresses a second primary liquidity risk associated with commercial banking — bank runs. In times of financial crisis, banks, like other financial institutions, would often see a spate of insolvencies. These insolvencies would necessarily dry up the entire roll of demand deposits a given bank would have.⁴⁹ Thus, many depositors, fearing insolvency, would withdraw their funds from their banks as a risk-hedging strategy.⁵⁰ However, if large amounts of depositors withdraw their funds from a bank at the same time, the bank’s cash reserves start to dry up.⁵¹ This is what a bank run is — as more people withdraw their funds, a bank’s risk of insolvency increases, causing more people to withdraw their funds, which may cause insolvency in and of itself.⁵² Deposit insurance protects against bank runs by insuring a depositor’s account up to a certain amount.⁵³ Thus, depositors are disincentivized from withdrawing their funds because they know that their deposits are safe even if the bank becomes insolvent.⁵⁴

What we see with commercial banks is that the regulatory system, while somewhat onerous, accomplishes what can arguably be seen as its main goal — protecting consumers. This results in consumer confidence, which results in more people depositing their money with commercial banks, giving commercial banks more money to invest, and bolstering their business models. However, what if the small rate of interest offered on demand deposits does not incentivize a person enough to deposit her money in with commercial bank? What if she wants to deposit her money in a firm that can engage in greater risk taking, generating higher returns? Enter shadow banking.

48. Deposit insurance is a form of “insurance [that] covers all types of deposits received at an insured bank, including deposits in a checking account, negotiable order of withdrawal account, savings account, money market deposit account, time deposit such as a certificate of deposit, or an official item issued by a bank, such as a cashier’s check or money order.” *Deposit Insurance*, FDIC, <https://www.fdic.gov/deposit/covered/> (last visited Dec. 9, 2016). Deposit insurance is managed and administered by the Federal Deposit Insurance Corporation (“FDIC”). See *Strategic Mission*, FDIC, <https://www.fdic.gov/about/strategic/strategic/mission.html> (last visited Dec. 9, 2016).

49. *Bank Run*, Investopedia, <http://www.investopedia.com/terms/b/bankrun.asp> (last visited April 7, 2017).

50. *Id.*

51. *Id.*

52. *Id.*

53. See *How Are My Deposit Accounts Insured by the FDIC?*, FDIC, <https://www.fdic.gov/deposit/covered/categories.html> (last visited Dec. 16, 2016).

54. The FDIC was absolutely correct in its assertion that deposit insurance would provide a bulwark against bank runs whenever a financial crash occurred. After 1933, the amount of bank runs occurring in the United States plunged. Deposit insurance has since been replicated in many other countries as a proven government strategy to prevent bank runs. See ALAN S. BLINDER & ROBERT F. WESCOTT, A REFORM OF DEPOSIT INSURANCE: A REPORT TO THE FDIC (2001), <https://www.fdic.gov/deposit/insurance/initiative/reform.html>.

B. *Shadow Banking System*

Shadow banks are financial institutions that engage in many of the same practices that commercial banks engage in but that receive a different regulatory framework.⁵⁵ The shadow banking system refers to a group of intermediary-like institutions (e.g., investment banks, hedge funds, and so on) that facilitate credit creation much like commercial banks do.⁵⁶ However, shadow banks avoid much of commercial banking's regulatory oversight by not taking traditional demand deposits.⁵⁷ As a result, they retain the ability to both engage in riskier investing strategies and avoid many of the capital requirements commercial banks are subject to.⁵⁸ However, lest we think that shadow banks reap the best of both worlds, with the increase in reward comes an increase in risk. Shadow banks can neither access the discount window nor receive deposit insurance. Regarding the discount window, the only firms that can access the Fed's discount window are institutions with transaction accounts or non-personal time deposits, subject to reserve requirements, at the Fed.⁵⁹ Traditionally, these firms were commercial banks, thrift institutions, U.S. government branches, and agencies of foreign banks.⁶⁰ As a result, shadow banks facing liquidity shortages are generally forced to go to the market to receive added liquidity. Furthermore, shadow banks have a hard time protecting themselves from liquidity risk because they have little means to stop one of the biggest liquidity risks — bank runs. According to Paul McCulley:

Unlike regulated real banks, who fund themselves with insured deposits, backstopped by access to the Fed's discount window, unregulated shadow banks fund themselves with un-insured commercial paper, which may or may not be backstopped by liquidity lines from real banks. Thus, the shadow banking system is particularly vulnerable to runs – commercial paper investors refusing to re-up when their paper matures, leaving the

55. *How shadow banking works*, THE ECONOMIST (Feb. 2, 2016), <http://www.economist.com/blogs/economist-explains/2016/02/economist-explains-0>.

56. *Shadow Banking System*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/shadow-banking-system.asp> (last visited April 7, 2017).

57. *Id.*

58. *Id.*

59. *The Discount Window*, FEDERAL RESERVE BANK OF NEW YORK, <https://www.newyorkfed.org/aboutthefed/fedpoint/fed18.html> (last visited April 7, 2017).

60. However, the Fed may, in exigent circumstances, extend the discount window to non-depository institutions. Before the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") it was well established that the Fed could open the discount window to non-depository institutions. See *Discount Window*, *supra* note 59. If "credit was not available from other sources and that failure to provide the credit would have adversely affected the economy" the Board of Governors could approve opening the discount window to a non-depository institution under § 13(3) of the Federal Reserve Act. However, after Dodd-Frank, opening the discount window is only allowed if the program is opened on a broad basis, is approved by the Treasury Secretary, and is "for the purposes of providing liquidity to the financial system and not to aid a failing financial company." *Id.*

shadow banks with a liquidity crisis – a need to tap their back-up lines of credit with real banks and/or to liquidate assets at fire sale prices.⁶¹

After 2008, it became in vogue to criticize the shadow banking system for creating the housing bubble by engaging in reckless, and at times fraudulent, risk taking. However, it is important to understand that our financial system necessitates shadow banking. There is simply no way to conduct banking in our society without recognizing that it operates as a dual system. Commercial banking, by dint of the regulatory limitations placed on its business model, can never offer a wide swath of risk preferences.⁶² Thus, commercial banking is fundamentally limited in how much credit and liquidity it can inject into the market. For example, one of the classic benefits of the shadow banking system is that it can take illiquid assets and make them liquid.⁶³ This is essentially the housing market model. Shadow banks took home mortgages, bundled them together, securitized them, and sold them as liquid debt instruments. Though it ultimately caused the 2008 financial crisis, at the beginning, mortgage-backed securities created a huge increase in home ownership by injecting liquidity into the housing market. Thus, even relatively liberal statutes, like Dodd-Frank, never intend to throw the baby out with the bath water in terms of shadow banking. Instead, the goal is to keep the good parts of shadow banking while limiting its more devious and reckless aspects.

III. THE SHADOW IMMIGRATION SYSTEM

A. *Traditional Immigration System*

To understand the shadow immigration system it is important to first understand what the traditional immigration system is — legal immigration. Legal immigration is the type of immigration that most people think of

61. See Paul A. McCulley, *Teton Reflections*, PIMCO (Sept. 2007), <https://www.pimco.com/insights/economic-and-market-commentary/global-central-bank-focus/teton-reflections>. (last visited April 7, 2017). Also, although bank runs can often lead to insolvency risk the shadow banking system does have something to akin to deposit insurance — the credit-default swap (“CDS”). A CDS is a contract between two parties that centers on a certain asset. One party contracts that if the value of the asset decreases to a certain level the other party will pay them a certain multiplied value of the asset. In return for this payment guarantee, the guarantor receives regular premium payments. In essence, CDSs are quasi-insurance contracts that protect against an institution’s assets becoming less valuable, which may implicate that institution’s ability to sell its commercial paper or be subjected to a bank run. See PERRY MEHLING, *THE NEW LOMBARD STREET*, 118 (Princeton Univ. Press 2011).

62. See Marcus Stanley, *The Paradox of Shadow Banking*, ROOSEVELT INST., 3–4 (2015), http://rooseveltinstitute.org/wp-content/uploads/2015/11/Stanley_Shadow_Banking.pdf.

63. *Id.* at 3.

when they think of immigration — it is Ellis Island.⁶⁴ An immigrant seeks to enter a country, which the government allows by granting them legal status. The immigrant then uses that legal status to live and work in that country in much the same way that a citizen of that country would.⁶⁵ Due to the nature of legal immigration, which citizens trust will result in a net benefit, the government imposes a host of requirements in order for an immigrant to legally immigrate.⁶⁶ For example, the U.S. government divides legal immigration into discrete channels in which a potential immigrant must pass through in order to legally immigrate. For example, consider one of traditional immigration's specific categories — family-based immigration.

Family-based immigration allows citizens and legal immigrants, otherwise known as legal permanent residents ("LPRs"), to bring family members into the United States either as immediate relatives or through a preference system.⁶⁷ In order to sponsor a potential immigrant as an immediate relative, the sponsor needs to be a citizen and meet certain age and financial criteria.⁶⁸ Assuming that the sponsor satisfies these standards the immediate relative can legally immigrate if she satisfies certain eligibility criteria.⁶⁹

Alternatively, if an immigrant does not qualify under the immediate relative subcategory, the immigrant may attempt to qualify under the preference system.⁷⁰ The preference system provides a limited number of green cards every year to family members who do not qualify as immediate relatives under the INA.⁷¹ According to the American Immigration Council, to balance the amount of immigrants entering each year based on family relationships, Congress devised a system of calculating how many immigrants can enter under the preference system.⁷² First, like with immediate family

64. See *About Ellis Island*, The Statute of Liberty — Ellis Island Found., <http://www.libertyellisfoundation.org/about-the-ellis-island> (last visited Dec. 16, 2016).

65. See *How the United States Immigration System Works*, AM. IMMGR. COUNCIL (Aug. 12, 2016), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

66. Governed by the Immigration and Nationality Act (the "INA"), legal immigration's goals are to reunify families, admit immigrants with skills valuable to the U.S. economy, shelter refugees, and promote diversity. See *id.*

67. *Id.*

68. *Id.*

69. *Id.* According to the INA, immediate relatives are "(1) spouses of the citizen, (2) unmarried children of the citizen if the child is under twenty-one years old, or (3) parents of the citizen if the citizen is at least twenty-one years old." Procedurally, in order for an immigrant to enter the United States under the family-based category a citizen or LPR has to petition for that immigrant. The citizen or LPR must also establish the legitimacy of the relationship, a certain income, and sign an affidavit stating that the sponsor will be financially self-sufficient or that the sponsor will financially support the immigrant.

70. See *id.*

71. See *supra* note 65.

72. *Id.*

members, both the sponsor and immigrant must meet certain qualifications to take advantage of the preference system. The sponsor needs to be either a citizen or legal immigrant and the potential immigrant must also meet certain age and financial criteria.⁷³ The INA allots 480,000 green cards to the family-based category.⁷⁴ Of this number, immediate family members and paroled aliens get first preference. After adding back in a number of other unused non-family-based immigration green cards whatever green cards remain are allotted to the preference system.⁷⁵

Not only does legal immigration impose a burdensome process for entering the country, but once an immigrant legally immigrates that immigrant is subject to further responsibilities. For example, legal immigrants must file income taxes and register with the Selective Service if the immigrant is a male between eighteen and twenty-five years old. In this regard, legal immigrants are subject to many of the same responsibilities as citizens. However, in return for a burdensome entrance process and perpetual responsibilities legal immigrants receive a broad swath of rights. For example, unless a legal immigrant violates the terms of the INA, that immigrant cannot be subject to deportation. Furthermore, legal immigrants receive the protection of all U.S., state, and local laws, which they may vindicate in court just like any citizen may.⁷⁶ Moreover, legal immigrants receive the right to pursue the same degree of employment opportunities as citizens receive.⁷⁷

In regards to risk, traditional immigration is the avenue for risk-averse primary actors in the same way that traditional banking is. Employers, as suppliers of jobs, receive low returns for employing immigrants over employing citizens. The only way an employer benefits from employing a legal immigrant over a citizen is if her skill set makes her a better candidate than any citizen applicant. This is because an employer is subject to the same responsibilities by employing a legal immigrant as it is with employing a citizen. However, in return for an employer's low benefit for hiring a legal immigrant, the employer subjects itself to a similarly low degree of risk, namely not breaking the law. Thus, the traditional immigration system

73. *Id.* According to the INA, qualifying preference system family members are “(1) adult children of the citizen, (2) brothers and sisters of the citizen if the citizen is at least twenty-one years old, (3) spouses of LPRs, and (4) unmarried children of LPRs.”

74. *See id.*

75. *See id.*

76. *See Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited Dec. 16, 2016).

77. This is not altogether true. There certain jobs in which being a citizen is a requirement, thus making legal immigrants ineligible. An example of this job would be the President of the United States. *See* U.S. CONST. art. II, §1, cl. 5.

lines up very similarly with the traditional banking system — the more regulated system carries the lowest degrees of risk and reward.

B. *Shadow Immigration System*

Shadow immigrants, who are illegal immigrants, are immigrants that act in much the same way as legal immigrants. However, much like shadow banks, illegal immigrants are not regulated like legal immigrants. Illegal immigrants avoid much of the regulatory burden imposed on legal immigrants by entering a country illegally. For example, a foreign national may fly to the United States on a tourist visa. These visa are normally limited to a period of a couple months. However, instead of returning to her home country, the foreign national may decide to stay in the United States after the expiration of her visa. In doing so, the foreign national becomes an immigrant. However, she does so without going through the traditional entrance requirements imposed by the traditional immigration system, making her an illegal immigrant.

Concerning regulatory burdens, most obviously, illegal immigrants avoid the burdensome process of entering the country legally. Furthermore, illegal immigrants also avoid many of the perpetual responsibilities legal immigrants are subject to after entrance. For example, illegal immigrants are not required to pay taxes or pay into many federal benefit programs like Social Security.

However, in return for avoiding the responsibilities imposed by the government on legal immigrants, illegal immigrants receive fewer rights. Illegal status results in increased risk of employer exploitation. According to Johnson, “[t]he threat of deportation — and consequently the fear of loss of liberty and of separation from friends, family, job, and community — rests heavily on undocumented workers, possibly chilling them from exercising any rights under the law.”⁷⁸ Lastly, and most obviously, illegal immigrants are subject to deportation at any given time. Thus, although illegal immigrants are still entitled to a broad swath of constitutional rights their ability to vindicate those rights in court are limited. An illegal immigrant filing a lawsuit immediately makes herself known to immigration authorities, which likely implies a concurrent deportation proceeding against her.⁷⁹

78. See Johnson, *supra* note 27, at 226–27.

79. However, illegal immigrants maintain their constitutional rights even in deportation proceedings. For example, in *Yamataya v. Fisher* the Court held that immigration services cannot deport an illegal immigrant without a hearing that satisfies the immigrant’s due process rights. See *Japanese Immigrant Case*, 189 U.S. 86, 98 (1903). Today, in a deportation proceeding an illegal immigrant is entitled to:

(1) a hearing before an immigration judge and review, in most cases, by a federal court; (2) representation by a lawyer (but not at government expense); (3) reasonable notice of charges, and of a

Much like the shadow banking system, the shadow immigration system exists specifically because traditional immigration focuses on risk-averse primary actors. Employers receive high rewards for employing illegal immigrants. These employers do not need to adhere to a large bulk of the labor laws they would need to adhere to if they employed legal immigrants. For example, an employer can pay an illegal immigrant below minimum wage and supply illegal immigrants with sub-standard working conditions. This results in a huge cost savings for these employers. However, in return for an employer's high reward in employing illegal immigrants there is a similar high degree of risk, namely breaking the law. Though employing illegal immigrants can result in high cost savings, government lawsuits for doing so can result in very high fines. For example, in 2012 both Atrium Companies and Advanced Containment Systems paid \$2 million each in non-criminal fines for employing illegal immigrants along with being required to implement compliance programs in their hiring.⁸⁰

IV. THE BENEFITS OF ACCEPTING DUAL SYSTEM IMMIGRATION

A. *Acknowledging the Shadow Immigration System's Permanence*

A major benefit to accepting dual system immigration is that it helps policy makers understand that illegal immigration is a permanent feature of immigration. Both the deportation and amnesty/earned citizenship views assume, at least in theory, that illegal immigration can be eliminated.⁸¹ This assumption is false — eliminating illegal immigration is no more possible than eliminating noncommercial banking. The incentive-based nature of finance ensures that some percentage of primary actors will always engage in noncommercial banking because they determine that the rewards outweigh the risks. This is just as true with immigration — the rewards of illegal immigration will always outweigh the risks for some percentage of primary actors. For example, according to Douglas Massey, Luin Goldring, and Jorge Durand, “migration networks and patterns are self-perpetuating

hearing's time and place; (4) a reasonable opportunity to examine the evidence and the government's witnesses; (5) competent interpretation for non-English speaking immigrants, and clear and convincing proof that the government's grounds for deportation are valid.

ACLU, *The Rights of Illegal Immigrants — ACLU Position Paper*, ACLU (Apr. 10, 2017, 12:06 PM), <https://www.aclu.org/other/rights-immigrants-aclu-position-paper>; see generally Raoul Lowery Contreras, Yes, *Illegal Aliens Have Constitutional Rights*, THE HILL (Sept. 29, 2015, 12:30 PM), <http://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-alien-have-constitutional-rights>.

80. See Worksite Enforcement, *2 Companies Admit to Hiring Illegal Aliens, each forfeit \$2 million*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 24, 2012), <https://www.ice.gov/news/releases/2-companies-admit-hiring-illegal-alien-each-forfeit-2-million>.

81. MOTOMURA, *supra* note 32, at 45.

and durable once they are established. Migration transforms sending and receiving communities in ways that sustain more migration, largely oblivious to what the law may or may not allow.”⁸²

The shadow immigration system is still likely to exist even if the United States adopted an open borders policy. The open border position argues that interstate immigration (i.e. from one country to another country) should function in the same way that intrastate immigration (i.e. within one country) does.⁸³ However, according to Johnson, one of the leading proponents of open borders, even full implementation of an open borders policy would maintain the shadow immigration system.⁸⁴ According to Johnson, from a policy perspective open border immigration would likely continue excluding immigrants with certain criminal, health, or terrorist elements.⁸⁵ As such, these primary actors would continue to be incentivized to operate in the shadow immigration system.

Furthermore, even if an open borders policy allowed the type of immigrants that Johnson advocates for excluding, the shadow immigration system would still remain. Part of any immigration system, even an open borders immigration system, requires the registration of that immigrant with a regulatory agency. What is the likelihood that a drug smuggler would want to register with a regulatory agency if her sole reason for entering the country was to commit an illegal act? Thus, even if the drug smuggler *could* legally immigrate the chances that she *would* legally immigrate are incredibly low, necessitating the continuation of a shadow immigration system. As such, from a theoretical perspective the deportation and amnesty/earned citizenship views are in error because they advance a goal that is premised and based on eliminating illegal immigration. Instead, the correct assumption from which to base immigration policy is how big or small the shadow immigration system should be.

B. Detangling the Economic/Moral Conflict: Economy as Primary, Morality as Secondary

A second benefit to accepting a dual immigration system is that it dispels the idea that there is a significant moral component to immigration. This is false — there is nothing particularly moral or immoral about immigration, at least not to any degree as is commonly assumed. Immigration is a moral

82. MOTOMURA, *supra* note 32, at 45; see HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES, 48–49, 134–35, 178–79 (Oxford Univ. Press, 2006); Douglas S. Massey, et al., *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 AM. J. SOC. 1492, 1496–1503 (1994).

83. See Johnson, *supra* note 27, at 196–97.

84. See Johnson, *supra* note 27, at 214.

85. See Johnson, *supra* note 27, at 203.

question to the same extent that finance is a moral question. Obviously, regulating financial institutions involves moral components.⁸⁶ However, it would be categorically wrong to say that financial regulation is essentially a moral question.

The same is true for immigration — people do not make the decision to immigrate on moral grounds. A person's decision to immigrate is based on the incentives surrounding the availability of jobs. The characters in John Steinbeck's *Grapes of Wrath* did not decide to leave their farm and move to California because they felt it was morally right.⁸⁷ The basis for that family's decision revolved around job opportunities and the incentives surrounding the pursuit of those opportunities.⁸⁸ Moreover, the morality-neutral nature of immigration applies whether the immigration is legal or illegal. The decision to move from a third-world country to a first-world country revolves around job availability in the same manner as the *Grapes of Wrath* example.

Unfortunately, both the deportation and amnesty/earned citizenship views give an outsized role to morality. The recent presidential election is a great example of how policymakers mischaracterized immigration as a moral question through these two views. Donald Trump epitomized the deportation view in the same way that Hillary Clinton epitomized the amnesty/earned citizenship view. For example, Trump's website stated that illegal immigration should be cut off because illegal immigrants take citizens' jobs.⁸⁹ As such, an illegal immigrant who attains employment in the United States has essentially committed a theft, rendering that person morally culpable. Conversely, Clinton's website stated that enforcing the current immigration laws would tear families apart and thus "[w]e can't wait

86. See *Moral Hazard*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/moraleazard.asp?lgl=no-infinite>, (last visited Dec. 16, 2016) ("Moral hazard is the risk that a party to a transaction . . . has an incentive to take unusual risks in a desperate attempt to earn a profit before the contract settles."). This particular component to moral hazard was glaringly present in the 2008 crash. Prior to the crash, mortgage lenders engaged in a pernicious form of subprime lending called originate-to-distribute. Originate-to-distribute is when lenders issue loans with the intention of selling them to other investors as opposed to holding them on their book. See *Originate-to-Distribute*, NASDAQ, <http://www.nasdaq.com/investing/glossary/o/originate-to-distribute> (last visited Nov. 28, 2016). This model increased the amount of valueless subprime loans in the market, creating a sizeable debt-fueled bubble. See *Moral Hazard*. After the crash, regulators discussed originate-to-distribute, and its regulation in terms of its moral hazard. See *id.* As such, originate-to-distribute provides a good example of how the regulation of financial institutions can be primarily concerned with morality as a means to systemic stability. Thus, a moral question in immigration would likely involve the same calculus, namely resolving a moral question as a means to systemic stability.

87. See generally JOHN STEINBECK, *GRAPES OF WRATH* (Penguin Classics, 2006).

88. See generally *id.*

89. See *Immigration*, DONALD J. TRUMP, <https://www.donaldjtrump.com/policies/immigration/> (last visited Dec. 16, 2016).

any longer for a path to full and equal citizenship.”⁹⁰ As such, the deportation of illegal immigrants is an act of family destruction and thus a moral wrong.

Both of these views misunderstand deportation. Deporting an illegal immigrant is not punishment for a moral wrong. Deporting an illegal immigrant is the materialization of a known risk that the immigrant considered in her decision to operate within the shadow immigration system. Similarly, earned citizenship is not forgiveness of a moral wrong. Instead, it is the adjustment of the incentives surrounding the choice to continue operating within the shadow immigration system or not.

Obviously, a counterargument is that immigration is, in fact, primarily moral. In arguing for open borders, Johnson’s argument heavily rests on the morality of doing so. According to Johnson, immigration is a clear and natural extension of our country’s long history of discrimination. As such, our borders themselves constitute a further impediment to getting past this history. In Johnson’s view, the United States can never be truly free of its discriminatory past until it open its borders, thus “send[ing] an expressivist message that people from other nations, including people of color from the developing world, have equal dignity with all people.”⁹¹ Accepting Johnson’s view is thus to accept that immigration is primarily moral as discrimination is a primarily moral concern.

Alternatively, Owen Fiss argues that the very allotment of rights between illegal immigrants and legal immigrants, namely that illegal immigrants receive less rights, constitutes a moral wrong. Fiss sees the disparity in rights between illegal immigrants and legal immigrants as a disability for illegal immigrants, making illegal immigrants something akin to pariahs.⁹² Specifically at issue for Fiss is the fact that the Constitution protects alienage as a suspect class. Preliminarily, Fiss acknowledges some necessary difference between legal immigrants and illegal immigrants. However, he argues that the United States shirks its constitutional responsibilities to illegal immigrants when it fails to protect them as a suspect class. Thus, Fiss’ argument is moral in a different way than Johnson’s. Johnson argues that illegal immigrants face discrimination primarily driven by racism whereas

90. See *Immigration Reform*, HILLARY CLINTON, <https://www.hillaryclinton.com/issues/immigration-reform/> (last visited Dec. 16, 2016).

91. Johnson, *supra* note 27, at 218. Put another way, “[b]order enforcement promotes animosity directed at certain minority groups and renders certain groups of U.S. citizens as holding limited citizenship . . . This result runs contrary to the general thrust of U.S. law to remedy racial discrimination.”

92. OWEN FISS, *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* 5 (Joshua Cohen & Joel Roger eds., 1999). “In recent years, the social disabilities imposed upon [illegal] immigrants have increased, and have taken three different forms: (a) bars on employment, (b) exclusions from public schools, and (c) denials of statutory entitlements, such as food stamps or medical services, that are routinely provided to the poor by the welfare state.”

Fiss stresses discrimination primarily driven by alienage. That being said, both of these arguments approach immigration as a morally-centered issue. Moreover, immigration's economic aspects, like the migratory nature of illegal immigration, are relevant primarily insofar as they uphold the moral wrongness of immigrant discrimination.

Johnson and Fiss are correct insofar as discrimination is a moral wrong, however they are wrong to place morality as primary. Human movement does not occur for moral reasons, it occurs because of employment. Anything that does not relate to immigration's primary driver is necessarily an effect of immigration, not a cause. Thus, morality must be an effect, making it a secondary aspect.

C. Acknowledging the Government as an Economically-Driven Secondary Actor

By accepting that primary actors operate in either system because of their incentive calculi it also beneficially reframes the government's role as a secondary actor. If primary actors in the dual immigration system operate based on economic incentives then the secondary actor should assumedly regulate immigration from a similar, economic perspective. One of the main problems with the deportation and amnesty/earned citizenship views is that it presents a moral solution to a moral problem. However, if immigration is not morally driven then a disconnect arises between the problem and the solution posited by these two views. Why is it proper to have a moral solution to an economic problem?

For example, consider how the government regulates primary actors in money-market funds ("MMFs").⁹³ MMFs are investment vehicles that seek to earn interest for shareholders while maintaining a value of around one dollar per share.⁹⁴ MMFs earn interest by investing in short-term, highly safe investments such as U.S. treasuries and commercial paper.⁹⁵ By valuing each share at around one dollar MMFs look incredibly similar to commercial bank deposits — instead of each dollar earning interest in a commercial bank deposit, each share (valued at one dollar) earns interest on its investments.⁹⁶ However, the interest earned on MMF shares is often higher than the interest earned on dollars in a commercial bank account.⁹⁷ Before the housing market crash many investors invested in MMFs as an alterna-

93. See *Money Market Fund*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/money-marketfund.asp> (last visited Feb. 22, 2017).

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

tive to maintaining deposits at commercial banks.⁹⁸ However, during the crash, the stability of MMFs was put in serious jeopardy when a few MMFs were forced to value their shares below one dollar per share.⁹⁹ This caused a run on MMFs, which were not covered by deposit insurance.¹⁰⁰

Though MMFs ended up causing a systemic issue that the government needed to address, the MMFs' actions were not based in moral wrongness. Instead, primary actors went to MMFs because their incentive calculus held that the market was safe enough to justify using MMFs instead of commercial bank deposits. Thus, the government's solution was not to punish investors, but instead to adjust the incentives surrounding investment in MMFs.¹⁰¹ Essentially, the government acted in a similarly incentive-based manner as MMFs' primary actors did by regulating MMFs in a way that would produce an overall net benefit to the economy.

What the MMF example shows is that incentive-based decisions by primary actors should be adjusted by similar incentive-based decisions by secondary actors. Savers and users of funds utilize MMFs because they determine that the rewards of using them outweigh their risks. Similarly, the government regulates MMFs in the exact same way, namely that the rewards of MMFs' continued existence outweigh their risks. This is exactly how the government, as a secondary actor, should regulate in the immigration context. An immigrant operates in either immigration system because of the current regulatory framework and that immigrant's particular risk preference. The government should thus regulate these systems in a similarly incentive-based manner, one in which the ultimate goal is to benefit the economy.¹⁰²

For example, let's say the legislature was considering whether to double the amount of green cards issued every year while increasing the fines to employers for employing illegal immigrants. This theoretical statute clearly adjusts the incentive structure for primary actors. If an immigrant knows that she has twice as good of a shot of getting a green card then she will be disincentivated, to an extent, to operate in the shadow immigration system. Similarly, if an employer knows that employing illegal immigrants is riskier than it previously was that employer will be disincentivized, to an extent, from employing illegal immigrants. Thus, in considering whether to vote

98. See Paul A. McCulley, *Teton Reflections*, PIMCO (Sept. 2007), <https://www.pimco.com/insights/economic-and-market-commentary/global-central-bank-focus/teton-reflections>.

99. See Dealbook, *Money-Market Fund 'Breaks the Buck'*, N.Y. TIMES (Sept. 17, 2008, 8:09 AM), https://dealbook.nytimes.com/2008/09/17/money-market-fund-says-customers-could-lose-money/?_r=0.

100. See *Money Market Fund*, *supra* note 93.

101. See *id.*

102. This is also the same goal that the government should have when regulating finance.

yes or not on the theoretical statute the government should vote economically — does this statute benefit the economy?¹⁰³ Perhaps a legislator in favor of the statute could argue that it decreases the cost of enforcing the INA and expands the tax base. Similarly, a legislator opposed to the statute could argue that it expands the amount of people who can access entitlement programs and unnecessarily increases competition for blue-collar jobs.

Whatever the arguments for or against this hypothetical statute, the thing to focus on is that the above debate directly addresses the statute's actual effects. Thus, a statute that produces economic effects is discussed in economic terms.

1. The Theory in Practice: Open Cities

The previous example about the hypothetical statute highlights how one could look at a statute from an economic perspective. However, in all likelihood, that example's economic arguments would likely have been made even without accepting a dual immigration system. Thus, what is the dual immigration theory really doing? How does accepting this model help the government *truly* think about immigration from an economic perspective? Consider the following example — open cities.

Before discussing open cities it is necessary to accept that there is currently an existing and permanent shadow immigration system. However, due to the restrictedness of the INA, the shadow immigration system is larger than it probably should be. Moreover, the shadow immigration system's size is harmful for two reasons. First, it produces a large group of people, illegal immigrants, that the government has little documentation on. Part of being a nation-state is knowing who resides within one's borders.¹⁰⁴ Thus, in some ways a large shadow immigration system thus erodes U.S. borders.¹⁰⁵ For this reason, the government is incentivized to keep the amount of people in the shadow immigration system down to the amount that the system necessarily demands.¹⁰⁶ Put another way, if there are significant amounts of illegal immigrants who would prefer, but cannot get, legal status then the government has failed in its regulatory scheme.

103. The focus on the economy is the same for both because the base foundation to each system is economic — for finance it's capital and for immigration it's jobs.

104. See OXFORD UNIV. PRESS, CHALLENGE TO THE NATION STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 5 (Christian Joppke ed. 1998); but see Ilya Somin, *Nations (and Borders) Can Exist Without Restricting Immigration*, FOUND. FOR ECON. EDUC. (Aug. 18, 2015), <https://fee.org/articles/nations-and-borders-can-exist-without-restricting-immigration/>.

105. See OXFORD UNIV. PRESS, *supra* note 104, at 5–6.

106. For example, migratory labor.

Second, the relatively free flow of illegal immigration within the United States means that the allotment of illegal immigrants leaves much to be desired. On some level, the market determines where illegal immigrants go.¹⁰⁷ After all, this paper posits that employment flows like capital, meaning that labor chases job opportunities. In this manner, the shadow immigration system operates efficiently. However, there is so much more that the government, and our economy, could get out of the shadow immigration system.

Currently, what does our society get from illegal immigration? Primarily, it gets cheap and often migratory labor. However, the government also owes illegal immigrants services. It is not like this labor is wholly “free” labor for the government in terms of the economic benefits this labor offers. The government owes illegal immigrants free education.¹⁰⁸ Illegal immigrants often get counted in the U.S. Census, which means that federal money gets allotted to support these illegal immigrants just as if they were citizens.¹⁰⁹

However, if employment operates like capital in that labor follows to the best employment opportunities then illegal immigrants will likely concentrate in areas where those opportunities are highest. Most likely, these are urban areas currently experiencing positive economic growth. On some level, this is not an effective allotment of employment resources. Consider the following example. Assume that 100,000 actors currently live in Los Angeles. Los Angeles, at any given time, has 10,000 acting roles available. This means that, at maximum, 10% of the actors in Los Angeles will always be employed, but no more and no less than 10%. However, 10% actor employment is the highest percentage of actor employment of any city in the United States. Thus, actors not currently residing in Los Angeles are incentivized to move to Los Angeles because their chances of employment are higher. Is this a good thing? Specifically, do you want more actors moving to Los Angeles?

On some level the answer is yes. On some level you want as many actors in Los Angeles as possible because it increases the talent pool. However, what if 20% of the actors currently living in Los Angeles are really good actors? This means that, at most, 50% of those really good actors are always unemployed. This is a huge waste of good resources. If this is true, do

107. See *infra* Part I.

108. See *Plyler v. Doe*, 457 U.S. 202, 244–46 (1982); *Public Education for Immigrant Students: Understanding Plyler v. Doe*, AM. IMMR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/plyler-v-doe-public-education-immigrant-students> (last visited Feb. 22, 2017).

109. See *Immigrants and the Census*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/census/messaging/immigrants.html> (last visited Feb. 22, 2017).

you really want *more* actors moving to Los Angeles, especially if parts of the United States are starved for art?

This paper argues that the government should think economically about immigration. So what is an economic solution if lack of documentation and inefficient labor allocation are economic harms produced by an unnecessarily large shadow immigration system? How can the government get a better deal? The answer may very well be open cities.

What is the open city idea and how does it work? First, the government eliminates all currently legal immigration paths other than work visas.¹¹⁰ Second, the government identifies three of four cities that are depopulated, economically stagnant, and generally failing. Third, the government announces that these three of four cities are completely open to immigration — something akin to open borders within their city limits.¹¹¹ Thus, any foreign national that wants to immigrate to the United States can do so assuming that they immigrate into one of these cities.¹¹² Concurrent with the government's announcement of open cities it raises the fines for employers that higher illegal immigrants and contributes a large amount of infrastructure-focused fiscal stimulus to every open city.¹¹³ For example, consider Buffa-

110. Two things to note about how immigration would work under the open cities idea. First, the United States cannot constitutionally limit legal immigrants' freedom of movement after entering the country. See *Plyler*, 457 U.S. at 244–46. Instead, it can only control the legality of a given immigrant's presence in the United States. Thus, the work visa exception to open cities would allow a safe haven for immigrants to freely move about the country without losing their legal status. Non-work-visa immigrants, on the other hand, would lose their legal status upon leaving an open city. The immigrant would then be subject to a deportation proceeding.

111. See Johnson, *supra* note 27, at 234.

112. The idea of an open city can be somewhat analogized to an already existing concept in finance — special economic zones (“SEZs”). See *Special Economic Zone*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sez.asp> (last visited Feb. 22, 2017). SEZs are “designated areas in countries with special economic regulations that differ from other areas in the same country. . . . SEZs are zones intended to facilitate rapid economic growth by leveraging tax incentives to foreign dollars and technological advancement.” *Id.* In the immigration context, open cities would operate similarly to SEZs, but whereas SEZs' goal economic growth, open cities' goal is economic revitalization.

113. The injection of economic stimulus is particularly key to the success of open cities. Specifically, significant amounts of evidence exists pointing to the fact that population growth, in and of itself, produces overall negative affect on cities. See Seth Norton, *Population Growth, Economic Freedom, and the Rule of Law*, in PERC POL'Y SER. 24, 2–3 (Jane S. Shaw ed., 2002) <https://perc.org/sites/default/files/ps24.pdf> (last visited Feb. 22, 2017). According to the Population and Environmental Research Center, Thomas Malthus' assertion hundreds of years ago, that population growth is ultimately negative, is scientifically valid. *Id.* Specifically, the Malthusian view argues that population growth ultimately stalls living standards increases by keeping people in a state of constant struggle for subsistence. *Id.* However, economic stimulus takes population increases outside of the Malthusian context because, generally, population growth tied to increased demand for employment is generally an economic good. Thus, by artificially creating demand, fiscal stimulus accommodates open cities' population growth, resulting in population growth causing economic growth in and of itself (e.g., housing and commercial construction booms).

lo. Buffalo is, by most metrics, failing.¹¹⁴ Its population is half its peak population.¹¹⁵ Its infrastructure is crumbling.¹¹⁶ Its economy is stagnant.¹¹⁷ In many ways, Buffalo is begging to be turned from an economic drain to an economic contributor.¹¹⁸ What if Buffalo became an open city?

In regards to registration, any immigrant that wanted to move to Buffalo would have to register with Homeland Security, asserting Buffalo as that immigrant's place of residence. That immigrant would then attain legal status for as long as that immigrant resided in Buffalo or any other open city. In regards to the government's fiscal stimulus, what if a million immigrants moved to Buffalo in the next ten years? First, Buffalo would need to build a lot of new housing to house a newly quadrupled population. Second, Buffalo would need to utilize the government's stimulus package to bolster its infrastructure — public transportation, schools, hospitals, and so on. Thus, Buffalo would likely experience a construction boom, fueled by both public and private spending.¹¹⁹

What are the benefits to open cities and how do they address the shadow immigration's current problems? Furthermore, how are open cities a product of economically driven government thinking on immigration? In regards to benefits, this paper assumes that some amount of illegal immigrants would prefer legal status over illegal status. As such, this paper assumes that the only reason some illegal immigrants are not legal immigrants is because they are unable to attain legal status. This creates an unnecessary dearth of documentation of these immigrants within U.S. borders. Hence, open city immigration should increase the overall documentation of immigrants by allowing illegal immigrants to attain legal status, thus decreasing the size of the documentation-light shadow immigration system. Also, open city immigration takes urban areas that were once net takers of government resources and makes them net contributors.¹²⁰ Open cities

114. See Edward L. Glaeser, *Can Buffalo Ever Come Back?*, CITY J., Autumn 2007, <http://www.city-journal.org/html/can-buffalo-ever-come-back-13050.html>.

115. See *id.*

116. See *id.*

117. See *id.*

118. Start-Up NY is a great example of the type of stimulus the New York state government currently attempts to revive areas like Buffalo. "StartUp NY is a business development program that offers new companies a tax-free environment for 10 years. It is designed to counter New York's reputation as high tax and to recruit startup enterprises." Howard Zensky, *Another Voice: State's Economic Development Program is Succeeding*, BUFFALO NEWS, July 9, 2016, <http://buffalonews.com/2016/07/09/another-voice-states-economic-development-program-is-succeeding/>. In order for a business to qualify for StartUp NY funds it must partner with a New York State college in a certain business sector. See *About, STARTUP NY*, <https://startup.ny.gov/business-growth> (last visited Dec. 10, 2016).

119. The public construction would be infrastructure construction. The private construction would be housing. There would also likely be a boom of commercial construction as the new immigrants would need to access basic amenities like food and clothing.

120. See Glaeser, *supra* note 114.

would see population increases, making more efficient use of cities' infrastructures and spurring possible economic booms.

Concerning how open cities are products of economically driven government thinking on immigration, consider the current traditional immigration system. Currently, if a foreign national wants to legally immigrate she has to fit herself into a specific category.¹²¹ What is the benefit to the United States, for instance, in giving Syrian War refugees legal status? According to Katy Long, the benefit is that “[i]n resettling more Syrian refugees quickly and equitably, Washington will win a moral victory, which in turn will help it persuade allies to do more to help resolve the Syrian war and the attendant humanitarian catastrophe.”¹²² Essentially, the United States gains a moral benefit and nothing more.

With open cities, the United States does not even need to consider the refugee issue. Any foreign national that wants to immigrate to the United States can do so by immigrating to an open city, including refugees. Thus, not only does the United States get Long's “moral victory” it also gets the economic benefit of having a refugee contribute to an open city's economic development. In this way, the economic benefit of immigration is primary, while the moral benefit is secondary. Why focus on a secondary moral benefit when you can get both an economic and moral benefit at the same time? This is the real benefit of having an economically driven secondary actor. In building a regulatory framework, the government focuses on the primary benefit of immigration, namely economics, and through achieving economic benefits it also captures secondary, moral benefits.

CONCLUSION

Today and tomorrow, illegal immigrants will be both deported and made citizens. The degree to which each occurs appears to be the central immigration question of our day. However, the answers to these questions do not lie in the prescriptions of either the deportation of amnesty/earned citizenship views. These views fail because they cannot answer a question that they do not understand.

Dual system immigration does not posit an answer to the above paragraph's central question. Dual system immigration merely identifies what is already true — the American immigration system consists of two contrasting immigration systems, traditional and shadow. In so identifying,

121. See *How the United States Immigration System Works*, *supra* note 65.

122. Katy Long, *Why America Could — and Should — Admit More Syrian Refugees*, THE CENTURY FOUND. 1, 3 (Dec. 16, 2015), https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2015/12/16202847/Long_Why_America_CouldE28094and_ShouldE28094Admit_More_Syrian_Refugees_-13.pdf.

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dual system immigration creates the proper framework in which to discuss illegal immigration, namely as a shadow immigration system.

To play a football game you need to agree on the dimensions of the field. Now that the dimensions have been set, let us play the game.