I’m grateful to David Holmes and the Legal Alumni of Wooster for inviting me to speak on this Constitution Day. It’s a great opportunity to have a serious conversation with a group of smart lawyers and, perhaps, future lawyers, about issues that I care deeply about.

I should begin by emphasizing that I’m a social scientist, not an immigration lawyer. But I hang out with a bunch of them, and I greatly respect their service on the front lines of defending immigrants and asylum-seekers, and their efforts to bring executive branch lawlessness on immigration policy to the appellate courts for review.

The federal courts have been a hugely important bulwark against some of the worst excesses of the current administration’s immigration and asylum policies, especially since Congress remains gridlocked on most of the issues that need to be addressed in this area. The Supreme Court, alas, is proving to be the weak link in that buffering effort.

We are in a very dark place today in our immigration policies. The executive branch seems to be in a constant state of war against foreign-born people of all types. Colleges like Wooster must struggle with politically motivated, “extreme vetting” to get their international students into the country. Students from mixed-legal-status immigrant families fear that their loved ones may get swept up in this administration’s mass deportation campaign. Every day, the screws are being tightened on the asylum process, to keep all but a handful of refugees from getting protection in our country. The concept of birthright citizenship is under fire (again).

My task this evening is to explain how we fell into this rabbit hole of exclusion and to outline a scenario for climbing out of it.
Here’s the track record: Since the very first week of the Trump administration, the president and Stephen Miller, his 33-year-old chief domestic policy adviser, have worked diligently to build out the architecture of mass immigrant incarceration and deportation. This has been done through a series of executive orders and new federal regulations, with no Congressional review.

One of the earliest of these executive orders ended the Obama policy of targeted immigration enforcement in the U.S. interior. Obama’s immigration agents prioritized serious felons and security risks. Trump’s enforcement policy dispensed with priorities. It called for an indiscriminate dragnet, using ICE agents armed only with administrative warrants – no order signed by a judge, no probable cause demonstrated.

The same executive order called for a massive expansion of so-called “expedited removal,” a legal mechanism for getting apprehended migrants out of the country as quickly as possible. They are asked to sign a document -- which they usually don’t understand, even though it is translated into Spanish -- waiving their right to a hearing before an immigration judge. The goal is to get them out of the country before they can secure legal counsel and challenge their removal. The unstated premise is that enabling people to seek some form of relief from deportation is a bad thing; it’s allowing them to “game the system.”

This practice is particularly noxious when applied to recently arrived asylum-seekers. The goal is to get them into removal proceedings before they can meaningfully access our asylum laws. So-called “rocket dockets” have been created to dispose quickly of large numbers of asylum claimants. For example, in the El Paso jurisdiction, each immigration judge hears 50 cases every morning and 50 more in the afternoon.

Expedited removal has been around for decades. It was created as part of the 1996 immigration law signed by Bill Clinton. What has changed is the indiscriminate use of it under Trump, to restrict due process and serve the president's political ends. Under previous administrations it had been used selectively. For example, in Obama’s last fiscal year, only about one-third of deportations occurred through expedited removal.

This past July, the Trump administration issued a new rule expanding expedited removal even farther, making it apply to all undocumented immigrants encountered anywhere in the country -- not just those apprehended while
crossing the border – if they can’t prove at least two years of continuous physical presence in the U.S.. Under this rule, hundreds of thousands of people may be deported with less due process than people get in traffic court. The new rule was quickly challenged in court by the ACLU, and that litigation is ongoing.

In the last few months, there has been intense scrutiny of one provision of U.S. immigration law. Section 1325 defines unauthorized entry into the U.S. as criminal offense. But illegal presence in the U.S. is a civil offense – a misdemeanor. So, entering illegally is a criminal act, but living in the U.S. as an undocumented immigrant is not. Got it?

Last July, in the first of the Democratic presidential candidate debates, Julian Castro made an impassioned appeal to repeal Section 1325, by redefining unauthorized entry as a civil offense. He and other candidates argued that this provision of immigration law was being used by the Trump administration to separate migrant parents from their children. In fact, since last year, more than 3,600 children have been separated from their parents, so that the parent could be put into criminal custody.

Criminalizing undocumented immigration is a process that has been underway since the last years of George W. Bush administration. Criminal prosecutions for illegal entry became common in the Obama years and they mushroomed under Trump. Under Bush and Obama, this usually meant prosecuting a larger share of repeat entrants -- undocumented migrants caught reentering the country following a formal removal) -- as well as people-smugglers, and those flagged for having committed serious felonies unrelated to immigration. A large majority of undocumented migrants apprehended by the Border Patrol, especially Mexican nationals, were offered the chance to leave the U.S. voluntarily, waiving their right to an immigration court hearing in return for avoiding prolonged detention and formal deportation, which carries long-term legal penalties.

Under Trump, beginning in April of last year, the vast majority of apprehended migrants were held for prosecution on a criminal charge. The share of apprehended immigrants who were allowed to depart voluntarily, after a few hours of processing, dropped to less than one-quarter, compared with over 90% in the early 2000s.

As former Attorney General Jeff Sessions defined this so-called “zero tolerance” policy, all undocumented aliens would be “met with the full prosecutorial power
of the Department of Justice.” This was the death knell of the policy of prosecutorial discretion that governed immigration enforcement under Obama.

The Trump administration is using Section 1325 to conduct mass prosecutions that raise serious legal and constitutional issues. People are arraigned and plead in batches of 50 or more, with no meaningful opportunity to have legal counsel.

Repealing Section 1325 would make it more difficult for the government to separate families at the border, but it wouldn’t necessarily prohibit the practice. Currently the administration is using anti-human-trafficking statutes to claim that parents have endangered their children by taking them to the border. It’s also using parents’ legal histories to separate families. Some parents are deemed unfit to have their children with them because they have misdemeanors on their record – just a traffic ticket will do. Even a parent’s HIV status has been used to justify separation.

The policy of prosecuting as many as possible immigrants on criminal charges and putting them into deportation proceedings has exploded the backlog in our immigration court system, which is now over 1 million cases, with just 444 immigration judges to hear them. Together with systematic detainment of asylum-seekers, the policy of blanket prosecutions has doubled the population of incarcerated immigrants to more than 55,000 on any given night.

These people are being held in a gulag of immigration prisons and county jails stretching from coast to coast. It’s the largest immigrant detention system in the world. 72% of the beds are in privately run, for-profit facilities. Just one company, CoreCivic, owns and operates over 100 for-profit immigrant detention centers. It’s big business, costing taxpayers upwards of $7.4 billion a year. We’re spending all this money to detain immigrants who pose no threat to public safety.

We are into mass incarceration of immigrants, because, if they’re being prosecuted criminally, they must be held in custody until they can be marched in front of a judge to get a deportation order. The result is that immigration offenses (illegal entry and reentry) are now a majority of all criminal prosecutions pending in the federal court docket.

Immigration courts are not part of our judicial branch. They belong to the Department of Justice, which makes them completely vulnerable to being used as just another politicized law enforcement tool. That’s exactly what is going on,
according to a senior immigration judge, Ashley Tabador. She recently denounced what she called an attempt to turn immigration judges from neutral arbiters of the law into immigration enforcement agents enacting White House policies.

Our last two Trump-appointed Attorney Generals have imposed so-called “performance standards” on immigration court judges. This is really a quota system. Judges’ jobs now depend on their deciding at least 700 cases per year with tight deadlines for closing individual cases. This assembly-line justice has nothing to do with due process and everything to do with ensuring that immigrants are removed swiftly from the country.

Another major policy initiative since 2017 has been a systematic effort to dismantle the legal framework for claiming asylum that has been in place since the 1980 Refugee Act was passed. The first big step was taken by former Attorney General Jeff Sessions, who with a stroke of his pen, drastically reduced the possible grounds for asylum claims. Session disallowed what he called “private violence”: gang and drug-related violence, and domestic violence. Now, it’s only people who can demonstrate that they are victims of violence perpetrated by their home country governments – i.e., “public violence” – who might qualify for asylum in the U.S.

There are sensible people who think the Attorney General shouldn’t be able to unilaterally rewrite asylum law, but in fact under current law he does have that authority, and both of the last two AGs have exercised it aggressively.

Other regulatory changes have also made it much harder to claim asylum. In July a new regulation was issued requiring asylum-seekers to apply in the first country through which they pass, and to have their claim denied by that country, to make them eligible to seek protection in the U.S. For example, asylum-seekers from Honduras and El Salvador will have to apply in Guatemala, even though it has hardly any capacity to adjudicate asylum claims.

The practical impact of this policy of out-sourcing asylum to other countries will be to block asylum for nearly all families originating in Central America from getting protection in the United States. And they are a large majority of all asylum-seekers these days.

This is a clear violation of U.S. asylum law, as well as our international legal obligations. But the Trump administration is determined to keep tightening the
screws until no would-be asylum seeker would even try to set foot on U.S. soil. And last week it got support from the Supreme Court, which allowed the new third-country restrictions to go into effect, while legal challenges go forward.

At the U.S.-Mexican border, we have “turnback” and “metering” policies in place. “Turnbacks” means that if you approach an immigration officer at a legal port of entry, asking to make an asylum claim, you are told “we’re full, go away.” The “metering” policy puts you on a wait list for an initial vetting interview. The wait list at some of the major ports of entry, like Tijuana, has over 10,000 names. You wait for months for your number to come up. Once you get an initial interview, you are sent back to Mexico to await your day in a U.S. immigration court. As of last month, more than 40,000 asylum-seekers who had reached the U.S. border were either on wait lists for an interview or had been interviewed and returned to Mexico to wait for a court date.

This policy is officially known as the “Migrant Protection Protocols” — a bit of Orwellian double-speak. By last month, over 23,000 asylum-seekers had been sent back to Mexico. They will be waiting, for months, if not years, in extremely dangerous Mexican border cities like Nuevo Laredo and Ciudad Juárez, where drug violence is rampant. Extorting and kidnapping migrants have become new revenue streams for the cartels. This policy is being litigated in the courts; a federal appeals court will hear arguments on it next month.

The Mexican government is enabling the Trump administration’s bad behavior. Trump bullied Mexico’s president into accepting the “Remain in Mexico” scheme, in return for relief from a 25% tariff that Trump had threatened to impose on all goods imported from Mexico.

The Trump administration says it is doing things like this to weed out people who are supposedly trying to file bogus asylum claims and then failing to appear at court hearings. The real game is to force asylum-seekers to wait so long for their hearing that they’ll just give up and return to their country of origin.

Moreover, making them wait in Mexico sharply reduces their opportunity to get legal counsel, which makes a huge difference in outcomes of asylum cases. Past experience shows that 90% of those with legal representation ultimately have been granted asylum; fewer than 10% of those lacking counsel prevail.
Why not just release them into the U.S. to await their hearings? Nearly all of them have at least one U.S.-based relative waiting for them. Trump claims they wouldn’t show up for their hearing, but if they are put into the Family Case Management Program, 98% would show up, according to the federal government’s own statistics. They have every incentive to do so; they want to be living in the U.S. legally.

By having to wait in Mexico, asylum-seekers are, in effect, being prevented from getting legal representation. Finding a U.S.-based lawyer willing to take the case of a client living in Mexico is next to impossible, and pro-bono legal services organizations are overwhelmed. A recent study by researchers at Syracuse University found that just 1.3% of the asylum-seekers who have been returned to Mexico had gained legal representation.

Every day, busloads of asylum-seekers are being picked up at the border and dumped into U.S. immigration courtrooms, representing themselves, with little or no understanding of what’s needed to successfully present an asylum case. Starting last week, asylum-seekers aren’t even getting into a real courtroom. Tent courtrooms have been erected in border cities like Laredo, with judges beamed in from hundreds of miles away, via teleconference. No lawyers are present. This is just the latest step in turning our immigration courts into a deportation machine.

Another attack on asylum has taken the form of a drastic reduction in the number of visas theoretically available to refugees. The annual visa allocation has been slashed by more than 70% from Obama’s last year, to just 30,000, from all countries. And because of so-called “extreme vetting,” just 23,000 refugees were resettled last year. (By comparison, Canada is resettling six times as many refugees as the U.S., on a per capita basis.) Stephen Miller has been pushing Trump to reduce refugee visas to zero next year, effectively ending the resettlement program that we have had for the last four decades.

The sustained assault on our asylum system is a good illustration of the Trump administration’s larger M.O.: Do whatever you can, however illegal it may be, for as long as you can, until you get blocked by a federal appeals court or a Supreme Court ruling. Then throw in the towel, reminding your supporters that you fought the good fight.

Donald Trump views every immigration policy as a litigation strategy. This past July 16 the New York Times published a long investigative report based on
interviews with more than 20 current and former Homeland Security officials. In this account, Trump and Stephen Miller have repeatedly bullied both cabinet and sub-cabinet officials into taking actions that are clear violations of U.S. and/or international law. As one of the Times’ interviewees recalled: “Trump’s constant instinct was: just do it, and if we get sued, we get sued. Almost as if the first step is a lawsuit. I guess he thinks that because that’s how business worked for him in the private sector. But federal law is different. There really isn’t a settling step when you break federal law.”

You may not get a settlement, but you can drag out litigation so you can keep doing extra-legal things for as long as possible. An example is the President’s battle to use over $6 billion diverted from the Defense Department’s budget to build his border wall, after Congress explicitly refused to fund it. This past July, Trump won a U.S. Supreme Court decision that allows wall construction to proceed while litigation continues. “Big WIN,” the President tweeted.

Trump has endorsed various schemes fashioned by Stephen Miller to drastically reduce the overall level of legal immigration and, in the bargain, admit far fewer non-white immigrants. His latest plan introduces a points system that uses English language ability, age, education, and family income as criteria for determining eligibility to immigrate. The impact would be to disproportionately exclude people from Latin America and Africa. This scheme got no traction in Congress, which normally sets immigration levels. So now the administration is trying to accomplish the same end by regulation.

A new rule, published last month, contains a much harsher interpretation of the longstanding “public charge” provision in U.S. immigration law. The new rule can be used to deny entry to would-be immigrants based on a bureaucrat’s expectation that they might use any of a long list of public benefits at some point in the future, including Medicaid, food stamps, and housing subsidies. The new standard can also be used to deny adjustment of status to immigrants already in the country, legally, who are seeking permanent resident status, and to penalize permanent residents who apply for U.S. citizenship.

Even if court challenges block immediate implementation, the new public charge rule will have a massive chilling effect. It clearly discourages immigrant parents from applying for, or staying enrolled, in programs like food stamps and Medicaid’s Children’s Health Insurance Program (CHIP) – programs that benefit
U.S.-citizen children. The non-partisan Migration Policy Institute estimates that the chilling effect could impact 12 million U.S.-citizen family members.

There is also a new family detention rule, published last month, that nullifies the 1997 Flores consent decree that limits detainment of migrant children under eighteen to 20 days. The new rule allows indefinite detention of migrant parents along with their children. Two key points about this: The Trump administration claims, without evidence, that when the government is forced to release migrant families with children after 20 days, that incentivizes more illegal entries. In fact, Trump and his minions insist that the current surge of asylum-seekers is driven entirely by what they call “legal loopholes” like Flores. But parents fleeing gang and drug violence just want to protect their children. They’re not trying to game the asylum process.

The administration further claims that, under the new rule, most families will be detained for no more than three months while they wait for their cases to be closed. But that flies in the face of reality. With a 1 million-case backlog in the immigration courts, the average time needed to resolve immigration cases is now over 700 days. That's a lot of time to keep children in detention.

What’s the pattern here? These new federal regulations are integral to a broader strategy of undermining immigrants’ rights through end-runs around Congress and the federal courts. When the administration encounters a law or court settlement that it dislikes, the approach is to try to gut it through regulatory action.

These policies aren’t just cruel; they won’t work.

The Trump administration insists that everything they are doing will deter potential economic migrants and asylum-seekers. But this is contradicted by a huge body of fieldwork-based social science research, including my own, which shows that governments have very limited capacity to intervene in international population movements. Policies and physical barriers erected by developed countries get overwhelmed by economic and demographic push and pull factors.

For example, the flow of new unauthorized migrants from Mexico is down sharply since 2008, but not because of the medieval wall that Trump keeps trying to build on the southwestern border. Many fewer Mexicans are showing up at the border
mainly because the pool of potential migrants has been depleted by the falling birth rate and slower labor force growth in Mexico.

On blanket prosecutions for unauthorized entry, there’s no evidence that creating a criminal record for migrants whose only offense is entry without papers and incarcerating them for longer periods is an effective deterrent.

Ditto for the new, draconian public charge rule. There isn’t a shred of scientific evidence that access to taxpayer-funded services actually shapes migration decisions, which are responses to extreme poverty, lack of physical security, and having family ties with the United States.

What should we be doing?

Many of the things wrong with our current immigration policy could be fixed just by the reversing the toxic executive orders that have been pumped out by the Trump White House.

But other problems require policy shifts, or re-budgeting, or new legislation.

For example, in immigration enforcement, we need to get back to prioritizing prosecutions and deportations, as the Obama administration did -- targeting serious felons and security threats, not asylum-seekers and economic migrants with no criminal record.

if the policy challenge is uncontrolled flows of asylum-seekers, most of whom originate today in just three Central American countries, we should be making a serious effort to address the root causes in these countries. Trump’s harsh measures to make asylum in the U.S. an impossible dream for Central Americans have been totally ineffective in stemming the exodus, so let’s try something else. We need well-financed, well-targeted programs to boost development, support the rule-of-law, and mitigate the effects of climate change. Instead, President Trump has ordered a totally counter-productive cut-off of aid to these countries.

Sensible policy design must begin with a correct definition of the problem to be fixed.

A few months ago, President Trump made the claim that “Our country is full.” Actually, what we have is a growth problem.
The U.S. must find some way to replace 76 million retiring baby boomers, at a time of full employment. Our unemployment rate has fallen to 3.7 percent -- the lowest in 50 years. Our labor force growth has fallen from an annual average increase of 5 percent in the 1970s to less than 1 percent since 2000. In many sectors of our economy, labor bottlenecks are keeping businesses from growing. The basic problem from which these businesses are suffering is that not enough U.S. teenagers were born in the last three decades. We have a historically low, steadily declining birth rate -- far below what’s needed to keep our population stable.

Our population is also aging rapidly: 70 years ago, we had 150 active workers for every 20 retirees; by 2050 we will have just 56 workers supporting every 20 retirees. Retirees pay less taxes, so it’s increasingly difficult to finance Social Security, Medicare, state pension plans, and local government services.

Artificial intelligence and robotics won’t save us. These new technologies will reduce our labor requirements in manufacturing and some retail industries, but millions of low-skill jobs now held by immigrants would remain, in agriculture, construction, and services. The home health care aide that most of us baby boomers will eventually need is unlikely to be a robot.

Former Federal Reserve chairman Ben Bernanke had it right. Back in 2006, he told Congress: “We need a more liberal immigration policy to ease the burden of a shrinking work force.” In fact, Bernanke pointed out, we would need an annual inflow of nearly 3.5 million immigrants – not the 1 million per year being admitted under current policy – to replace the baby boomers.

We should be planning for a future of contracting labor supply, rather than throwing up new barriers to would-be legal immigrants – like Trump’s new public charge rule.

The point of departure should be comprehensive immigration reform legislation that includes a generous path toward legalization and eventual U.S. citizenship for as many as possible of the approximately 11 million undocumented immigrants now living in the U.S., including the Dreamers, who need permanent protection from deportation.

A legalization program should be complemented by other reforms to create enough opportunities for legal entry to accommodate future flows of migrants.
It’s not enough to just legalize undocumented immigrants already here, then bar the door. The number of legal entry tickets will never be enough to accommodate everyone who would like to start a new life in the U.S., but the current gap between visa supply and demand is so large that we are, in effect, manufacturing illegality.

We could start by revisiting the absurdly low caps on our temporary foreign worker programs for both high-skilled and low-skilled jobs. These caps were set many years ago and haven’t been adjusted for changing labor market conditions. For example, why should H-2B visas, used for temporary, low-skilled, non-agricultural workers, be capped at 66,000 a year, in a $20 trillion economy? Mr. Trump alone could probably employ that number of H-2B workers on his own properties. We could have an independent, standing commission of technical experts to review labor market data and adjust our visa caps, on an annual basis.

We also need to increase the number of permanent, employment-based visas, which are now capped at just 140,000 per year. The United States issues fewer visas of this type than Australia, despite having a population 14 times larger.

Overall, there’s a very strong economic case that we should significantly increase our current intake of immigrants and refugees, who are also workers. But we need to do a better job of dispersing them geographically. For example, here’s a map showing the destinations of 7,500 migrants who passed through a single shelter in Tucson, Arizona, from October 2018 to April of this year. They are dispersed rather widely, but there are significant pileups in coastal cities.

Why not steer newly arriving legal immigrants and refugees to where they are needed most -- the small cities and rural areas that have been losing population and whose tax bases are depleted? Here’s a map of the U.S. counties that lost prime-working-age population in the last 10 years. The redder the shading, the more population they have lost.

We could help those counties by creating a new, place-based visa, that might be called a “Community Renewal Visa.” Localities would be eligible to participate if the county where they are located has lost prime-working-age population in the last ten years. The visa holders would commit to at least three years of residence in one of these places. After that they could transition to a green card. Presidential candidate Pete Buttigieg has included this idea in his plan to revitalize the economies of rural areas and small cities.
Mayor Pete is on to something. Now is the time to reframe immigration as a solution to our demographic and fiscal challenges. Public support for immigration is at a record high, with nearly two-thirds of Americans wanting a higher level of immigration or keeping it at the current level; 81% now support offering undocumented immigrants a path to citizenship.

Generational succession is also likely to have a big positive impact. The survey data show that Millennials and Gen-Xers are much more supportive of immigrants than the two oldest generations. That’s partly because young people today have had a lot more experience with immigrants than older Americans. They’ve grown up in a diverse society. And the evidence shows clearly that the more direct, personal experience you have with immigrants, the more tolerant you are.

So, here’s the hopeful prediction on which I will end: Generational succession in the electorate, combined with spreading labor shortages, will mean that more Americans will see immigrants not as threats and tax burdens but as essential partners in securing our economic future. The zero-sum political calculus that currently blocks comprehensive immigration reform in Congress will eventually weaken. At least some politicians will even come to see electoral benefit in embracing less restrictive policies. Stay tuned!