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IMMIGRATION RESTRICTION AS REDISTRIBUTIVE TAXATION: WORKING WOMEN AND THE COSTS OF PROTECTIONISM IN THE LABOR MARKET

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ABSTRACT

In this article, I argue that tax and transfer policies are more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers. Policies to protect these native workers from immigrant competition in the labor market are no better at promoting distributive justice and are likely to impose a greater economic burden on natives in the country of immigration than the tax alternative. These immigration restrictions are especially costly given the disproportionate burden that they place on households with working women, a burden that discourages female participation in the labor force. This burden runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market because the supply of female labor is more elastic than the supply of male labor. Thus, the best response to concerns about the effect of immigration on the distribution of income among natives is to increase the progressivity of the tax system.

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I. INTRODUCTION

To an economist, the international migration of workers is one facet of globalization, which economists understand to mean the development of a global common market, that is, our evolution toward a world economy that is integrated across national boundaries. Our progress in this direction has been especially dramatic in the liberalization of international trade in goods. Economists generally welcome this development, prescribing free trade as the regime that maximizes global economic welfare. Economists also recommend liberalized trade as a policy that is likely to produce gains for each national economy.

Economists also recognize that the same theory that applies to goods also applies to international trade in other markets. Nations can gain through not only the free movement of goods across national boundaries but also the free movement of labor across national boundaries.¹ The basic intuition for this result derives from the gains from international trade in the labor market. We would expect labor to migrate from low-wage countries to high-wage countries in pursuit of higher wages. As a result of this mi-

¹ See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1148-50 (1997).

gration, world output rises. Higher wages in the host country imply that the marginal product of labor is higher there than in the source country. In other words, higher wages for the same worker mean that the worker produces more value in the host country than in the source country. Labor migration generally leads to net gains in global wealth because labor flows to the country where it has the higher-value use.² For this reason, economic theory raises a presumption in favor of the free movement of labor. Migration restrictions distort the global labor market, producing a misallocation of labor among countries, thereby wasting human resources and creating unnecessary poverty in labor-abundant countries.

Despite these considerations, many observers favor immigration restriction as a policy designed to protect native workers from foreign competition.³ In the United States, these protectionists claim that the entry of immigrant workers has increased income inequality among natives substantially.⁴ Protectionists concerned about distributive justice among citizens often infer that we should restrict immigration insofar as the entry of alien workers causes such an increase in income inequality among natives.⁵ In this article, I will focus on this concern regarding income inequality in particular, setting aside the other reasons that restrictionists may have for opposing more liberal immigration policies.

Concerns for the labor market prospects of the least skilled natives in the United States lead protectionists to urge restrictions on the immigration of the least skilled immigrant workers in particular.⁶ The economist George

² See PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 158-59 (2d ed. 1991).

³ See, e.g., Steven A. Camarota, *Immigrant Employment Gains and Native Losses, 2000-2004*, in *DEBATING IMMIGRATION* 139, 156 (Carol M. Swain ed., 2007) (presenting evidence that "immigration has adversely impacted natives" and concluding that "reducing the levels of immigration may be helpful for the job prospects of native-born Americans").

⁴ See, e.g., GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 99 (1999) (claiming that immigration "transfers a substantial amount of wealth away from the workers who compete with immigrants to the natives who have skills or physical resources that benefit from the presence of immigrants" and that "it is the less-skilled natives who pay the price of immigration"); Peter Brimelow, *Economics of Immigration and the Course of the Debate Since 1994*, in *DEBATING IMMIGRATION*, *supra* note 3, at 157, 158, 164 (claiming that "immigration does cause a substantial redistribution of income among the native-born" such that "it is distributed among a diminishing number of the native-born at the expense of their fellow countrymen").

⁵ See, e.g., Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, in *DEBATING IMMIGRATION*, *supra* note 3, at 63, 64, 68 (worrying that liberal immigration policies "involve injustice toward poorer native-born Americans" and arguing that "if high levels of immigration have a detrimental impact on our least well-off fellow citizens, that is a reason to limit immigration").

⁶ See, e.g., BORJAS, *supra* note 4, at 17 (assuming that the United States "does not want immigration to greatly increase the amount of inequality in the society" and concluding that the evidence supports "a strong case that the United States would be better off by adopting an immigration policy that favored skilled workers"); VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST*

Borjas, for example, proposes that the United States adopt a “point system” to select skilled workers for admission.⁷ In fact, when the U.S. Senate considered comprehensive immigration reform in 2007, the bill at the center of those deliberations would have replaced existing employment-based admissions and some family-sponsored immigration with such a point system.⁸

In this article, however, I suggest that proposals to reduce relatively unskilled immigration are inappropriate responses to concerns about the distribution of income among natives. I argue that the appropriate response to these concerns would be to increase the progressivity of our tax system rather than to restrict the entry of relatively unskilled alien workers. In Part II of this article, I briefly summarize the literature on the economic effects of labor migration, including some recent estimates of the magnitude of these effects.⁹ In particular, this review focuses on the effects that migration produces for participants in national labor markets, assuming that fiscal policies do not change the distribution of costs and benefits among individuals. This background information lays the foundation for the analysis that follows in Part III of this article, which introduces the option of redistribution through the public sector and focuses on a comparison of immigration restrictions with a set of tax reforms that has the same expected impact on the distribution of income among natives.

This comparison evaluates policy alternatives in terms of the economic welfare of natives alone. I assume a strictly nativist measure of national economic welfare, not because I believe that immigration policy should be guided solely by the interests of natives, but because their interests have in fact played a dominant role in the public debate over immigration policy. Borjas adopts this nativist perspective, for example, when he builds his case for tighter restrictions on the immigration of relatively unskilled alien workers,¹⁰ noting that “many participants in the immigration debate” assume that “the United States should be concerned only with the economic well-being of the native population.”¹¹

Thus, I adopt this perspective for the sake of argument, not because I believe that it is morally defensible, but because this nativist welfare objective is commonly thought by influential protectionists to provide a strong

247 (1992) (arguing that “[w]ith job prospects for unskilled and semiskilled workers becoming dimmer” in the United States, “[l]egal entry should be restricted to skilled and educated immigrants”).

⁷ BORJAS, *supra* note 4, at 192-94.

⁸ See S. 1639, 110th Cong. § 502 (2007); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 460-62 (6th ed. 2008).

⁹ For a more comprehensive survey of the empirical literature, see Howard F. Chang, *The Economic Impact of International Labor Migration: Recent Estimates and Policy Implications*, 16 TEMP. POL. & CIV. RTS. L. REV. 321 (2007).

¹⁰ BORJAS, *supra* note 4, at 17 (assuming that “the goal of immigration policy is . . . to maximize the economic well-being of the native population,” which “depends both on per capita income and on the distribution of income in the native population”).

¹¹ *Id.* at 182.

case in favor of immigration restriction. My goal in this article is to take the objective commonly adopted by protectionists like Borjas and to argue that, even if we take this objective seriously, it does not support the restrictionist conclusions they seek to derive. With this goal in mind, I adopt his assumption that we seek “to maximize the economic well-being of the native population,” defined as a measure of social welfare that “depends both on per capita income and on the distribution of income in the native population.”¹²

My analysis suggests that even from this narrow perspective, which “stacks the deck” against the immigrant, immigration restrictions that protect the least skilled native workers from foreign competition are a costly response to concerns about income distribution. These restrictions are especially costly given the disproportionate burden they place on households with working women, a burden which discourages female participation in the labor force. As the supply of female labor is more elastic than the supply of male labor, the burden that immigration restrictions impose on working women runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market. I conclude that progressive tax reforms would be more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers.¹³

In Part IV, I discuss the normative implications of my economic analysis. I relax the assumption that our sole concern is the welfare of natives and address the welfare of immigrants and of aliens outside of the United States. I conclude that protectionist immigration policies are not only likely to be relatively costly as an instrument for redistribution among natives but also perverse from the standpoint of global justice. Thus, considerations of economic efficiency and distributive justice both militate against immigration restrictions.

II. THE ECONOMIC IMPACT OF INTERNATIONAL LABOR MIGRATION

To evaluate the use of immigration restrictions to achieve a desirable distribution of income, we must first understand both the economic costs that these restrictions impose and the benefits they generate for some work-

¹² *Id.* at 17.

¹³ These progressive fiscal policies would also compensate many native workers who may be harmed by liberalized immigration policies. I do not, however, take compensation to be the goal of these policies. Instead, I take at face value the claims of protectionists who express concerns about income inequality among natives and argue against immigration restrictions within that framework of distributive justice. Progressive fiscal policies nevertheless may as an incidental matter compensate native workers for the adverse effects of liberalized immigration. If these progressive reforms are explicitly linked to liberalized immigration, then the prospect of compensation may also reduce the political opposition to liberalization.

ers. Therefore, I begin my analysis of immigration restrictions with a review of the impact of labor migration on the private sector, setting aside the impact immigrants may have on the public sector. For the time being, I will assume that fiscal policies do not offset the effects in the labor market by shifting costs and benefits among individuals in the country of immigration. Later, in Part III of this article, I will introduce the possibility of redistribution through the public sector.

First, I review some of the latest estimates of the magnitude of the gains that the world could enjoy by liberalizing international migration. These estimates indicate that even partial liberalization would not only produce substantial increases in the world's real income but also improve its distribution by reducing international inequality. Second, I turn to the question of the effects of immigration on the distribution of income among natives in the United States. In particular, I review recent estimates of the impact of immigration on the least skilled native workers. I suggest that, under a fair reading of this economic literature, the best evidence available indicates that the adverse effect of immigration on the least skilled native workers is small.

A. *The Gains from International Trade in the Labor Market*

The larger the inequality in wages between countries, the larger the distortion of global labor markets caused by migration restrictions, and the larger the economic gains from liberalizing labor migration. Given the degree of wage inequality in the world today,¹⁴ it should be apparent that the gains from liberalized migration are huge. In fact, some economists have attempted to estimate the gains that the world could enjoy by liberalizing migration.

The World Bank, for example, has recently studied the potential gains from a modest increase in international migration.¹⁵ The World Bank economists considered the effects of an increase in migration from "developing" countries to "high-income countries" sufficient to increase the labor force in the host countries by 3% by the year 2025.¹⁶ They concluded that this scenario "would generate large increases in global welfare,"¹⁷ increasing the world's real income by \$356 billion in 2025.¹⁸ The gains from lib-

¹⁴ See *Mexican Deportees Report Good Treatment*, United Press International, Apr. 21, 1996, available at LexisNexis Library, UPI File (reporting the results of a survey of deported Mexican immigrants, who received an average of \$278 per week in the United States, compared with \$30.81 per week in Mexico).

¹⁵ See WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION (2006).

¹⁶ *Id.* at 25.

¹⁷ *Id.* at 26.

¹⁸ See *id.* at 31.

eralization would be distributed such that if we examine the effects on natives in the countries of immigration, on the migrants, and on those left behind in the countries of emigration, we find that each group would enjoy significant gains. Furthermore, "the relative gains are much higher for developing-country households than high-income country households."¹⁹ Thus, liberalization would not only increase the world's real income but also reduce international income inequality.

First consider the effects of immigrant workers on natives in the country of immigration. If we examine the impact of immigrants in the labor market, we find that the natives of the host country, taken together, will gain from the immigration of labor.²⁰ Wages may fall for native workers who compete with immigrant labor, but this loss for workers is a pure transfer among natives: it is offset by an equal gain for those who employ labor and ultimately for consumers who obtain goods and services at lower cost.²¹ Furthermore, natives gain from employing immigrant workers: they gain surplus in excess of what they pay immigrants for their labor. Thus, natives as a group enjoy a net gain from employing immigrants. In fact, the World Bank economists estimate that the high-income countries receiving immigrants in their liberalization scenario would enjoy an increase of \$139 billion in their real income.²²

In theory, migration may make those left behind in the source countries worse off insofar as they no longer enjoy the gains from trade that they used to enjoy from employing the workers who have emigrated. Although workers left behind would enjoy an increase in wages as a result of the departure of competing workers, employers would lose more than the workers left behind would gain. As long as the migrants allowed to move under the liberalization analyzed by the World Bank send the same proportion of their income to those left behind as that sent by existing migrants, however, the World Bank estimates that with these remittances, those left behind would enjoy a gain of \$143 billion.²³

It is the migrants themselves, however, who gain by far the most from their own migration. They obtain much higher wages in their host countries than they did in their source countries. In the scenario analyzed by the World Bank, the additional migrants allowed to move under liberalized immigration policies nearly tripled their own real income on average, enjoying a gain of \$162 billion, even after subtracting remittances sent back to

¹⁹ *Id.* at 35.

²⁰ See NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 135-53 (James P. Smith & Barry Edmonston eds., 1997) [hereinafter NRC].

²¹ See *id.* at 138-39.

²² See WORLD BANK, *supra* note 15, at 34.

²³ See *id.* at 33-34.

those left behind in their countries of origin.²⁴ In this sense, labor migration represents a form of international trade in which the source country exports labor to the host country. Like international trade in goods, labor migration allows foreign suppliers to sell their services to domestic buyers, allowing both parties to gain from trade.

B. *Income Distribution Among Natives*

Nevertheless, countries often restrict immigration to protect native workers from the unemployment or the wage reductions that the entry of foreign workers would supposedly entail. In this sense, immigration barriers, like trade barriers, are protectionist: they are designed to protect natives from foreign competition.²⁵ Protectionists often defend these barriers as policies that promote a more equal distribution of income among natives, pointing to the adverse effects of immigration on the welfare of the least skilled native workers in particular. Although the economic effects of immigration on native workers and distributive justice are often advanced as reasons to reduce immigration, these concerns for distributive justice do not provide a sound justification for restrictive immigration laws.

First, concerns regarding income inequality among natives do not justify any restrictions on skilled immigration because skilled immigrants not only increase total wealth for natives but also promote a more equitable distribution of income among natives.²⁶ Skilled immigrants are likely to have an adverse effect only on competing skilled natives and increase the real wages of everyone else, including less skilled natives, who enjoy the benefits of a greater supply of skilled labor. Therefore, the pursuit of a more equal distribution of income among natives would at most justify concerns regarding relatively unskilled immigration, which could have an adverse effect on the real wages of relatively unskilled native workers.²⁷

²⁴ See *id.* at 34-35. This gain of \$143 billion would represent an increase of migrants' real income by 199%. *Id.* at 38.

²⁵ In the United States, we have designed some of our immigration restrictions explicitly in terms of this objective. For example, we require "labor certification" for most categories of employment-based immigration visas, including even those for skilled workers holding advanced degrees. See 8 U.S.C. §§ 1153(b)(2)-(3), 1182(a)(5)(D) (2000). Labor certification requires the employer show that "there are not sufficient workers who are able, willing, qualified . . . and available" to perform the work in question and that the employment of the alien "will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* § 1182(a)(5)(A)(I), (II). We also impose quantitative restrictions on immigration visas, in part, to protect native workers from foreign competition. See *id.* §§ 1151-1153.

²⁶ See Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 308-09 (2003).

²⁷ Few relatively unskilled workers can obtain employment-based immigration visas to enter the United States: of the 140,000 visas allocated to employment-based immigration per year, only 10,000 may go to relatively unskilled workers. See 8 U.S.C. §§ 1151(d)(1)(A), 1153(b)(3)(A)(iii), (B) (2000).

Second, studies of the effects of immigration in labor markets in the United States and in other countries have shown little evidence of any significant effects on native wages or employment, even for the least skilled native workers.²⁸ Given the small effects of immigration on native wages and employment, protectionist policies seem particularly misguided. David Card's influential study of the effect of the Mariel Cubans on the Miami labor market, for example, produces fairly typical results for this literature: he found that the arrival of 125,000 Cubans in 1980, which increased the supply of labor in Miami by 7% almost overnight, had virtually no effect on the wages and employment opportunities for workers in Miami, including the least skilled whites and the least skilled blacks.²⁹

Why do immigrants have so little adverse impact on the wages and employment of natives? One reason is that the demand for labor does not remain fixed when immigrants enter the economy. Immigrant workers not only supply labor but also demand goods and services. This demand translates into greater demand for locally supplied labor. Furthermore, an influx of labor will create a profit opportunity for investors, which in turn will attract capital to the economic activities employing the immigrant labor. This expansion in the sector of the economy employing this labor will also increase the demand for that labor, which in turn would tend to offset the effect of increased supply.³⁰

Finally, the empirical evidence indicates that immigrants and natives are not perfect substitutes in the labor market, so they often do not compete for the same jobs.³¹ For example, immigrants are likely to have different language skills than natives do. Therefore, employers may find natives to be better suited than immigrants are for some tasks. In fact, labor markets are highly segregated, with immigrant labor concentrated in some occupations and natives concentrated in others.³² Immigrants compete with one

²⁸ See George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 1667, 1697-98 (1994); Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, J. ECON. PERSP., Spring 1995, at 42; NRC, *supra* note 20, at 223. Estimates of these effects are small, whether we consider the effect on native wages, native unemployment rates, or native participation in the labor force. See *id.* at 222.

²⁹ See David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245, 256 (1990).

³⁰ Thus, by shifting resources to the sectors of the economy employing immigrants, an economy can mitigate or even eliminate the adverse effects that immigrant workers may have on the wages of competing native workers. See Noel Gaston & Douglas Nelson, *Immigration and Labour-Market Outcomes in the United States: A Political-Economy Puzzle*, 16 OXFORD REV. ECON. POL'Y 104, 108 (2000) (noting that "some of the adjustment . . . will occur via a change in the output mix, reducing the . . . costs to the competing factor (i.e. domestic unskilled labour)").

³¹ See Jean Baldwin Grossman, *The Substitutability of Natives and Immigrants in Production*, 64 REV. ECON. & STAT. 596 (1982).

³² See NRC, *supra* note 20, at 218 (concluding that the data suggest that "the jobs of immigrant and native workers are different").

another far more than they compete with natives.³³ Indeed, some immigrant labor can be a complement rather than a substitute for native labor so that an increase in the supply of immigrant labor will increase the demand for native labor and thus have positive effects on native wages.

Nevertheless, some economists claim that immigration has a significant adverse impact on the least skilled native workers.³⁴ It is important, however, to interpret these claims carefully in light of the positive effects of immigration on the demand for native labor. Recent work by George Borjas, in particular, is widely cited by restrictionists for his large estimates of the effect of immigrants on native wages.³⁵ In a recent study, for example, he attempts to estimate the effects of all immigration between 1980 and 2000 on native workers in the United States, concluding that the large influx of workers over these two decades reduced the wage of the average native worker by 3.2% and the wage of high-school dropouts by 8.9% during this period.³⁶ These results, however, are based on a simulation that makes two extreme assumptions. First, he assumes that immigrants are *perfect* substitutes for natives as long as the workers have the same number of years of education and of experience.³⁷ Second, he assumes that the capital stock is fixed and does not respond to this immigration by increasing the supply of capital to the economic activities employing immigrant labor.³⁸ Given these restrictive assumptions, his simulation is inherently biased in favor of finding large adverse effects on natives.³⁹

³³ Thus, immigration does have a more substantial adverse effect on the wages of other immigrants, who are much closer substitutes for new immigrants. *See id.* at 223 (“The one group that appears to suffer significant negative effects from new immigrants are earlier waves of immigrants, according to many studies.”).

³⁴ *See, e.g.,* BORJAS, *supra* note 4, at 99.

³⁵ *See* Brimelow, *supra* note 4, at 164 (citing Borjas); Macedo, *supra* note 5, at 66 (same); Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in *DEBATING IMMIGRATION*, *supra* note 3, at 175, 182, 185 (same).

³⁶ *See* George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q.J. ECON. 1335, 1368 (2003).

³⁷ *See id.* at 1360 (assuming an “aggregate production function for the national economy” that draws no distinction between native workers and immigrant workers).

³⁸ *See id.* at 1368 (“[a]ssuming that the capital stock is constant”).

³⁹ In a more recent simulation George Borjas and Lawrence Katz allow the capital stock to adjust and produce much better results for native workers. *See* George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States* 39 (Nat’l Bureau of Econ. Research, Working Paper No. 11281, 2005). After the capital market adjusts to the influx of immigrants between 1980 and 2000, the wage of the average worker *rises* slightly, and the wages of high-school dropouts falls by only 4.8%. *See id.* at 39-40, 63. Borjas and Katz have since reduced their estimate of this adverse effect on the wages of high-school dropouts down to 3.6%, “acknowledging that the original analysis used some statistically flimsy data.” Eduardo Porter, *Cost of Illegal Immigration May Be Less Than Meets the Eye*, N.Y. TIMES, Apr. 16, 2006, § 3, at 3. This “small impact . . . was likely swamped by all the other things that hit the economy,” including “the revolution in technology.” *Id.* Furthermore, all of these simulations maintain the restrictive assumption that immigrants and natives are perfect substitutes within each class of labor.

A more recent study by Gianmarco Ottaviano and Giovanni Peri uses a simulation that instead allows the supply of capital to adjust and allows immigrants and natives with the same number of years of education and experience to be imperfect substitutes.⁴⁰ By relaxing the restrictive assumptions used by Borjas, they produce dramatically different results. Once they allow the capital stock to adjust fully, they estimate that all immigration into the United States from 1990 to 2004 increased the average wage of native workers by 1.8% and decreased the wage of native high-school dropouts by only 1.1%.⁴¹ Indeed, they find that all native workers with at least a high-school education enjoy increased wages as a result of this immigration rather than reduced wages. Thus, this influx of immigrants had only a small adverse effect on the shrinking minority of native workers with less than a high-school education.⁴²

III. PROTECTIONISM AND DISTRIBUTIVE JUSTICE

On the other hand, even if present levels of immigration have little effect on the wages of the least skilled natives, a more liberal immigration policy might produce more significant effects, especially if relatively unskilled workers were to make up an increasingly large fraction of the flow of immigrants. Indeed, restrictionists often cite the need to protect the least skilled native workers from relatively unskilled immigrant competition in the labor market. Like trade barriers, however, immigration barriers sacrifice gains from trade and thus reduce the total wealth of natives as a group. In this sense, protectionism is a costly way to redistribute wealth from some natives to others.

This observation brings me to my main thesis: we could redistribute the same wealth through tax policies and transfer programs rather than through protectionism and probably would thereby make all classes of natives better off than they are under restrictive immigration policies because

⁴⁰ See Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 12497, 2006).

⁴¹ See *id.* at 4. These results are based on their median estimate for the "elasticity of substitution" between immigrants and natives. See *id.* at 18, 45 (Table 7). Ottaviano and Peri report the results of 40 different regressions estimating this elasticity, and these results are uniformly inconsistent with the null hypothesis of perfect substitution. See *id.* at 41-12. But see George J. Borjas et al., *Immigration and African-American Employment Opportunities: The Response of Wages, Employment, and Incarceration to Labor Supply Shocks* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 12518, 2007) (testing the hypothesis that immigrants and natives are perfect substitutes and finding "no evidence to support the hypothesis that immigrants and natives are imperfect substitutes").

⁴² See BORJAS, *supra* note 4, at 27 (noting that "by 1998, only 9 % of natives lacked a high school diploma" and showing how this percentage declined steadily over the preceding four decades); NRC, *supra* note 20, at 228 (noting that "[b]y 1995, high school dropouts represented less than 10 % of the American workforce" and were "a declining group of American workers").

immigration produces net gains for natives as a group.⁴³ Thus, concerns about the distribution of income among natives do not imply that protectionist immigration restrictions are in order. Instead, the appropriate response to these concerns is redistribution through progressive reforms of tax and transfer policies.

In the United States, for example, we could make Social Security and income taxes more progressive or increase the earned income tax credit and liberalize its eligibility requirements. These progressive tax reforms can supplement the income of the least skilled native workers if relatively unskilled immigration drives down their real wages. This alternative could reduce deadweight loss while still redistributing the same amount of wealth that we currently transfer through costly protectionism.

If we wish to protect relatively unskilled native workers from adverse distributive effects, redistribution through fiscal policies is likely to be a less costly solution than protectionism. If so, then optimal policies would liberalize immigration insofar as it increases the total wealth of natives. As long as immigration increases total wealth, then those who gain from immigration can compensate those who lose and still be better off. That is, those natives who gain from an expanded demand for their own labor, capital, or real property, or by paying lower wages to employees, or by buying products and services at lower cost can afford to pay enough to compensate those who find their wages have fallen relative to prices. Through redistribution, we can attempt to shift the costs of liberalized immigration to the many beneficiaries of liberalization.

For example, if the immigration of relatively unskilled workers reduces the wages of the least skilled natives, then raising taxes on those workers with higher incomes and reducing taxes on native workers with the lowest incomes could leave all classes of natives better off than they would be in the absence of immigration.⁴⁴ Those income classes that would pay higher taxes to compensate the least skilled native workers are likely to bear a still heavier burden under the protectionist alternative, which raises the prices of goods and services for all consumers and reduces the real incomes of more skilled natives. Protectionist policies currently impose an implicit tax on natives that probably costs them more than the explicit tax that would be necessary to offset the adverse effects of liberalized immigration policies on the least skilled native workers. Once we recognize that protectionism is merely a disguised tax-and-transfer program, it should be apparent that there is no good reason to favor protectionism over less costly and more efficient transfer policies.⁴⁵

⁴³ See Chang, *supra* note 26, at 309-11.

⁴⁴ See Barry R. Chiswick, *Illegal Immigration and Immigration Control*, J. ECON. PERSP., Summer 1988, at 101, 107.

⁴⁵ Similarly, insofar as liberalized immigration were to cause any increase in unemployment among natives, alternative policies are likely to prove to be more efficient responses than immigration

A. *The Double Distortion*

Redistribution through the tax system would produce some costly distortions in the behavior of taxpayers because income taxes reduce the incentives to earn income either by working or by saving and investing. The deadweight loss of protectionism, however, is likely to be greater than the deadweight loss from taxes with the same effect on the overall distribution of real after-tax income. In other words, protectionism is likely to be less efficient than the tax system in producing a desirable distribution of income because protectionism not only produces the distortions associated with redistribution but also sacrifices the gains from immigration in the labor market.

This reasoning is a specific application in the immigration context of a claim advanced more generally by Louis Kaplow and Steven Shavell, who suggest that we can always replace an economically inefficient rule with an efficient rule without making any income class worse off, provided that we make the appropriate adjustments in income taxes.⁴⁶ Kaplow and Shavell argue that “using legal rules to redistribute income distorts work incentives fully as much as the income tax system—because the distortion is caused by the redistribution itself—and also creates inefficiencies in the activities regulated by the legal rules.”⁴⁷ In the immigration context, protectionist restrictions are the inefficient legal rules, and liberalization is the efficient alternative.

The “double-distortion argument” advanced by Kaplow and Shavell, however, is subject to a number of important qualifications.⁴⁸ In particular,

restrictions. Macroeconomic fiscal policies or monetary policies, for example, could increase the demand for labor and restore full employment if unemployment rises above the long-run equilibrium level due to inadequate aggregate demand. If minimum wage laws, however, keep not only wages but also unemployment above equilibrium levels, then economists would generally urge the use of tax alternatives instead of minimum wage laws to increase the after-tax incomes of the working poor. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 110-14, 226-28 (Avon Books 1981) (1979). For an extended discussion addressing concerns regarding unemployment, see Chang, *supra* note 1, at 1181-85.

⁴⁶ See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. PAPERS & PROC. 414 (1981).

⁴⁷ Kaplow & Shavell, *supra* note 46, at 667-68.

⁴⁸ Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008 (2001); see Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998). This article will focus on the objections raised by Chris Sanchirico. Christine Jolls has raised other objections from the perspective of behavioral economics. For an evaluation of the objections raised by Jolls in the context of immigration restrictions, see Howard F. Chang, *The Disadvantages of Immigration Restrictions as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23, 34 (2008).

Chris Sanchirico points out that in certain circumstances we may have reasons to believe that a particular legal rule is superior to redistribution through income taxes. Nevertheless, the various objections raised by Sanchirico do not suggest that protectionist immigration restrictions are a better response to income inequality than fiscal policies under existing conditions in the United States.

B. *Heterogeneous Individuals*

Sanchirico notes that individuals may be heterogeneous in ways that make some legal rules superior to taxes because these two policy alternatives may direct transfers from different parties and to different beneficiaries.⁴⁹ Note that I have suggested that, in the United States, we could achieve redistribution more efficiently by expanding programs already in use under the existing U.S. tax system. I do not suggest that we identify workers displaced by immigrant competition in the labor market and target subsidies to those individuals, as we direct trade “adjustment assistance” to those harmed by import competition in goods markets.⁵⁰ As Raj Bhala notes, trade adjustment programs have proven “nightmarishly complex” and “ineffectual.”⁵¹ A similar program for workers displaced by immigrant competition would require a new bureaucracy and additional administrative costs.⁵² Instead, the measures that I propose would only modify existing tax policies to ensure that immigration liberalization does not increase overall after-tax income inequality.

These measures would not seek to compensate precisely every single individual affected adversely by liberalization so that immigration reform would make literally *no one* worse off. To insist that these reforms effect such a Pareto improvement over the status quo sets too high a hurdle for reform. Such a requirement would prevent us from implementing virtually any reform in any public policy.

⁴⁹ Sanchirico, *supra* note 48, at 1057-64; see Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

⁵⁰ See JOHN J. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 669-75 (4th ed. 2002) (discussing trade adjustment assistance programs); RAJ BHALA, *INTERNATIONAL TRADE LAW* 1580-89 (2d ed. 2000) (same).

⁵¹ Bhala, *supra* note 50, at 1582.

⁵² Furthermore, if we compare the administrative costs of alternative policies, then we must recall that the enforcement of immigration restrictions has proven to be costly. See DOUGLAS S. MASSEY, *BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION* 7-8 (2005); Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in *JUSTICE IN IMMIGRATION* 158, 191 (Warren F. Schwartz ed., 1995) (noting that “considerable resources are devoted to . . . apprehension and deportation . . . along the Mexican border and to the detection of undocumented workers in the workplace”).

1. Equity

Not only is it infeasible as a practical matter to replicate exactly the redistribution produced by protectionism but it is also not desirable as a normative matter. We can generally design progressive tax and transfer policies so that they redistribute income on the basis of morally relevant criteria, whereas the alternative of protectionism distributes its subsidy on a morally arbitrary basis. Protectionism subsidizes the unskilled native who happens to face immigrant competition in the labor market but not the similarly unskilled native who does not. In this sense, protectionism is inferior to tax and transfer policies from the perspective of not only economic efficiency but also horizontal equity.

Sanchirico, however, suggests that some legal rules may enable us to target transfers in ways that taxes cannot and that are more appealing from the perspective of distributive justice. For example, if immigration restrictions were to target transfers disproportionately to black natives rather than white natives, we might regard this effect as desirable given the disadvantages that blacks face relative to whites in our society.⁵³ At the same time, legal constraints imposed by constitutional law in the United States may prevent explicit discrimination in favor of blacks and against whites in tax rates.

In fact, a recent study by George Borjas, Jeffrey Grogger, and Gordon Hanson suggests that immigration drives down black employment rates to a greater extent than white employment rates.⁵⁴ Their study, however, indicates that this effect derives only from a greater elasticity of labor supply among blacks than among whites so that a given wage impact from immigration has a greater employment effect among blacks.⁵⁵ Their results suggest that immigration does not have a greater wage effect on black workers than on white workers after they control for education and experience. Given this evidence, even if we take all their results to be true, tax reforms that yield the same after-tax wage for each income class of native workers as protectionist immigration restrictions yield would be just as effective in

⁵³ Some observers express concern about the impact of immigration on black workers in particular. See, e.g., BORJAS, *supra* note 4, at 93-94; BRIGGS, *supra* note 6, at 213-15; Swain, *supra* note 35, at 180-87.

⁵⁴ See Borjas et al., *supra* note 41, at 37.

⁵⁵ *Id.* (explaining that their results suggest “the 1980-2000 immigrant influx had roughly similar impacts on wages by race, but had a bigger impact on both employment rates and incarceration rates for blacks”). Their proposed explanation for their results is that blacks shift more readily out of legitimate employment and into criminal activity than whites in the face of the same drop in wages. See *id.* at 17 (noting that “if the demand for labor in the crime sector is more elastic for blacks than for whites, immigration will have a larger negative impact on black market employment and a larger positive impact on black crime employment”).

preventing this adverse effect on black employment as the protectionist alternative.

Thus, the study by Borjas, Grogger, and Hanson provides no reason to believe that protectionist immigration restrictions provide an advantage over the tax system from the standpoint of equity. Their results are better understood as a reason to adopt progressive tax reforms than as a reason to restrict immigration. Protectionism still derives no apparent justification from the fact that the transfers it accomplishes do not fall on precisely the same individuals targeted by transfers through the tax system.

2. Economic Efficiency and Interacting Distortions

Sanchirico suggests that some legal rules may target transfers more efficiently than redistributive tax policies can. This suggestion might apply to immigration restrictions if such policies happen to change the real wages of those with the least elastic supply of labor. According to principles of optimal taxation, redistribution should target workers with the least elastic supply of labor so as to minimize the distortions in labor supply associated with a given amount of redistribution. There seems to be no reason, however, to think that protectionism targets its transfers in a way that reduces the distortions associated with those transfers.

Sanchirico also notes that, although redistribution through legal rules may produce a second distortion in addition to the distortion produced by redistribution itself, a double distortion may be less costly than a single distortion because “[d]istortions may counteract one another.”⁵⁶ There seems to be no reason, however, to think that the distortions specific to protectionist immigration restrictions mitigate the distortions in work incentives associated with redistribution. Indeed, the empirical evidence gives us ample reason to think that protectionist immigration restrictions introduce additional distortions that instead aggravate the distortion in work incentives associated with redistribution.

a. Optimal Tax Theory and Working Women

Specifically, the costs of protectionist immigration restrictions in the United States may fall disproportionately on working women, whose labor supply is more elastic than that of men.⁵⁷ The decision of women to participate in the labor force is particularly sensitive to economic incentives

⁵⁶ Sanchirico, *supra* note 48, at 1017.

⁵⁷ See EDWARD J. MCCAFFERY, *TAXING WOMEN* 180-83 (1997) (surveying the empirical evidence of labor supply elasticities for men and women).

compared to the same decision for men.⁵⁸ When taxation induces women to stay home and out of the labor market, society bears the costs of the depreciation of their labor market skills and of a less efficient allocation of labor in the economy.⁵⁹ Therefore, optimal tax principles suggest that redistribution should target male workers rather than female workers so as to achieve a given quantity of redistribution with the minimum distortion in labor supply.

According to optimal tax theory, we should tax women at lower rates than men, given the greater deadweight loss that results from the taxation of women.⁶⁰ Insofar as legal constraints—such as those imposed by constitutional law in the United States—prevent explicit sex discrimination in tax rates, other policies that achieve similar results in effect would increase social welfare. For example, favorable tax treatment or explicit subsidies for child-care expenses may reduce the distortion in female labor participation flowing from the taxation of women.⁶¹ This reduction in behavior distortion would allow us to accomplish either the same redistribution with less deadweight loss or a more equal income distribution with the same deadweight loss.

b. Immigration Restrictions and Working Women

When protectionist immigration restrictions reduce the supply of immigrant workers and thereby raise the cost of relatively unskilled labor, the result is precisely the opposite of what optimal tax theory recommends, driving up the cost of services demanded disproportionately by households

⁵⁸ The decision to participate in the labor market is more sensitive to economic incentives than the choice of how many hours to work conditional on having accepted employment. See James J. Heckman, *What Has Been Learned About Labor Supply in the Past Twenty Years?*, 83 AM. ECON. REV. 116, 117 (1993) (“Participation (or employment) decisions generally manifest greater responsiveness to wage and income variation than do hours-of-work equations for workers.”). A survey of the empirical literature reveals that “the strongest empirical effects of wages and nonlabor income on labor supply are to be found at the extensive margin—at the margin of entry and exit.” *Id.* at 118.

⁵⁹ See Janet C. Hunt et al., *Taxation and the Wife’s Use of Time*, 34 INDUS. & LAB. REL. REV. 426, 432 (1981) (noting that “higher marginal tax rates reduce the amount of specialization in the economy” by reducing the labor supplied by wives outside the home, causing “a fall in real income,” and that a “real loss may occur in the form of human capital depreciation of wives because of reduced labor-time attachment and lower hours of market work”).

⁶⁰ See HARVEY S. ROSEN, PUBLIC FINANCE 337 (3d ed. 1992) (noting that “econometric studies suggest that the husband’s supply of labor is considerably less elastic than that of the wife” and that “[e]fficiency could therefore be gained if the current tax law were modified to give husbands higher marginal tax rates than wives”); Michael J. Boskin & Eytan Sheshinski, *Optimal Tax Treatment of the Family: Married Couples*, 20 J. PUB. ECON. 281, 296 (1983) (estimating that the optimal “tax rate on husbands would be roughly twice that on wives”).

⁶¹ See MCCAFFERY, *supra* note 57, at 278 (noting that “optimal tax” principles support “a more generous child-care deduction or credit”).

with working women. In the United States, for example, the National Research Council (“NRC”) ranked low-education occupations in terms of the share of hours worked by immigrants. Among the top twenty such occupations, the NRC listed the following: cooks, kitchen workers, bakers, and others who work in food preparation; housekeepers, maids, and others who clean private households; child-care workers; and waiters, waitresses, and their assistants.⁶² Similarly, given the concern expressed by many restrictionists regarding low levels of education among Mexican immigrants in the United States, George Borjas and Lawrence Katz rank occupations according to the share of employment in the United States accounted for by Mexican immigrants in 2000. Among the top ten occupations in this ranking, Borjas and Katz list cooks, gardeners, and those employed in private households.⁶³ Borjas reports that, in the United States in 1995, immigrant workers were more than four times as likely as native workers to work in private households.⁶⁴ The NRC observed that “[t]he degree to which immigrants dominate some of these fields is remarkable,” concluding that “[t]hese services would not exist on the same scale without immigrants, and the main economic impact may well be in the form of lower prices.”⁶⁵

The NRC also calculated the share of the cost of different goods and services that went to pay for immigrant labor. The NRC found that “[t]he categories that have relatively high immigrant labor-cost shares include household services (18.2%)” and “laundry, cleaning, and garment services (10.9%).”⁶⁶ The NRC also found that “[s]ingle (childless) males and couples in which both spouses work have the highest fraction of expenditures attributable to immigrant labor – 5.1%,” precisely “because these households spend a greater proportion of their income on services, in particular household services and food consumption away from home, both expenditure categories with relatively high immigrant labor shares.”⁶⁷ The NRC concluded that “those who would be expected to have less time to spend inside the household . . . consume fractionally higher proportions of commodities produced using relatively high proportions of immigrant labor.”⁶⁸

Thus, immigrant workers provide services, such as child care, housekeeping, and food preparation, which are consumed by many households that would otherwise rely on a woman staying out of the work force to supply these services at home. By reducing the supply and driving up the cost of these services, protectionist restrictions on the immigration of relatively

⁶² See NRC, *supra* note 20, at 213-14 (Table 5.18).

⁶³ See George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States*, in MEXICAN IMMIGRATION TO THE UNITED STATES 13, 23 (George J. Borjas ed., 2007).

⁶⁴ See BORJAS, *supra* note 4, at 80 (Table 4-3).

⁶⁵ NRC, *supra* note 20, at 215.

⁶⁶ *Id.* at 232.

⁶⁷ *Id.* at 233-34.

⁶⁸ *Id.* at 235.

unskilled foreign workers impose an implicit tax on working women, increasing their incentives to leave the labor force and the incentives of other women to stay at home.⁶⁹ By imposing the burden of redistribution disproportionately on working women, protectionist immigration restrictions distort labor supply more than necessary, contrary to the teachings of optimal tax theory.

Consider, for example, the effect of the cost of child care on labor supply. Numerous studies confirm that mothers reduce their labor supply as the price of child care rises. Patricia Anderson and Phillip Levine survey the empirical evidence and conclude that “studies do virtually uniformly find a negative relationship between child care costs and maternal employment.”⁷⁰ Rachel Connelly also surveys this evidence and reports “evidence of a negative effect of child care costs on hours worked in the labor market.”⁷¹

The adverse effect of child care costs on maternal employment seems especially large for households with the lowest incomes.⁷² These costs have a disproportionate effect on the poor because a given increase in the cost of child care represents a larger burden as a fraction of income for a household with less income. Connelly reports that “[t]he percent of family income devoted to child care increases as incomes decline.”⁷³ To avoid the high cost of child care, many mothers with low incomes choose to stay home and out of the labor market.⁷⁴ In this sense, when immigration restrictions increase the cost of child care, the implicit tax that they impose on

⁶⁹ See WORLD BANK, *supra* note 15, at 50 (noting that “the beneficial effect of immigration” would include any “expansion in the supply of native labor [as more parents can afford child care and workers have more time to devote to their jobs]” resulting from “reductions in the prices of services”).

⁷⁰ Patricia M. Anderson & Phillip B. Levine, *Child Care and Mothers’ Employment Decisions*, in FINDING JOBS: WORK AND WELFARE REFORM 420, 440 (David E. Card & Rebecca M. Blank eds., 2000); see Rachel Connelly, *The Importance of Child Care Costs to Women’s Decision Making*, in THE ECONOMICS OF CHILD CARE 87, 111 (David M. Blau ed., 1991) (surveying the empirical evidence and finding “general agreement that higher costs of child care lead to lower levels of labor force participation for both married and unmarried women”). For a more recent survey of this evidence, see David M. Blau, *Child Care Subsidy Programs*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 443, 481-93 (Robert A. Moffitt ed., 2003).

⁷¹ Connelly, *supra* note 70, at 114.

⁷² See Anderson & Levine, *supra* note 70, at 438-40 (Table 10.5, showing multiple studies demonstrating that the elasticity of employment with respect to the price of child care may differ across groups, all of which show larger elasticities for low-income groups).

⁷³ Connelly, *supra* note 70, at 95 (“Families who pay for care,” she finds, “with incomes of less than \$10,000 devoted more than 25% of family income to child care,” which “is over 30% of the mother’s labor earnings.”); see *id.* at 97 (reporting data in Table 3). See also Anderson & Levine, *supra* note 70, at 454 (“The least skilled workers who use child care” pay “more for child care, even when the youngest child is of school age,” calculated “as a percentage of income.”).

⁷⁴ Thus, Anderson and Levine suggest that “[t]he lack of low-cost child care may be a crucial determinant of the employment decisions of the less skilled,” whose potential market wages are more likely to be outweighed by the costs of child care. Anderson & Levine, *supra* note 70, at 420.

households tends to be regressive, undercutting efforts to increase the real income of the poor.

To some extent, a working mother can mitigate the costs of child care by turning to a relative to care for her children, or in unusual cases, by caring for her children while at work. Indeed, David Blau reports that “[i]n almost half of all primary child care arrangements for young children of employed mothers, the caregiver is the mother, the father, or another relative.”⁷⁵ In fact, the lower the income of the household, the more likely the mother is to turn to a relative for child care.⁷⁶ In these cases, the effect of child care costs on labor supply takes a different form. Rather than reducing the mother’s participation in the labor market, the costs of child care inhibit the participation of the mother’s relative, who stays home to provide the needed child care. Thus, the existing empirical literature, which estimates the effect of child care costs on maternal employment, actually understates the effect of these costs on labor supply, especially for families with low income.

Similarly, as Connelly observes, a working mother can mitigate the costs of child care by choosing less expensive child care with “a lower level of quality.”⁷⁷ In these cases, rather than distorting the decision to participate in the labor market, the high cost of child care distorts the choice of quality. Less costly child care, Connelly notes, would allow mothers “to choose high quality care for their children” with a corresponding “positive effect on their children.”⁷⁸ Higher costs and a less attractive set of options for child care, on the other hand, may persuade a mother to stay out of the labor market.

Once we consider the cumulative effect of immigration restrictions on the cost of all services consumed by households with working women, including not only child care but also food preparation and housekeeping, the total impact on female labor supply is likely to be even greater. Furthermore, the impact of these restrictions in costs may prove to be less progressive than one might think, given that, as consumers, the poor as well as the rich enjoy the benefits of immigrant labor. In fact, the NRC found that the “consumption of immigrant-intensive commodities is spread rather evenly across different groups of consumers,” albeit with somewhat greater benefits going to “those with relatively high incomes” and “those with high levels of education.”⁷⁹

⁷⁵ Blau, *supra* note 70, at 460.

⁷⁶ *See id.* at 461 (“Loosely speaking, center and family day care and babysitters appear to be normal goods, substituted for relative care as income rises.”). In a similar vein, Anderson and Levine report that “the use of relative care drops sharply with mother’s education.” Anderson & Levine, *supra* note 70, at 429; *see id.* at 454 (reporting that “children of the least skilled mothers are about twice as likely as children of the most skilled to be cared for by a relative”).

⁷⁷ Connelly, *supra* note 70, at 114.

⁷⁸ *Id.*

⁷⁹ NRC, *supra* note 20, at 235.

On the other hand, immigration restrictions may also encourage female participation in the labor market by increasing the wages that working women may expect to receive. Recall, however, that we can replicate the after-tax wages paid to native workers through the appropriate adjustments in income or payroll taxes. Therefore, optimal tax considerations would favor restrictions on the immigration of relatively unskilled workers as a device for redistribution only if these restrictions somehow increased the wages of poor working women relative to poor working men. This immigration might have such a disparate impact, for example, if labor markets are segregated by sex and these immigrant workers were predominantly female rather than male. If these immigrant workers were therefore better substitutes for native women in the labor force than for native men in the labor force, then restrictions on the entry of those workers generally would confer benefits on working women disproportionately.

The empirical evidence, however, suggests that just the opposite is true: if there is any disparate impact of the immigration of relatively unskilled aliens on the wages of native workers, this impact is likely to be more adverse for native male workers than for native female workers. A recent study by the Urban Institute finds that, in the United States, men dominate the low-wage immigrant labor force, while the low-wage native labor force is mainly female.⁸⁰ Given this pattern, a typical influx of relatively unskilled immigrants is likely to cause a larger percent increase in the supply of low-wage male workers than in the supply of low-wage female workers in the United States. If labor markets are segregated by sex, then this influx would have a correspondingly greater adverse effect on the wages of male native workers than on female native workers. In this sense, restrictions imposed on this immigration are generally more likely to benefit men than women. Furthermore, the Urban Institute also finds that, among low-wage immigrant workers, “women . . . are better educated than their male counterparts.”⁸¹ Insofar as immigration restrictions exclude relatively unskilled workers based on education, these restrictions are more likely to exclude men than women, with correspondingly greater benefits

⁸⁰ See RANDY CAPPS ET AL., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf (reporting that 56% of the low-wage immigrant labor force is male, whereas 59% of the low-wage native labor force is female). This pattern is even more pronounced among those immigrant workers who may be those most likely to take advantage of liberalized opportunities for legal immigration. The Urban Institute reports that only “37% of low-wage undocumented workers are women,” reflecting “very high labor-force participation among undocumented men and relatively low labor participation among undocumented women,” who “are far more likely to be married” and “have more children on average than native-born women.” *Id.* at 6.

⁸¹ *Id.* at 6 (reporting that 76% of “female low-wage immigrant workers hold at least a high school diploma, compared with 66% of male low-wage immigrant workers,” and are “also more likely to be proficient in English than foreign-born male workers: 59 versus 50%”).

for male natives in the labor market.⁸² Thus, restrictions on the immigration of relatively unskilled immigrant workers not only burden working women disproportionately as consumers but also seem likely to benefit male natives disproportionately as workers.⁸³

Given this disparate impact on households with working women, redistribution through protectionist immigration restrictions is inferior to the tax alternative not only from the standpoint of economic efficiency but also from the perspective of the feminist who would like to remove artificial obstacles to female participation in the labor force.⁸⁴ Protectionism in this context raises another hurdle for many women entering the labor market by implicitly taxing working women and discriminating in favor of families organized along more traditional lines. For the feminist opposed to public policies that are biased in favor of traditional gender roles, the tendency of protectionist immigration laws to keep women at home should militate against those laws and in favor of transfers through the tax system instead.

On the other hand, there may also be those conservatives who believe that public policies that promote the traditional family, with women staying at home, increase social welfare.⁸⁵ For example, these policies may produce benefits for children, whose interests might not receive the consideration

⁸² Current immigration restrictions in the United States often favor more educated aliens for immigration visas. *See, e.g.*, 8 U.S.C. § 1153(c)(2) (2000) (requiring either “at least a high school education or its equivalent” or “at least 2 years of work experience in an occupation which requires at least 2 years of training or experience” for a “diversity” immigrant visa); *id.* § 1182(a)(4) (requiring consideration of “education and skills” in determining whether an alien is “likely at any time to become a public charge” and thus “inadmissible”). Similarly, the point system proposed in the U.S. Senate in 2007 would have awarded points to prospective immigrants based on education and proficiency in the English language. *See* S. 1639, 110th Cong. (2007); ALEINIKOFF ET AL., *supra* note 8, at 461.

⁸³ In an effort to raise the wages of female native workers in particular, we could target female aliens for exclusion, but insofar as labor markets are segregated by sex, the result in the market for goods and services could be perverse. These aliens may provide many of the services consumed disproportionately by households with working women.

⁸⁴ A welfarist might object to these obstacles based on gender equity if the welfarist believes that the following two conditions hold. First, women are worse off than men as a general matter. *See* MCCAFFERY, *supra* note 57, at 237 (describing the status quo as “a world in which [women are] disproportionately poor, marginal, unhappy, overworked, underappreciated, and stressed”). Second, female participation in the labor market improves the welfare of women relative to men so that removing obstacles to this participation would promote a more equitable distribution of welfare between the sexes. *See id.* at 268 (“Many women really do want to work outside as well as inside the home—they want the satisfaction, stimulation, prestige, engagement, and financial rewards of paid work, and they don’t want to spend all of their time in the often exhausting, frustrating, underappreciated, and unpaid domestic sphere.”). According to Edward McCaffery, for example, women “who stay at home full time wish that they could get out of the house more . . . to share some of the joys of the working world, to experience more diversity in their lives, and to earn some money and independence.” *Id.* at 212.

⁸⁵ Some observers believe “that traditional families with stay-at-home wives were good for society, for children, for men, even for women.” *Id.* at 166.

that they deserve from parents.⁸⁶ Perhaps child care provided by a parent at home increases human capital, raising children who will become more productive workers as adults, thereby generating benefits for society as a whole. These benefits may include positive externalities in the form of tax revenue for the public treasury, which may be a social benefit neglected by parents making private decisions regarding child care and participation in the labor market.

In any event, I do not intend to enter that debate here, other than to suggest that, even if we were to decide to promote the traditional family, immigration restrictions would be a poor choice as an instrument with which to do so. It would probably be more efficient to do so through the tax system for the same reason that it would probably be more efficient to transfer income from the rich to the poor through the tax system: immigration restrictions needlessly destroy gains from trade in the labor market. We can subsidize traditional families directly through the tax system without the additional distortions in the labor market that are specific to immigration restrictions. Given this observation, I will set aside the promotion of the traditional family as a possible objective for immigration policy. Instead, I focus on an equitable distribution of income as the policy objective and maintain the standard assumption that we would like to achieve the desired income distribution with as little distortion in labor supply as possible.

c. Immigration Restrictions Versus the Tax Alternative

How can we be sure that immigration restrictions are less efficient than the current tax system in shifting income from the rich to the poor in the United States? As Edward McCaffery has explained, the current tax system in the United States also includes several features that tend to discourage female participation in the labor market. Given these features, the existing tax system causes more distortions than a system conforming to the principles of optimal tax theory.

For example, McCaffery notes how the U.S. system of joint filing for married couples discourages female participation in the workforce.⁸⁷ Suppose we refer to the spouse who earns less or is otherwise less committed to the labor market as the “secondary earner” in the household.⁸⁸ This spouse

⁸⁶ Therefore, some may believe that it is “a good thing” if we encourage “parents to stay at home with their children . . . because children benefit from being cared for at home.” *Id.* at 126, 201. To the extent that this encouragement takes the form of an implicit or explicit tax on the use of professional child care, however, the claim that this encouragement produces net benefits for children seems dubious because such a tax reduces the wealth of many households with children.

⁸⁷ *See id.* at 12-23.

⁸⁸ *Id.* at 21.

is more often the wife rather than the husband.⁸⁹ “For the most part, women are second earners simply because they earn less than their husbands,” as McCaffery explains, noting that “[m]arried women make about 60 percent of what married men do.”⁹⁰ When contemplating entry into the labor market, the secondary earner takes the participation of the primary earner as given, and therefore often faces a higher marginal tax rate. In many cases, the income of the primary earner has already pushed the household out of the lower tax brackets. The secondary earner does not enjoy the low marginal tax rates applied to the income brought in by the primary earner.

Thus, much of McCaffery’s critique of the current tax system objects to its tendency to extend equal treatment to households with the same total income, whether that income is earned by one worker or two workers in the family. He points out how the secondary earner does not produce the same social security benefits⁹¹ or fringe benefits⁹² that the primary earner does for a family because the tax system fails to double these benefits when a secondary earner adds income to the household. In essence, he observes that the tax system must treat a household with a secondary earner better than a household without one, even if these households have the same total income, in order to give the secondary earner the same incentive to participate in the labor market that the primary earner faces.

In this respect, restrictions on the immigration of relatively unskilled workers are even worse than the tax alternative as an instrument for income transfers. Whereas the tax system tends to treat the household with a secondary earner the same as the household without one, provided that the households have the same total income, immigration restrictions tend to treat the household with a secondary earner worse. This disparate impact on households with working women implies that immigration restrictions cause greater distortions than tax reforms with the same effect on income distribution among natives would cause.

There is one respect, however, in which the current tax system may treat households with a secondary earner worse than those without: housework performed by a woman for her own household in her own home avoids taxation whereas the government would tax the same work performed by an employee or independent contractor that she hires as well as any income that she earns in the labor market.⁹³ As McCaffery notes, this feature of the tax system places a burden on working women and provides an implicit exemption for the woman who stays at home and does her own

⁸⁹ *Id.* (noting that “there is apt to be a secondary earner in most families, and it is overwhelmingly likely to be the wife”).

⁹⁰ *Id.*

⁹¹ *See id.* at 94-96.

⁹² *See id.* at 126-29.

⁹³ *See id.* at 120-21.

housework. Thus, the tax system may burden a household with a secondary earner compared to a household with the same total income but without a secondary earner insofar as it taxes the income earned by the worker performing housework for compensation. The incidence of this tax falls at least in part on the household employing that worker.⁹⁴ Thus, this tax increases the cost of going to the labor market for those services.

Nevertheless, restrictions on the immigration of relatively unskilled workers are still likely to place a greater burden on households with secondary earners than the tax alternative. Whereas restrictions on the immigration of relatively unskilled workers drive up the cost of services demanded by households with secondary earners, progressive tax reforms with the same impact on the distribution of income among natives are likely to reduce the cost of those services. After all, those tax reforms would cut taxes on the least skilled natives. By cutting taxes on those natives most likely to supply the services demanded by households with secondary earners, these reforms would tend to bring down the cost of those services rather than drive them up. Thus, despite the defects in the current tax system that discourage female participation in the labor market, immigration restrictions are likely to cause greater distortions than tax reforms producing the same improvement in the distribution of income among natives.

The available empirical evidence bolsters confidence in this conclusion. This evidence suggests that even immigration restrictions focused on excluding relatively unskilled foreign workers would produce surprisingly small benefits for the least skilled native workers because these immigrants and natives are imperfect substitutes in the labor market, because immigration tends to increase the demand for labor, and because immigration restrictions increase prices paid by the poor as well as the rich. These disadvantages make immigration restrictions relatively ineffectual as instruments for redistribution compared to income taxes, which are not subject to these disadvantages. Given the small adverse effects of immigration and the small number of native workers who find their wages reduced by the influx of immigrant labor, a correspondingly small increase in the progressivity of

⁹⁴ Although public finance economists commonly assume that the incidence of income and payroll taxes falls on the employee and not on the employer, the elasticity of labor supply would have to be zero rather than positive for the employee to bear the full tax burden. Zero elasticity of labor supply may be a reasonable approximation for male workers or for hours of work conditional on employment but it is not a reasonable assumption for labor supply in general. See Heckman, *supra* note 58, at 118 (surveying the empirical evidence and concluding that, although labor supply elasticities may be close to zero “for hours-of-work equations . . . estimated for those who are working,” these “elasticities are definitely not zero” if we look “at the extensive margin – at the margin of entry and exit”). Furthermore, if we nevertheless assume that the employer bears none of this tax burden, then this assumption implies that the tax system treats the household with a secondary worker no worse than the household with the same total income but with no secondary worker. In this case, immigration restrictions impose a greater burden on the household with a secondary worker than the tax system does and are therefore less efficient as a means to transfer income from the rich to the poor.

our taxes would suffice to compensate the few who lose real income as a result of competition from immigrant workers. If only a small change in tax rates is required to replicate the redistribution effected by protectionist immigration restrictions, then this change would cause only correspondingly small distortions in the labor market. By the same token, protectionist immigration restrictions can improve the welfare of the least skilled natives by only a small amount compared with the costs that those restrictions would impose on other natives.

Finally, there is no principled reason why we cannot reform the tax system to conform more closely to optimal tax principles.⁹⁵ If we can increase tax rates to effect more redistribution, then we can also make the tax system more efficient by eliminating those features that needlessly burden working women in particular. The costly features of the current tax system noted by McCaffery are neither immutable nor inherent in the notion of taxation. Indeed, McCaffery proposes various reforms that would eliminate or mitigate the problems that he identifies. For example, he suggests that we allow spouses to file separately so that the secondary earner in a household would face the same marginal tax rates that the primary earner does when deciding whether to enter the labor market.⁹⁶ He also suggests favorable tax treatment for the secondary earner's income or for child care expenses as possible responses to the failure to tax work done at home for one's own household.⁹⁷ Ultimately, the ideal for which we should strive is redistribution through an optimal tax system rather than through protectionist immigration restrictions.

We could also make immigration restrictions more efficient by tailoring them more narrowly so as to reduce the burden that they place on

⁹⁵ Moreover, if we are taking the current tax system as given, then the distortions caused by protectionist immigration restrictions are even more costly than they would be in the absence of that system. In general, the more distorted behavior is, the more costly further distortions in that behavior would be. As we move further away from the social optimum, the marginal cost of the distortion increases. Therefore, to the extent that women or men work less than would be economically efficient, any policy that aggravates that distortion is especially costly. We should keep in mind that this observation would be true of not only further increases in tax rates but also the use of protectionist immigration restrictions in addition to the existing tax system. This interaction between immigration restrictions and income taxes also implies that more progressive taxes are likely to become socially optimal as we liberalize our immigration policies. Liberalized immigration would reduce the distortions in labor supply caused by restrictive policies, which would reduce the social costs of more redistribution through the tax system. Thus, if we wish to reduce income inequality, then it will be appropriate to make tax rates more progressive as we ease immigration restrictions.

⁹⁶ See McCaffery, *supra* note 57, at 278 (suggesting "a system of separate filing under the income tax" for spouses). He also suggests that we solve "[t]he problem with fringe benefits . . . by allowing secondary earners to opt out of certain coverage and get cash instead." *Id.* at 134. As a response to the problem with social security benefits, he suggests a "secondary-earner exemption" from social security taxes, *id.* at 102, or "earnings sharing" between spouses, *id.* at 103.

⁹⁷ See *id.* at 133-34; *id.* at 278 (suggesting "greater secondary-earner relief" and "a more generous child-care deduction or credit").

households with working women. For example, we could restrict the immigration of relatively unskilled workers but create exceptions for workers entering the United States to accept employment in food preparation, housekeeping, or child care. Insofar as labor markets are segregated by sex, however, these exceptions might also have the perverse effect of driving down the wages of women relative to men, for example, if native women work disproportionately in child care or housekeeping. Such an effect would tend to undercut the advantage that we would seek through such exceptions, which would be to reduce the burden that redistributive policies place on working women.

Furthermore, these exceptions would simultaneously make our immigration restrictions less effective at protecting the least skilled native workers from foreign competition. Native workers who remained in those particular occupations would find immigration driving down their real wages. Those native workers who instead turn from those occupations to seek other lines of work requiring modest levels of skill would tend to drive down real wages for similarly skilled natives employed in those other lines of work. Given these effects, the impact of immigration policy on income distribution would be greatly reduced, and it remains likely that we could achieve the same modest impact at lower cost through the tax system. After all, even if we tailored immigration restrictions so as to eliminate the disparate impact that they have on households with working women, these immigration restrictions would still destroy gains from trade in the labor market, whereas progressive tax reforms would not.

IV. CONCLUSION

On the merits, protectionist immigration restrictions have little to recommend themselves as a policy to improve income distribution among natives, given the option of superior tax alternatives. My economic analysis indicates that tax and transfer policies are more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers. Policies to protect these workers from immigrant competition in the labor market are no better at promoting distributive justice among natives and are likely to impose a greater economic burden on natives in the country of immigration than the tax alternative. These immigration restrictions are especially costly given the disproportionate burden that they impose on households with working women, a burden that discourages female participation in the labor force. This burden runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market because the supply of female labor is more elastic than the supply of male labor. Thus, the best response to concerns about the effect of immigration on the distribution of income among natives is to increase the progressivity of the tax system.

The preceding discussion of the effects of immigration on native workers has assumed that the welfare of immigrants is of no concern to us. Thus, this discussion has ignored the benefits that the immigrants themselves enjoy from their access to our labor markets. This nativist assumption also implies that we would exclude immigrants from the same access to transfer programs that natives enjoy so as to ensure that immigrants do not impose a net cost on natives through the public sector.⁹⁸ Restrictions on immigrant access to public benefits can ensure that natives continue to enjoy the economic gains from employing immigrant workers without the fiscal burden that full access to transfers would impose on the public treasury.⁹⁹

We can relax this nativist assumption and instead assume that our objectives reflect concern for the welfare of immigrants. This shift in our welfare objectives would imply greater immigrant access to public benefits than the nativist would favor, which in turn might well imply that the least skilled immigrants impose a net burden on natives. Once we drop the nativist assumption, however, we may consider this reduction in the welfare of natives a burden worth bearing. After all, we would only expand immigrant access to transfer programs if we thought the benefit to immigrants outweighed the cost to natives in the first place.

If concern for the welfare of immigrants militates in favor of more liberal access to transfer programs, then it should also militate in favor of more liberal admissions policies. If we care about the welfare of the aliens whose immigration is under consideration, then we should respond by liberalizing our immigration laws.¹⁰⁰ Indeed, we might also care about the welfare of aliens abroad who are not seeking admission to our country, which should lead us to consider the impact of our immigration policies on those aliens as well.

Once we give any weight at all to the interests of those born outside our borders, then we have yet another reason to liberalize immigration.

⁹⁸ Congress has in fact restricted immigrant access to a broad range of public benefits. See 8 U.S.C. §§ 1611-1613 (2000); Chang, *supra* note 1, at 1178-80 (describing various restrictions on alien access to public benefits in the United States).

⁹⁹ See Chang, *supra* note 9, at 313 ("Otherwise, transfers to immigrants could dissipate the economic gains to natives.").

¹⁰⁰ In my prior work, I have argued against theories of distributive justice that extend concern to immigrants only after we have decided to admit them. "If our admission policies are based only on the interests of natives and immigrants already here, then we would refuse to admit poor immigrants because we would anticipate the public benefits that they would consume and the fiscal burden that they would impose on incumbent residents." Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 769 (2003). "This moral stance . . . produces an anomaly" because the exclusion of poor aliens implies that, "by agreeing to obligations of distributive justice toward them if admitted, we harm them." *Id.* I suggest that we should avoid this "immigration paradox" by adopting "a cosmopolitan perspective that extends equal concern to all individuals, including aliens." *Id.* at 772.

Once we recognize any moral obligation to reduce poverty abroad and to reduce global inequality, we must confront the significant economic harm we inflict on those we exclude under our restrictive immigration laws.¹⁰¹ Given adverse effects of restrictive immigration policies on the poor abroad, considerations of global justice militate in favor of progressive fiscal policies and against protectionism as a method of addressing any concerns regarding the distribution of income among natives.

¹⁰¹ I have argued elsewhere in favor of liberal immigration policies based on a cosmopolitan theory of global distributive justice that extends equal concern to all individuals worldwide. *See id.*, at 769-73; Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 11-25 (2008); *see also* Gillian K. Hadfield, *Just Borders: Normative Economics and Immigration Law*, in JUSTICE IN IMMIGRATION, *supra* note 52, at 201, 205 (arguing that “[i]f economists are to participate in the normative debate over immigration . . . there can be no starting point other than a global social welfare function” because only that perspective “avoids the question begging raised by a national social welfare function”).

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WELCOME TO THE JUNGLE: NEW IMMIGRANTS IN THE MEATPACKING AND POULTRY PROCESSING INDUSTRY

*Anna Williams Shavers**

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I. INTRODUCTION

The law and economics of immigration in the United States produces one of the most heated debates in the country. Conflicts arise between the goals of immigration policy and the goals of profit-maximizing industries. In fact, some business practices regarding hiring practices of new immigrants have created animosity among some U.S. workers and new immigrants. U.S. workers accuse new immigrants of taking jobs from U.S. workers, depressing wages, and burdening government resources. The counter argument expressed by others, including some new immigrants,

says that new immigrants are performing jobs that U.S. workers will not do and are helping to keep costs low on consumer products.

The meatpacking and poultry processing industry is one industry that receives persistent attention on its hiring practices, both from U.S. workers as well as federal immigration enforcement agencies.¹ This article examines business decisions in the meatpacking and poultry processing industry with a focus on the effect of hiring practices on immigration matters. The perceived conflict between Black Americans and new immigrants receives particular scholarly attention in this article. An examination of hiring practices in the meatpacking industry provides an excellent example of the economic conditions related to an immigrant workforce. Limiting the research to one industry reveals the interplay between political and cultural issues presented by conflicting immigration policies. The meatpacking labor force finds itself in the middle of a political debate on prioritizing goals of stimulating the economy, protecting U.S. workers, unifying families, and providing national security. Upton Sinclair used the metaphor of the jungle in his 1906 novel, *The Jungle*, to depict the inhumanity suffered by immigrant workers in the meatpacking industry.² In this article, the jungle metaphor is used not only to scrutinize the working conditions of and reliance on new immigrants in the meatpacking industry as Sinclair did more than a century ago,³ but also to place in a more general context the complex relationships between various stakeholders in the industry with constraints and policies shaped by economic and political goals.

Part I addresses the economics of immigration and its particular impact on the meatpacking industry to answer a basic question: what are the consequences of employing an immigrant workforce in the meatpacking industry? Answering this question requires consideration of business realities and employment options for new immigrants and U.S. workers. Part II discusses the political aspects of existing and recently considered amendments to immigration law. Part III considers cultural aspects that affect opinions on immigration. The article concludes by warning that any attempt to amend the existing immigration laws without a careful consideration of these factors is destined for failure.

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¹ The term “meatpacking industry” is used in this article to refer to both meatpacking and poultry processing.

² UPTON SINCLAIR, *THE JUNGLE* (Kessinger Publishing 2005) (1906), available at <http://books.google.com/books?id=iy74f14MWdUC&printsec=frontcover>.

³ *Id.* at 28 (“Now, sitting in the trolley car, they realized that they were on their way to the home of [the smell of the stockyards]—that they had traveled all the way from Lithuania to it The new emigrants were still tasting it, lost in wonder, when suddenly the car came to a halt, and the door was flung open, and a voice shouted—‘Stockyards!’”).

II. ENTER THE JUNGLE: THE ECONOMICS OF EMPLOYING NEW IMMIGRANTS

On February 13, 2008, a federal district court dismissed a lawsuit filed by former meatpacking employees in which they alleged, among other things, that their employer purposefully and unlawfully hired undocumented workers with the intent to depress wages and avoid hiring lawful U.S. workers.⁴ Although the court found that the plaintiffs had not provided sufficient evidence to support their claims, it did not conclude that such a claim is invalid or unrecognized under state or federal law. This case is just one of many lawsuits that have been filed as a result of flawed immigration law and practice.⁵ One particular example of such failure is the Immigration Reform and Control Act of 1986 (IRCA).⁶

IRCA created a one-time-only program that allowed certain aliens in an unlawful status in the United States to apply for temporary residence during a twelve-month period beginning on May 5, 1987, and for permanent residence after one year.⁷ This process was known as legalization or amnesty. Undocumented aliens who did not qualify for legalization were to be removed from the United States. In addition, to discourage additional undocumented aliens from entering the United States, IRCA provided for increased border security and created sanctions against employers who hired undocumented workers. For the first time, employers who knowingly hired or continued to employ aliens who did not have employment authorization from the Immigration and Naturalization Service (INS) were subject to penalties.⁸ Policymakers considered IRCA to be consistent with Congress' dual goals in enacting immigration legislation: (1) protecting American workers while stimulating the economy and (2) unifying families. These goals are reflected in the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 (1990 Act), which allocates visas to intending immigrants.⁹ When President George H. W. Bush signed the

⁴ *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842 (E.D. Tenn. 2008).

⁵ See *infra* Part I.B.3.

⁶ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁷ See Immigration and Nationality Act, 8 U.S.C. § 1255(a) (2006); 8 C.F.R. § 245a.2(a) (2008). The Attorney General set the application period to run from May 5, 1987, to May 4, 1988 in accordance with the Act's authorization granted the Attorney General in 8 U.S.C. § 1255a(a)(1)(A).

⁸ IRCA mandated that all U.S. employers prepare and maintain certain paperwork regarding newly hired employees' right to work in the United States. See 8 U.S.C. § 1324a (2007).

⁹ *E.g.*, Rep. Bruce Morrison (D-Conn.) commented on the 1990 Act:

[I]t is strong on the improvement of family unification. This is pro-family legislation. It brings families together Second, this legislation protects American jobs. Those who suggest that the admission of skilled workers for positions which go unfilled is contrary to the interests of American economy and American workers are mistaken, because we provide for filling jobs that otherwise would not be filled. Americans retain their jobs. American businesses expand in order to hire more Americans.

legislation on November 29, 1990, he described it as meeting “several objectives of this administration’s domestic policy agenda—cultivation of a more competitive economy, [and] support for the family as the essential unit of society.”¹⁰

Since the catastrophic events of the 1993 World Trade Center bombing, the 1995 Oklahoma City Federal Building bombing, and the September 11, 2001 attacks, the goal of maintaining a secure nation has taken its place alongside the two longstanding immigration policy goals of economic stability and family unity. This additional goal has resulted in several amendments to the INA beginning in 1996 that were aimed at making the country more secure.¹¹ One of the most significant amendments was legislation signed into law by President George W. Bush on November 25, 2002 creating the Department of Homeland Security (DHS) as a new cabinet-level department.¹² The Homeland Security Act of 2002 placed the INS, an agency previously within the Department of Justice (DOJ) that had responsibility for immigration services and enforcement, under the direction of the newly-created DHS.¹³ Most former INS functions were divided among several agencies within the DHS including Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).¹⁴

136 CONG. REC. H12,358-03 (1990) (statement of Rep. Morrison, Chairman, House Subcomm. on Immigration and Refugee Affairs).

¹⁰ Remarks on Signing the Immigration Act of 1990, 1 PUB. PAPERS OF GEORGE BUSH 1716, 1717 (1990).

¹¹ While immigration legislation had included some recognition of the need to consider national security in immigration policy, these more recent events caused a greater emphasis to be placed on the issue of security and admission of immigrants to the United States. In 1996 Congress passed three laws: (1) the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) to improve criminal procedure for alien terrorists, (2) the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) to facilitate exclusion and deportation of certain noncitizens, and (3) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) to limit government benefits to noncitizens. In 2001, greater national security protections were enacted by Congress through the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) and the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) which contained provisions aimed at preventing terrorists from entering the country.

¹² Homeland Security Act, 6 U.S.C. § 111(a) (2002).

¹³ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). The INS was abolished by HSA § 471.79 INTERPRETER RELEASES 1733, 1737 (Nov. 25, 2002). For a section-by-section summary of the HSA’s immigration provisions, see 79 INTERPRETER RELEASES 1733 (Nov. 25, 2002).

¹⁴ The three newly created immigration divisions began referring to themselves without the “bureau” designation. The proper designation is either without “bureau” or replacing “bureau” with “U.S.” See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection, 72 Fed. Reg. 20,131 (Apr. 23, 2007).

Two decades after the enactment of IRCA and in light of changing national priorities, policymakers generally recognized that at least in part IRCA had not met its goals. This failure was evidenced by the growing number of unauthorized immigrants living in the United States. While an estimated 4 million undocumented immigrants lived in the United States in 1986,¹⁵ this estimate continued to grow to over 12 million by 2006.¹⁶ Among the approximately 34 million foreign-born in the country, undocumented immigrants account for about 30% of that number, where almost 80% of these undocumented immigrants have arrived since 1990.¹⁷ The DHS estimates that the average increase each year in undocumented immigrants was 515,000 between 2000 and 2006.¹⁸ As a result, some have called for a strengthening of the southern U.S. border, enforcement and intensification of existing employer sanctions,¹⁹ and a decrease in the number of immigrants admitted each year.

Framing an appropriate immigration policy requires the difficult and contentious task of agreeing on empirical data on the economic effect of immigrants on the jobs, wages, and tax burdens of native-born workers. Many scholars, economists, and government agencies have attempted to prove or disprove that new immigrants result in adverse economic effects. These approaches generally examine either spatial effects based upon the presence of a high concentration of new immigrants²⁰ or nationwide ef-

¹⁵ For a discussion of the number of estimated undocumented aliens in 1986, see Jeffrey S. Passel & Karen A. Woodrow, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State*, 18 *Int'l Migration Rev.* 642, 665-67 (1984) (extrapolation based upon 1980 census and number of documented aliens). See also Note, *Re-examining the Constitutionality of INS Workplace Raids After the Immigration Reform and Control Act of 1986*, 100 *Harv. L. Rev.* 1979, 1996 nn.108-09 (1987) (citing *Immigration Control and Legalization Amendments: Hearing on H.R. 3080 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 99th Cong. 225 (1985); Telephone Interview with Jeffrey S. Passel, Pew Hispanic Center, in Lincoln, Neb. (2008).

¹⁶ See PEW HISPANIC CTR., *NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES: AMERICA'S IMMIGRATION QUANDARY* (2006), <http://pewhispanic.org/files/reports/63.pdf> [hereinafter PEW HISPANIC CTR., IMMIGRATION QUANDARY].

¹⁷ MICHAEL HOEFER, NANCY RYTINA, AND CHRISTOPHER CAMPBELL, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006* (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

¹⁸ *Id.*

¹⁹ Compare Jeffrey L. Ehrenpreis, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 *S. CAL. L. REV.* 1203, 1208 (2006) (calling for increased sanctions), with Maria I. Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 *GEO. MASON L. REV.* 669, 695 (1997) (concluding "it is not at all clear that cracking down on employment of unauthorized persons will deter unauthorized immigration").

²⁰ See, e.g., GEORGE J. BORJAS, CTR. FOR IMMIGRATION STUDIES, *INCREASING THE SUPPLY OF LABOR THROUGH IMMIGRATION: MEASURING THE IMPACT ON NATIVE-BORN WORKERS I* (2004), <http://www.cis.org/articles/2004/back504.html> (finding that "when immigration increases the supply of workers in a skill category, the earnings of native-born workers in that same category fall").

facts.²¹ A definitive opinion remains elusive as to the adverse effect because of the wide range of conclusions reached by these studies.²² An alternative approach of focusing on particular industries may yield more accord. The meatpacking industry provides an ideal model for such an examination because of the extensive scrutiny that has been applied to both industry business practices and its workforce since its inception.

A. *Immigration and the U.S. Workforce*

Basic economics teaches that corporations make rational profit-driven decisions. Corporations exist to provide a return on investment to their investors or shareholders realized by its profit-maximizing strategy. To profit-maximize, corporations grow revenue or minimize costs, which includes minimizing labor costs.²³ A managerial economist describes the business decision of labor costs this way: "Because '[m]aximizing profit requires the firm to maximize the difference between total revenue and total cost,' it is easy to see that a reduction in the cost of labor from workers accepting a lower wage will maximize profits."²⁴ If the available supply of labor is increased to exceed an employer's demand, minimizing labor costs becomes a realistic goal. Arguably, increased immigration aids this goal.

1. The Foreign-Born Workforce

Conventional economic theory on the implications for employment and wages argues that the interaction of labor supply and demand determines wages. An increase in the labor supply is predicted to reduce wages and increase unemployment. It is argued that immigration increases the labor supply and thus reduces earnings for natives in competition with immigrants. Economic theory also suggests that a number of other factors such as international trade, corporate relocations, technology, union representation, and government regulation, such as minimum wage laws, can affect wages and unemployment.

²¹ See generally LINDA LEVINE, CONG. RESEARCH SERV., IMMIGRATION: THE EFFECTS ON NATIVE-BORN WORKERS (CRS Report for Congress No. 95-408, Mar. 28, 2006).

²² *Id.* at 4-8. Compare RAKESH KOCHHAR, PEW HISPANIC CTR., GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF THE NATIVE BORN (2006), <http://pewhispanic.org/files/reports/69.pdf> (finding native employment is not harmed by rapid immigration), with BORJAS, *supra* note 20 (finding that wages for native workers decrease in areas highly concentrated with immigrants).

²³ See *Graphic Commc'ns Int'l Union v. NLRB*, 977 F.2d 1168, 1171 (7th Cir. 1992).

²⁴ Joel F. Herold, Note, *Wages, Workers, and Potential Windfalls: Rethinking Section 8(A)(3) Labor Disputes In a Capitalist Economy*, 66 GEO. WASH. L. REV. 657, 673 n.165 (1998) (quoting LAWRENCE S. ZUDAK, *MANAGERIAL ECONOMICS* 5 (Harper Collins 1980)).

Because the United States is a nation of immigrants, immigrants have always constituted a significant part of the workforce. However, determining the effect of new immigrants on U.S. workers is a complex task because of the structure of immigration laws and the multi-faceted policies addressed by those laws. Counting the number of new immigrants and comparing that to the size of the U.S. population does not answer the effects question, but it provides a starting place to consider some assumptions made about new immigrants.

The estimated U.S. population in 2006 was 300 million people; foreign-born immigrants constituted about 12% of the population at 34 million.²⁵ The Pew Hispanic Center estimated the population of unauthorized immigrants had risen to 12 million in 2006, making up about 30% of foreign-born persons in the United States. If, as some have indicated, the number of unauthorized immigrants is not as low as 12 million but closer to 20 million, and if those unauthorized immigrants have been included in the census counts of foreign-born, then undocumented immigrants could represent well over 50% of America's foreign-born population.²⁶

A closer look at the immigration rate of legal immigrants shows that in 2006, about 1.25 million aliens received legal permanent residence in the United States. Of that number, approximately 450,000 were new arrivals, and over 800,000 were immigrants who were already in the U.S. and were able to adjust their status from that of a temporary immigrant to that of a lawful permanent resident. Of the 1.25 million aliens who became legal permanent residents in 2006, only about 13% or 160,000 immigrants received visas based on employment preferences. The agencies charged with enforcing immigration laws thus determined that approximately 160,000 qualified immigrants either: (1) were needed to fill permanent jobs that U.S. workers were not available for, or (2) had such superior skills that their skills would be of particular benefit to the United States. The INA limits the number of immigrants authorized to enter the United States under temporary and permanent employment categories. Almost two-thirds of the legal immigrants entering the country were family preference immigrants,

²⁵ U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2007, tbl.1 (2007), <http://www.census.gov/popest/states/NST-ann-est.html>; PEW HISPANIC CTR., IMMIGRATION QUANDARY, *supra* note 16.

²⁶ PEW HISPANIC CTR., IMMIGRATION QUANDARY, *supra* note 16; PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2006 (Jan. 23, 2008), <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=36>; *id.* at FOREIGN BORN AT MID-DECADE, tbl. 1, <http://pewhispanic.org/files/other/foreignborn/Table-1.pdf>; Robert Justich & Betty Ng, Bear Stearns Asset Management, The Underground Labor Force is Rising to the Surface (Jan. 3, 2005), <http://www.bearstearns.com/bscportal/pdfs/underground.pdf> (estimating the number of illegal immigrants to be as high as 20 million people in 2005).

that is, close relatives of either U.S. citizens or lawful permanent residents.²⁷ Many family preference immigrants also entered the workforce.

In contrast, the annual immigration rate of unauthorized or illegal immigrants in 2006 is not reported. However, the ratio of total unauthorized immigrants compared to legal immigrants continues to rise. The next question that arises is the related ratio of unauthorized immigrants to legal immigrants who actually enter the workforce. Within the workforce, unauthorized immigrants and legal immigrants are employed in very different professions.

Population and workforce statistics are typically reported in two categories, foreign-born and native-born persons, creating difficulties in determining precisely how many lawful versus unauthorized immigrants enter the workforce. Foreign-born persons include citizens who were not citizens at birth, as well as the foreign-born population who are legally admitted immigrants, refugees, temporary residents such as students and temporary workers, and undocumented immigrants.²⁸

Estimates of the foreign-born workforce are based on data collected as part of the Current Population Survey (CPS). The CPS obtains information on employment and unemployment among the civilian workforce population ages sixteen and older. In 2004, there were about 126 million natives in the workforce, comprising 85.5% of the total labor force of 147 million total workers. The percentage of native-born workers has decreased steadily as the percentage of foreign-born workers has grown from 10.8% (14.4 million) in 1996 to 14.5% (21.4 million) in 2004.²⁹ This trend continued through 2006 where the immigrant labor force was estimated to be about 15.3% (23 million) of the working population.³⁰ The percentage of the foreign-born population participating in the workforce is slightly higher than the percentage of natives in the workforce. In 2006, 68.6% (23 million) of

²⁷ U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2006 YEARBOOK OF IMMIGRATION STATISTICS 5-34 (2007), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf. See also U.S. DEP'T OF STATE, VISA BULLETIN, http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html (last visited Jan. 9, 2009) (archive of visa bulletins explaining visa categories and dates of entry).

²⁸ Most government agencies use the term alien to mean a foreign-born individual who has not been naturalized and is still a subject or citizen of a foreign country. See generally ELIZABETH GRIECO, MIGRATION POL'Y INST., DEFINING 'FOREIGN BORN' AND 'FOREIGNER' IN INTERNATIONAL MIGRATION STATISTICS (2002), <http://www.migrationinformation.org/Feature/display.cfm?ID=34> (last visited Jan. 1, 2009).

²⁹ ABRAHAM T. MOSISA, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW, FOREIGN-BORN WORKFORCE, 2004: A VISUAL ESSAY 48, 49 (2006), <http://www.bls.gov/opub/mlr/2006/07/ressum.pdf>.

³⁰ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, FOREIGN-BORN WORKERS: LABOR FORCE CHARACTERISTICS IN 2006 (2007), <http://www.bls.gov/news.release/History/forbrn.txt> [hereinafter LABOR FORCE CHARACTERISTICS IN 2006].

the foreign-born population were in the labor force compared to 65.8% (126 million) of the native-born population.³¹

Of those foreign born in the workforce, at least 30% represent unauthorized immigrants. Jeffrey Passel of the Pew Hispanic Center estimates that there were 11.1 million unauthorized immigrants in 2005, 7.2 million of whom were in the workforce.³² Combined with the 2006 CPS estimate of 23 million total foreign-born workers, unauthorized workers represented over 30% of the total foreign-born workforce.

In a 2006 report from the President's Council of Economic Advisors (CEA), the chairman concluded that immigrants "fuel the Nation's economic growth [and] have an overall positive effect on the income of native-born workers."³³ Research supports this conclusion: the unemployment rate of the foreign-born population decreased from 4.6% in 2005 to 4% in 2006 whereas the unemployment rate of the native-born population decreased by 9.6% in terms of percentage points from 5.2% to 4.7% for the same time period.³⁴ One report to Congress concluded that because only a small portion of the U.S. labor force is foreign-born, "immigration is unlikely to have substantially affected the wage or job prospects of the *average* native-born worker."³⁵ The report also concluded that "little research has been undertaken to assess" whether "an increase in the supply of foreign born workers to high-skilled occupations might adversely affect the wage and employment opportunities of native-born workers in those fields."³⁶ Thus, different skill sets and socio-economic characteristics of foreign-born workers will determine their effect on different groups of native-born workers.

The presence of a large percentage of foreign-born workers in one employment category might not have as favorable an effect as that same percentage in another category. For example, in support of the conclusion that "[i]mmigrants are a critical part of the U.S. workforce and contribute to productivity growth and technological advancement," the CEA noted that approximately 40% of Ph.D. scientists working in the United States are

³¹ *Id.*

³² Jeffrey S. Passel, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE UNITED STATES (2006), <http://pewhispanic.org/files/reports/61.pdf> (last visited Jan. 1, 2009).

³³ COUNCIL OF ECONOMIC ADVISERS, EXECUTIVE OFFICE OF THE PRESIDENT, IMMIGRATION'S ECONOMIC IMPACT 1 (2007), http://www.whitehouse.gov/cea/cea_immigration_062007.pdf (last visited Jan. 1, 2009) [hereinafter COUNCIL OF ECON. ADVISORS REPORT] (based on 2006 statistical data for all "foreign-born" workers regardless of immigration status), *See generally* BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, LABOR FORCE CHARACTERISTICS OF FOREIGN-BORN WORKERS SUMMARY (2008), <http://www.bls.gov/news.release/forbm.nr0.htm> (cited in COUNCIL OF ECONOMIC ADVISORS REPORT).

³⁴ LABOR FORCE CHARACTERISTICS IN 2006, *supra* note 30.

³⁵ LEVINE, CONG. RESEARCH SERV., *supra* note 21, at 5.

³⁶ *Id.* at 14-15.

foreign-born.³⁷ Less favorable conclusions might be reached if the foreign-born participation percentage approached 40% in all job categories. The participation rates vary among occupation categories. However, as illustrated in Figure 1, the 2007 Bureau of Labor Statistics (BLS) survey reports that a smaller proportion of foreign-born than native-born workers were employed in management, professional, and related occupations, 27.2% versus 37%; however, foreign-born workers were more likely to be employed in service occupations, natural resources, construction, maintenance, production, transportation, and material moving occupations.³⁸

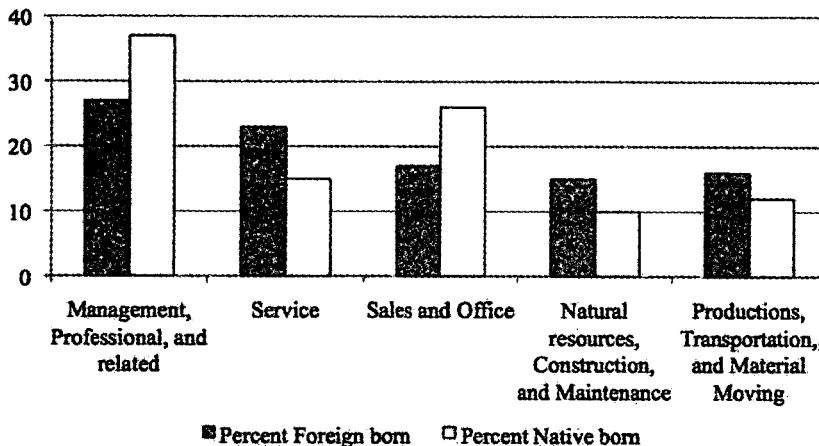


Figure 1. Foreign born workers by occupation. 2007. Source: Bureau of Labor Statistics CPS.

It is generally conceded that depending on the location and skill level of the workers some native-born workers might be affected by an influx of foreign-born workers. For example, the percentage of new immigrants who are low-skilled and lack a high school diploma has increased, potentially affecting similarly situated native-born workers.³⁹ One measure of this effect is the change in the wage rate as the percentage of immigrants entering low-skilled jobs increases; however, the influx of immigrants in low-skilled employment may cause the wage rate of some native workers to increase. The CEA concluded in its 2007 report that immigrants have a positive impact on the wages of 90% of the native-born workforce.⁴⁰ Some

³⁷ COUNCIL OF ECON. ADVISORS REPORT, *supra* note 33, at 2.

³⁸ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY, LABOR CHARACTERISTICS OF FOREIGN-BORN WORKERS 12, tbl.4 (Mar. 26, 2008), available at <http://www.bls.gov/news.release/pdf/forbrn.pdf> [hereinafter LABOR FORCE CHARACTERISTICS IN 2007].

³⁹ See Adam Davidson, NPR.org, *Q&A: Illegal Immigrants and the U.S. Economy*, National Public Radio, May 22, 2006, <http://www.npr.org/templates/story/story.php?storyId=5312900>.

⁴⁰ COUNCIL OF ECON. ADVISORS REPORT, *supra* note 33, at 4 (concluding that native workers see total annual income gains of between \$30 billion and \$80 billion from immigration).

evidence suggests that the native-born workforce is better paid than the foreign-born workforce. In 2006, the median usual weekly earnings of foreign-born full-time wage and salary workers were \$532 compared with \$698 for the native-born workers.⁴¹ While statistics can show that native-born wages increase or remain elevated compared to foreign-born wages, statistics also show that immigrants in the workforce may depress the wages of some native-born workers. This effect may occur when immigrants have skills that substitute for native-born workers. The CEA report cites research findings that show wage depression rates of 1% or 2% up to 10% in the category of low-skilled workers without a high school diploma, otherwise referred to as “high school dropouts.”⁴² Despite this possible negative effect of immigration on high school dropouts, the CEA report concludes that restrictions on immigration are not the solution to assist the low-skilled workers.⁴³

Perhaps the clearest example of some workers’ and business owners’ opinion that authorized workers are being displaced by new immigrants, especially those who are undocumented, is the filing of lawsuits by workers who have lost their jobs or experienced depressed wages and businesses that are no longer able to compete. The worker plaintiffs include citizens, and “authorized immigrants,”⁴⁴ other plaintiffs include local governments⁴⁵ as well as business owners.⁴⁶ Some of these lawsuits allege violations of the Racketeer Influenced and Corrupt Organizations Act (RICO),⁴⁷ which prohibits a “person” from engaging in a “pattern of racketeering activity” in connection with the acquisition, establishment, or conduct of an “enterprise.”⁴⁸ Violations of the statute can trigger both civil and criminal penalties.⁴⁹ In 1996, RICO was amended to incorporate certain violations of

⁴¹ See LABOR FORCE CHARACTERISTICS IN 2007, *supra* note 38, at 13 tbl.5.

⁴² COUNCIL OF ECON. ADVISORS REPORT, *supra* note 33, at 4 n.7 (citing George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q. J. OF ECON. 1335-74 (2003), and Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages*, Nat’l Bureau of Econ. Research, Working Paper No. 12497, 2006).

⁴³ *Id.*

⁴⁴ See *e.g.*, *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1163 (9th Cir. 2002). (Plaintiff class members were described as “persons, legally authorized to be employed in the United States.” Two of the named plaintiffs Olivia Mendoza and Juana Mendiola, were Mexican Nationals. Persons authorized to work include U.S. Citizens or nationals, lawful permanent residents, or non-citizens “otherwise” authorized to work for an employer in the U.S.). See INA § 274A(b)(2), 8 U.S.C. § 1324a(b)(2).

⁴⁵ See *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 969 (9th Cir. 2008).

⁴⁶ See, *e.g.*, *Commercial Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 378-79 (2d Cir. 2001) (describing a class-action lawsuit by office cleaning company against competitor claiming lost business as a result of Colin Service Systems’ pattern of hiring illegal aliens).

⁴⁷ 18 U.S.C. §§ 1961-1968 (2006).

⁴⁸ 18 U.S.C. §§ 1961(3), (5), (4) (2006) (defining, respectively, “person,” “pattern of racketeering activity” and “enterprise”); see also *id.* § 1961(1) (defining the key term “racketeering activity”).

⁴⁹ See 18 U.S.C. §§ 1963-1964 (2006).

immigration laws⁵⁰ including employing,⁵¹ encouraging, or inducing an alien to come to the United States⁵² in violation of law.⁵³ The law is still being developed regarding the use of RICO as a viable method for challenging the hiring of undocumented workers.⁵⁴ For example, in *Mendoza v. Zirkle Fruit*,⁵⁵ a group of Mexican fruit pickers and packers alleged in their complaint that by hiring “illegal immigrants” the defendants, Zirkle Fruit, Matson Fruit, and an employment agency, depressed their labor wages to a level that was “below the wage rate at which a labor market comprised of workers legally entitled to work . . . would be set.”⁵⁶ Some RICO lawsuits have been settled in favor of plaintiffs,⁵⁷ some have been dismissed,⁵⁸ and others are still pending.⁵⁹ In addition to RICO lawsuits, there has also been a significant increase in other lawsuits filed by authorized workers; these lawsuits alleged violations of federal wage laws.⁶⁰ Some of these lawsuits

⁵⁰ 18 U.S.C. §§ 1961(F) (2006) provides that violations include “any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain . . .”

⁵¹ See Immigration & Nationality Act of 1952 § 274(a)(3)(A) (codified at 8 U.S.C. § 1324(a)(3)(A) (2005)).

⁵² See Immigration & Nationality Act of 1952 § 274(a)(1)(A)(iv) (2008) (codified at 8 U.S.C. § 1324(a)(1)(A)(iv) (2005)).

⁵³ See generally Elisabeth J. Sweeney Yu, Note, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private RICO Litigation and Public Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 909 (2006).

⁵⁴ See generally Megan M. Reed, Note, *RICO at the Border: Interpreting Anza v. Ideal Steel Supply Corp. and Its Effects on Immigration Enforcement*, 64 WASH. & LEE L. REV. 1243, 1258-68 (2007) (suggesting that workers may not be valid plaintiffs under RICO).

⁵⁵ *Mendoza*, 301 F.3d at 1163.

⁵⁶ See Complaint ¶ 47, *Mendoza*, 301 F.3d 1163 (E.D. Wash. Mar. 28, 2000) (No. 00-CY-3024-FVS), 2000 WL 34480427; Second Amended Class Action Complaint ¶ 58, *Mendoza*, 301 F.3d 1163 (E.D. Wash. Nov. 6, 2003) (No. 00 CY 3024-FVS), 2003 WL 23980586.

⁵⁷ See, e.g., *Commercial Cleaning*, 271 F.3d at 374. See also Leah Beth Ward, *Zirkle Settles job suit Yakima Herald-Republic* (Wash.), Dec. 30, 2005 available at [http://www.amre.com/mtnews/archives/Zirkle Settles Job Suite](http://www.amre.com/mtnews/archives/Zirkle%20Settles%20Job%20Suite) (*Mendoza* settled). See generally MICAH KING, CTR. FOR IMMIGRATION STUDIES, *RICO: A NEW TOOL FOR IMMIGRATION LAW ENFORCEMENT* (2003), <http://www.cis.org/articles/2003/back1103.html>.

⁵⁸ See, e.g., *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842 (E.D. Tenn. 2008) (Collier, C.J.) (dismissing suit on Tyson Foods' motion for summary judgment on February 13, 2008); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004) (finding employees' union as a necessary party). See generally discussion *infra* Part I.B.2.

⁵⁹ See, e.g., Original Complaint, *Valenzuela v. Swift* (N.D. Tex. Dec. 15, 2006) (No. 06-CV-2322), 2006 WL 3747439; First Amended Complaint, *Valenzuela v. Swift* (N.D. Tex. Oct. 6, 2008) (No. 06-CV-2322), 2006 WL 4016022 (amending class action plaintiffs). See discussion *infra* Part I.B.3.

⁶⁰ See, e.g., *Venant v. Torrese*, No. 08-CV-20046 (S.D. Fla. filed Jan. 8, 2008); *Navarrete-Cruz v. LVI Envtl. Servs. of New Orleans*, No. 06-CV-0489 (E.D. LA. filed Feb. 1, 2006). See generally David B. Caruso, *Workers Sue Over Low Pay*, Associated Press, May 29, 2007 (reporting in connection with discussion of immigrant lawsuits, that federal lawsuits alleging violations of the Fair Labor Standards

are partially based on the belief that employers are exploiting immigrant workers by failing to pay legally required wages.⁶¹

Reliance on immigrant labor is not sound economic policy unless the impact of immigration considers the economies of both the receiving and sending nations. This consideration is generally discussed in terms of the “push factors” of the sending country, namely poor economic conditions, civil strife, and political repression, coupled with the “pull factors” of the receiving country⁶² such as family members, job availability, higher wages, and ease of entry. Policy makers should also consider other factors such as the residual consequences of immigration on the populations of each affected country.

While immigration may provide positive effects for U.S. businesses, consumers, and foreign-born workers, the negative effects and consequences cannot be ignored. A consistent stream of immigrants is required to provide a source of cheap labor as evidenced by the differentials in average wages between immigrants and natives in the same job categories. However, by accepting lower wages, immigrants providing cheap labor may be denied rights and protections other workers receive. In 2002, for example, the Supreme Court held in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,⁶³ a 5-4 decision, that undocumented workers fired in retaliation for supporting a “union-organizing campaign” could not receive a statutory back pay penalty.⁶⁴ The majority concluded that although such firings are generally violations of the National Labor Relations Act, federal immigration policies enacted in IRCA prohibited awarding undocumented workers back pay.⁶⁵ Furthermore, some authorized workers have alleged in RICO lawsuits that “due to their economic situation and fear of asserting their rights due to their illegal status, [undocumented workers] can be easily exploited.”⁶⁶ Professor Kevin Johnson noted that employers, interested in acquiring a cheap labor source, may at times advocate on behalf of immigrants. Employers, he said, “can be expected to press policies that benefit capital over labor.”⁶⁷

Act have more than doubled nationwide in recent years, rising from 1,854 cases in 2000 to 4,389 in 2006).

⁶¹ See generally Tere Figueras Negrete, *Field Laborers Sue For Wages*, Miami Herald, Jan. 9, 2008, at 1C (discussing Florida lawsuit filed by Haitian field workers).

⁶² See generally Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. Mich. J.L. Reform 147, 154-55 (1984) (discussing the “push” and “pull” factors).

⁶³ 535 U.S. 137 (2002).

⁶⁴ *Id.* at 140.

⁶⁵ *Id.*

⁶⁶ Complaint at ¶ 3, *Mendoza*, 222 F.R.D. 439 (E.D. Wash. Mar. 28, 2000) (No. CY-00-3024-AAM), 2000 WL 34480427.

⁶⁷ Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 23 (2008) [hereinafter Johnson, *Hurricane Katrina*].

Substandard labor conditions and wages experienced by immigrants are viewed as a type of subsidy to the U.S. economy.⁶⁸ Sending nations may view this as a reason they should be involved in establishing U.S. immigration policy. This may be particularly true of Mexico since it is the largest sending country. A sending nation may want to influence both the emigration from its country as well as U.S. immigration policies in order to help relieve some internal economic and political pressures.⁶⁹ For example, sending nations may encourage the United States to liberalize immigration policies through the use of bilateral treaties. Such policies, however, can result in a movement of labor into the United States and a movement of capital to the sending nation.

As a receiving nation, the United States must consider the effects of encouraging immigration on both citizens and aliens. If employers do not have a supply of immigrant labor but need additional labor, they may be required to offer higher wages. Labor theory suggests that if wages are increased, then the amount of available labor supplied will also increase. However, while higher wages may increase the labor supply, they may also result in increased service and product prices. Rather than lower profits, businesses will generally choose to increase prices.

Even if U.S. consumers benefit from an increased labor supply by way of lower production costs, and therefore lower prices, some U.S. workers may still be harmed by low wages and job loss.⁷⁰ An increase in output that stimulates an increased demand for labor in other areas⁷¹ may harm U.S. workers in the short run but a decision to invest in their own human capital that places them in a higher wage category may help them in the long run. In the short run, however, U.S. workers may be paid insufficient wages to provide for themselves, forcing the government to provide for them. When native workers are displaced by either authorized or unauthorized immigrant labor, alternatives in the form of education and training should be available to the displaced workers. Such actions in the long run help ensure

⁶⁸ See Jorge A. Bustamante, *Proposition 187 and Operation Gatekeeper: Cases for the Sociology of International Migrations and Human Rights*, 1 MIGRACIONES INTERNACIONALES 72001, <http://redalyc.uaemex.mx/pdf/151/15100102.pdf> (Mex.) (citing U.S. DEP'T OF LABOR, RESEARCH REPORT NO. 5, MIGRANT FARMWORKERS: PURSUING SECURITY IN AN UNSTABLE LABOR MARKET (1994)).

⁶⁹ See, e.g., JOEL FEINLEIB AND DAVID WARNER, SOCIAL SECURITY ADVISORY BOARD, ISSUE BRIEF NO. 1: THE IMPACT OF IMMIGRATION ON SOCIAL SECURITY AND THE NATIONAL ECONOMY 5 (Dec. 2005), http://www.ssa.gov/documents/IMMIG_Issue_Brief_Final_Version_000.pdf [hereinafter SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF] (noting that demographer Michael Teitelbaum concludes "there is overwhelming evidence that immigrant flows are powerfully affected by government policies and the things that governments do. For instance, if the Chinese government were suddenly to authorize passports for every one of its 1.3 billion citizens, we would likely see a substantial shift in the volume and direction of migration in and out of China.").

⁷⁰ LEVINE, CONG. RESEARCH SERV., *supra* note 21 at 1.

⁷¹ *Id.* at 3.

that a supply of labor is available. Professor D. Massey stated: "Not only is immigration a poor substitute for investments in the education and training of Americans, it is much less reliable as [a] source of human capital."⁷²

A number of variables affect the demand for labor; therefore, a static immigration admissions policy that lasts for several years is ill-advised. A 1995 report submitted to Congress by Barbara Jordan, Chair of the U.S. Commission on Immigration Reform, recommended that admission levels for immigrants authorized by Congress be reviewed at a specified time period (e.g., three to five years).⁷³ A specified time period would better ensure a regular periodic review.⁷⁴ A periodic review process would allow Congress to reassess labor needs in terms of the current supply and demand factors. The principles influencing this recommendation included both the "flexibility to adjust to changing circumstances in the United States" and the recognition that a goal of immigration policy is to "protect U.S. workers against unfair competition from foreign workers, with an appropriately higher level of protection to the most vulnerable in our society."⁷⁵ Congress never acted on these recommendations.⁷⁶

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷⁷ IIRIRA made significant changes to the immigration admissions requirements and procedures,⁷⁸ but it did little to change the system of admissions. The current system used to determine both the preference categories and the numbers of immigrants annually allowed into the country is based on a simple system created by the 1990 Act.⁷⁹ Using these preference categories and annual numerical restrictions, there are more people in the world who qualify for visas than are allowed to enter each year, resulting in backlogs. Often, intending immigrants wait for

⁷² *Education, Skills, and U.S. Immigration Policy: Hearing before the S. Comm. on Health, Education, Labor, and Pensions*, 104th Cong. 2, 152 Cong. Rec. D964-01 (2006) available at http://help.senate.gov/Hearings/2006_09_14/Massey.pdf (statement of Douglas S. Massey, Professor of Sociology, Woodrow Wilson School of Public and International Affairs, Princeton University).

⁷³ U.S. COMM'N ON IMMIGRATION REFORM (JORDAN COMMISSION), LEGAL IMMIGRATION: SETTING PRIORITIES, A REPORT TO CONGRESS, EXEC. SUMMARY vii (1995), available at <http://www.utexas.edu/lbj/uscir/exesum95.pdf> (last visited Jan. 15, 2009) ("An effectively regulated system requires some flexibility with regard to numbers so as to permit adjustment as circumstances in the United States change.").

⁷⁴ *Id.*

⁷⁵ *Joint Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary, and Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995), available at <http://www.utexas.edu/lbj/uscir/062895.html> (last visited Jan. 15, 2009) (statement of Barbara C. Jordan, Commission Chair and Congresswoman, on Immigration Reform). See generally 141 Cong. Rec. D801-01 (June 28, 1995).

⁷⁶ SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra* note 69, at 7.

⁷⁷ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

⁷⁸ See discussion *infra* Part II.A.

⁷⁹ See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

years before they can legally enter the country. For example, under the family third preference category for married sons of daughters of immigrants that have become U.S. citizens, there is a wait of about eight years for a visa. However, under the same preference category for intending immigrants from Mexico, the wait increases to over sixteen years due to the number of already pending visa applications. This long waiting period for intending immigrants coupled with a lack of available employment-based immigrant visas and non-immigrant visas for low-skilled workers contribute to the large number of undocumented entries.

2. Black Americans and Immigration

It is a part of the popular discourse that tensions exist between Black Americans and new immigrants.⁸⁰ This discourse is usually centered on the question: are new immigrants taking jobs away from Black Americans? Some respond to this question by arguing that new immigrants perform jobs that native workers either do not want or will not do. For example, former Mexican President Vicente Fox stated that Mexican immigrants take jobs that “not even blacks want to do.”⁸¹ This argument only increases the perceived tension between Black Americans and immigrants.⁸² This tension does not necessarily exist because Black Americans oppose immigration or dislike immigrants.⁸³ In fact, some Black Americans feel empathy towards both immigrants of color and those from oppressed populations.⁸⁴ The tension may enter when new immigrants taking jobs traditionally held by Black Americans lead some Black Americans to dislike immigration policies.

Others suggest that Black Americans are ambivalent toward immigration. This ambivalence has existed since slavery ended. Frederick Douglass, a former slave, recognized that Black Americans’ labor was often re-

⁸⁰ See generally Tanya K. Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997) (citing ROY BECK, *THE CASE AGAINST IMMIGRATION* 156-202 (1996), and David J. Hellwig, *Strangers in Their Own Land: Patterns of Black Nativism, 1830-1930*, 23 AM. STUD. 85, 93 (Spring 1982)) (concluding that “African American opposition to immigration is often overstated by conservatives in their efforts to denounce immigration in general, as demonstrated by the African American reluctance to join nativistic organizations”).

⁸¹ See Ginger Thompson, *Memo from Mexico: Uneasily, a Latin Land Looks at Its Own Complexion*, N.Y. TIMES, May 19, 2005, at A4.

⁸² *Id.* See generally Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99 (2008) (discussing reasons for perceived tensions).

⁸³ Hellwig, *supra* note 80, at 90.

⁸⁴ Salim Muwakkil, *A Shared Vision*, THE NATION, June 2, 2006, available at <http://www.thenation.com/doc/20060619/muwakkil>.

jected in favor of new immigrant labor.⁸⁵ However, Douglass also spoke in favor of Chinese immigration. There are numerous areas of commonality between Black Americans and new immigrants, especially immigrants with dark skin. As one commentator suggested, escaped slaves in the United States could be considered the first “illegal aliens.”⁸⁶

In the CEA Report, low-skilled workers are listed as the group most adversely affected by the hiring of immigrants.⁸⁷ Black Americans are most likely well represented in this group of low-skilled workers, particularly high school dropouts, who may be affected by the hiring of immigrants.⁸⁸ The dropout rate is nearly one half for Black Americans, Hispanics, and Native Americans.⁸⁹ This rate is especially startling when compared to the graduation rate for whites in a state-by-state comparison. For example, the graduation rate for Caucasians in Pennsylvania is 81%, which is well above the national average, while the Pennsylvania graduation rate for Latino and Black American students is 41% and 46%, respectively.⁹⁰ Furthermore, dropout rates are generally higher for young black males.⁹¹

The consequences of not being able to find work at a living wage can negatively impact society. For example, the incarceration rate for young black men is 28% but is over 60% for young black men who are high school dropouts.⁹² By failing to take all of these numbers into account, the reports of low unemployment rates do not reflect the actual unemployment rate in some populations. Additionally, these government statistics do not include individuals who have given up work, who are not seeking work, or who are incarcerated. In 2000, the actual unemployment rate for young

⁸⁵ See generally FREDERICK DOUGLASS, *COMPOSITE NATION* (1867), quoted in *LIFT EVERY VOICE: AFRICAN AMERICAN ORATORY, 1787-1901*, 488, 498 (Philip S. Foner ed., 1998); *Ping v. U.S.*, 130 U.S. 581, 606 (1889) (demonstrating the resistance to Chinese immigration that had been incorporated into U.S. immigration law).

⁸⁶ Muwakkil, *supra* note 84.

⁸⁷ See COUNCIL OF ECON. ADVISORS REPORT, *supra* note 33, at 4 and accompanying text.

⁸⁸ *Id.*

⁸⁹ See JOHN M. BRIDGELAND ET AL., *CIVIC ENTERPRISES & PETER D. HART RESEARCH ASSOCIATES, THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS 1* (2006), <http://www.civicerprises.net/pdfs/thesilentepidemic3-06.pdf> (“For minority students (black, Hispanic or Native American), the rate at which they finish public high school with a regular diploma declines to approximately 50 percent.”).

⁹⁰ See GARY ORFIELD ET AL., *CIVIL RIGHTS PROJECT AT HARVARD UNIV. ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 14* (2004), <http://civilrightsproject.ucla.edu/research/dropouts/LosingOurFuture.pdf>.

⁹¹ See Erik Eckholm, *Plight Deepens for Black Men*, *Studies Warn*, N.Y. Times, Mar. 20, 2006, at A1 (citing HARRY J. HOLZER, ET AL., *RECONNECTING DISADVANTAGED YOUNG MEN* (Urban Institute Press 2006)) (reporting findings that in the inner cities in the 1990s, more than half of all black men do not finish high school where in 2000, 65% of black male high school dropouts were jobless).

⁹² Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 619-20 (2005).

black male high school dropouts was 65%.⁹³ In contrast, even with similarly high dropout rates, persons of Mexican ancestry tend to have lower poverty rates and higher employment rates than Black Americans. This contrast has been partially explained by an employer preference for hiring immigrants over Black Americans and not solely because of employer interest in cheap labor. The research of Professors Johnson and Hing demonstrated that the disparities are often caused by racial prejudices of the employers.⁹⁴

There are numerous causes for these disparities that should be considered when establishing an immigration policy that affects any segment of the population. In a survey conducted by the Bill and Melinda Gates foundation, 45% of high school dropouts reported that they “started high school poorly prepared by their earlier schooling.”⁹⁵ The lack of equity in the various school systems, racism, and various societal factors should be addressed to avoid losing or pushing natives from the workforce.

3. Taxes and Benefits

In addition to concerns about private employment, the economic debate regarding immigration raises issues concerning the public budget. Generally, this debate focuses on a balance sheet-like analysis that attempts to determine if undocumented immigrants use more public services than they pay in taxes.⁹⁶

Many immigrants, including those that are undocumented, file income tax returns.⁹⁷ The Government Accountability Office (GAO), known as the General Accounting Office prior to 2004, reports that individuals who are not eligible to receive a social security number can pay taxes using an Individual Taxpayer Identification Number (ITIN) and that “a significant but not precisely known number of ITIN holders are illegal resident aliens.”⁹⁸

⁹³ See Eckholm, *supra* note 91.

⁹⁴ See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 121-27 (2007).

⁹⁵ BRIDGELAND ET AL., *supra* note 89, at iii.

⁹⁶ See generally Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal and Without Representation*, 9 HARV. LATINO L. REV. 1, 1-7 (2006) (“[U]ndocumented immigrants provide a fiscal windfall and may be the most fiscally beneficial of all immigrants.”), citing JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 294-95 (1989). *But cf.* STEVEN A. CAMAROTA, *CTR. FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET* 26-27 (2004), <http://www.cis.org/articles/2004/fiscal.html> (“[I]llegal households comprise 3.6 percent of the total population, but . . . they account for an estimated 0.9 percent of taxes paid and 1.4 percent of costs.”).

⁹⁷ See SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra*, note 69.

⁹⁸ *Testimony Before the Subcomm. on Oversight and Subcomm. on Social Security of the H. Comm. on Ways and Means*, 108th Cong. 48 (2004), available at

The Internal Revenue Service (IRS) has issued ITINs since 1996, when it issued 60,682 ITINs.⁹⁹ From 1996 to 2006, the IRS has steadily increased the number of ITINs issued to 1.5 million.¹⁰⁰ In 2006, the Commissioner of the IRS appeared before the House Committee on Ways and Means and reported that “many illegal aliens, utilizing ITINs, have been reporting tax liability to the tune of almost \$50 billion from 1996 to 2003.”¹⁰¹ Also, undocumented immigrants pay sales tax, state income tax, Social Security tax, and other use taxes such as gasoline and property taxes.¹⁰²

Some undocumented immigrants likely will never benefit from the taxes they pay. For example, with respect to Social Security taxes, some undocumented immigrants will return to their country of origin while others will eventually become authorized workers and thus become Social Security beneficiaries. Social Security actuaries estimate that about half of the undocumented immigrants who pay social security taxes are unlikely to collect benefits.¹⁰³ This phenomenon helps the Social Security imbalance¹⁰⁴ caused by an increase in the proportion of Americans entering retirement and the continuous improvements in human longevity.¹⁰⁵

Many immigrants cannot take advantage of government supported resources and benefits because of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).¹⁰⁶ PRWORA made

<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=1232> (statement of Michael Brostek, Director, Tax Issues, U.S. General Accounting Office).

⁹⁹ *Id.*

¹⁰⁰ The IRS issued 60,682 ITINs in 1996; 1,363,071 in 1997; 566,745 in 1998; 615,413 in 1999; 818,392 in 2000; 1,088,837 in 2001; 1,493,284 in 2002; 1,229,097 in 2003; and 1.5 million by November 2006. *Id.* at n.7; Nina Bernstein, *Tax Filings Rise for Immigrants in U.S. Illegally*, N.Y. Times, Apr. 16, 2007, at A1.

¹⁰¹ *Hearing on Impacts of Border Security and Immigration on Ways and Means Programs, Testimony Before the H. Comm. on Ways and Means*, 109th Cong. 20 (2006), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5171> (statement of Honorable Mark W. Everson, Comm’r, Internal Revenue Service).

¹⁰² See JANE L. ROSS, U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: NATIONAL NET COST ESTIMATES VARY WIDELY* (1995), <http://www.gao.gov/archive/1995/he95133.pdf>; Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. Times, June 19, 2006, at A1; CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER OF PUB. ACCOUNTS, *SPECIAL REPORT: UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY* (2006), www.immigrationpolicy.org/images/File/spotlight/Texas%20Undocs%20Spotlight.pdf.

¹⁰³ SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra* note 69, at 3.

¹⁰⁴ Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. Times, Apr. 5, 2005, at A1 (noting that, in 2004, illegal immigrants accounted for about 10% of the Social Security surplus).

¹⁰⁵ SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra* note 69, at 1.

¹⁰⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.) [hereinafter PRWORA].

comprehensive changes to alien eligibility for public benefits.¹⁰⁷ Immigrants are eligible only if they meet “qualified alien” status requirements.¹⁰⁸ Undocumented immigrants are not eligible for federal benefits such as food stamps, welfare benefits, public or assisted housing, unemployment benefits, Social Security, earned income tax credit, and most forms of Medicaid.¹⁰⁹ The definition of “qualified alien” also excludes many legal immigrants from government benefits.¹¹⁰ Furthermore, PRWORA dictates that a state may provide a state or local benefit that would otherwise be prohibited under PRWORA only if the state enacts a law that “affirmatively provides for such eligibility.”¹¹¹ Thus, state and local governments vary in the range of services they provide to undocumented immigrants. A Center for Immigration Studies project concluded that, despite a PRWORA reform in 1996, immigrants use means-tested programs at a higher rate than the native-born population. These programs include Supplemental Security Income (SSI),

¹⁰⁷ For a thorough analysis of the effects of PRWORA, see Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-immigrant Provisions of the “Contract with America” Congress*, 90 *KY. L.J.* 1043, 1048-49, 1052-53 (2002).

¹⁰⁸ See *id.* at 1053-54 (noting that the PRWORA definition abolishes the PRUCOL doctrine). PRWORA defines a “qualified alien” as:

(b) . . . (1) [A]n alien who is lawfully admitted for permanent residence under the [INA], (2) an alien who is granted asylum under section 208 of [the INA], (3) a refugee who is admitted to the United States under section 207 of [the INA], (4) an alien who is paroled into the United States under Section 212(d)(5) of [the INA] for a period of at least 1 year, (5) an alien whose deportation is being withheld under section 243(h) of [the INA] (as in effect [prior to] April 1, 1997 . . .) or [whose removal has been withheld under] section 241(b)(3) of [the INA], (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of [the INA] as in effect prior to April 1, 1980; or (7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980). . . . [And]
(c) . . . (1) [A]n alien who has been battered or subjected to extreme cruelty . . . ; [or] (2) an alien whose child has been battered or subjected to extreme cruelty . . . ; or (3) an alien child [whose] parent . . . has been battered or subject to extreme cruelty.

8 U.S.C. § 1641 (2000) (footnote omitted), amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 211, 122 Stat. 5044.

¹⁰⁹ See, e.g., *City of Chicago v. Shalala*, 189 F.3d 598, 605-09 (7th Cir. 1999) (challenging unsuccessfully provisions of the Act that disqualify most legal aliens from receiving food stamps, Supplemental Security Income (SSI), and other welfare benefits on the basis that the restrictions violate the Fifth Amendment’s Due Process Clause). The PRWORA restrictions are found in various federal statutes. See, e.g., 7 U.S.C. § 2015(F) (2008) (food stamps); 8 U.S.C. § 1611(a), (c)(1)(B) (2008) (“[W]elfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided”); 26 U.S.C. § 32(c)(1)(D) (2008) (earned income tax credit); 26 U.S.C. § 3304(a)(14)(A) (2008) (unemployment insurance), amended by Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. No. 110-458, § 111, 122 Stat. 5092; 42 U.S.C. §§ 401-403, 405(c)(2)(B)(i) (2007) (Social Security benefits).

¹¹⁰ See NAT’L IMMIGRATION LAW CTR., GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, tbl. 1 (4th ed. 2002), http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf (table updated Mar. 2005).

¹¹¹ 8 U.S.C. § 1621(d) (2000) (prohibiting states from providing “any State or local public benefit” to undocumented aliens unless the state enacts a law affirmatively providing for such eligibility).

General Assistance, Food Stamps, Medicaid, and the Subsidized School Lunch Program.¹¹²

Under the belief that undocumented immigrants impose a burden on state treasuries, some states have attempted to limit undocumented immigrants' access to services to which they are entitled including public school education and emergency medical services.¹¹³ However, in *Plyler v. Doe*,¹¹⁴ the Supreme Court held that the undocumented children of undocumented immigrants are entitled to Fourteenth Amendment equal protection.¹¹⁵ In that decision, the Supreme Court struck down a Texas statute that withheld from local school districts any state funds used for the education of children who were not "legally admitted" into the United States and did not pay tuition.¹¹⁶ More generally, the Supreme Court ruled that states and school districts could not deny K-12 education to undocumented children residing in their borders without showing a substantial state interest.¹¹⁷ Also, the Emergency Medical Treatment and Active Labor Act (EMTALA), enacted in 1986,¹¹⁸ permits undocumented immigrants to receive emergency treatment.¹¹⁹ However, under EMTALA, uncertainty remains regarding which permissible services will be reimbursed by the federal government.¹²⁰

Although some commentators have concluded that immigrants as a group pay more in taxes than they receive in benefits,¹²¹ it is difficult to

¹¹² STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES 35 (2001), <http://www.cis.org/articles/2001/mexico/toc.html>.

¹¹³ See Lipman, *supra* note 96, at 6 (remarking that a dual pressure from "ever-present fear of government officials and deportation" also deter access to federally required services).

¹¹⁴ *Plyler v. Doe*, 457 U.S. 202 (1982). See Michael A. Olivas, *Plyler v. Doe*, *The Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197-220 (David A. Martin & Peter H. Schuck eds., 2005).

¹¹⁵ See *Plyler*, 457 U.S. at 210 (undocumented children of undocumented immigrants are "persons within the jurisdiction" of the state of Texas and are therefore entitled to Fourteenth Amendment rights).

¹¹⁶ *Id.* at 205.

¹¹⁷ *Id.* at 223-24, 228-30 (asserting that education is vital and necessary for any child to succeed in life and finding the State of Texas's arguments for the protection of their fiscal and educational resources unavailing).

¹¹⁸ Emergency Medical Treatment and Active Labor Act of 1986, 42 U.S.C. § 1395dd (2000).

¹¹⁹ 8 U.S.C. §§ 1611(b)(1)(A), 1621(b)(1). See Svetlana Lebedinski, *EMTALA: Treatment of Undocumented Aliens and the Financial Burden It Places on Hospitals*, 7 J.L. IN SOC'Y 146 (2005); Tiana Mayere Lee, *An EMTALA Primer: The Impact of Changes in the Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS HEALTH L. 145, 161 (2004).

¹²⁰ See, e.g., Sarah Kershaw, *U.S. Rule Limits Emergency Care for Immigrants*, N.Y. Times, Sept. 22, 2007, at A1 ("The federal government has told New York State health officials that chemotherapy, which had been covered for illegal immigrants under a government-financed program for emergency medical care, does not qualify for coverage.").

¹²¹ See, e.g., STRAYHORN, *supra* note 102; Tamar Jacoby, Am. Enter. Inst. for Pub. Policy Research, Bradley Lecture on Immigration Reform: Politics and Prospects (Jan. 10, 2005), http://www.aei.org/include/pub_print.asp?pubID=21803 [hereinafter Jacoby, AEI Bradley Lecture]

reach a definitive conclusion either way. The measurement of benefits and losses differs depending on whether the focus is on the federal government or state and local governments. For example, although total tax revenues paid by undocumented immigrants may exceed total services they receive, it may also be true that state and local services received exceed tax revenues paid to the state.¹²² Concluding that immigrants pay more in taxes than they receive in benefits is limited by the inexact processes used in determining the balance of benefits and losses to the private economy via public economy measures of taxes and government resources.

B. *The Meatpacking and Poultry Processing Industry*

The former INS, and later the DHS, created programs to improve the employer verification system and to increase its enforcement of employer sanctions. The agencies did this in part because of a perception that the presence of undocumented immigrants hurt the prospects of U.S. workers and flaunted established immigration law. Both programs particularly targeted the meatpacking industry.

1. The House of Swift

A brief history of a leading meatpacking plant illustrates the changes in the meatpacking industry and its workforce as well as the recent scrutiny it has received with respect to undocumented workers.

In June 2005, Swift & Company, headquartered in Greeley, Colorado, celebrated its 150th anniversary. At that time, it had annual sales of more than \$10 billion, was the second largest meatpacking company in the world, the largest beef processor in Australia, and the third-largest processor of fresh beef and pork in the United States.¹²³ Swift & Company was started by Gustavus Swift. He began his career in the meatpacking industry at the age of 14 as an employee in his brother's butcher shop in Massachusetts. He started his own business with the purchase of one heifer from which the meat was sold to buy more livestock. In 1875, he moved to Chicago where

("Over their lifetimes, even the poorest pay in more in taxes than they take out in government services. And for several decades now, it's their payments that have kept the social security system afloat.").

¹²² See generally CONG. BUDGET OFFICE, CONG. OF THE U.S., *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* (2007), <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

¹²³ See Press Release, Swift & Co., *Swift & Company, S&C Holdco 3, Inc. and Swift Foods Company Announce Extension of Tender Offers* (July 10, 2007), http://www.jbsswift.com/media/releases/2007_07_10_Tender_Offer_Extension_FINAL.pdf, Press Release JBS S.A. *Completes Acquisition of Swift & Company*, (July 12, 2007), http://www.jbsswift.com/media/releases/2007_07_12_JBS_Swift_Closing_Final.pdf.

the stockyards had been established. He became both a cattle dealer and butcher. Swift & Company was incorporated in 1885 and had packing plants in St. Louis, Omaha, St. Joseph, St. Paul, and Fort Worth. At the time of his death in 1903, Swift had developed a family business that employed more than 21,000 people.¹²⁴

Gustavus Swift revolutionized the meat-processing industry when he developed the mass production process of disassembling livestock carcasses along a conveyor belt. Henry Ford modeled his innovations in the automobile industry after Swift's changes in the packing plants. Ford simply reversed the process; at the end, he had a finished product rather than dismantled livestock.¹²⁵ In 1881, Swift also introduced the refrigerated rail car thus reducing reliance on the local butcher. Finally, he determined that shipping livestock by rail was inefficient so he began slaughtering and packing beef and hogs in Chicago, and then shipping only the dressed carcasses east.¹²⁶

Workforce changes often served as the impetus behind Swift's business decisions. Decisions such as plant relocations mirrored what was happening generally in the industry. Swift's record also provides a good example of the persistent pattern of mergers and acquisitions in the industry and the resulting effects on wages and workforce demographics. One reporter noted: "By 1930, the number of Hispanics employed by Swift had grown to 217. But it would be 30 years before the real boom in Hispanic workers would hit the slaughterhouses, largely as a result of the labor unions' loss of power as well as consolidation and relocation within the industry."¹²⁷

In 1982, Swift became Swift Independent Packing Company (SIPCO) and remained one of the nation's largest beef and pork packagers. The following year, the company bought an Armour & Company facility in Worthington, Minnesota. ConAgra Foods Inc., subsequently acquired SIPCO. ConAgra had previously acquired Monfort, Inc., a Colorado beef packer.

¹²⁴ See *Gustavus F. Swift Dead*, N.Y. TIMES, Mar. 30, 1903, <http://query.nytimes.com/mem/archive-free/pdf?res=9B07E2DA1E30E733A25753C3A9659C946297D6CF>; Mark Rhoads, *Illinois Hall of Fame: Gustavus Swift*, ILLINOIS REV., Dec. 3, 2006, http://illinoisreview.typepad.com/illinoisreview/2006/12/illinois_hall_o_2.html; Press Release, Swift & Co., *Swift Celebrates 150 Years of Meat Industry Excellence: Gus Swift's Legacy of Meat Industry Innovation Lives On* (June 24, 2005), http://www.jbsswift.com/media/releases/Swift_History_6-05.pdf.

¹²⁵ See HENRY FORD, MY LIFE AND WORK 81 (Samuel Crowther ed., 1922), reprinted in GIANT ENTERPRISE 141-44 (Alfred D. Chandler, Jr. ed., Harcourt Brace & World 1964) ("I believe that this was the first moving line ever installed. The idea [of the assembly line] came in a general way from the overhead trolley that the Chicago packers use in dressing beef.").

¹²⁶ See Rhoads, *supra* note 124.

¹²⁷ Joel Dyer, *Meatpacking Industry Has a Long History of Reliance on Immigrant Laborer*, THE FORT COLLINS WEEKLY, Dec. 26, 2006 reprinted in GREELEY TRIB., available at <http://www.greeleytrib.com/article/20061226/NEWS/112230087> [hereinafter Dyer, GREELEY TRIB.].

Swift merged with Monfort to form Monfort Pork Division, renamed Swift & Company in 1995. In keeping with the general industry plan of maintaining the ability to shift production easily, Swift & Company constructed virtually identical plants in Greeley, Colorado; Grand Island, Nebraska; and Cactus, Texas.¹²⁸

Monfort opened the Greeley, Colorado facility in 1960.¹²⁹ Citing cost efficiency, the Greeley plant closed in 1980.¹³⁰ It reopened two years later without a union contract and using a high percentage of Hispanic workers. Monfort reported that this business decision resulted in a 25% reduction in labor costs.¹³¹ In 1991, the INS raided the Greeley plant while it was still owned by Monfort. According to the *Greeley Tribune*, the company claimed “[t]hey had never knowingly hired illegal aliens.”¹³² Dick Monfort, then head of Monfort meatpacking operations, told the paper:

The INS agents abused the legal process to accomplish something they could not obtain by any other means. The raid by 200 armed agents from all over the United States, a helicopter and 80 vehicles was not only a blatant use of excess force and a waste of taxpayer money, but it humiliated over 1,900 of our employees.¹³³

The newspaper also reported that the company expressed that “the greatest concern was for the school children who had no one to pick them up and were likely traumatized by their parent’s and relative’s arrest and deportation.”¹³⁴

After the 1995 merger and perhaps in part to avoid situations like the 1991 Greeley raid, Swift joined the INS’s Basic Pilot Program (BPP) in 1997.¹³⁵ Swift continued its participation and even supported the expansion of the program by the DHS in 2004.¹³⁶ The BPP created a free, voluntary,

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Dyer, *GREELEY TRIB*, *supra* note 127.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (Apr. 24, 2007), available at <http://judiciary.house.gov/hearings/April2007/Shandley070424.pdf> (hereinafter *Shandley Testimony*) (statement by John W. (Jack) Shandley, Senior Vice President, Human Resources, Swift & Co.).

¹³⁶ The BPP was originally authorized under Title IV of IIRIRA in 1996 as an employment eligibility verification pilot program. On December 3, 2003, President Bush signed the Basic Pilot Program Extension and Expansion Act of 2003 which extended the employment eligibility verification program. Pub. L. No. 108-156, 117 Stat. 1944. At the time the 2003 legislation was signed the program operated in six states: California, Florida, Illinois, Nebraska, New York, and Texas. As required by section 3 of the legislation, however, DHS expanded the legislation to all states in December 2004. See *Unlawful Employment of Aliens Act*, INA § 274A(d); 8 U.S.C.A. § 1324a (West 2004). In 2007, the BPP was renamed “E-Verify” and relies upon the Verification Information System (VIS) to assist employers with

Internet-based program that gave participating employers access to Social Security Administration and DHS records to verify work eligibility for new hires. Swift prided itself on going “above and beyond what is required by federal or state law in terms of identity determination and work authorization.”¹³⁷ However, Swift found that its attempts were not always appreciated. A Swift Senior Vice President testified before Congress: “In 2001, Swift was sued for \$2.5 million by the Department of Justice for discrimination because the company allegedly went too far in trying to determine applicant eligibility. We subsequently settled the case for less than [sic] \$200,000 with no admission of wrong doing.”¹³⁸

In 2002, ConAgra Foods and Australia Meat Holdings were spun off as Swift & Company. The majority interest in Swift’s fresh beef and pork-processing businesses was transferred to Hicks, Muse, Tate & Furst, Inc. (HMTF), an investor group. During this time, the DHS had begun implementing its plan to step up enforcement of employer sanctions.

On December 12, 2006, simultaneous raids on six plants including Cactus, Texas; Grand Island, Nebraska; Greeley, Colorado; Hyrum Utah; Marshalltown, Iowa; and Worthington, Minnesota, led to the arrest of 1,282 persons suspected of being undocumented workers. Just days before, on November 28, 2006, Swift had unsuccessfully sought an injunction to prevent ICE and DOJ from conducting raids at its plants.¹³⁹ In a hearing conducted on December 6 and 7, 2006, Swift told the court that the raids could severely impact its ability to conduct business because it feared it could lose up to 40% of its workforce.¹⁴⁰ The *Greeley Tribune* reported that “[Swift’s] insistence that it does not draw from an illegal workforce rings more hollow with each passing year.”¹⁴¹ Former Swift President and Chief Executive

the verification of newly hired employees. See U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM AN EMPLOYER . . . HOW DO I . . . USE THE E-VERIFY?, Doc. No. M-655 (Sept. 2007), http://www.uscis.gov/files/nativedocuments/E4_english.pdf. Employers who also participate in the ICE Mutual Agreement between Government and Employers (IMAGE) program agree to cooperate with the government in audits of its workforce and adopt “Best Hiring Practices.” See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMAGE Program, <http://www.ice.gov/partners/opaimage> (last visited Jan. 3, 2009).

¹³⁷ Shandley Testimony, *supra* note 135, at 3.

¹³⁸ *Id.*

¹³⁹ See Complaint For Declaratory and Injunctive Relief, *Swift & Co. v. Immigration and Customs Enforcement Div.*, No. 06-CV-314-J (N.D. Tex. Nov. 28, 2006), available at http://www.jbsswift.com/docs/8K/12-13-06_ICE_Press_Release.pdf; Order, *Swift & Co. v. Immigration and Customs Enforcement Div.*, No. 060CV-314-I (N.D. Tex. Dec. 7, 2006), available at http://www.jbsswift.com/docs/8K/12-13-06_ICE_Press_Release.pdf (denying injunction and referencing the fact that Swift had been the subject of an investigation by ICE and DOJ). See generally Mark Steil, All Things Considered: Feds Raid Meat-Packing Plant in Minnesota (Minnesota Public Radio broadcast Dec. 12, 2006), available at <http://minnesota.publicradio.org/display/web/2006/12/12/meatraids> (reporting that federal agents raided the Swift & Co. plant in Worthington, Minnesota as part of a nationwide investigation).

¹⁴⁰ Dyer, *GREELEY TRIB.*, *supra* note 127.

¹⁴¹ *Id.*

Officer Sam Rovit attributed the December 2006 raids to a jail interview with an illegal immigrant in Marshalltown, Iowa, where Swift operates a pork plant. Rovit said the former employee told officials of a widespread identification theft ring.¹⁴² Rovit also said this report might have come from a former employee carrying a grudge.

Although the government had not filed civil or criminal charges by winter 2006,¹⁴³ the raids prompted the filing of a lawsuit on December 15, 2006, by eighteen former Swift employees.¹⁴⁴ In their complaint, the former employees sought \$23 million in damages and alleged that the meat-packing company conspired to manipulate and depress the labor market and wages by hiring illegal immigrants.¹⁴⁵ One of the plaintiffs' attorneys from Dallas, Texas told the Associated Press that Swift had paid the plaintiffs approximately \$20 an hour but paid their replacements, undocumented immigrants, \$12 to \$13 an hour.¹⁴⁶ In addition, the former employees complained that authorized workers were replaced by unauthorized workers to avoid payment of workers' compensation claims.¹⁴⁷ Other court actions arising from the raids included the convictions of undocumented workers for fraud and misuse of Social Security numbers.¹⁴⁸

In July 2007, Swift became JBS-Swift when JBS S.A. (JBS), Latin America's largest beef processor, acquired Swift & Company from HMTF. Because of this acquisition, the consolidated JBS Swift Group became the

¹⁴² See Bill Jackson, *President of Swift Talks, Says ICE Rebuffed Company's Offer to Help*, GREELEY TRIB., Feb. 2, 2007, available at <http://www.greeleytrib.com/article/20070202/NEWS/102010112>.

¹⁴³ See Debbie Elliot, *All Things Considered: Immigration Raids Target Meat Plants* (National Public Radio broadcast Dec. 16, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6636356> (interviewing Asst. Sec., Dep't of Homeland Security, Immigration and Customs Enforcement Julie Myers).

¹⁴⁴ Original Complaint ¶¶ 1-18, *Valenzuela v. Swift*, No. 06-CV-2322 (N.D. Tex. Dec. 15, 2006), 2006 WL 3747439; see *supra* note 59.

¹⁴⁵ *Id.* at ¶ 54; *id.* at ¶ 32 ("The Illegal Immigrants were willing to work for lesser wages at Swift Company than those individuals who had the legal right to work at Swift Company would have been willing to accept and work for had the Defendants not artificially manipulated the labor market."); *id.* at ¶ 33 ("The Defendants have engaged in numerous criminal acts as they have sought to depress wages of Plaintiffs at their meat-packing plant by employing Illegal Immigrants, to whom Defendants pay substantially lower wages and fewer employment benefits.").

¹⁴⁶ Associated Press, *Former Employees Sue Swift Alleging Wage Manipulation*, GREELEY TRIB., Dec. 18, 2006, available at <http://www.greeleytribune.com/article/20061218/NEWS/61218005> ("When the Swift plant opened in Cactus, wages were approximately \$20 an hour," said another plaintiffs' attorney, Michael Haygood. "Now, the average wage is approximately \$12 to \$13 an hour. Illegal immigration has fueled this depression in wages.").

¹⁴⁷ *Id.* (quoting plaintiffs' attorney Angel Reyes).

¹⁴⁸ See, e.g., Press Release, U.S. Attorney's Office, District of Nebraska, *Sentencing – Alma Lima-Rivera*, Feb. 12, 2008, <http://www.usdoj.gov/usao/ne/press/feb/021208%20sent%20rivera.html>; see also *United States v. Lima-Rivera*, No. 4:01-CR-03010 (D. Neb. Feb. 12, 2008) (announcing defendant's sentence of one year and one day imprisonment for fraudulent use of a social security number).

largest beef processor in the world.¹⁴⁹ Prior to the merger, JBS reported annual sales of about \$2.1 billion and operated twenty-three plants in Brazil and five in Argentina. Initially, the merger led to layoffs, primarily of administrative personnel. Shortly thereafter, JBS-Swift changed operations at its Greeley plant to run at full capacity by reinstating the second shift that Swift had ended in 2005. As an additional 1,300 workers were needed to run at full capacity, it was predicted that the reintroduction of the second shift would add an additional \$80 million annually to the local economy.¹⁵⁰ The immediate problem was obtaining a workforce. The December raids had depleted the source of labor and JBS-Swift was in competition with other plants. Even though JBS-Swift offered wages at the top of the pay scale, \$11 to \$13 per hour, the hiring process was slow.¹⁵¹ One trade expert reported that JBS-Swift could probably hire workers at a faster pace “if they offered \$15 an hour, but that would put them . . . out of line with other wage structures” and make it more difficult for the company to operate cost-effectively.¹⁵² After hiring was completed, the demographics of the company’s meatpacking employees reportedly changed slightly. About 80% of the employees were Latino, a decrease from 90% before the raid.¹⁵³ Swift continues to change. In March 2008, JBS announced plans to acquire National Beef Co. of Kansas City and the Smithfield Beef Group.¹⁵⁴

¹⁴⁹ See Press Release, Swift & Co., *JBS S.A. Completes Acquisition of Swift & Company* (July 12, 2007), http://www.jbsswift.com/media/releases/2007_07_12_JBS_Swift_closing_FINAL.pdf.

¹⁵⁰ See Sharon Dunn, *New Plans for Swift Could Return Millions to Economy*, GREELEY TRIB., July 19, 2007, available at <http://www.greeleytrib.com/article/20070719/BUSINESS/107180092> (“Northern Colorado economist John Green said the city’s estimates for tax revenues are a bit conservative. With 1,000 workers, he said up to \$80 million could be filtered back into the economy based on a potential average wage of \$40,000 a year when lower skilled and middle-management wages are considered. Usually, every dollar spent is spent again in an economy, Green said, which could equate to \$80 million.”); *Influx of JBS-Swift Jobs Shifts Outlook*, GREELEY TRIB., Feb. 26, 2008, available at <http://www.greeleytrib.com/article/20080226/TRIBEDIT/111187850>; *JBS-Swift to Hire 1,300 Workers at Greeley Plant*, GREELEY TRIB., July 26, 2007, available at <http://www.greeleytrib.com/article/20070726/NEWS/70726016>; Andrew Villegas, *Swift Lays Off Dozens on Same Day It Completes Sale to Brazilian Firm*, GREELEY TRIB., July 14, 2007 (discussing administrative layoffs), available at <http://www.greeleytrib.com/article/20070714/NEWS/107140113>.

¹⁵¹ The company announced that in November 2007, the base rate would increase from \$11.75 to \$12.00 an hour and the top rate for the second shift would increase from \$13.70 to \$13.95 an hour. See Maria St. Louis-Sanchez, *Hiring Spree*, GREELEY TRIB., Sept. 23, 2007, available at <http://www.greeleytrib.com/article/20070923/BUSINESS/109230156>.

¹⁵² Sharon Dunn, *JBS-Swift Hiring for Second Shift Going Slow*, GREELEY TRIB., Aug. 15, 2007, available at <http://www.greeleytrib.com/article/20070815/NEWS/108150094> (quoting Steve Kay, publisher of CATTLE BUYER’S WEEKLY).

¹⁵³ See Bill Jackson, *JBS-Swift dedicated to hiring changes a year since raid, Company sticking to ID program*, Dec. 15, 2007. Jackson, *supra* note 142.

¹⁵⁴ See Bill Jackson, *JBS-Swift Preps to Buy Nos. 4 and 5 in Beef Packing Industry*, GREELEY TRIB., Mar. 5, 2008, available at <http://www.greeleytrib.com/article/20080305/NEWS/839969363/0/FRONTPAGE>.

2. The Changing Face of the Meatpacking Labor Force

As the Swift Company illustrates, the process of getting meat to the table has gone through several transformations. The process evolved from the hunter bringing prey back to be slaughtered and shared with the village family to the farming of livestock in order to remove some of the risk of not having meat readily available. Next, livestock was sold to local butchers making meat more widely available but still keeping the process local. Then came the creation of meatpacking plants, which took the livestock and slaughtered it at locations far away from the farmers and ranchers, and then distributed it throughout the country. Finally, plants were relocated closer to farmers and ranchers. Each time a business decision was made, a major change in the process resulted. Mergers, acquisitions, relocations, and automation by large companies resulted in dramatic changes to the composition of the workforce. One government report noted: “[C]onsolidation and/or restructuring inevitably affects workers. Similarly, however justified in terms of efficiency, it also affects the communities from which a facility moves and into which it relocates.”¹⁵⁵

When people purchased beef from their local butcher, the animal had often been slaughtered that day. The public considered butchers to be skilled craftsmen. As the country became more urban and industrialized so did the process of getting meat to the table. When Upton Sinclair wrote *The Jungle* in 1905, slaughtering was concentrated in a few large cities. In the late 19th century, meatpacking plants had been established in urban centers including Chicago, Cincinnati, Omaha, St. Louis, Kansas City, and St. Paul. In 1902, three large meatpackers—Swift, Armour, and Morris—formed the National Packing Company and secured control of packing-houses. Labor unions were organizing at the same time that companies were changing their business practices to maximize usage of unskilled and immigrant labor in order to form high-profit, low-wage operations.¹⁵⁶ As reported in a 1904 article, “The national union dates from July, 1897, and is designed to include all wage-earners in slaughtering and packing establishments and all meat-cutters employed in stores.”¹⁵⁷ The three large meatpackers with the addition of Cudahy Meatpacking came to be known as the “Big Four” and later the “Big Five” with the addition of Wilson Meatpacking. In *The Jungle*, Upton Sinclair referred to the concentration of the meatpacking business in a small number of companies as the “The Beef

¹⁵⁵ WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., LABOR ECONOMICS DOMESTIC SOCIAL POLICY DIVISION, 109TH CONG., LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW 27 (CRS Report 2006), available at <http://www.nationalaglawcenter.org/Sassets/crs/RL33002.pdf> (hereinafter LABOR PRACTICES IN THE MEAT PACKING INDUSTRY).

¹⁵⁶ See John R. Commons, *Labor Conditions in Meat Packing and the Recent Strike*, 19 Q. J. ECON. 1, 6 (1904).

¹⁵⁷ *Id.* at 2.

Trust.”¹⁵⁸ This practice established a large number of sellers dealing with a small number of buyers in the Midwest. Spurred in part by *The Jungle*, the Federal Trade Commission launched an investigation that ended with the Big Five entering a consent decree in 1920 divesting their control of refrigerated storage facilities, stockyards, and railroads.¹⁵⁹ The investigation proved the packers had engaged in monopoly and anti-trust violations. The National Packing Company was dissolved. In 1921, Congress passed the Packers and Stockyards Act to regulate the “Beef Trust” and address allegations that as demand for beef increased, the “Beef Trust” had used its power to increase the price of beef as well as set the prices offered for cattle.¹⁶⁰ These controls were possible because Armour, Swift, Morris, Wilson, and Cudahy controlled about 55% of the market.¹⁶¹ Armour, Cudahy, Swift, and Wilson continued to dominate meatpacking until the 1970s.¹⁶²

The demographics of the workforce in the late 19th and early 20th centuries were drastically different from those of the 21st century. Just as the U.S. economy traditionally attracted immigrant labor, the meatpacking industry also has been a magnet for immigrant labor. In 1909, Hispanics comprised only 1% of the meatpacking workforce.¹⁶³ The majority of the workers were new Eastern European immigrants from Poland and Lithuania.¹⁶⁴ In addition to his claims that stockyards were unsanitary and selling diseased meat, Upton Sinclair also focused on the treatment of the workers.¹⁶⁵ He expressed some disappointment that most of the focus had been on regulating the unsanitary conditions of the meat rather than the workers. He stated that he “aimed at the public’s heart and by accident hit its stomach.”¹⁶⁶ Some of the mistreatment Sinclair focused on was the hiring of cheap labor to replace the meatpacking employees. The supply of cheap labor available at that time consisted of black workers migrating from the South. Because of this migration, this group comprised 29.5% of the work-

¹⁵⁸ SINCLAIR, *THE JUNGLE*, see *supra* note 2, at 131 (“He had learned by this time that Packing-town was really not a number of firms at all, but one great firm, the Beef Trust.”).

¹⁵⁹ ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 136-37 (2001).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² RICK HALPERN & ROGER HOROWITZ, *MEATPACKERS: AN ORAL HISTORY OF BLACK PACKINGHOUSE WORKERS AND THEIR STRUGGLE FOR RACIAL AND ECONOMIC EQUALITY* 3 (1996).

¹⁶³ LABOR PRACTICES IN THE MEAT PACKING INDUSTRY, *supra* note 155, at 13.

¹⁶⁴ *Id.*

¹⁶⁵ SINCLAIR, *THE JUNGLE*, *supra* note 2, at 30-31 (“In all their journey they had seen nothing so bad as this. Poni Aniele had a four-room flat in one of that wilderness of two-story frame tenements that lie “back of the yards.” There were four such flats in each building, and each of the four was a “boardinghouse” for the occupancy of foreigners—Lithuanians, Poles, Slovaks, or Bohemians. Some of these places were kept by private persons, some were cooperative. There would be an average of half a dozen boarders to each room—sometimes there were thirteen or fourteen to one room, fifty or sixty to a flat... Such was the home to which the new arrivals were welcomed.”).

¹⁶⁶ Upton Sinclair, *What Life Means to Me*, 41 *COSMOPOLITAN* 591, October 1906.

force in 1928.¹⁶⁷ The increase was also due in part to attempts by unions to organize the meatpacking employees. During strikes, the companies would replace the strikers with black workers. Eventually the Black American workforce outnumbered the Europeans and they joined the union.¹⁶⁸ Meatpacking jobs became sources of stability and a pathway into the middle class for blacks and other workers. Blacks also had a strong presence in poultry processing. For example, Crider Poultry's workforce was 70% black in the mid-1990s.¹⁶⁹

The demographics began to change dramatically when the meatpacking companies decided to relocate the plants from urban to rural areas. This resulted in a new reliance on the Hispanic labor force. This transformation began in 1960 when plants began moving based upon a plan created by the Iowa Beef Processors, Inc. (IBP) meatpacking company. IBP wanted to operate in a non-union environment and pay low wages. "If we paid the base rate the union wants," an IBP official reportedly stated, "our whole program would fail."¹⁷⁰ The plan was to leave the urban centers and move to livestock source states with little tradition of union representation like Kansas, Iowa, and Nebraska. In addition to being able to pay lower wages, transportation costs would be cut by slaughtering the livestock in locations near the areas where most cattle are raised. Most urban workers, black and white, chose not to move. Eventually, this became the standard for the large meatpacking companies. At first, the relocation may have seemed odd because the rural areas selected had low unemployment rates and the companies were not planning to pay high wages in order to lure workers from other employers. While some companies that rely on less-skilled workers relocate to high-immigrant communities, this was not the strategy used in the meatpacking industry. Its strategy was to bring or lure workers to the remote locations.¹⁷¹ IBP even opened plants in locations where many of the townspeople objected.¹⁷²

¹⁶⁷ LABOR PRACTICES IN THE MEAT PACKING INDUSTRY, *supra* note 155, at 13.

¹⁶⁸ See ROGER HOROWITZ, NEGRO AND WHITE, UNITE AND FIGHT!: A SOCIAL HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930-90, at 94-103 (1997); HALPERN & HOROWITZ, *supra* note 162.

¹⁶⁹ UNIV. OF CAL.-DAVIS MIGRATION CTR., ENFORCEMENT: SWIFT, CRIDER, RURAL MIGRATION NEWS, Jan. 2008, http://migration.ucdavis.edu/rmn/more.php?id=1270_0_4_0.

¹⁷⁰ HOROWITZ, *supra* note 168, at 261 (quoting Arden Walker, former head of labor relations for IBP).

¹⁷¹ *Id.* at 277 (discussing how the availability of "federal job training programs to subsidize transportation and training costs" of new immigrants aided the recruitment process); UNIV. OF CAL.-DAVIS MIGRATION CTR., OPERATION VANGUARD, IBP, RURAL MIGRATION NEWS, July 1999, http://migration.ucdavis.edu/rmn/more.php?id=377_0_2_0 (reporting that recruiters operate in Mexico and the U.S.); Christopher Drew, *A Chain of Setbacks For Meat Workers*, CHI. TRIB., Oct. 25, 1988, at 1.

¹⁷² Joe Duggan, *Growing Pains in Racially Changing Rural, Small Towns*, LINCOLN J. STAR (Lincoln, Neb.), June 10, 2001, at A1, available at <http://www.ruralwomyn.net/lexington.html> (hereinafter Duggan, LINCOLN J. STAR) (reporting on changes in Lexington, Neb.).

Coupled with the relocation tactics were plans for increased mechanization and the elimination of skilled workers in favor of low skilled or unskilled workers. Workers who would perform repetitive tasks replaced skilled butchers. The companies looked for ways to speed production and provide low-level training. Workers performing these tasks could easily be replaced. Meatpacking jobs became low-skilled jobs and the immigrant flow began to depress the wage-rate of the low-skilled jobs.¹⁷³

By the time that IBP entered the meatpacking industry in the 1960s, the four largest meatpackers controlled 21% of the industry.¹⁷⁴ By 2000, with the relocations, new plans of operation, and mergers and acquisitions, the top four meatpacking companies controlled 85% of the industry.¹⁷⁵ One major acquisition was poultry processor Tyson Foods' acquisition of IBP in 2001 for about \$3.2 billion.¹⁷⁶ This level of control and consolidation allowed the companies to force the unions to adopt a plant-by-plant negotiating strategy that led to a decrease in the power of the unions. The creation of low-skilled, repetitive process jobs¹⁷⁷ allowed the companies to build facilities that could simply increase production in the case of a strike at a similar plant. As the 1989 Hormel strike in Minnesota illustrated, workers still tried to use strikes to hold on to the gains they had made in the plants. Despite their efforts, the success of the unions and the strikes began to fade.¹⁷⁸

¹⁷³ Donald D. Stull & Michael J. Broadway, *Meat Processing and Garden City, KS: Boom and Bust*, 22 J. RURAL STUD. 55 (2006) (noting meatpacking wages in 1960 were 15% above average manufacturing wages and by 2002 they were 25% below). The Bureau of Labor Statistics includes the meatpacking and poultry processing workers in the production, transportation, and material moving group which has a higher percentage of foreign than native-born workers. See LABOR FORCE CHARACTERISTICS IN 2007, *supra* note 38 and accompanying text.

¹⁷⁴ Dyer, GREELEY TRIB., *supra* note 127.

¹⁷⁵ *Id.*

¹⁷⁶ *Tyson to Acquire No. 1 Beef Supplier IBP for \$3.2 Billion*, L. A. TIMES, Jan. 2, 2001, at C1, available at <http://articles.latimes.com/2001/jan/02/business/fi-7280>.

¹⁷⁷ Jennifer Ludden, All Things Considered: Former Workers File Suit Over Illegal Hiring (National Public Radio Jan. 8, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=6749042> (interviewing Professor Lance Campa of Cornell University and discussing the phenomenon that occurred in the 1980s when the meatpacking companies revolutionized the industry by breaking down the work into single, repetitive tasks resulting in a loss of skilled positions and making lower wages possible).

¹⁷⁸ Dyer, GREELEY TRIB., *supra* note 127; Matt McKinney, *Meatpacking Raids Illustrate How Much Industry Has Changed: Automation and Declining Wages Opened the Door to Immigrant Workers*, STAR TRIB. (Minneapolis - St. Paul, Min.), Dec. 26, 2006, at 1A, available at http://www.swifraid.org/media/articles/http___www.startribune.com%20%20Meatpacking%20raids%20illustrate%20how%20much%20industry%20has%20changed.pdf. See generally PETER RACHLEFF, *HARD-PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* (1993); *AMERICAN DREAM* (Cabin Creek 1990) (recounting the 1989 strike against Hormel Foods in an Academy Award-winning documentary film).

These changes resulted in the industry's ability to cut its hourly wages by nearly half while increasing output per worker.¹⁷⁹ The packing industry also reported the highest rate of injuries or illnesses causing workers to lose work time or be transferred to less physically demanding jobs.¹⁸⁰ What had once been the highest paying of all manufacturing jobs became one of the lowest. By 2004, in many places the wage rate for meatpacking employees had dropped from the 1982 average of \$17 an hour to an average industry rate of \$12 an hour, and many workers were paid even less, at a wage rate of \$8 to \$10 per hour.¹⁸¹

Mark Grey concluded that “[u]ltimately, [the meatpackers’ concern] is not about a stable workforce, but maintaining a transient workforce.”¹⁸² Another commentator added that turnover “may well be a desirable component of the meatpackers’ business model” and cited in support of his conclusion the 1984 testimony of Arden Walker, former head of labor relations for IBP, during a hearing of the National Labor Relations Board (NLRB):

We found very little correlation between turnover and profitability. An employee leaves for whatever reason. Generally, we’re able to have a replacement employee, and I might add that the way fringe benefits have been negotiated or installed, they favor long-term employees. For instance, insurance, as you know, is very costly. Insurance is not available to new employees until they’ve worked there for a period of a year or, in some cases, six months. Vacations don’t accrue until the second year. There are some economies, frankly, that result from hiring new employees.¹⁸³

Furthermore, a 2006 congressional report states: “In a carefully structured and highly competitive industry, high turnover may not be accidental. Some would argue that worker retention may be neither desirable—nor profitable.”¹⁸⁴ This phenomenon is possible because the work has evolved into specific low-skilled tasks that can be performed by easily-replaced, unskilled immigrant labor.¹⁸⁵ The skilled, highly paid jobs that facilitated

¹⁷⁹ See MICHAEL OLLINGER, ET AL., U. S. DEP’T OF AGRIC., ECON. RESEARCH SERV., STRUCTURAL CHANGE IN THE MEAT, POULTRY, DAIRY, AND GRAIN PROCESSING INDUSTRIES 9 (2005), <http://www.ers.usda.gov/publications/err3/err3.pdf>.

¹⁸⁰ See Roger Horowitz, *Government, Industry Play the Numbers Game on Worker Safety in Meatpacking Plants*, LABOR NOTES MAGAZINE, June 2008, <http://labornotes.org/node/1681> (last visited Nov. 18, 2008) (noting that even with the changes made to recording injuries in 2002, the U.S. Bureau of Labor Statistics found “in 2006 meatpacking still had the highest injury rate among industries with more than 100,000 workers”).

¹⁸¹ See Mike Hughlett, *Meatpackers See Wages Fall One Rural Plant’s Workers, Many Of Them Immigrants, Will Vote On Unionizing Today*, ST. PAUL PIONEER PRESS, May 5, 2004, at A1 (hereinafter Hughlett, ST. PAUL PIONEER PRESS).

¹⁸² Christopher Cook, *Hog-Tied: Migrant Workers Find Themselves Trapped on the Pork Assembly Line*, THE PROGRESSIVE, Sept. 1999, at 32.

¹⁸³ Dyer, GREELEY TRIB., *supra* note 127.

¹⁸⁴ LABOR PRACTICES IN THE MEAT PACKING INDUSTRY, *supra* note 155, at 35.

¹⁸⁵ U.S. GOV’T. ACCOUNTABILITY OFFICE, WORKPLACE SAFETY AND HEALTH: SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED 17 (Jan.

movement of the workers into the middle class no longer exist. Professors Champlin and Hake observed that the shift in location was “accompanied by a shift from the use of well-paid, unionized workers to a low-wage workforce composed almost entirely of immigrant labor from Mexico.”¹⁸⁶ At first, Mexican labor became, as had blacks in the early 20th century, the source of labor when the labor force went on strike. Dyer’s description of an IBP incident concludes: “In one of the clearest examples of things to come, union workers went on strike at IBP’s Dakota City, Neb., plant in 1969. IBP brought in Mexican workers to break the strike. They never left.”¹⁸⁷ From that point on, there has been even more transformation in the workforce and concentration of ownership in the industry.¹⁸⁸

By 2000, four firms processed 85% of all beef, up from 36% in 1980; the top four hog processors handled more than 50% of federally inspected hogs; and ownership also became concentrated in the poultry industry but to a lesser extent.¹⁸⁹ Poultry processing is concentrated in the South and meatpacking is concentrated in the Midwest, both of which are areas where the Latino population has traditionally been low.¹⁹⁰ The workforce became overwhelmingly Latino and undocumented.¹⁹¹ For example, in Minnesota,

2005), <http://www.gao.gov/new.items/d0596.pdf> (hereinafter WORKPLACE SAFETY IN THE MEAT INDUSTRY).

¹⁸⁶ Dell Champlin & Eric Hake, *Immigration as Industrial Strategy in American Meatpacking*, 18 REV. OF POL. ECON. 49 (2006).

¹⁸⁷ Dyer, GREELEY TRIB., *supra* note 127.

¹⁸⁸ See generally Champlin & Hake, *supra* note 186; See also Sylvia R. Lazos Vargas, *Missouri, The “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 777-78 (2002) (discussing attractiveness of meatpacking jobs for both authorized and undocumented immigrants from Mexico and Central America due to the great disparity in wages between the immigrant’s home country and the U.S.).

¹⁸⁹ See MICHAEL OLLINGER, ET AL., U.S. DEP’T OF AGRIC., AGRIC. ECON. REPORT NO. 787: STRUCTURAL CHANGE IN U.S. CHICKEN AND TURKEY SLAUGHTER 6-10 (2000), <http://www.ers.usda.gov/publications/aer787/aer787.pdf> (concluding that the top four poultry processors control less than half of the final product market); U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., SPECIAL ARTICLE: CONSOLIDATION IN MEATPACKING: CAUSES & CONCERNS, AGRIC. OUTLOOK, June-July 2000, <http://www.ers.usda.gov/publications/agoutlook/jun2000/ao272i.pdf>.

¹⁹⁰ See generally Sylvia R. Lazos, “*Latino/o-ization*” of the Midwest: *Cambio de Colores* (Change of Colors) as *Agromaquilas* Expand Into the Heartland, 13 BERKELEY LA RAZA L.J. 343 (2002). By 2007 the foreign born comprised 24.6% of the total labor force in the West, 18.3% in the Northeast, and 13.7% in the South. By comparison, only 7.5% of the total labor force in the Midwest was foreign born. Nationally, Hispanics comprised 50.0% of the foreign-born labor force. See LABOR FORCE CHARACTERISTICS IN 2007, *supra* note 38, at 1-2.

¹⁹¹ One GAO 1998 federal study estimated that in Iowa and Nebraska—two prime meat-processing states—as many as one in four meatpacking workers were undocumented. See WORKPLACE SAFETY IN THE MEAT INDUSTRY, *supra* note 185, at 29, referring to U.S. GEN. ACCT. OFFICE, COMMUNITY DEVELOPMENT: CHANGES IN NEBRASKA’S AND IOWA’S COUNTIES WITH LARGE MEATPACKING PLANT WORKFORCES (Feb. 1998), <http://www.gao.gov/archive/1998/rc98062.pdf>. See also STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA’S FAVORITE FOOD (Yale U. Press 2005) (discussing the increased reliance on Hispanic labor in the poultry industry).

it was reported that about 35% of U.S. meatpacking workers in 2000 were Hispanic, up from under 10% in 1980.¹⁹² Union membership of meatpacking workers went from 33.4% in 1983 to 19.6% in 2002.¹⁹³ Nationally, the percentage of Hispanic workers in meatpacking rose to about 35% in 2000 from 15% in 1990, and the non-Hispanic white share of the industry's workforce fell from about 75% to 40%.¹⁹⁴ The meatpacking industry found a continuous labor supply in new immigrants seeking to increase their earnings, even if the wages were drastically lower than those of their predecessors.

3. Operation Vanguard

In 1999, the Clinton administration established Operation Vanguard in response to the reported presence of large numbers of undocumented immigrants working in meatpacking plants. This initiative was launched in conjunction with a stepped up wave of worksite enforcement operations including raids. The meatpacking plants in Iowa and Nebraska became the primary focus of an operation, which was originally called Operation Prime Beef. The INS subpoenaed plant records and then compared them with national Social Security records. The INS would send "Do-Not-Hire" letters rather than engage in raids. Employees suspected of being unauthorized to work were given a few days to present proper documents. Some of the employees had purchased "papers" while others had used papers belonging to friends and had no choice but to leave. The INS did follow-up inspections every sixty days. After determining that the program was successful, the INS expanded it to other states. The expansion to other states is also attributed to complaints from Nebraska's congressional delegation and Governor that Operation Vanguard should not be located in Nebraska because of the low unemployment rate in the state, shortage of labor, and its "adverse economic impact on agriculture" resulting in a decline in livestock prices.¹⁹⁵

Prior to IBP's acquisition by Tyson, it had been raided several times between 1994 and 1997. Raids slowed under Operation Vanguard between 1999 and 2003 until the operation was expanded to other states and the ICE

¹⁹² Hughlett, ST. PAUL PIONEER PRESS, *supra* note 181 (citing William Kandel, U.S. Dep't of Agric., and U.S. Bureau of Labor Statistics, Barry Hirsch of Trinity Univ. in Texas, and Minnesota Dep't of Empl. and Econ. Dev.).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See NAT'L IMMIGRATION LAW CTR., INS QUESTIONS NEBRASKA MEATPACKING WORKERS AS PART OF OPERATION VANGUARD, IMMIGRANTS' RIGHTS UPDATE 16, May 28, 1999, <http://www.nilc.org/pubs/iru/1999/iru3-99.pdf>; UNIV. OF CAL.-DAVIS MIGRATION CTR., OPERATION VANGUARD, *supra* note 171.

stepped up the raids.¹⁹⁶ A Tyson poultry plant located in Arkansas was raided in July 2005. ICE arrested 119 plant workers as illegal aliens. Of those arrested, two were from Honduras, one was from El Salvador, one was from Guatemala, and the rest were from Mexico.¹⁹⁷ The Crider poultry-processing plant in Stillmore, Georgia was raided in September 2006 after having been inspected during the summer. Crider lost about two-thirds of its workforce and 75% of its Hispanic workers. In its attempts to replace the workers, the company raised its wage rates and first turned again to black workers as replacements. Crider's supervisors were reportedly dissatisfied when the workers complained of injuries suffered from slips and falls on the job and began looking elsewhere for other types of employees. Crider recruited Laotian Hmong refugees to move from Minnesota to Georgia, convicted felons eligible for work release programs, and homeless individuals from a nearby rescue mission. Some jobs were also outsourced to an Alabama Crider location.¹⁹⁸

The December 2006 ICE raids of the Swift Company plants arose in part from a public call for the DHS to crack down on businesses hiring undocumented workers. Although Swift was not charged with any immigration violations, its hardship came in the form of having to find new workers, lost production, and the cost of defending lawsuits. Swift reported a slowdown in its operations after the raids, \$30 million in lost production, and the necessity of hiring and training replacements. Swift indicated that it was easy to find replacement workers because of the publicity from the raids.¹⁹⁹ Other companies that have experienced raids have not found it so easy to find replacements.

Smithfield Foods, the world's largest hog processor, was raided in January 2007. The Tar Heel, North Carolina raid came after Smithfield had been cooperating with ICE since July to verify the status of its 5,200 employees.²⁰⁰ At that time, nearly half of the plant's employees described

¹⁹⁶ See Spencer S. Hsu & Kari Lydersen, *Illegal Hiring Is Rarely Penalized: Politics, 9/11 Cited in Lax Enforcement*, WASH. POST, June 19, 2006, at A01.

¹⁹⁷ See Molly Hennessy-Fiske, *The Town That Didn't Look Away*, L.A. TIMES, July 23, 2006, at A1, available at <http://articles.latimes.com/2006/jul/23/nation/na-arkadelphia23>; Melissa Nelson, *Huckabee Looks into INS Raid — Children Left Behind After Parents Deported*, MEMPHIS COM. APPEAL, Aug. 3, 2005, at B2.

¹⁹⁸ See Jennifer Ludden, Morning Edition: Hmong Fill Jobs Left Empty by Immigration Raid, (National Public Radio broadcast May 29, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10461104>. See also Evan Perez, *An Immigration Raid Aids Blacks — For a Time*, WALL ST. J., Jan 17, 2007, at A1.

¹⁹⁹ See Jeff Brady, Day to Day: An Immigration Raid's Fallout in Colorado (National Public Radio broadcast Mar. 14, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=8895914>; Christina Tatum, *Swift Raids Slice \$30 Million, Packer Says*, DENVER POST, Jan. 5, 2007, at C01, available at http://www.denverpost.com/ci_4952703.

²⁰⁰ Smithfield participated in ICE's IMAGE program referred to *supra* note 136. See Al Greenwood, *Meat Plant Follows Accord*, THE FAYATTEVILLE OBSERVER (N.C.), Dec. 16, 2006, available at <http://www.highbeam.com/doc/1G1-156023548.html>.

themselves as Hispanic, and 37% as African-American. Twenty-one workers were arrested in the raid. An immigration official reported that of the twenty-one workers who were arrested and would be deported, eighteen were Mexicans and three were Guatemalans.²⁰¹ A subsequent raid, conducted in August 2007 resulted in the arrest of twenty-eight Hispanic people accused of identity theft.²⁰²

Pilgrim's Pride Corp., one of the nation's largest chicken producers, is based in Pittsburgh, Texas and has 55,000 employees. It was subjected to a small-scale raid at its Dallas, Texas facility in 1992, but beginning in April 2008, it was subjected to a major five-state raid in which its plants in Mount Pleasant, Texas; Batesville, Arkansas; Live Oak, Florida; Moorefield, West Virginia; and Chattanooga, Tennessee were raided. Rather than seeking to charge the employer with violations, the target of these raids, like most recent raids, was to arrest and charge employees with civil and criminal penalties related to identity theft, document fraud, and unauthorized work.²⁰³

4. Lawsuits Related to the Employment of Unauthorized Workers

The increased ICE investigations and raids of meatpackers and poultry processors have led to few civil or criminal charges against the employers probably because of their participation in the BPPs, E-verify, or Image. In addition, federal prosecutors may have been discouraged after Tyson and its employees were acquitted of smuggling charges in March 2003. In December 2001, Tyson and six of its employees were indicted after an investigation, which began in 1997, led the government to conclude that Tyson was smuggling illegal aliens into the country. One of those indicted committed suicide and two others pleaded guilty and cooperated with the government.²⁰⁴ Tyson and the other employees, however, were acquitted in the trial held in the United States District Court for Eastern Tennessee.²⁰⁵

²⁰¹ Darryl Fears & Krissah Williams, *In Exchange for Records, Fewer Immigration Raids; Businesses Skeptical of New Federal Program*, WASH. POST, Jan. 29, 2007, at A3; Julia Preston, *Immigration Raid Draws Protest From Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A17.

²⁰² Mike Baker, Associated Press, *25 Illegal Immigrants Arrested in N.C. Hog Slaughterhouse Raids Face ID Theft Charges*, SOUTH COAST TODAY, Aug. 29, 2007, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20070829/NEWS/708290370>; *North Carolina: Raid at Hog Processing Plant*, N.Y. TIMES, Aug. 24, 2007, at A15.

²⁰³ Anabelle Garay, Associated Press, *Hundreds Arrested in Immigration Raid; Charges of Identity Theft, Fraud Follow Sweep of Poultry Plants in W.Va., Four Other States*, CHARLESTON DAILY MAIL (W. VA.), Apr. 17, 2008, at P2A.

²⁰⁴ See Ken Ellingwood, *Tyson Smuggled Help for Years, U.S. Alleges*, L.A. TIMES, Feb. 6, 2003, at 18; Univ. of Cal.-Davis Migration Ctr., *Sanctions: INS vs. Tyson*, RURAL MIGRATION NEWS, July 2002, http://migration.ucdavis.edu/mn/more.php?id=601_0_4_0.

²⁰⁵ See UNIV. OF CAL.-DAVIS MIGRATION CTR., *SANCTIONS: TYSON ACQUITTED, RURAL MIGRATION NEWS*, Apr. 2003, http://migration.ucdavis.edu/rmn/more.php?id=12_0_4_0.

There have been numerous other raid-related lawsuits filed including those filed by employees against employers, civil and criminal charges filed against former employees by the government, lawsuits filed by employers against unions,²⁰⁶ and lawsuits filed against the government regarding its treatment of workers during the raids.²⁰⁷ Complaints have also been filed by unions with the NLRB.²⁰⁸

The lawsuits that seem to be most directly related to claims that meatpacking companies are deliberately recruiting and hiring undocumented workers are those based upon the RICO statute. RICO lawsuits have been filed against Tyson Foods and Swift. In *Trollinger v. Tyson Foods, Inc.*, authorized current and former legal workers alleged in their complaint that Tyson had intentionally hired illegal immigrant workers to depress the wages of plant employees.²⁰⁹ Tyson was granted summary judgment in February 2008.²¹⁰ The district court judge concluded that, although the employees were able to show that Tyson knowingly hired at least ten unauthorized employees at its Corydon, Indiana facility, they were unable to prove this occurred at the other seven facilities, and they were unable to show that the hiring artificially reduced their wages.²¹¹

In *Valenzuela v. Swift*,²¹² former and current employees alleged that Swift, among other things, engaged in a scheme to hire unauthorized immi-

²⁰⁶ See, e.g., *Smithfield Foods Inc. v. United Food & Com. Workers Int'l Union*, 2008 WL 4899543 (E.D. Va. Oct. 23, 2008). See also Adam Liptak, *A Corporate View of Mafia Tactics: Protesting, Lobbying and Citing Upton Sinclair*, N.Y. TIMES, Feb. 5, 2008, at A14 (alleging pressure tactics and smear campaign in violation of RICO to get company to surrender to the Union). Some of the allegations relate to statements made by the Union and included in a Human Rights Watch report. See HUMAN RIGHTS WATCH, IMMIGRANT WORKERS IN THE UNITED STATES MEAT & POULTRY INDUSTRY, Dec. 14, 2005, <http://www.hrw.org/backgrounders/usa/un-sub1005>.

²⁰⁷ See, e.g., *Complaint, United Food & Com. Workers Int'l Union v. U.S. Dep't of Homeland Sec.*, No. 2:07CV-188-J (N.D. Tex. Sept. 12, 2007).

²⁰⁸ See Hughlett, ST. PAUL PIONEER PRESS, *supra* note 181 (reporting that United Food and Communications Workers Local 789 filed a complaint on April 23, 2004 with the National Labor Relations Board, saying that a Minnesota Beef manager told an employee that if that employee votes for the union, he would call the local police department; manager told workers that police would stop workers and take away their "papers" and vehicles because they were illegal).

²⁰⁹ *Trollinger v. Tyson Foods, Inc.*, 2008 WL 1984264 (E.D. Tenn. May 02, 2008) (filed in 2002 and Tyson was initially granted summary judgment in part because the judge agreed with Tyson's claim that the plaintiffs lacked standing because they could not show a direct cause of their injuries, and if a claim existed, it would belong to the union who negotiated the wages)

²¹⁰ *Id.*

²¹¹ *Id.* See generally *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 622 (6th Cir. 2004); *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840 (E.D. Tenn. 2002) (criminal charges were still pending against Tyson, the dismissal was appealed and the Sixth Circuit took note of this fact when it reversed and remanded the case to the district court. In so doing, the court warned that summary judgment might be granted if the basis of employees' claim revealed "a causal relationship that is too weak or too attenuated.")

²¹² Original Complaint, *Valenzuela v. Swift*, No. 06-CV-2322 (N.D. Tex. Dec. 15, 2006), 2006 WL 3747439; see *supra* note 59.

grants, assisted in the falsification of documents, and ignored obvious facts that indicated the documents did not belong to the people presenting them. One former employee reported noticing that some of the recently hired workers were from El Salvador and Guatemala and had names like “Smith” and that when she pointed this out to a manager no action was taken.²¹³ She was later fired because of a work-related injury.²¹⁴

C. *Reforms in Immigration and Labor Laws*

The preceding sections demonstrate that determining the optimal immigration policy is complex. There are so many variables in determining the economic effects of immigrants that in 1995 the Commission recommended that a periodic review should be conducted to discuss the permissible levels of immigration. This review would ensure that the desired goals of family unity, economic stimulation, and protection of U.S. workers should be seriously considered as Congress continues its attempts to enact immigration laws. Immigration policy is not determined solely by economics. Additional factors for consideration are the political questions regarding sovereignty, allegiance, and security as well as the cultural aspects of identity, values, and customs.

III. ORDER IN THE JUNGLE: BALANCING POLICY WITH THE RULE OF LAW

Some of us are illegal, and some are not wanted,
Our work contract's out and we have to move on;
Six hundred miles to that Mexican border,
They chase us like outlaws, like rustlers, like thieves.
Deportee by Woody Guthrie²¹⁵

Immediately after he was elected, President George W. Bush sought to amend the INA to address migration from Mexico. Between President Bush's speech in January 2004 and the end of 2007, Congress made many failed attempts at amending the immigration statute to address migration from Mexico as well as the presence of large numbers of undocumented immigrants.²¹⁶ In reaction to these attempts, there were marches in the street to protest provisions that imposed onerous conditions on aliens.²¹⁷

²¹³ Ludden, National Public Radio, *supra* note 177.

²¹⁴ *Id.*

²¹⁵ Woody Guthrie, Lyrics: Deportee (Plane Wreck at Los Gatos), available at <http://www.woodyguthrie.org/Lyrics/Deportee.htm> (last visited Jan. 17, 2009).

²¹⁶ See generally Johnson, *Hurricane Katrina*, *supra* note 67, at 25-26; David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 527-32 (2007).

²¹⁷ See Johnson, *Hurricane Katrina*, *supra* note 67, at 56-58.

The media was also filled with reports that citizens were reacting to the failure of Congress and the President to secure the borders.²¹⁸ Some of these reactions demonstrate that immigration policies are not determined by economics alone. The civil and political rights of citizens and aliens, as illustrated by the above-quoted Woody Guthrie song lyrics, as well as social and cultural relationships, are affected by and influence the adoption of immigration laws. The history of immigration laws reflects the various political demands involved in the process. Yielding to some political demands may result in laws that deprive individuals of perceived rights. The ensuing debate focuses on three primary issues: (1) who is entitled to rights in the United States, (2) whether the United States under sovereignty principles is allowed to adopt immigration policies without any restraint imposed by the Constitution or principles of international law, and (3) how these adopted policies will be enforced.

A. *Concepts of Sovereignty, Rights, and Immigration*

The development of immigration law is based primarily on the two doctrines of sovereignty and plenary power. The sovereignty doctrine is often cited as a basis for the Supreme Court's deference to the political branches in immigration matters.²¹⁹ While not an enumerated power, the Supreme Court has determined that a more general principle of sovereignty provides the basis for congressional authority over immigration.²²⁰ This conclusion is based on the recognition in international law that each sovereign state has the power to place unlimited restraints upon foreigners coming into its territory.²²¹

The plenary power doctrine establishes the principle that empowers the political branches of the government, Congress and the Executive branch, to exercise immigration authority with very little interference from the judicial branch.²²² Under this doctrine, the Supreme Court has given

²¹⁸ *Id.* Although Congress failed to pass comprehensive immigration legislation, it did pass the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended at 8 U.S.C. § 1103 (2006)) which authorized the building of a fence along the border, and the REAL ID Act of 2005 §§ 101(f)(2), 106(a)(1)(ii), 106(b), Pub. L. No. 109-13, 119 Stat. 231, 305, 310-11 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)) which, among other things, adopted stringent requirements for obtaining a driver's license or identification card that would be valid for federal purposes.

²¹⁹ *See, e.g.,* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandell, 408 U.S. 753, 766 (1972).

²²⁰ *Id.*

²²¹ *See, e.g.,* Kleindienst, 408 U.S. at 765-66 (referring to the "ancient principles of the international law of nation-states" in support of assertion that the power to exclude is unlimited).

²²² The plenary power doctrine also establishes the principle that immigration authority lies with the federal government rather than the states. *See also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Hiroshi

great deference to immigration law and policy decisions made by the other political branches.²²³ Included in these powers is the authority to decide which aliens can enter or remain in the country and under what conditions. This authority is viewed as consistent with the constitutional structure that places matters of national concern in the control of the political branches. Included in this group of political decisions are international law matters, citizenship, and security.

When making these kinds of decisions, the political branches of government can and should be responsive to the public. If they fail to act according to the political will of the people, the citizenry can make its displeasure known at the ballot box. Political pressures, however, can sometimes lead to ill-advised legislation because of the desire to please various constituents. For example, as one scholar has noted with respect to the 1996 amendments to the INA, “the legislative process that produced IIRIRA . . . evinces political rhetoric dictating legislative policy in absence of reasoned discourse.”²²⁴

Political pressures from those affected by labor decisions in the meatpacking industry, as in other industries, can lead to conflicting demands. These conflicts are often discussed in terms of those who are either anti-immigration or pro-immigration.²²⁵ However, the various interests, as demonstrated by the meatpacking industry, cannot be expressed in such simple terms. For example, the former meatpacking employees involved in the lawsuits discussed above want immigration and labor laws to be reformed and interpreted in their favor. They cannot be categorized wholesale as anti-immigration because many of them are immigrants, but they cannot be simply described as pro-immigration since they view the presence of many new immigrants, especially undocumented immigrants, as causing them harm. Consumers who want reasonably priced meat and poultry may benefit from labor provided by new immigrants, and they may demand the reasonable prices while at the same time arguing against immigration or the

Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

²²³ See Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1990 (2000) [hereinafter Neuman, *Jurisdiction*] (discussing application of the doctrine to substantive immigration policy with some limits applying to procedural issues).

²²⁴ Medina, *supra* note 19, at 729.

²²⁵ The groups are often referred to as restrictionists and as immigration advocates, respectively. See, e.g., Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: the Mixed Messages of Federal Policies*, 16 TEMP. POL. & CIV. RTS. L. REV. 367 (2007); Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 638 (2006); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 217-19 (1994); Chris Weinkopf, Editorial, *License Issue A Rocky Road For Arnold*, DAILY NEWS (L.A.), Nov. 18, 2007, at VI (suggesting that Governor Schwarzenegger tried to appease both immigration advocates and restrictionists with respect to his position on driver licenses for noncitizens).

specific immigrants providing the labor.²²⁶ In addition, the natural migration pressures that lead to a constant stream of immigrants willing to take meatpacking jobs may place obstacles in the way of the attempted responses to domestic political pressures.

Throughout the 20th century, numerous scholars have criticized the continued application of the plenary power doctrine in cases challenging the immigration actions of the political branches.²²⁷ Scholars have also criticized the more restrictionist²²⁸ laws and practices that recently developed in response to terrorist events in the United States and have caused even greater concern for the treatment of aliens. On the other hand, others have argued that being tough on immigration is necessary to assure the security of the nation. While many nations, such as European Union countries, are forced to reexamine their immigration laws because of the changing relations caused by the adoption of new social and political relationships, in many ways these relationships have been static or at least slow to change in the United States especially with respect to countries such as Mexico. Therefore, rather than focusing on changing relationships, the United States should focus on changing immigration laws to realistically accommodate existing relationships. Changing political pressures coupled with the migration flows linked to economic activity will determine the political responses.

The treatment of aliens presents another basis for political pressure to change immigration law and practices. The INA distinguishes between citizens (or nationals) and aliens. An alien is “any person not a citizen or national of the United States,”²²⁹ and a national of the United States is “a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”²³⁰ Within the alien category are immigrants who are authorized to enter and remain in the United States either permanently or temporarily, and those who are not authorized. An analysis of constitutional jurisprudence leads to the conclusion that immigrants in the United States generally receive constitutional protections for non-immigration matters but not so with respect to substan-

²²⁶ See generally STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, *THE LABOR MARKET IMPACT OF IMMIGRATION: A REVIEW OF RECENT STUDIES* (1998), <http://www.cis.org/articles/1998/back198.html>.

²²⁷ See Johnson, *Hurricane Katrina*, *supra* note 67 at 34 (citing T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 7 (2002), GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION - IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 118-33 (1996), and Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005)).

²²⁸ These laws include the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), the USA PATRIOT Act, and the REAL ID Act of 2005. See *supra* notes 11, 77 and accompanying text.

²²⁹ Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1996). See *supra* note 7.

²³⁰ *Id.* § 101(a)(22), 8 U.S.C. § 1101(a)(22) (1996).

tive immigration matters. For example, invidious discrimination based upon race has not been tolerated except in approving immigration laws.²³¹ Constitutional challenges to immigration provisions that have discriminated on the basis of race, gender, ideology, sexual preference, and legitimacy have all been rejected.²³² The sovereignty doctrine has provided a basis for rejecting these challenges. As the Supreme Court has stated: “The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.”²³³ In addition, it is agreed that there are some political rights available only to citizens,²³⁴ but there is debate about what those specific rights are.²³⁵ While some of these issues are addressed in international law principles and treaties, these sources fail to provide definitive answers. It is not clear what rights exist under international law, and even if international law applies, how these rights might be claimed.²³⁶ Nonetheless, an examination of international law may provide a basis to challenge immigration law and practices or in some cases justify measures that are claimed to treat immigrants harshly.²³⁷ The Universal Declaration of Human Rights (UDHR),²³⁸ the International Covenant on

²³¹ Compare *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *Chae Chan Ping v. U.S. (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (permitting racial discrimination in immigration laws) with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down city ordinance that discriminated against Chinese on the basis of race).

²³² See, e.g., *Fiallo*, 430 U.S. at 787 (1977) (gender and legitimacy); *Kleindienst*, 408 U.S. at 753 (1972) (ideology); *Boutilier v. I.N.S.*, 387 U.S. 118 (1967) (sexual preference); *Fong Yue Ting*, 149 U.S. at 698 (1893) (race); *The Chinese Exclusion Case*, 130 U.S. at 581 (1889) (race).

²³³ *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

²³⁴ See generally Raquel E. Aldana, *Silent Victims No More?: Moral Indignation and the Potential for Political Mobilization in Defense of Immigrants*, 45 HOUS. L. REV. 73 (2008) (discussing the lack of political influence of immigrants); Johnson, *Hurricane Katrina*, *supra* note 67, at 68 (concluding that noncitizens lack basic political rights such as voting); Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 374-75 (2001) (discussing the effect that new immigrants can have on immigration policy as they become a voting majority).

²³⁵ AVIVA CHOMSKY, “THEY TAKE OUR JOBS!”: AND 20 OTHER MYTHS ABOUT IMMIGRATION xiii (2007) (noting that a large number of the U.S. population lacks full rights of citizenship).

²³⁶ See generally Sandra Day O’Connor, Assoc. Justice, U.S. Sup. Ct., Remarks to the Southern Center for International Studies 1-2 (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf (arguing that citation to foreign and international law “will create that all-important good impression,” and explaining that “[w]hen U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced”).

²³⁷ See generally Johnson, *Hurricane Katrina*, *supra* note 67 at 22 (discussing immigration laws that treat immigrants harshly).

²³⁸ Universal Declaration on Human Rights, G.A. res. 217 (III), 3 U.N. GAOR U.N. Doc. 1/777 (1948).

Civil and Political Rights (ICCPR),²³⁹ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),²⁴⁰ are known as the “International Bill of Rights.” One scholar aptly describes their significance: The ICCPR and the ICESCR, which came into force in 1976, “were drafted to transform the principles of basic human rights originally formulated by the [UDHR] into binding rules of law that all states are obliged to follow.”²⁴¹ The United States ratified the ICCPR in 1992 but made several reservations.²⁴² The United States has not yet ratified the ICESCR nor has it ratified or signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families that provides specific human rights protections for immigrants.²⁴³

In particular, the ICCPR recognizes the right to enjoy “civil and political freedom” and extends these rights to all people within a country with few exceptions.²⁴⁴ The only specific references to rights that are limited to “citizens” are found in Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs . . .
- (b) To vote and to be elected at genuine periodic elections . . . guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.²⁴⁵

On the other hand, some other sections permit discrimination based on citizenship and immigration status. In Article 2, for example, the prohibited categories for distinctions in the provision of rights includes “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” but does not include nationality as a prohib-

²³⁹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *available at* <http://www2.ohchr.org/english/law/ccpr.htm> (hereinafter ICCPR); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976, *available at* <http://www1.umn.edu/humanrts/instree/b4ccprp1.htm>.

²⁴⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, *available at* <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR] (including 153 signatories).

²⁴¹ See Shaleeta Washington, *Transcending Rhetoric: Redressing Discrimination In Education In Bulgaria and Israel Through Affirmative Action*, 23 PENN. ST. INT’L L. REV. 969, 977 (2005).

²⁴² See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. No. 102-23, at 3 (1992).

²⁴³ See FEMINIST MAJORITY FOUNDATION, FACT SHEET, UNITED STATES FAILURE TO RATIFY KEY INTERNATIONAL CONVENTIONS, TREATIES AND LAWS 2, *available at* http://www.feministcampus.org/fmla/printable-materials/global_project/ratify_factsheet.pdf.

²⁴⁴ ICCPR, *supra* note 239, at pmb1.

²⁴⁵ *Id.* at Art. 25.

ited ground.²⁴⁶ Similarly, Article 12 does not specifically mention of citizenship or nationality, but it does provide that the right to freely move within a nation-state is limited to those “lawfully within the territory of a State” and that the prohibition against an arbitrary deprivation of a right to enter a country is limited to an individual’s “own country.”²⁴⁷ An alien’s right to a hearing to contest expulsion from a nation-state is limited by Article 13 to “an alien lawfully in the territory.”²⁴⁸ Even when rights are found to exist, the nation-state can deny certain rights in times of “public emergency which threatens the life of the nation.”²⁴⁹

Because of the perceived threat to the nation triggered by the events of September 11, 2001, the predicted demise of the plenary power doctrine in immigration law has not occurred²⁵⁰ and immigration policy has become an essential element of national security policy. A greater emphasis has been placed on security in the enforcement of immigration laws through increased border security efforts, interior enforcement, and the denial of rights to immigrants. Even if convincing arguments for decreasing the emphasis on immigration in the development of security efforts exist, and citizens as well as policymakers welcome the idea of granting alien rights, particularly to undocumented immigrants, concern for the application of the rule of law in immigration matters is a political pressure that cannot be ignored.

²⁴⁶ *Id.* at Art. 2(1). While it might be argued that national and social origin encompasses nationality, international treaties usually list both categories if nationality is also a protected class. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, arts. 1(1), (7), U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

²⁴⁷ ICCPR, *supra* note 239 at Art. 12(4). The Human Rights Committee, established under Article 28 of the ICCPR, has issued an ICCPR General Comment that allows for each country to restrict the movements of persons who are not lawfully within the territory and such lawful status is determined by domestic law. *See* U.N. Human Rights Committee, General Comment No. 27: Freedom of Movement, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999), available at <http://www.unhcr.org/cgi-bin/texis/vtx/research?id=3ebf8ef14>.

²⁴⁸ *Id.* at Art. 13.

²⁴⁹ *Id.* at Art. 4(1).

²⁵⁰ *See* Aldana, *supra* note 234, at 80 (citing Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 *Geo. Immigr. L.J.* 257, 285 (2000), and Peter J. Spiro, *Explaining the End of Plenary Power*, 16 *Geo. Immigr. L.J.* 339, 339 (2002)).

B. *The Rule of Law and Immigration Practice*

*We are a nation of immigrants committed to the rule of law.*²⁵¹

The enforcement of immigration laws or the lack thereof triggers lawmakers' concerns about the rule of law.²⁵² Professor Katherine L. Vaughns adeptly stated that "the toleration of illegal behavior in a host of immigration arenas undermines the rule of law, an essential tenet of a democratic society."²⁵³ The rule of law in the context of immigration matters is sometimes asserted with reference to the system established for allocating visas. It is observed that many authorized immigrants who are "coming in today from most parts of the world applied 15 to 20 years ago"²⁵⁴ while unauthorized immigrants are "jumping the line" when they seek to remain in a permanent status through a legalization process or by acquiring lawful status through some other means. Their initial entry is viewed as breaking the law and therefore acceptance of the entry is viewed as a violation of the rule of law. Intending immigrants, it is argued, comply with the immigration laws and wait until they can enter under the system of visa allocations. These intending immigrants and others may perceive the undocumented entry as a violation of the rule of law requirement that a person should know in advance what conduct is prescribed and be able to adjust his or her behavior accordingly. When the undocumented immigrant is allowed to acquire status, arguably the society's commitment to respect for the rule of law has been eroded.

Congresswoman Jordan's emphatic statement in her 1995 testimony before Congress that "[u]nlawful immigration is unacceptable"²⁵⁵ is a view

²⁵¹ *Hearing Before Subcomm. on Immigration Reform of the H. Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Barbara C. Jordan, Commission Chair and Congresswoman, U.S. Comm. on Immigration Reform), available at <http://www.utexas.edu/lbj/uscir/022495.html> [hereinafter Jordan Testimony].

²⁵² See Michael Fix, Doris Meissner & Demetrios Papademetriou, Migration Pol'y Inst., Independent Task Force on Immigration and America's Future: The Roadmap, in 1 MIGRATION POL'Y INST. POL'Y BRIEF 2 (2005), http://www.migrationpolicy.org/pubs/MPI_policyBrief_rdmf.pdf [hereinafter FIX ET AL., MIGRATION POL'Y INST.] (including the need to uphold the rule of law along with individual rights, the operation of markets, American competitiveness, and national security in consideration of an appropriate immigration policy).

²⁵³ Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 151, 153 (2005).

²⁵⁴ See SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra* note 69, at 6.

²⁵⁵ Jordan Testimony, *supra* note 251. See also U.S. Comm'n on Immigration Reform, *Becoming An American: Immigration And Immigrant Policy* 104 (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf> (providing guidance on the direction of immigration policy: "As a nation committed to the rule of law, our immigration policies must conform to the

held by many in the U.S. population.²⁵⁶ While Congresswoman Jordan stressed the value of immigrants to the United States, she also urged Congress to adopt and enforce immigration laws that make “distinctions between those who obey the law, and those who violate it.”²⁵⁷ She went on to denounce those who would label efforts to control immigration as anti-immigrant.²⁵⁸ The two primary government actions for a workable and just policy were concluded to be: (1) border enforcement and (2) worksite enforcement. So even in the face of data that shows the presence of undocumented immigrants in the meatpacking plants benefits the communities where they are located,²⁵⁹ the perceived absence of these dual enforcement measures along with recognition of “[h]igh undocumented flows...fuel[s] deep resentment”²⁶⁰ that is manifested in various ways. These manifestations include policies adopted by private institutions,²⁶¹ states’ enactments of restrictive laws and enforcement actions targeting undocumented aliens,²⁶² and racist attitudes directed toward some recent immigrants.²⁶³

highest standards of integrity and efficiency in the enforcement of the law.”). See, e.g., Christopher McDonagh, Commentary, *Animal Crossing*, Ariz. Att’y, March 2008, at 10, http://www.myazbar.org/AZAttorney/PDF_Articles/0308Soundoff.pdf (noting that uncontrolled immigration undermines the rule of law and national interests).

²⁵⁶ Jacoby, AEI Bradley Lecture, *supra* note 121, at 6 (explaining how even though immigration benefits the country, current immigration policy is viewed as contradicting the rule of law: “[A]s things stand now, [we are] asking the American people to accept an inevitable end to the rule of law as they know it—guaranteed, routine, ongoing illegality in their neighborhoods and workplaces. It’s an unthinkable request—no matter how good immigrants are for our economy.”).

²⁵⁷ Jordan Testimony, *supra* note 251.

²⁵⁸ *Id.*

²⁵⁹ Jacoby, AEI Bradley Lecture, *supra* note 121, at 5 (commenting on the need for new immigrants for low-skilled jobs, but also viewed as an erosion of the rule of law).

²⁶⁰ See FIX ET AL., *MIGRATION POL’Y INST.*, *supra* note 252, at 2 (including the need to uphold the rule of law along with individual rights, the operation of markets, American competitiveness and national security in consideration of an appropriate immigration policy).

²⁶¹ See Huyen Pham, *The Private Enforcement Of Immigration Laws*, 96 GEO. L.J. 777, 818 (2008).

²⁶² Compare Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34, 36 (2007), Karla M. McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3 (2007), Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 968 (2004), and Olivas, *Preempting Preemption*, see *supra* note 225 (arguing for adherence to rule that state regulation of immigration is preempted by federal law), with Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 180-83 (2005) (“If the rule of law is ever to be restored in immigration, state and local arrest authority will be a crucial component of the restoration.”), Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (2007) (asserting that the states should play a larger role in immigration policy), and Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 122-23, 174 (1994).

The restrictionists ask: “What part of ‘illegal’ don’t you understand?”²⁶⁴ While the question is often perceived as harsh, it does reflect that, in addition to government enforcement actions, the rule of law depends on the acceptance of policies that are adopted and their methods of implementation by society in general. Congress must not only recognize the need to restore the rule of law in immigration when considering amendments to immigration law but also the need to communicate effectively the basis for its actions.²⁶⁵ A demonstrated need for the increase in admissions of immigrants for low-skilled jobs and the enforcement of wage and labor laws are essential to convince society that the rule of law has been restored in immigration.²⁶⁶

Like most immigration issues, application of the rule of law and its place in determining immigration matters is complex. For example, a strict application of the rule of law could separate families. There are many families of “mixed status” in which members comprise a combination of unauthorized as well as authorized immigrant family members and in many cases U.S. citizen members. The establishment of an immigration policy should also take into consideration the effect of a perceived lack of respect for the law and balance it with economic and humanitarian factors. Humanitarian concerns, for example, raise the question of the rule of law in terms of the treatment of aliens once they have arrived in the United States regardless of their immigration status.²⁶⁷ Scholars have addressed the treatment of aliens from numerous perspectives including: (1) restrictive laws regarding immigration admissions,²⁶⁸ (2) separation of families,²⁶⁹ (3)

²⁶³ See, e.g., Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000) (arguing that selection of meatpacking plants as targets for raids may have been racially motivated).

²⁶⁴ Jacoby, AEI Bradley Lecture, *supra* note 121, at 6.

²⁶⁵ See, e.g., Letter from Robert D. Evans, Director, Governmental Affairs Office of the American Bar Association to Senators (Apr. 4, 2006), available at http://www.abanet.org/publicserv/immigration/cir_senate_ltr4406.pdf (urging comprehensive immigration reform legislation to restore the rule of law “to our broken immigration system” while describing the American Bar Association’s position on several immigration issues).

²⁶⁶ See generally FIX ET AL., *MIGRATION POL’Y INST.*, *supra* note 252, at 5 (suggesting that the immigration system should be changed to reflect the workers needed due to changes in the economy as well as to decrease the time required to unite families).

²⁶⁷ See generally Neuman, *Jurisdiction*, *supra* note 223.

²⁶⁸ Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1092-93 (1998); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2580-81 (1998).

²⁶⁹ Maria Pabón López, *A Tale Of Two Systems: Analyzing The Treatment Of Noncitizen Families In State Family Law Systems And Under The Immigration Law System*, 11 HARV. LATINO L. REV. 229, 237-45 (2008); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 354, 374-75 (2007).

detention of aliens,²⁷⁰ (4) harsh consequences of the criminalization of immigration,²⁷¹ (5) the declining availability of judicial review for immigration matters,²⁷² (6) the exclusion of aliens from public benefits and participation in their communities,²⁷³ and (7) the broader implications that such policies may have even for U.S. citizens.

IV. THE CODE OF THE JUNGLE: CULTURAL RESISTANCE AND ACCEPTANCE

He had gone to Brown's and stood there not more than half an hour before one of the bosses noticed his form towering above the rest, and signaled to him. The colloquy which followed was brief and to the point

"Speak English?"

"No; Lít-uanian." (Jurgis had studied this word carefully.)

"Job?"

"Je." (*A nod.*)

"Worked here before?"

"No 'stand."

(Signals and gesticulations on the part of the boss. Vigorous shakes of the head by Jurgis.)

"Shovel guts?"

"No 'stand." (More shakes of the head.)

"Zarnos. Pagaiksztis. Szluofa!" (*Imitative motions.*)

"Je."

"See door. Durys?" (*Pointing.*)

"Je."

²⁷⁰ See generally Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

²⁷¹ See generally Medina, *supra* note 19; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937 (2000) (discussing 1996 amendments resulting in criminal punishment, exile and family separation).

²⁷² See Neuman, *Jurisdiction*, *supra* note 223; David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2494-506 (1998).

²⁷³ See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (establishing distinctions in the availability of public benefits between citizens and noncitizens). See generally Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043 (2002); Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271, 278 (1992); Tamar Jacoby, *Borderline: Why We Can't Stop Illegal Immigration*, NEW REPUBLIC, Jan. 26, 2004, at 18 (explaining that the undocumented may stay hidden and not participate in the communities where they live: "Undocumented workers fear police and other authorities, thereby undermining law enforcement in their communities. They come to believe the U.S. laws, like the immigration code, are meant to be winked at.").

“*To-morrow, seven o’clock. Understand? Ry-toj! Prieszpietys/Septyni!*”

“*Dekui, tamistai!*” (Thank you, sir.) And that was all. Jurgis turned away, and then in a sudden rush the full realization of his triumph swept over him, and he gave a yell and a jump, and started off on a run. He had a job! He had a job!²⁷⁴

A. *Violating the Code: Speak English and Assimilate*

*The mob confronted him and he was told to use English only.*²⁷⁵ This description is not of an incident that has occurred with the arrival of a large number of undocumented immigrants in the latter 20th and early 21st centuries. Rather, it is from 1921, and was directed at a German immigrant rather than a Hispanic or other “new immigrant” as might first be suspected. Like Jurgis’s experience with English, other incidents have been recorded through the history of American immigration. Germans in the 1920s faced similar dissonance. German immigrants were barred from using their native languages because of the anti-German hysteria during and following World War I.²⁷⁶ Some current reactions to new immigrants are similar to the incidents after World War I. A fear of immigrants is expressed and manifested in negative actions because some view the new immigrants as not living according to the code of the jungle. In this jungle, English is spoken and certain codes of conduct exist that new immigrants must adopt.

New immigrants became not only “wanted, exploited and blamed”²⁷⁷ in the workforce but also in particular communities and the country as a whole. Current reactions to new immigrants may also be expressed in terms of what is best for the new immigrants, who will be able to survive and thrive only if they assimilate. The demonstrations and marches where immigrants were observed waving flags of their country of nationality and carrying signs in Spanish led some to complain about the cultural aspects of the new immigration. Others have had the experience of venturing into neighborhoods and finding that little or no English is spoken there. Some Americans even choose to leave their own neighborhoods when large numbers of new immigrants move there.²⁷⁸ Others who do not leave the com-

²⁷⁴ SINCLAIR, *THE JUNGLE*, *supra* note 2, at 35-36.

²⁷⁵ The Baxter New Era, May 26, 1921, at 1 (reporting on a German preacher being confronted for using German (the Hun language) in a church service), *reprinted in* 11 GERMANIC GENEALOGY J. at 9, Spring 2008. (on file with the author).

²⁷⁶ See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁷⁷ See Johnson, *Hurricane Katrina*, *supra* note 67, at 15.

²⁷⁸ See LEVINE, CONG. RESEARCH SERV., *supra* note 21, at 6 n.10, *citing* Randall K. Filer, “The Effect of Immigrant Arrivals on Migratory Patterns of Native Workers,” *in* IMMIGRATION AND THE

munities have elected to take their children to nearby school districts that have smaller percentages of Spanish-speaking children.²⁷⁹

As with the Germans and other immigrant groups, battles have been fought over assimilation, but generally when the battle ends, it moves on to another immigrant group. The cultural resistance present today is perceived as unique because of the large numbers of immigrants that present a linguistic, racial, and cultural difference.²⁸⁰ In 2006, 50% of the foreign-born labor force was Hispanic, whereas Hispanics only represented 7% of the native-born labor force. Asians constituted 22% of the foreign-born workforce as compared with about 1% of the native-born workforce.²⁸¹

Some evidence suggests that much of the anti-immigrant feeling is a reaction to the race and ethnicity of the new immigrants. Since the INA was amended in 1965 to eliminate nationality quotas that were based in part on racial restrictions, the face of immigration has changed. Even though Mexicans have a long history of temporary and permanent immigration to the United States, they have not been received or perceived in the same way as European immigrants. When the Dillingham Commission produced a report on immigration to the United States in 1911,²⁸² it identified the immigration “problem” in the West as “new immigrants” from Asia and the problem in the North East from Southern and Eastern Europe.²⁸³ The report

WORK FORCE: ECONOMIC CONSEQUENCES FOR THE UNITED STATES AND SOURCE AREAS (George J. Borjas & Richard B. Freeman eds., 1992) (“[E]stimated that an increase in immigration to a particular locality prompts increased out-migration among native-born residents and decreased in-migration among native-born nonresidents.”); William H. Frey, *Immigration and the Internal Migration ‘Flight’ from U.S. Metropolitan Areas: Toward a New Demographic Balkanisation*, 32 URB. STUD. 733 (1995) (finding that native non-Latino white high school dropouts are apt to leave areas that experience large immigrant inflows); Michael J. White & Lori M. Hunter, *The Migratory Response of Native-Born Workers to the Presence of Immigrants in the Labor Market* (Brown University, PSTC Working Paper Series No. 93-08, 1993) (finding that workers in some less-skilled occupations are likely to move away from areas as the concentration of immigrants increase).

²⁷⁹ See Emily Gersema & Paul Goodsell, *Trend In Meatpacking Towns Raises Question Of ‘White Flight’*, AMERICAN RENAISSANCE NEWS, Aug. 22, 2004, available at http://www.amren.com/mtnews/archives/2004/08/trend_in_meatpa.php; Duggan, LINCOLN J. STAR, *supra* note 172.

²⁸⁰ See SOCIAL SECURITY ADVISORY BOARD ISSUE BRIEF, *supra* note 69, at 3 (reporting that in 2005, 32% of foreign born residents are from Mexico, 23% from Latin America, 25% from Asia. Sixty percent of the undocumented were from Mexico; but as with Irish and German immigration, “it is not unprecedented to have as large a share coming from just one country”).

²⁸¹ See LABOR FORCE CHARACTERISTICS IN 2006, *supra* note 30.

²⁸² The Dillingham Commission was established by Congress in 1907 to investigate the effects of immigration on the United States and issued a 42-volume report. U.S. IMMIGRATION COMMISSION, REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 61-747, 61st Cong., 3d Sess. (1911).

²⁸³ U.S. IMMIGRATION COMMISSION, REPORTS OF THE IMMIGRATION COMMISSION: VOL. 1 AND 2: ABSTRACTS OF THE REPORTS OF THE IMMIGRATION COMMISSION WITH CONCLUSIONS AND RECOMMENDATIONS AND VIEWS OF THE MINORITY, S. Doc. No. 61-747, 41 (1911) (“The various laws have resulted in a steady decrease of the Chinese population until the immigration of that race is no longer a problem of present importance.... In the southern section of the Western division immigration

concluded that Mexicans were not desirable as citizens but were good choices for cheap and reliable labor.²⁸⁴ In part, because of the report, Asians were initially barred from immigration in 1917 and permanently excluded by the Immigration Act of 1924. Countries of the Western Hemisphere, such as Mexico, were not included in the 1924 quotas because Mexican labor was still desired. When the 1965 amendments to the INA were enacted and abolished the national origin quota system, it meant that many previously excluded aliens, particularly Asians, could immigrate to the United States. The 1965 changes also subjected the Western Hemisphere countries to annual numerical limitations on admissions. This was just after the Bracero Program had ended in 1964 and many Mexicans, including U.S. citizens, were returned to Mexico.²⁸⁵ The 1965 amendments led to some unexpected, if not unintended, consequences. No longer were the immigrants primarily from Europe; the face of immigration had changed. This pattern continued for the next four decades. The enactment of the 1980 Refugee Act also contributed to the changing face of immigration.²⁸⁶

Professor Kevin Johnson concludes that many immigrants both lawful and undocumented have been mistreated in that they hold second-class status in the United States and constitute part of a low wage caste of color.²⁸⁷ The reaction by some U.S. citizens that the new immigrants are different, are changing the culture of the United States, and are refusing to assimilate seems to embody some aspects of racism. Some fear that the linguistic, cultural, and racial homogeneity that once existed in the United States may cease to exist.²⁸⁸ Some towns have seen demographic changes where populations that were once 95% white have decreased to less than 50% white.²⁸⁹ As white populations are aging and leaving, new and younger immigrants are moving into the towns.²⁹⁰ Even in rural areas like

from Mexico has become an important factor in the situation, the immigration of the race corresponding somewhat to some of the southern and eastern European races coming to the eastern States.”).

²⁸⁴ *Id.* at 698-91 (“The assimilative qualities of the Mexican are slight....Thus it is evident that in the case of the Mexican he is less desirable as a citizen than as a laborer.”). See Jorge A. Bustamante, *The Mexicans Are Coming: From Ideology to Labor Relations*, 17 INT’L MIGRATION REV. 323 (1983).

²⁸⁵ Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. CHI. LEGAL F. 131, 135 (2007).

²⁸⁶ The 1980 Refugee Act was enacted to bring U.S. refugee law into accord with international obligations. The Act granted grant asylum to individuals who were already in the country and met the definition of a refugee. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

²⁸⁷ Johnson, *Hurricane Katrina*, *supra* note 67, at 22.

²⁸⁸ CHOMSKY, *supra* note 235, at xv.

²⁸⁹ See Duggan, LINCOLN J. STAR, *supra* note 172.

²⁹⁰ Michele Yehieli & Mark Grey, *Immigrant Workers in Agricultural Processing Communities: Health Implications of the New Demographics*, Address at the AgriWellness Conference: The Clock is Ticking for Rural America at 10 (Feb. 14, 2007), <http://www.agriwellness.org/Conference2007/>

Hall County, Nebraska, several languages are spoken in a community with a population of fewer than 50,000 people.²⁹¹ Reported increases in the levels of crime and violence are attributed to the arrival of the new immigrants. Residents complain about “ethnic separatism”²⁹² and claim that the new arrivals “keep to themselves and don’t bother to learn American customs, culture or English.”²⁹³ Cultural practices that some immigrants bring with them seem inapposite to the values that natives have taken for granted and are the source of some tension.²⁹⁴ A delegation from Nebraska, including law enforcement officers from meatpacking communities such as Hall County, met with the INS Director in 1998 and complained about the problems caused by undocumented immigrants.²⁹⁵ It has been suggested that Operation Vanguard was established in response to tensions created by the changing demographics.²⁹⁶

It is arguable that even if these views are properly held, as suggested by the ICESCR, people should be allowed to enjoy their own culture and language. There is evidence that these fears are unfounded. Research shows that, although first generation immigrants may not, on average, catch up with natives in terms of economic performance, there is a strong educational progress of second-generation immigrants.²⁹⁷ The educational progress indicates assimilation and includes the ability to speak English.

There are reasons to encourage the use of one common language and the acquisition by all of the facility to speak that language. An Urban Institute study reports that limited English skills are closely associated with low-wage work; 62% of low-wage immigrant workers are “limited English pro-

powerpoints/Immigrant%20Workers%20in%20Agricultural%20Processing%20Communities.pdf (last visited Jan. 16, 2009) (describing growth in Hispanic/Latino populations in Minnesota, Missouri, Kansas, Iowa, Nebraska, and South Dakota with statistics and maps).

²⁹¹ JIM CARRIER, THE S. POVERTY LAW CTR., TEN WAYS TO FIGHT HATE: A COMMUNITY RESPONSE GUIDE 23 (2000), http://www.tolerance.org/pdf/10_ways.pdf (noting that 30 different languages are spoken in Hall County, Nebraska).

²⁹² Thomas L. Friedman, *Foreign Affairs; My Fellow Immigrants*, N.Y. TIMES, Sept. 10, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE5DD1739F933A2575AC0A963958260>.

²⁹³ Duggan, LINCOLN J. STAR, *supra* note 172 (describing frustration expressed by a retired nurse in Lexington, Nebraska).

²⁹⁴ See, e.g., Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES, Mar. 23, 2007 (discussing the practice of polygamy that some immigrants attempt to continue in the U.S.).

²⁹⁵ See UNIV. OF CAL.-DAVIS MIGRATION CTR., OPERATION VANGUARD, *supra* note 171.

²⁹⁶ *Id.*

²⁹⁷ David Card, *Immigration in the U.S.: Economic Effects on the Nation and Its Cities Conference: Is the New Immigration Really So Bad?*, Keynote Address at the Federal Reserve Bank of Philadelphia (Apr. 29, 2005), available at <http://www.philadelphiafed.org/research-anddata/events/2005/immigration/papers/card.pdf>.

ficient" (LEP) compared with only 2% of low-wage natives.²⁹⁸ The majority, 84%, of LEP workers are foreign-born.²⁹⁹ Immigration laws and policy recommendations have consistently included some favoritism for English as a national language.³⁰⁰ This favoritism is attributed in part to the desire for a shared commitment to democratic principles that can be learned more easily through an existing common civic culture and language.³⁰¹ Some studies indicate that recent Hispanic immigrant parents have lower expectations for higher education because of their limited English abilities and unfamiliarity with the U.S. education system. Surveys indicate that new immigrants want to learn English but many of them find it difficult to do so because of either cost or lack of opportunity.³⁰² However, undocumented immigrants may be reluctant to take part in public programs where they can learn English for fear of having their unauthorized status detected and reported. New immigrants who enter as refugees have less of a problem because of programs established to ease their transition into the country.³⁰³ Immigration policies should include measures that assist new immigrants in their transitions. One such program is the adoption of state measures that allow certain undocumented children to attend state institutions and pay in-state tuition.³⁰⁴ The acquisition of higher education by the children of undocumented immigrants should assist in the assimilation of their parents.

Even if the benefit of assistance to new immigrants is accepted, such efforts may nevertheless be resisted. As the American Immigration Law-

²⁹⁸ RANDOLPH CAPPS, MICHAEL E. FIX, JEFFREY S. PASSEL, JASON OST & DAN PEREZ-LOPEZ, URBAN INSTITUTE, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 3 (Oct. 27, 2003), <http://www.urban.org/publications/310880.html>.

²⁹⁹ *Id.* ("Almost half (46 percent) of all foreign-born workers are 'limited English proficient' (LEP), according to data from Census 2000. Nearly three-quarters (73 percent) of LEP workers speak Spanish. Much smaller shares speak other languages, led by Chinese (4 percent), Vietnamese (4 percent), and Korean (2 percent). While time in the United States and work experience reduce the share of workers who are LEP, 29 percent of workers who have been in the country for 20 years or more can still be considered LEP.") (citation omitted).

³⁰⁰ *See, e.g.*, U.S. IMMIGRATION COMMISSION, REPORTS OF THE IMMIGRATION COMMISSION: VOL. 41: STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION, S. Doc. No. 61-764, 42 (1911) ("The committee should endeavor to persuade every immigrant girl of the necessity not only of learning English, but of learning to speak it fluently and well. If there are suitable night classes conducted by the public schools or any existing institutions, the girls should be introduced to those classes."). *See generally supra* note 275.

³⁰¹ FIX ET AL., MIGRATION POL'Y INST., *supra* note 252, at 6-7.

³⁰² *See e.g.*, Lionel Sosa The Unspoken Reasons for Hispanic Undereducation, 1 Journal of Hispanic Higher Education 88 (2002).

³⁰³ *See, e.g.*, Refugee Act, *supra* note 286.

³⁰⁴ *See Cristina M. Rodriguez, The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 605-09 (2008). These local statutes have been enacted largely because Congress has failed to adopt the DREAM Act, originally introduced in the Senate in 2005, which would have provided nationwide access to higher education for undocumented children who graduate from U.S. high schools. Development, Relief, & Education for Alien Minors Act of 2005, S. 2075, 109th Cong. § 2 (2005).

yers Foundation (AILF) has reported, some believe that “anything done to help Hispanics enjoy the advantages of U.S. society is somehow a betrayal of their own family’s immigrant heritage.”³⁰⁵

B. *Changing the Code: Enriching Communities*

Perhaps new immigrants do not have to assimilate or live by the code of the jungle to survive and thrive if they bring something that is perceived as beneficial to the communities in which they live. This view may be more desirable than one that forces immigrants to assimilate, leaving their cultures behind, and is certainly preferable to excluding the new immigrants in a way that perpetuates an underclass of people without economic opportunities or the ability to fully participate in their new communities. Some communities have recognized the enrichment provided by new immigrants. In Northern Colorado, for example, where the Swift Meatpacking plant is located, the local paper reports that the “culture has surely deepened with the rising numbers of Hispanic citizens who bring with them a commitment to family and a rich cultural heritage.”³⁰⁶ Additionally, “[t]he transformation brought to these communities by the meatpacking industry is indisputable,”³⁰⁷ and is viewed as a positive experience.

New immigrants are revitalizing communities. The recent arrivals from Latin America and Africa are opening new businesses, reinvigorating church attendance, and helping to keep open schools that were threatened with consolidation. It is reported, however, that even with such observations many Midwesterners only see “disarray and obstacles.”³⁰⁸ A 2006 poll conducted by the University of Nebraska at Lincoln showed that less than one-third of those responding agreed that new immigrants improve the quality of life in their communities.³⁰⁹ When faced with such attitudes, local and state governments should work to dispel such erroneous conclusions, stress the benefits that new immigrants bring,³¹⁰ and work with the

³⁰⁵ CALVIN E. BELLAMY, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION LAW FOUNDATION, *SERVING THE UNDER-SERVED: BANKING FOR UNDOCUMENTED IMMIGRANTS, PERSPECTIVES ON IMMIGRATION*, March 2007, <http://immigration.server263.com/index.php?content=P20070416>.

³⁰⁶ *See* Dyer, GREELEY TRIB., *supra* note 127, at 5.

³⁰⁷ *Id.*

³⁰⁸ Pete Lethby, *In the Midwest, Bring On the Immigrants*, DENVER POST, Aug. 19, 2007, at E01.

³⁰⁹ INST. OF AGRIC. AND NATURAL RES., UNIV. OF NEB., *RURAL POLL REVEALS AMBIVALENCE ABOUT NEWCOMERS TO COMMUNITIES* (Aug. 8, 2006), <http://iannews.unl.edu/static/0608081.shtml> (reporting findings from 2,482 responses from poll of 6,200 randomly selected households in Nebraska’s 84 rural counties).

³¹⁰ The Pittsburgh, Pennsylvania area is a location where new immigrants are actively recruited and efforts are made to make them welcome. *See, e.g.*, Andrew Conte & Justin Velluci, *Hispanics Find Welcome Mat in Beechview*, PITTSBURGH TRIB. REV., Aug. 10, 2007, <http://www.pittsburghlive.com/>

federal government in trying to assure that new immigrants develop a sense of belonging in the United States.³¹¹

V. CONCLUSION

While immigration generally has a positive effect on the U.S. economy, some U.S. workers are harmed by the presence of new immigrants. The harm seems to be more severe when the immigrants are undocumented. Examination of the meatpacking industry workforce illustrates these consequences. The experiences in the meatpacking industry highlight the need for immigration and labor practices that benefit all workers. Immigration policies should be accepted by those affected; however, this is not likely if the focus is only on economic factors. All levels of government bear some responsibility for the integration of new immigrants into the communities where they settle.

After this article was written, a major workplace raid was conducted in May 2008 in Postville, Iowa at the Agriprocessors Meatpacking plant. This raid and its consequences on the workers, the city, and the company demonstrate that the issues discussed in this article continue to present problems that must be resolved.

x/pittsburghtrib/news/multimedia/s_521517.html.

³¹¹ See Friedman, N.Y. TIMES, *see supra* note 292.

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NAFTA, GLOBALIZATION, AND MEXICAN MIGRANTS

*Bill Ong Hing**

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I. INTRODUCTION

My tour of the United States-Mexico border (“the border”) concluded in a large, cold community center in El Paso, Texas, but the warmth generously shared by the families in attendance toward our delegation of immigration experts was undeniable. Make no mistake, the stories we heard were not warm, but the hope for a changed U.S. immigration policy was strong and inspiring. Throughout the evening, more than 200 local residents of all ages—mostly Mexican-American—sat and listened while representatives from their ranks took turns explaining their life experiences on the border.

The Border Community Alliance for Human Rights (“Alliance”), a network of organizations primarily working along the border, organized this February 2006 tour. The Alliance includes the following organizations: American Friends Service Committee (Texas, California, Arizona); the U.S./Mexico Border Program (California); the Border Action Network (Arizona); the Border Network for Human Rights (Texas and New Mexico); and the Latin American Working Group Education Fund (Washington, D.C.).¹ The delegation included representatives from the following organizations: the National Immigration Forum; the National Council of La Raza; the National Immigration Law Center; the American Immigration Lawyers’

¹ Border Action Network, *Help Border Action Build A Movement for Human Rights at the Border*, May 5, 2006, http://www.borderaction.org/web/index.php?option=com_content&task=view&id=98&Itemid=26 (last visited Jan. 11, 2009).

Association; the U.S. Conference of Catholic Bishops; and staff members from the offices of U.S. Senators Ted Kennedy, Harry Reid, and Sam Brownback.

Most in the immigrant rights field are familiar with Operation Gatekeeper and the immoral deaths it has caused.² Even the casual observer is well aware of the vast authority of the U.S. Customs and Border Patrol (“Border Patrol”), whose ranks have been increased exponentially by Congress and whose power continues to be expanded by the courts. Reports of Border Patrol abuse are common and the need for reforms in the monitoring of misconduct is apparent. I had visited the border before but primarily as a Border Patrol guest. For example, I visited the border as a member of the Citizens Advisory Panel, a body appointed by Janet Reno during the Clinton administration. During this border tour, which stretched from San Diego, California to El Paso, Texas, I expected to see the psychological as well as the physical effects of walls and fences along the border. What I did not expect to see, however, was the integration of societies and economies on both sides of the border.

Time and again, members of the delegation heard from residents, religious leaders, community leaders, elected officials, local law enforcement officers, and even Border Patrol agents about the uniqueness of the border communities. The barriers that separate the communities are unnatural. While barriers to “stop the flood” of immigrants might make sense to Lou Dobbs, the Minutemen, and misguided policymakers in Washington, D.C. like Congressmen James Sensenbrenner and Tom Tancredo, the anti-immigrant sentiment they share fails to comprehend the traditions, the families, the relationships, and the tremendous benefits that flow from maintaining an open relationship between the two worlds. The two worlds are, in fact, one.

On those February nights in El Paso, Texas, the testimony from local residents revealed a world that Americans should not condone. Their words depicted life in a militarized zone, with hordes of Border Patrol agents constantly monitoring the activities of Latino-looking residents. A woman of Latina appearance spoke of being stopped for a traffic violation and being deported because she had no documents. Another woman of Latina appearance said that Border Patrol agents constantly harassed her, except when she was with her blond, blue-eyed husband. Countless parents and teens who were not undocumented spoke of regularly being stopped and asked for their papers on the streets of El Paso, Texas. A health care worker related that immigrants were afraid to show up for preventive health care appointments because they feared deportation. When a series of teen-aged girls—elegantly bilingual—spoke of being harassed by Border Patrol agents as they walked to school and the fear that these experiences instilled

² See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY 184-205* (Temple University Press 2004) [hereinafter HING, *DEFINING AMERICA*].

in them, it became even clearer to me that U.S. immigration policy is headed in the wrong direction. At the end of the evening, the young girls presented each of the delegation members with a t-shirt professing a simple yet profound slogan of a better way of looking at immigrants: “*No somos enemigos, somos parte de la solución.*” [We are not enemies, we are part of the solution.]

Indeed, these young women and the other individuals and families that we met along the border are not the enemy. Yet the Border Patrol has militarized the border in a manner that suggests it is dealing with an enemy. I am not alone in wondering why the Border Patrol antagonizes these individuals and militarizes a border the United States shares with a “friendly, peaceful nation” that is an “ally and a large trading partner.”³ There must be a different approach to the border that respects the lives of these families and their contributions to the United States.

Of course this issue is not just about the border. When U.S. Immigration and Customs Enforcement (ICE) agents raided several of Swift & Company’s meatpacking sites in December 2006, about 1,300 undocumented workers—mostly from Mexico—were arrested. Swift and other large companies across the country have come to rely on migrant workers for their hard-to-fill jobs. Nationwide production was severely affected, prompting the following call for immigration reform from company officials: “The impact of this is so widespread. We’re being indirectly impacted—Main Street businesses and social services are all impacted. There has to be a better method.”⁴

On the Friday before Labor Day weekend in 2006, ICE officials conducted a raid in Stillmore, Georgia. Nestled amid pine trees and cotton fields, undocumented Mexican immigrants supplied a stable workforce for a thriving poultry industry and for the onion fields in Vidalia only a few miles away. Descending shortly before midnight, ICE agents arrested and deported 125 undocumented workers over a three-day period.⁵ Most of those captured by ICE were men, while their wives and children fled to the woods to hide.⁶ In the weeks after the raid, at least 200 more immigrants left town. Many of the women whose husbands were deported used their spouse’s final paycheck to purchase bus tickets to Mexico.⁷ The impact

³ DOUGLAS S. MASSEY, CATO INSTITUTE, BACKFIRE AT THE BORDER—WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION, 29 CENTER FOR TRADE POL’Y STUD. CATO INST. 3 (2006) [hereinafter MASSEY, CATO INSTITUTE].

⁴ *Immigration Raid Still Hurting Pork Producer*, Associated Press, Dec. 28, 2006, <http://wcco.com/topstories/immigration.raid.Swift.2.363948.html> (quoting Brad Freking, owner and managing partner of New Fashion Pork).

⁵ Dahleen Glanton and Tribune National Correspondent, *For Immigrants, Raid Dims Hope for a Better Life*, CHI. TRIB., Dec. 11, 2006, <http://archives.chicagotribune.com/2006/dec/11/news/chi-0612110234dec11>.

⁶ *Id.*

⁷ *Id.*

was evident, underscoring just how vital the undocumented immigrants were to the local economy. Trailer parks were abandoned. The poultry plant scrambled to replace more than half of its workforce. Business dried up at stores where Mexican laborers once lined up to buy groceries, household goods, and other living essentials. The former community of about one thousand people became a ghost town.

The raid included a trailer park operated by David Robinson, where immigrants were taken away in handcuffs. Robinson, who bought an American flag and flew it upside down in protest, commented that “[t]hese people might not have American rights, but they’ve damn sure got human rights. There ain’t no reason to treat them like animals.”⁸

In places like Santa Fe, New Mexico and Richmond, California, ICE agents have arrested parents walking their children to school or waiting at public school bus stops. These outrageous tactics have left communities in fear—children are afraid of going to school, worried that their parents may be arrested. These Gestapo-like enforcement strategies have no place in a society that prides itself in fairness and in supporting family values.

In spite of the fact that the vast majority of Americans favor amnesty for undocumented immigrants,⁹ Congress has been mired in debate on the topic. In 2007, comprehensive immigration reform efforts in the U.S. Senate were derailed by the perception that any path to legalization for undocumented immigrants amounts to “amnesty” for law breakers. More precisely, enough Senators—mostly Republicans—did not want to be perceived as supporting “amnesty for illegal immigrants” that a cloture motion requiring sixty senators was impossible. Despite the strenuous lobbying efforts of the Bush Administration to move the legislation forward, the proposed reforms ultimately failed to garner enough support to pass into law.

The “can’t-support-amnesty-for-lawbreakers” camp claims the moral high ground. They argue that we should not forgive undocumented aliens for breaking our laws because this would simply “reward lawlessness,

⁸ Russ Bynum, *Immigration Raid Cripples Ga. Town*, Associated Press, Sept. 15, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/09/15/national/a111311D31.DTL>.

⁹ See Lydia Saad, *Most Americans Favor Giving Illegal Immigrants a Chance*, GALLUP NEWS SERVICE, (2007),

<http://www.gallup.com/poll/27307/Most-Americans-Favor-Giving-Illegal-Immigrants-Chance.aspx> (last visited Jan. 15, 2009) (a Gallup Poll in April 2007 found that more than 80% of Americans favor a path to citizenship for undocumented immigrants). The article discusses polling data:

A USA Today/Gallup poll conducted April 13-15, 2007, finds the American public in broad agreement with Bush’s desire to give illegal immigrants a path to citizenship. Forty-two percent of Americans say their preferred approach to dealing with illegal immigrants is to require them to leave the United States, but then allow them to return and become U.S. citizens if they meet certain requirements. Another 36% would prefer a more liberal system that allows illegal immigrants to remain in the United States while they work toward meeting requirements needed to gain citizenship.

which naturally encourages more lawlessness.”¹⁰ As then Congressman and presidential candidate Tom Tancredo wrote: “We must keep maximum pressure on the U.S. Senate to stop this amnesty bill. If we fail, and this bill becomes law, we will have taken the first irrevocable step on the road to national suicide.”¹¹ Senator Bob Corker (R-Tenn.) declared: “I think Americans feel they are losing their country.”¹² And participants at a Washington, D.C. anti-immigrant rally in the spring of 2007 were described this way in the *Washington Post*:

The small but fervent crowd of protesters recited the Pledge of Allegiance and hummed along to “God Bless America.” They hoisted neatly lettered placards that portrayed the United States as under siege. They cheered lustily as a parade of speakers, jabbing fingers toward the White House, demanded action to secure U.S. borders, enforce its laws and make English its official language “We are certainly a nation of immigrants, but much more important, we are a nation of laws,” T.J. Bonner, a U.S. Border Patrol agent, told the assembly. “What is happening on the border is anarchy. Millions are crossing over, reaping our benefits, taking our jobs, and the government is not doing a [d***] thing about it.”

. . . . The rally was sponsored by an organization in Georgia and coordinated with the national Federation for American Immigration Reform, a nonprofit advocacy group, and a number of radio talk show hosts who have championed the cause of stopping illegal immigration. The crowd included retired teachers and aerospace workers, ex-soldiers and business contractors. Many were from Western states and said they were affiliated with organized groups but had paid their own airfares. Most were white, but a few were Latinos who described themselves as especially victimized by the protracted influx of illegal Latino immigrants.

“I was born in Mexico, but I came here legally, and I was brought up with American values,” said Anna Gaines, a retired high school teacher from Arizona. “I have had terrible experiences with illegal students. They don’t care about school, only about parties and drugs. They don’t come with respect for our laws and values.” Instead, speakers and participants complained about other problems they said were caused by illegal immigrants, including gang violence, drunken driving, a decline in wages, hospital overcrowding and impoverishment of community life The most popular rallying cry, though, was a call for “no amnesty,” meaning no repeat of the 1986 law that allowed hundreds of thousands of illegal immigrants to apply for residency under certain conditions. Many speakers and participants said any form of legalization for illegal residents, no matter how long they have lived in the United States, would amount to amnesty. “No matter what they call it this week, amnesty will not secure our borders, stop illegal immigrants or stop illegal employers,” King said. “We are in a struggle to save the sovereignty of our nation. We will not lose, compromise or bargain.”¹³

¹⁰ Letter from Edward Tuffy II, President, Local 2544, National Border Patrol Council, to Honorable Jon Kyl, U.S. Senator (May 24, 2007), http://www.nbpc2554.org/docs/kyl_letter_amnesty.pdf.

¹¹ Press Release for Tom Tancredo, *Join Tom’s Army Against Amnesty and Together Let’s Defeat Amnesty and Amnesty Politicians*, http://web.archive.org/web/20070710151006/http://www.teamtancredo.com/save_america_index.asp (last visited Jan. 15, 2009).

¹² 153 CONG. REC. S8641-07, at S8645 (June 28, 2007) (statement of Sen. Corker).

¹³ Pamela Constable, “No Amnesty” Is Cry at D.C. Immigration Protest, WASH. POST, Apr. 23, 2007, at B1.

Advocates for legalization respond to anti-immigrant sentiment by focusing on the contributions that undocumented immigrants have made to the economy. A journalist for *Time* magazine concluded: “[Amnesty is] a good thing for America. The estimated 12 million illegals are by their sheer numbers undeportable. More important, they are too enmeshed in a healthy U.S. economy to be extracted.”¹⁴ Barbara Ehrenreich, the author of *Nickel and Dimed*, agrees:

In case you don't know what immigrants do in this country, the Latinos have a word for it — *trabajo*. They've been mowing the lawns, cleaning the offices, hammering the nails and picking the tomatoes, not to mention all that dish-washing, diaper-changing, meat-packing and poultry-plucking When our debt to America's undocumented workers is eventually tallied, I'm confident that it will be well in excess of the \$5,000 fine the immigration bill proposes. There is still the issue of the original “crime.” If someone breaks into my property for the purpose of trashing and looting, I would be hell-bent on restitution. But if they break in for the purpose of cleaning it — scrubbing the bathroom, mowing the lawn — then, in my way of thinking anyway, the debt goes in the other direction.¹⁵

I have argued that undocumented immigrants' economic and social contributions should be recognized.¹⁶ Immigrants are seeking the “right to live ‘legally’ and be recognized as a productive, valued member of society.”¹⁷ For a variety of reasons, the border should not be seen as a barrier to keep out the unwanted. There are economic, practical reasons for a more open-minded approach. There are also ethical reasons and conditions that compel us to explore a more open-hearted solution.

In contrast to the absolute closing of the border, the perspective that others take, like former President George W. Bush, is that U.S. businesses need a pool of low-wage workers and a large guest-worker program in order to thrive.¹⁸ To me, U.S. immigration policy should not revolve around a business need for workers; it should address the modern-day social, cultural, political, and economic relations between nations—particularly those in our hemisphere. I advocate the need to look at these relations in a way that would endorse the free flow of residents of these nations between borders. The flow of immigrants must, however, be addressed in a manner that ensures that a primary sending nation like Mexico is not disadvantaged by a devastatingly large loss of able workers.

¹⁴ Nathan Thornburgh, *The Case for Amnesty*, TIME, June 18, 2007, at 38.

¹⁵ Barbara Ehrenreich, *What America Owes Its “Illegals,”* THE NATION, June 13, 2007.

¹⁶ BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* (New York Univ. Press, 1997).

¹⁷ Cliff Olin, *Masses of Immigrants Demand Amnesty*, LOS ANGELES INDEP. MEDIA CENTER, Apr. 9, 2007, <http://la.indymedia.org/news/2007/04/196534.php> (last visited Jan. 15, 2009).

¹⁸ Mike Allen, *Bush Proposes Legal Status for Immigrant Labor: Workers Could Stay Six Years or More*, WASH. POST, Jan. 8, 2004, at A01, <http://www.washingtonpost.com/wp-dyn/articles/A63428-2004Jan7.html>.

The need to develop an approach to address the challenge of undocumented laborers is great—some might even say urgent. Low-wage workers continue to be needed and recruited, yet they are demonized by some political leaders and segments of society. The workers themselves are attracted to the work, yet they are susceptible to exploitation. A pattern of circular migration of workers to the United States and back to their homes in Mexico has been interrupted by legal and physical barriers.

In Part II of this article, I review several concepts and phenomena that are relevant to understanding the flow of low-wage Mexican workers into the United States including the globalized economy, NAFTA, and the Mexican economy. My hope is that, given a better understanding of why so many low-wage Mexican workers are attracted to the United States, we will approach solutions to the so-called “illegal alien” problem in a more rational manner. In Parts III, IV, V, and VI, I explain why “solutions” to undocumented migration such as maquiladoras, employer sanctions, Operation Gatekeeper, and investment in Mexico have failed. In Part VII, I point out that what is happening in places like China is relevant. I also question whether the European Union (EU) experience with relatively open borders can provide beneficial insight into U.S. immigration policy reform. I analyze whether we should adopt completely open borders or, instead, pursue a system of open migration within trade regions. I urge the reader to consider a more generous approach to visas, given the greater need for immigrant workers today than ever before. Finally, in Part VIII, I argue that progressive solutions must be considered because we have an ethical responsibility to address the border situation fairly.

II. NAFTA—WHERE THINGS WENT WRONG

Since the 1980s, Mexico has engaged in economic reforms that have relied on international trade. Mexico adopted major reforms in 1986 when President Carlos Salinas and a new ruling elite successfully lobbied for the country’s entry into the General Agreement on Tariffs and Trade (GATT).¹⁹ Soon thereafter, President Salinas approached the United States about establishing a continent-wide free trade zone, and those efforts eventually culminated in the North American Free Trade Agreement (NAFTA).²⁰ Over the past twenty years, trade between Mexico and the United States has increased more than eightfold.²¹ Since NAFTA was signed in 1994, trade

¹⁹ MASSEY, CATO INSTITUTE, *supra* note 3, at 3.

²⁰ *Id.*

²¹ *Id.*

and investment among Mexico, the United States, and Canada has tripled,²² and Mexico has edged out Japan as the largest supplier of goods and services to the United States.²³

NAFTA was also supposed to fix the problem of undocumented Mexican migration in the United States. Proponents claimed that NAFTA represented a long-range solution to “illegal immigration” from Mexico.²⁴ These proponents reasoned that, by stimulating economic development in Mexico, NAFTA would create jobs in Mexico and keep Mexicans home.²⁵

In reality, as a method of reducing undocumented migration, NAFTA failed miserably. Even though NAFTA coincided with a new border enforcement regime, illicit border crossings have continued to rise. The entry points may have shifted so that, while apprehension rates may have decreased in places that were once easy to traverse, attempts to enter have surged in more dangerous places like Arizona.²⁶ Even today, most demographers estimate that between 300,000 and half a million undocumented immigrants continue to enter the country annually.²⁷

The low-wage labor sector is not the only migration from Mexico that has accelerated since Mexico initiated economic reforms. Business visas for Mexicans have tripled (now about 438,000 annually), while the number of investors and intra-company transferees (for corporate executives and key managers) has grown dramatically.²⁸ The number of Mexican tourists has increased by six times (to over 3.6 million each year), while the number of foreign students has doubled.²⁹

Of course, the problem with this picture is that, while the economic arrangements facilitated the movement of goods and services as the integration under NAFTA provisions was unfolding, nothing new was provided to facilitate the movement of labor beyond existing immigration law categories. That combination of factors means that the need and recruitment of

²² Jason Ackleson, *Achieving 'Security and Prosperity': Migration and North American Economic Integration*, IMMIGRATION POLICY IN FOCUS, Vol. 5, Issue 2, Feb. 2006, at 3-4 [hereinafter Ackleson, *Security and Prosperity*].

²³ Jennifer E. Harman, *Mexican President Vicente Fox's Proposal for Expanding NAFTA Into a European Union-Style Common Market—Obstacles and Outlook*, 7 L. & BUS. REV. AM. 207, 212 (2001) [hereinafter Harman, *Proposal for Expanding NAFTA*] (explaining that Mexico supplied \$200 billion a year in goods and services to the United States in 2001, compared to \$60 billion before NAFTA.).

²⁴ Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 941-42 (1994) [hereinafter Johnson, *Free Trade and Closed Borders*].

²⁵ *Id.* at 961-62 (citing Congressman Robert Matsui, a key NAFTA supporter in the House of Representatives).

²⁶ HING, *DEFINING AMERICA*, *supra* note 2, at 188-90.

²⁷ BILL ONG HING, *DEPORTING OUR SOULS—VALUES, MORALITY & IMMIGRATION POLICY* 12-13.

²⁸ MASSEY, *CATO INSTITUTE*, *supra* note 3, at 3.

²⁹ *Id.*

low-wage workers from Mexico, resulting from increased economic integration, has had no lawful channel to use. As Douglas Massey points out:

Despite the fact that politicians sold NAFTA as a way for Mexico “to export goods and not people,” everything that occurs in the course of integrating the North American market makes the cross-border movement of people—including workers—more rather than less likely in the short and medium run. The expanding bi-national network of transportation and communication that evolves to facilitate trade also makes the movement of people easier and cheaper. The interpersonal connections formed between Mexicans and Americans in the course of daily business transactions create a social infrastructure of friendship and kinship that encourage migration and facilitate further movement.³⁰

Failing to provide for labor migration in NAFTA was a mistake. In reality, economic integration in North America and development in Mexico has promoted labor migration.³¹

A. *The Conventional Background Description of NAFTA*

The conventional explanation of how NAFTA came about (as opposed to a more class-based description set forth below) begins in 1990 when President Salinas and President George H. W. Bush announced the initiation of negotiations of a free trade agreement between Mexico and the United States. Canadian Prime Minister Brian Mulroney soon joined in, setting the stage for the creation of a free trade area covering all of North America. Within two years, the three leaders signed NAFTA and began the implementation process. Although President Bush was not reelected, President Bill Clinton followed through with the agreement but insisted on side agreements pertaining to U.S. labor protection, environmental control, and certain import limitations. Tariffs and other barriers would be phased out over a fifteen-year period and intellectual property rights would be protected.³² By reducing restraints on trade, the idea was that commerce between the three nations would increase.³³

The debate over NAFTA was controversial. Free trade advocates, enamored by the accord, were pitted against liberal interest groups. Economists and chambers of commerce argued that the agreement would benefit all three nations, but organized labor worried that jobs would be lost because employers would move their operations to Mexico.³⁴ Independent presidential candidate Ross Perot sarcastically asserted that the “giant suck-

³⁰ *Id.* at 5.

³¹ Ackleson, *Security and Prosperity*, *supra* note 22, at 1.

³² Christopher J. Cassise, *The European Union v. the United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions*, 46 SYRACUSE L. REV. 1343, 1348 (1996) [hereinafter Cassise, *The European Union*].

³³ Johnson, *Free Trade and Closed Borders*, *supra* note 24, at 940-41.

³⁴ *Id.* at 939.

ing sound” one heard was the sound of jobs being lost to Mexico under NAFTA.³⁵ Environmentalists claimed that Mexico’s environmental protections were insufficient and that the accord would negatively affect the environment.³⁶ In territory, population, and production, NAFTA would be larger than the first fifteen members of the EU combined; nearly 400 million people live in the three countries of North America.³⁷

Apparently, NAFTA’s failure to include a component for low-skilled laborers was intentional. Kevin Johnson has explained that the debate over NAFTA “did not view the trade agreement and immigration as related. In part, this was a result of the fact that, in negotiating the trade agreement, the United States excluded the subject of labor migration from the bargaining table.”³⁸ The only real discussion about migration was in negative rather than positive terms. Late in the process, some urged opposition to NAFTA if Mexico did not agree to take steps to limit immigration and stem the flow of undocumented migrants.³⁹ The Mexican government objected to such a suggestion as a violation of the right to travel, and U.S. officials objected saying it was too late to add provisions on immigration controls.⁴⁰ Incredibly, when asked about immigration issues, the Deputy U.S. Trade Representative involved in the NAFTA negotiations responded:

[T]he issues of immigration . . . [are] not considered to be a subject of the free trade negotiations When we get into broad scale immigration, you’re not dealing with trade . . . you’re dealing with social issues . . . and we’ve agreed that will not be part of this negotiation.⁴¹

As a result, NAFTA did not deal with migration between the three countries.⁴²

B. *The Results of NAFTA*

The increase in trade that NAFTA generated has not translated into more jobs for Mexicans at home. In fact, NAFTA may have resulted in structural changes that encourage more labor migration from Mexico.

³⁵ *Id.* at 951.

³⁶ *Id.* at 939.

³⁷ ROBERT A. PASTOR, TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW 6 (Peterson Inst. for Int’l Econ. 2001) [hereinafter PASTOR, LESSONS FROM THE OLD WORLD].

³⁸ Johnson, *Free Trade and Closed Borders*, *supra* note 24, at 940.

³⁹ *Id.* at 941.

⁴⁰ *Id.* at 960.

⁴¹ Cassise, *The European Union*, *supra* note 32, at 1372 (citing Cyrille Rogacki, *An Interview with Ambassador Julius Katz*, 26 COLUM. J. WORLD BUS. 38 (1991)).

⁴² Johnson, *Free Trade and Closed Borders*, *supra* note 24, at 941.

Theoretically, for example, agricultural free trade should reduce migration pressures from poorer countries because agriculture is a huge source of employment in such countries; however, agricultural subsidies in the wealthier countries distort matters.⁴³ Consider the case of United States and Mexico:

American agriculture is the most mechanized and productive in the world, and government subsidies for farmers create market distortions, which in turn create a higher demand for cheap labor and for guest worker programs. If the goal of U.S. government policy is to reduce immigration from Mexico, it would make sense to address this distorting effect at the source. U.S. agricultural subsidies often support large-scale agricultural operations that create demand for immigrant labor. At the same time, these subsidies negatively affect agricultural production in developing countries that cannot afford to subsidize farms to the same degree and indirectly promote rural emigration. The result is both greater demand for and greater supply of guest workers.⁴⁴

The agricultural industry in Mexico is neither powerful nor vast. Certainly, there are large farms in the north that grow fruit and vegetables aimed at U.S. markets; however, most Mexican farms are small and do not have credit. The government permits the sale of land in the form of cooperatives, but it has little credit, funds, or aid for small farmers.⁴⁵ Net exports from the northern part of Mexico grew after NAFTA, but that expansion paled in comparison to new imports of grain, oilseeds, and meat from the United States; after ten years, Mexico was dependent on the United States for much of its food.⁴⁶

The effect of government subsidies to U.S. companies on undocumented migration is clear. Subsidies for agricultural entities actually promote the migration of unskilled workers “due to non-market stimulation of demand for employees in the [United States] and accompanying negative effects of domestic subsidies on developing countries which send migrant workers.”⁴⁷ This was easily foreseeable before NAFTA began. For years, Mexico provided support to rural areas through systems of price supports for producers and reduced prices of agricultural products for consumers, but after NAFTA, Mexico withdrew this support.⁴⁸ The United States, however, continued to produce subsidized corn in huge quantities at low prices,

⁴³ ROBERT J. FLANAGAN, GLOBALIZATION AND LABOR CONDITIONS 114 (2006) [hereinafter FLANAGAN, GLOBALIZATION].

⁴⁴ Bradly J. Condon & J. Brad McBride, *Do You Know the Way to San Jose? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 262 (2003) [hereinafter Condon & McBride, *Do You Know the Way to San Jose?*].

⁴⁵ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 79.

⁴⁶ JEFF FAUX, THE GLOBAL CLASS WAR : HOW AMERICA'S BIPARTISAN ELITE LOST OUR FUTURE—AND WHAT IT WILL TAKE TO WIN IT BACK 134 [hereinafter FAUX, THE GLOBAL CLASS WAR].

⁴⁷ Condon & McBride, *Do You Know the Way to San Jose?*, *supra* note 44, at 294.

⁴⁸ Monica L. Heppel & Luis R. Torres, *Mexican Immigration to the United States After NAFTA*, 20 FALL FLETCHER F. WORLD AFF. 51, 58 (1996) [hereinafter Heppel & Torres, *Mexican Immigration*].

undercutting Mexico's corn prices; this subsidized system displaced Mexican workers because corn was a major source of rural income.⁴⁹ At best, the effects of NAFTA in Mexico have been uneven, especially in rural areas and among low-skilled groups that tend to migrate to the United States. The wages for low-wage workers have declined, and the rural poverty rate has increased. The idea of NAFTA-created jobs that would reduce pressure to migrate simply has not become a reality.⁵⁰

The agricultural industry has always been a huge challenge for all three countries because of government intervention and subsidies. In 1996, while the United States was pressuring Europe to eliminate its farm subsidies, Congress passed a bill eliminating subsidies to U.S. farmers. U.S. crops were crowded out of the market as the global market was glutted and the U.S. dollar increased in value. As a result, the United States reversed course, and U.S. farm subsidies totaled \$28 billion by 2000.⁵¹

One might think that agricultural liberalization is good for a developing country in a trade relationship with a developed economy. However, even though Mexico had an agricultural trade deficit with the United States before NAFTA, the problem got worse following the trade accord. Not all tariffs on crops in both the United States and Mexico have been eliminated, and therefore, matters are still in flux; however, U.S. farm subsidies (and farmer efficiency) continue to make a difference. For example, U.S. corn is sold in Mexico at prices that are estimated to be at least 30% below the cost of production.⁵²

The trade deficit has resulted in agricultural job losses in Mexico.⁵³ Prior to NAFTA, Mexico had 8.1 million agricultural jobs.⁵⁴ That figure actually increased slightly after the peso crisis of the early 1990s, when unemployment led some workers back to the farm.⁵⁵ Then, a decline ensued, and by 2006, only 6 million agricultural workers were employed—down 2 million from pre-NAFTA levels.⁵⁶ While NAFTA cannot be blamed for all of these losses, Mexico has “reduced its agricultural tariffs much more for the United States than for other trading partners.”⁵⁷ Clearly,

⁴⁹ *Id.*

⁵⁰ Ackleson, *Security and Prosperity*, *supra* note 22, at 3-4.

⁵¹ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 108-09.

⁵² *NAFTA At Year Twelve: Hearing Before the Subcomm. on Int'l Trade of the S. Comm. on Finance*, 109th Cong. (Sept. 11, 2006), available at <http://finance.senate.gov/hearings/testimony/2005test/091106sptest.pdf> [hereinafter Polaski Testimony, *The Employment Consequences of NAFTA*] (prepared statement of Sandra Polaski, Senior Associate and Director, Trade, Equity and Development Project, Carnegie Endowment for Int'l Peace). See also S. HRG. 109-922, at 19 (U.S. Gov't Printing Office 2006) (hearing transcript).

⁵³ Polanski testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 8.

⁵⁴ *Id.* (citation omitted).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 8.

agricultural trade liberalization is the “single most significant factor” in Mexico’s agricultural jobs loss.⁵⁸

The two million farmers forced to abandon their land ended up as migrant workers in Mexican cities or in the United States.⁵⁹ Perhaps 200,000 migrant workers have settled in wretched conditions in an agricultural area called Sinaloa, where twenty families control the industry.⁶⁰ With pitiful wages, many survive on the corn and beans they manage to grow, live in inferior housing, and are unable to attend schools or obtain health care.⁶¹

Mexican farmers suffered from NAFTA’s failure to provide a long phase-out period for tariffs on basic crops. Little was done to help rural farmers face the adjustments that had to be made—no meaningful transition period, no assistance in shifting to competitive crops, and no development of alternative job opportunities.⁶² The effect of U.S. subsidies on products such as corn should have been anticipated when NAFTA was enacted.⁶³ The negative effect of subsequent actions on rural Mexican farmers must have been obvious; for example, the U.S. farm bill in 2002 further increased subsidies, putting Mexican farmers at an even greater disadvantage.⁶⁴ As small, allegedly “inefficient” Mexican farmers were put at risk, no foreign investments into the rural sector for industrial development or value-added activities arrived.⁶⁵

Agricultural job loss is emblematic of overall employment problems in Mexico. Jobs in non-maquiladora manufacturing are fewer today than in 1994, except in informal sector microenterprises.⁶⁶ By June 2006 there were 130,000 fewer jobs in non-maquiladora manufacturing than prior to NAFTA.⁶⁷ The U.S. recession and global changes, such as competitive exports from China, have also contributed to Mexican job loss in the past few years.⁶⁸

Export manufacturing jobs have increased modestly in Mexico during NAFTA. However, the loss of two million agricultural jobs greatly offsets the 700,000 jobs gained in export manufacturing.⁶⁹ Furthermore, 100,000 jobs in Mexico’s domestic manufacturing sector were lost from 1993 to

⁵⁸ *Id.*

⁵⁹ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 134.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 21.

⁶³ *Id.* at 19.

⁶⁴ *Id.*

⁶⁵ LAURA CARLSEN, *NAFTA AND IMMIGRATION: TOWARD A WORKABLE AND HUMANE INTEGRATION* (forthcoming 2010).

⁶⁶ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 4.

⁶⁷ *Id.*

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 9.

2003.⁷⁰ Simply put, “the trade pact has not produced a strong gain in overall employment and, indeed, might have produced a net loss of jobs for Mexico.”⁷¹

The effect of NAFTA on Mexican wages is also a relevant factor in undocumented migration from Mexico. Recent migration is a manifestation of historical restructuring of the Mexican economy.⁷² Disappointingly, while NAFTA substantially increased exports (worker productivity) and direct foreign investment, the average Mexican worker’s wages and standard of living has not improved. Wages for manufacturing workers (both maquiladora and non-maquiladora) have fallen below pre-NAFTA levels.⁷³ Even highly-educated workers in manufacturing (e.g., professional, technical, and administrative staff) had lower wages in the late 1990s than in 1993.⁷⁴ After ten years of NAFTA, real wages in Mexico were lower and income inequality had grown even though productivity had increased.⁷⁵ Many Mexicans, if not most, who come to the United States looking for work were employed in Mexico. That means that efforts to improve economic conditions in Mexico must look beyond employment to wages, job quality, and perceptions of opportunity.⁷⁶ Mexican labor migration is not as much about escaping abject poverty as it is about improving the economic situation in the new NAFTA economy.⁷⁷ In essence, given the growth in low-wage maquiladora jobs and the decline in domestic manufacturing jobs, the gap between U.S. and Mexican wages actually widened under NAFTA. In 1975, Mexican wages were about 23% of wages in the United States; just before NAFTA was implemented in 1994, they declined to 15% of wages in the United States; by 2002, they dropped further to 12% of wages in the United States.⁷⁸

Income inequality has been exacerbated during NAFTA as well. In the early 1990s, income discrepancies between Mexico’s rich and poor were already substantial. In 1994, the poorest 40% of households in Mex-

⁷⁰ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 136.

⁷¹ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 9.

⁷² Nina Bernstein, *Most Mexican Immigrants in New Study Gave Up Jobs to Take Their Chances in U.S.*, N.Y. TIMES, Dec. 7, 2005, at A30 (citing Kathleen Newland, director of the Migration Policy Institute).

⁷³ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 10.

⁷⁴ *Id.*

⁷⁵ Celia W. Dugger, *Report Finds Few Benefits for Mexico in NAFTA*, N.Y. TIMES, Nov. 19, 2003, at A8 (citing study by Carnegie Endowment for International Peace).

⁷⁶ RAKESH KOCHHAR, PEW HISPANIC CTR., *SURVEY OF MEXICAN MIGRANTS PART THREE: THE ECONOMIC TRANSITION TO AMERICA*, Dec. 6, 2005, at I.

⁷⁷ Douglas S. Massey, *An Exercise in Self-Deception*, NEWSWEEK, Jan. 19, 2004, at 41 [hereinafter Massey, *Self-Deception*].

⁷⁸ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 136.

ico earned 10.7% of the total income.⁷⁹ In 2001, the poorest 40% of households in Mexico earned 9.1%.⁸⁰

U.S. imports from Mexico have increased under NAFTA. Prior to the agreement, imports were increasing at a rate of about 6.4% compared to a 20% rate after NAFTA. Interestingly, commodities liberalized by NAFTA did not grow by as much as those unaffected by liberalization. Apparently, the expansion in exports was primarily in manufacturing and “due primarily to industrial integration by North American firms.”⁸¹ NAFTA has definitely affected Mexico more than it has the United States or Canada. The 1995 Mexican recession resulted principally from government mismanagement and political crises, but growing dependence on foreign capital also played a significant role. Despite these problems, Mexico experienced annual growth rates of about 5% through the end of the 1990s.⁸² Mexico is the world’s sixth-largest oil producer, the eighth-largest oil exporter, and the third-largest supplier of oil to the United States; its oil and gas revenues provide more than one-third of all Mexican government revenues.⁸³ NAFTA has transformed Mexico from an oil-dependent economy to one based on manufactured exports. Labor has moved out of the rural areas, and although about a fifth of the population still lives on farms, they produce only 5% of the country’s output. This movement of workers to the cities will affect Mexico’s ability to compete in the industrial market.⁸⁴

C. *The Effect of NAFTA on the United States*

There are diverse approaches for determining the effect of NAFTA in the United States. One approach is to calculate job growth by multiplying the estimated number of manufacturing jobs supported by a certain level of exports and by the increase in exports to Canada and Mexico. Another is to use a similar multiplier formula with the trade deficit (which presumably reflects the greater increase of imports over exports). NAFTA’s supporters do not use a multiplier formula to identify jobs lost due to imports, noting the lack of certainty that all imported goods displace U.S. goods that would nevertheless have been produced in the absence of trade. Most agree, however, that all trade agreements produce both winners and losers, so it is important to look at both jobs created and jobs lost. Also, additional factors beyond NAFTA are at play, such as other trade agreements and the creation

⁷⁹ *Id.* at 139.

⁸⁰ *Id.*

⁸¹ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 69.

⁸² *Id.* at 79.

⁸³ U.S. DEP’T OF STATE, BUREAU OF W. HEMISPHERE AFFAIRS, BACKGROUND NOTE ON MEX. (Nov. 2008), available at <http://www.state.gov/r/pa/ei/bgn/35749.htm>.

⁸⁴ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 79.

of the World Trade Organization (WTO). As a result, simple multiplier formulas may not truly capture all that is transpiring.⁸⁵

The U.S. International Trade Commission (USITC) uses its own approach to measure the effect of trade agreements on the U.S. economy.⁸⁶ Its model concluded that NAFTA and the Canada-United States Free Trade Association (CUFTA) together increased U.S. workers' compensation by about \$10 billion in 2001.⁸⁷ The model is based on the assumption that in full-employment economies there is no change in total employment.⁸⁸ The effect of NAFTA on U.S. employment falls between a gain of 270,000 jobs and zero net change.⁸⁹

The problem with the USITC model, as well as with others, is its failure to account for investment decisions to move production facilities from the United States to Mexico or Canada.⁹⁰ While investment decisions based on market access may be captured, other considerations, such as NAFTA's protections for U.S. investors, may be missed.⁹¹

Most researchers conclude that about a half-million U.S. workers lost jobs as a result of NAFTA.⁹² However, the losses were likely offset by job increases. About half of the losses were due to production shifts to Mexico with apparel manufacturing representing the greatest number at about 28%, followed by electronics at 13%, automobiles and parts at 7%, and fabricated metals at 6%.⁹³ While over 90,000 jobs may have been lost in the United States each year in the 1990s, about 200,000 jobs were also created in each of those years, making the losses "trivial in comparison."⁹⁴

Overall NAFTA has resulted in strong growth in manufactured exports but disappointing increases in manufacturing employment.⁹⁵ In addition, Mexican farmers have struggled under NAFTA changes. The costs can be severe under trade pacts, and the "losers are often those segments of society least able to cope with adjustment, due to low skills, low savings, and low mobility . . . [and the effect may be permanent] due to limitations of education, skills, geographic isolation, and other factors."⁹⁶ Mexican employment loss in domestic manufacturing and agriculture overwhelmed the number of jobs created in export manufacturing. In the United States, the

⁸⁵ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 13.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 13-14.

⁹⁰ *Id.* at 14.

⁹¹ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 14.

⁹² *Id.*

⁹³ *Id.* at 15.

⁹⁴ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 69.

⁹⁵ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 4.

⁹⁶ *Id.* at 21.

effect has been neutral or slightly positive at best in terms of employment, but it has certainly not been negative.⁹⁷

D. *The Dark Side of NAFTA*

The more critical description of NAFTA's background, what it represents, and how it came about reveals a disturbing history. That history provides a better understanding of why undocumented Mexican migration has increased since the enactment of NAFTA and explains related events such as the peso crisis of the 1990s. This history also raises ethical concerns about the approach the United States takes toward its southern border and low-wage workers from Mexico.

NAFTA represented a sea of changes in the manner in which the United States addressed international trade.⁹⁸ Until then, different sectors of the economy competed against each other for advantages, uniting each sector's workers, managers, and investors on the issues of tariffs and trade policies.⁹⁹ Manufacturers, food producers, shipping companies, and other sectors sought advantages so that each sector could do well.¹⁰⁰ But after NAFTA, class divisions emerged between workers and managers/investors when the latter realized that it could make money by investing elsewhere, irrespective of the workers in America.¹⁰¹

The long negotiation period leading up to NAFTA made clear that the agreement was not about workers' rights. Nearly all of the members of the U.S. Advisory Committee for Trade and Policy and Negotiations (ACTPIN) were representatives of multinational corporations.¹⁰² Likewise, trade unions, environmental groups, and other civil society organizations were not invited to the negotiating table by either Mexico or Canada.¹⁰³ The message was clear: trade agreements were business matters.¹⁰⁴ More than anything, NAFTA represented an opportunity to dismantle public regulation over business and to allow the business class to write its own ticket.¹⁰⁵

Supporters of NAFTA (including President Clinton) and the media advanced three common justifications for the new global economy agreement.¹⁰⁶ One was economic, arguing that NAFTA would create jobs and

⁹⁷ *Id.* at 2.

⁹⁸ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 12.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 15.

¹⁰³ *Id.* at 16.

¹⁰⁴ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 16.

¹⁰⁵ *Id.* at 31.

¹⁰⁶ *Id.* at 33.

increase the U.S. standard of living.¹⁰⁷ A second was related to immigration, stating that free trade would bolster Mexico's economy, thereby stemming the flow of undocumented migration.¹⁰⁸ Lastly, supporters offered a political rationale, maintaining that the forces of democracy epitomized by President Carlos Salinas had to be supported.¹⁰⁹ The immigration rationale appealed to many who were concerned with the flow of undocumented aliens in the early 1990s.¹¹⁰

The job creation theme was misleading.¹¹¹ The real benefits of free trade come in the form of lower prices rather than more jobs.¹¹² Free trade means larger markets that increase economies of scale; businesses can specialize more and sell products at lower prices.¹¹³ Although being able to buy more is a form of wealth creation, being able to buy cheaper products was not something typical taxpayers had in mind when their congressional representatives voted for NAFTA.¹¹⁴ Even President Jimmy Carter supported NAFTA.¹¹⁵ Perhaps concerned with EU consolidation and the early signs of a Chinese economic movement, President Carter endorsed NAFTA, fearful that "the Japanese and others will move in and take over markets that are rightfully ours."¹¹⁶

Negotiators solidified the dark side of NAFTA as the agreement neared completion. Multinational enterprises would be freed of national trade restrictions.¹¹⁷ Already connected to others in their worldwide business networks, national boundaries would no longer constrain the companies. Profit making across boundaries for multinationals from all three countries would be enhanced.¹¹⁸

Thus, NAFTA was crafted to enhance profit making for big business, not for everyday workers. Workers could have benefited, however, if a single internal market—a customs union, such as the EU—had been created.¹¹⁹ Under such a union, a protected, internal market could emerge. Businesses from all three countries could benefit from economies of scale, access to raw materials and technology, and shared research and development, training, and business subsidies.¹²⁰

¹⁰⁷ *Id.* at 33-34.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* at 32-33.

¹¹⁰ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 37.

¹¹¹ *Id.* at 34.

¹¹² *Id.* at 35.

¹¹³ *Id.*

¹¹⁴ *Id.* at 35-36.

¹¹⁵ *Id.* at 37.

¹¹⁶ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 45.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 46.

¹²⁰ *Id.*

However, a union between the three countries creating a protected market benefiting both workers and businesses would have amounted to a social contract that big business would not support.¹²¹ To big business, NAFTA was not about making North America or each country more competitive.¹²² Rather, NAFTA was about making corporate investors more competitive by giving them access to cheap labor and, in Mexico, even government assets.¹²³ NAFTA was not a commitment to North America; it was about cheap labor, no matter where the labor was located.¹²⁴ Big business made substantial contributions to the 1992 Clinton campaign after he advocated more open markets and less protectionism.¹²⁵

NAFTA promoters today do not have the evidence to successfully claim that the agreement has resulted in major job growth or higher wages. As a result, they emphasize how the agreement brought about lower prices for consumers.¹²⁶ A few years ago in 2001, the Office of the U.S. Trade Representative asserted that a family of four benefited \$1,300 to \$2,000 per year as a result of NAFTA and the WTO; however, this estimate was based on a simulated model that did not consider either unemployment or dislocation costs.¹²⁷

What do cheaper prices mean for Mexicans? Surely, some Mexicans benefit from cheaper U.S. and Canadian products. But the Mexican poverty rate is above 50%, and the cost of living in Mexico has risen.¹²⁸ The minimum wage in 1994 (about \$4.20 per day) bought 44.9 pounds of tortillas compared with only 18.6 pounds in 2003.¹²⁹ In 2003, the minimum wage bought seven liters of gas, down from 24.5 liters in 1994.¹³⁰ Consider the economic challenges faced by one maid in Mexico City. She “collects \$8 a day, or about 80 pesos—almost double the minimum daily wage. But her earnings are spent as soon as she makes them. Six pesos a day for bus fare for each of the three days she works. Twenty-four pesos a day for her youngest child’s bus fare to school. Thirty pesos a day for the oldest child’s bus fare to high school. That leaves 20 pesos a day to buy food and clothing and pay for any doctor’s bills or medicine, since her family is among the 63% of the population with no health coverage.”¹³¹

121 *Id.*

122 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 46.

123 *Id.*

124 *Id.* at 46-47.

125 *Id.* at 109.

126 *Id.* at 138.

127 *Id.* at 138.

128 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 139.

129 *Id.*

130 *Id.*

131 Susan Ferriss, *Broken Promises: How Economic Reforms Have Failed Mexico*, AUSTIN AMERICAN-STATESMAN, Aug. 10, 2003, http://www.statesman.com/search/content/specialreports/mexico_economy/0810mexico.html (last visited Jan. 12, 2009).

Vicente Fox provided some hope that Mexico would put pressure on the United States and Canada to approach NAFTA differently. Although he was a candidate for the conservative National Action Party (PAN) party in the 2000 Mexican presidential election, he had joined forces with leftist political parties to win the governorship in the state of Guanajuato. In his campaign for the presidency, he addressed NAFTA, declaring:

[NAFTA] has brought foreign investment [to Mexico], about \$10 billion a year, and it has created a lot of jobs. But I feel we must go ahead with a new phase. We must begin to talk to Canada and the United States to include the free flow of people under NAFTA. What is needed—and I know it sounds a bit too strong now—is to have the three countries evolving into a common market, an association that, in the long term, will reduce the brutal wage differential among the three countries.¹³²

After his election, he sought EU-type “cohesion” funds from the United States for infrastructure development and a border policy that would allow for the free flow of laborers from all three countries.¹³³ But the events of 9/11 intervened, and Fox’s notions were subsequently brushed aside. Nevertheless, commerce involving money and goods ultimately continued despite the war on terrorism.¹³⁴

Even though he was a member of the same governing class as Salinas and Zedillo, Vicente Fox’s election created the possibility of a new direction in Mexico; however, Fox, like Clinton, the Bushes, Mulroney, and Jean Chretien, remained loyal to his business supporters. When farmers harmed by NAFTA protested in late 2002, they were spurned by Mexican officials claiming that the United States and Canada held the power. U.S. Agriculture Department officials advised Mexican officials to “focus on rural structural reforms and not in constructing barriers to trade,” in essence, to move small farmers out of agriculture.¹³⁵

In short, a global governing economic class was the true beneficiary of NAFTA—not any particular nation and certainly not the poor or working class of the nations involved.¹³⁶ Some NAFTA promoters claimed that unrestricted trade with Mexico was like unrestricted trade between individual U.S. states. However, the problem with that analogy is that U.S. workers are covered by minimal, uniform employment protections involving wages, health and safety standards, and other benefits while no such uniformity applies among the NAFTA nations. Instead, the corporate investor across borders gains protection by the global economic structure of NAFTA, not the common worker who is restricted by the border. The

¹³² Sergio Munoz, *Opinion: Vicente Fox*, L.A. TIMES, Apr. 9, 2000, at M-3, available at <http://articles.latimes.com/2000/apr/09/opinion/op-17525>.

¹³³ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 212.

¹³⁴ *Id.* at 213.

¹³⁵ *Id.* at 153.

¹³⁶ *Id.* at 156-58.

words of a U.S. State Department official reveal the absence of care for working class interests: "when we negotiate economic agreements with these poorer countries, we are negotiating with people from the same class. That is, people whose interests are like ours."¹³⁷ Multinational corporations make up the protected collective institution, not the societies of each nation.¹³⁸ This global economic class is unified across borders, governing economic decisions from a class perspective rather than as representatives of different nation-states.¹³⁹ Viewed from that perspective, we are better informed in discussing "free trade" versus "protectionism."

Viewing NAFTA through a class lens helps us better understand how the WTO further damages the poor and working class of Mexico. Just a year after the United States approved NAFTA, Newt Gingrich and the Republican Party wrested control of the House of Representatives. President Clinton joined forces with the Republicans, and Congress approved the WTO, which is essentially a global version of NAFTA.¹⁴⁰ Trade among non-communist countries was already greatly expanded after World War II under GATT, but the WTO gave more strength to transnational investors.¹⁴¹ Governments could neither require foreign investors to purchase supplies from domestic businesses nor block certain products from entering their borders unless they were considered unsafe or immoral (e.g., produced by child labor). Local laws relating to workers' rights, the environment, and public health could not be used to restrict corporations from buying, selling, or investing.¹⁴²

By embracing the WTO and then actively encouraging China to enter the world market, the U.S. business economic class demonstrates that its true loyalty is to profit making. Mexican businesses have complained that multinational businesses centered in the United States have abandoned the vision of NAFTA under which they would partner with Mexican business supplying low-wage workers and their U.S. counterparts the capital.¹⁴³ Bringing China into the world market and thereby initiating U.S. trade talks with other Latin American countries strikes at the heart of Mexico's low-wage strategy.¹⁴⁴ Thus, NAFTA was not about enhancing the competitiveness of North America; it was about easing constraints on private corporations that might otherwise be imposed by a particular country or even a continent.¹⁴⁵

¹³⁷ *Id.* at 158 (citing a retired U.S. State Department official speaking at the Council of Foreign Relations in New York).

¹³⁸ *Id.* at 205.

¹³⁹ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 158.

¹⁴⁰ *Id.* at 159.

¹⁴¹ *Id.* at 160.

¹⁴² *Id.* at 161.

¹⁴³ *Id.* at 220.

¹⁴⁴ *Id.* at 220-21.

¹⁴⁵ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 221.

NAFTA has created a “seamless web of finance” as businesses, bankers, and brokers wheel and deal across borders. Food companies and auto makers use and rely on supplies and markets in accordance with freedoms that they have under the international accord.¹⁴⁶ Mexico and Canada are now dependent on the U.S. market with about 90% of their exports going to the United States.¹⁴⁷ To promote trade, eighteen U.S. states had offices in Mexico in 2006 compared to a dozen in Canada.¹⁴⁸ Just as we are not surprised that border crossings by business visitors, company officials, and professional workers have increased,¹⁴⁹ we should also understand that the pressure for low-wage workers to cross at increasing rates occurs as a natural consequence.¹⁵⁰ Unlike the EU experience,¹⁵¹ the gap between per capita GDP in Mexico and in the United States has widened.¹⁵²

The interest in providing multinationals access to cheap labor through trade agreements has contributed to a haunting U.S. trade deficit and massive foreign debt.¹⁵³ In the past, Europe and Japan have eased the pain that an overvalued dollar might have on U.S. living standards not only because the U.S. market for imports was important but also because of the need to support the United States for military security. However, without a Soviet threat or a shared obsession on global terrorism, Europe and Asia may not be as helpful on the international financial stage.¹⁵⁴ They are focused on their own economic growth, and their people may not be as willing to support the United States.¹⁵⁵ Yet, to get out of debt and reverse the trade deficit, Americans simply have to “save more and spend less, export more and import less.”¹⁵⁶ Crazy, the 2008 stimulus package was enacted by Congress and signed by President Bush with the hope that rebates would spur taxpayers on a spending spree to avert a recession. Given our trade deficit, all the spending will do is to help countries like China that manufacture so many consumer goods for the U.S. public.¹⁵⁷

¹⁴⁶ *Id.* at 205.

¹⁴⁷ *Id.* at 207.

¹⁴⁸ *Id.* at 209.

¹⁴⁹ See *supra* Part II and accompanying text.

¹⁵⁰ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 205.

¹⁵¹ See *infra* Part VII and accompanying text.

¹⁵² FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 136, 139-40.

¹⁵³ See *infra* Part V.

¹⁵⁴ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 195-96.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 201.

¹⁵⁷ All Things Considered, *China's Trade Deficit: "The \$1.4 Trillion Question"* (National Public Radio broadcast Jan. 29, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18518903>; Anthony Kuhn, *U.S.-China Trade Under Pressure From Congress* (National Public Radio broadcast May 20, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10283509>.

A crisis tied to the value of the dollar is looming.¹⁵⁸ If the value of the dollar begins to drop, the living standards for average Americans will fall.¹⁵⁹ To ensure that employment does not fall, the U.S. government would have to increase deficit spending even more with a concurrent rise in the level of debt.¹⁶⁰ Pressure would rise to correct the U.S. trade imbalance, inflation would follow, American consumers and businesses would spend less, and income growth and wages would be slowed.¹⁶¹ This would be devastating for many American families who are already in debt, faced with mortgage payments, health care costs, education, transportation, and insurance.¹⁶² Those expenses amounted to 50% of family income in the 1970s, but now they account for 75% of family income.¹⁶³

If in fact U.S. imports from the rest of the world decline substantially, capital in the developing world would decline.¹⁶⁴ Transnational elites outside of the United States may reduce their support for trade agreements with the United States—especially those that allow government subsidies of U.S. agriculture.¹⁶⁵ The EU would give priority to its own interests and resist large trade deficits outside its communities; China, Japan, and India would want to continue their successful export models, but the United States may have to seriously consider import surcharges—tariffs—in order to stop the outflow of U.S. dollars.¹⁶⁶

The fact that the economies of North America have become so integrated under NAFTA means that, when the United States makes its financial readjustment because of debt and trade imbalance, Canada and Mexico could be severely affected.¹⁶⁷ As shown below, the Mexican economy cannot sustain much more pain. The poverty rate is high, and the border region is dependent on the U.S. market. A major shift in the economic relationship between Mexico and the United States could cause even greater pressure for undocumented migration and perhaps political upheaval.¹⁶⁸ The task is to figure out how to reduce the U.S. trade deficit without creating major crises in Mexico and Canada.¹⁶⁹

158 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 197.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 197-98.

163 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 197, 201-02.

164 *Id.* at 198.

165 *Id.* at 199.

166 *Id.* at 198-99.

167 *Id.* at 215-17.

168 *Id.* at 216-17.

169 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 216-17.

III. WHERE DO MAQUILADORAS FALL INTO THE EQUATION?

After the expiration of the Bracero program in 1964, employment in Mexican border towns reached critical levels, and the foreign exchange that had been generated for Mexico under the program was lost.¹⁷⁰ Mexico looked for ways to replace the program with something that would create jobs, attract foreign investment, increase Mexican industrial competitiveness, and enhance technology.¹⁷¹ Attempting to attract capital and technology from abroad, Mexico eased legal restrictions that required foreign investments to be structured as joint ventures with majority Mexican control and protectionist tariffs that excluded foreign goods. At the same time, Mexico turned to the United States for help. Under trade laws, the United States charged tariffs on products produced abroad even if the components were from the United States.¹⁷²

The platform for maquiladoras was launched. First, Congress added the "807 Assembly Provision" in the tariff law, providing that U.S. components could be exported "ready for assembly," and the finished product, when imported back into the United States, would not be assessed duties on the value of any U.S. components. In other words, U.S. firms could reduce manufacturing costs by using cheaper labor in Mexico.¹⁷³ Then through presidential decree (the "Maquiladora Decree") in 1965, Mexico permitted active foreign ownership of manufacturing and assembly facilities located near the border. The decree also provided duty-free importation of raw materials and auxiliary materials (such as packaging and containers) irrespective of origin (including countries other than the United States) as long as the assembled or manufactured product was exported from Mexico within ninety days.¹⁷⁴ Non-maquiladora manufacturers in Mexico paid a price for these arrangements; without the advantage of duty-free components, they were disadvantaged for twenty-five years until 1990 when the government finally lifted duties on imported machinery, raw materials, and packaging.¹⁷⁵

The maquiladora program's effect on the Mexican and U.S. economies was substantial. In the early 1990s, maquiladoras generated the second largest source of foreign income and 45% of Mexico's exports to the United States.¹⁷⁶ New technology was also introduced to undeveloped towns and

¹⁷⁰ David M. Neipert, *NAFTA Section 303, A Difficult Choice for Mexico* NAFTA, 10 CURRENTS: INT'L TRADE L.J. 25, 25 (2001) [hereinafter Neipert, *NAFTA Section 303*].

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 26.

¹⁷⁵ *Id.*

¹⁷⁶ Alejandro Alvarez Béjar, *Industrial Restructuring and the Role of Mexican Labor in NAFTA*, 27 U.C. DAVIS L. REV. 897, 907 (1994) [hereinafter Béjar, *Industrial Restructuring*].

cities.¹⁷⁷ Yet during the 1980s, average Mexican wages fell to 30,000 pesos (U.S. \$9.50) a day, a sign that low Mexican wages were subsidizing U.S. industrial restructuring, especially in automotive and electronic industries. Thus, U.S. companies could save \$25,000 per worker by using Mexican labor, amounting to \$10 billion in 1990.¹⁷⁸

By the end of the 1990s, the maquiladora program had been hailed as a success by many observers. Almost one million workers were employed in nearly 3,000 factories, of which over 600 manufactured electronics.¹⁷⁹ Most of the electronics components come into Mexico duty free from Asia, and if sufficient value is added as a finished product, the product qualifies under NAFTA “rules of origin” to be exported duty free to the United States or Canada as a NAFTA product.¹⁸⁰ In contrast, Asian components exported to the United States or Canada that were made into finished products were dutiable.¹⁸¹

This advantage to Mexico did not go unnoticed in the negotiations over NAFTA. The United States and Canada forced Mexico to give up the maquiladora advantage on duty-free component imports by January 2001 when duty deferrals or refunds ceased.¹⁸² This placed Mexican decision makers in a difficult situation, forcing them to choose to maintain revenue either by attempting to export finished products to non-NAFTA countries or by reducing external tariffs.¹⁸³

Today, maquiladoras are concentrated in auto parts, electronics, and apparel. While maquiladora job-growth cannot be primarily attributable to NAFTA since the program predates NAFTA, the trade agreement stimulated apparel manufacturing due to tariff cuts. Maquiladora assembly plants added about 800,000 jobs between NAFTA’s enactment in 1994 and peak maquiladora employment in 2001. About 125,000 jobs were eliminated by January 2006, so employment in this sector rose by about 700,000 jobs since NAFTA began.¹⁸⁴ In the textile and apparel sectors, the number of jobs dropped by an average rate of 4.3% per year between 2001 and 2005.¹⁸⁵

The great increase in apparel and other manufacturing in China since January 2005, when international limits on clothing exports expired is not good news for maquiladora and other employment figures. The end to quo-

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Neipert, *NAFTA Section 303*, *supra* note 170, at 26.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 26-27.

¹⁸³ *Id.* at 27.

¹⁸⁴ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 5.

¹⁸⁵ Eliza Barclay, *An Unraveling Industry: Apparel Manufacturing Jobs Are in a Steep Decline*, HOUSTON CHRON., Apr. 23, 2006, available at 2006 WLNR 12659730, and reprinted in KNIGHT RIDDER TRIB. BUS. NEWS, July 23, 2006, at 1 [hereinafter Barclay, *An Unraveling Industry*].

tas on Chinese imports was a major reason that the owner of one Mexican stuffed animal plant decided to close. "I couldn't compete with the Chinese anymore," he complained.¹⁸⁶ While job loss in textiles and apparel is easily attributable to competition from even lower-wage factories in China, it is not the sole problem.¹⁸⁷ Mexico needs to do more to support export industries both in the form of financing and technological backing.¹⁸⁸

Mexico's maquiladora-dominated job growth reveals a real problem with a strategy that relies on the use of cheap labor for exports. For economic development to be sustained over time, the best paradigm would involve linking manufacturing companies with local business that supply materials, parts, or services. Since maquiladoras are simply about low-wage workers, the companies bring in components from outside of Mexico with little connection to local businesses and the rest of the economy.¹⁸⁹ As a result, little transfer in technology occurs. This phenomenon also occurs elsewhere around the globe, and the problem is that multinational corporations that established their businesses this way can abandon a particular country when cheaper labor is found in a different country.¹⁹⁰

Thus, China becomes a real headache for Mexico. Low-wage competition on a world stage is a trap. Although maquiladora wages in 2001 were less than 10% of the manufacturing wage in the United States, 200,000 jobs were transferred to China between 2002 and 2003, where wages were 3% of U.S. manufacturing wages. By 2003, China replaced Mexico as the second largest exporter to the United States.¹⁹¹

IV. MEXICO'S ECONOMY

Mexico's economic picture is not bright. In 2005, Mexican economic growth was 3%, one of the worst in Latin America.¹⁹² Wages and jobs are the major problems.

As substantial undocumented migration to the United States suggests, job growth is a problem in Mexico. As the population increased in the mid-1970s, residents matured and entered the workforce in the 1990s.¹⁹³ Workforce participation of women also increased in the 1980s and 1990s, in part,

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 136-37. Only about 10% of the parts for maquiladora products come from Mexico. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 137.

¹⁹² Marla Dickerson, *Economic Data Show Mexico Still Struggling for Growth*, L.A. TIMES, Feb. 16, 2006, at C1 [hereinafter Dickerson, *Mexico Still Struggling for Growth*].

¹⁹³ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 3.

because the household needed help during economic downturns.¹⁹⁴ The labor force expansion from 33.7 million, immediately prior to NAFTA, to 43.4 million in 2004 meant that a million new jobs a year were needed to absorb the labor supply.¹⁹⁵ However, the economy failed to generate the jobs needed to keep up with population growth.¹⁹⁶ Plausible explanations are hard to find given some favorable factors: “high prices for its crude oil, large remittances from Mexicans living abroad, and its lowest inflation rate in years.”¹⁹⁷ Some analysts describe the problem as Mexico’s failure to engage in “serious structural reform” of its rigid labor rules, poor tax collection, and government-controlled energy markets.¹⁹⁸ It is not helpful, of course, that China is now proving to be a formidable competitor for export manufacturing.¹⁹⁹

Mexico’s problems could merely reflect what is happening in all of Latin America, where per-capita GDP declined 0.7% during the 1980s and increased just 1.5% per year in the 1990s.²⁰⁰ During this period, Latin America’s poverty rates did not change much, but only Sub-Saharan African has a wider disparity between rich and poor.²⁰¹ Also, Mexico’s infrastructure challenges cannot be ignored. The southern state of Oaxaca did experience some growth, but other areas that were ignored by NAFTA were not so fortunate.²⁰² The railroad and road networks ignored the poor southern states while providing more for the already powerful rich states.²⁰³

The dark side of NAFTA shares parallels with a more unflattering description of what has happened in Mexico over the past twenty years. In the early 1980s, Mexico was experiencing strong economic growth, better income distribution, and a reduction in poverty until the bottom fell out. As a major oil producer, Mexico was on a high because most of the world expected oil prices to continue to rise.²⁰⁴ With that foundation, international banks were willing lenders to the government and to Mexican businesses.²⁰⁵ However, oil prices plunged in the 1980s, and the peso followed, leaving

194 *Id.*

195 *Id.*

196 Dickerson, *Mexico Still Struggling for Growth*, *supra* note 192.

197 *Id.*

198 *Id.* (citing Suhas Ketkar, an economist and Latin American specialist at RBS Greenwich Capital Markets in Connecticut and Christian Stracke, a market analyst with CreditSights in New York).

199 *Id.*

200 *Id.* (citing a new study by the World Bank).

201 *Id.*

202 PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 89.

203 *Id.*

204 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 39.

205 *Id.*

Mexico with a mounting foreign debt that was owed in dollars.²⁰⁶ Recession ensued.²⁰⁷

Carlos Salinas stepped forward with an answer. As President Miguel del la Madrid's minister of planning and budget in the 1980s, he challenged his own political party's historical social commitment by advocating for the privatization of state-owned businesses, deregulation of other businesses, and breaking up the historical method of collective rural landholdings. Mexico's entry into the GATT in 1986 was a part of Salinas's approach, and Mexico entered the world trading system.²⁰⁸

In 1988, Salinas became president in a highly controversial election riddled with fraud.²⁰⁹ His friends in Washington regarded him as a modern economic reformer. But by the time he left office in 1994, facts revealed that he covered up a huge cut in Mexico's foreign reserves. Mexico was bankrupted, and Salinas fled the country.²¹⁰ "One of his brothers was murdered, probably by federal police, and another . . . was jailed for murdering a rival politician. His entire family [remains] the target of numerous international money laundering investigations."²¹¹

The Salinas-led path to financial ruin for Mexico involved high finance, investor greed, and U.S. protection for its own capitalists. As Mexico tried to pull itself out of recession prior to NAFTA, many U.S. financiers invested short-term money into Mexico, foreseeing a rise in the price of Mexican securities and other assets.²¹² These expectations fueled price inflation and attracted more investors.²¹³ Interest rates soared, and right before NAFTA, speculators could "arbitrage," that is, borrow money in the United States for perhaps 5% and buy Mexican bonds that paid 12%.²¹⁴ The money trickled down to some urban areas of Mexico and painted a rosy picture that Mexicans would be good consumers of U.S. products under NAFTA.²¹⁵ However, the situation began to crumble soon after the approval of NAFTA in 1994. Investors cashed in and looked for new investments around the globe.²¹⁶ U.S. interest rates increased, narrowing arbitrage possibilities.²¹⁷ In Mexico's southernmost state of Chiapas, an Indian

206 *Id.*

207 *Id.*

208 *Id.* at 39.

209 *Id.* at 41.

210 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 44.

211 The Notable Names Database, Carlos Salinas, <http://www.nndb.com/people/439/000096151> (last visited Jan. 16, 2009). See also PBS.org, Family Tree: Carlos Salinas, <http://www.pbs.org/wgbh/pages/frontline/shows/mexico/family/carlossalinas.html> (last visited Jan. 25, 2009).

212 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 35.

213 *Id.*

214 *Id.* at 110.

215 *Id.*

216 *Id.* at 111.

217 *Id.*

peasant rebellion against rich farmers and NAFTA erupted.²¹⁸ Political assassinations, such as that of the Partido Revolucionario Institucional's ("PRI") secretary general, made matters worse.²¹⁹ Interest in Mexican financial markets tumbled.²²⁰

Prior to his exit from office, Salinas developed a scheme that would enable him to maintain an image of fiscal soundness and position himself to head the WTO.²²¹ He needed to keep the peso from falling so that Mexican consumers would continue to sense prosperity.²²² Even though his hand-picked successor, Ernesto Zedillo, won the July 1994 elections, Zedillo would not take office for five months so Salinas kept borrowing money to buy pesos to maintain their value.²²³ To keep U.S. and other investors engaged, he issued special bonds—*tesobonos*—that would be repaid in dollars.²²⁴ Ultimately, Salinas was buying pesos with loans that would have to be repaid in dollars. Mexico's trade deficit with the rest of the world grew, and by the end of 1994, its dollar reserves fell from \$17 billion to \$6 billion with a looming repayment of \$30 billion in debt due in 1995.²²⁵

Zedillo could not continue the charade. After his inauguration in December, he announced that the government could not support the peso any longer through loans.²²⁶ Investors sold off their pesos, and the currency fell 50% against the dollar.²²⁷ As such, Mexican bank reserves dwindled, and new bank loans were halted.²²⁸ Interest rates skyrocketed from 15% to 130% in two months.²²⁹ Personal bankruptcies, business failure, and unemployment ensued.²³⁰

In the meantime, U.S. supporters of NAFTA were not going to be caught holding the bag as far as U.S. investors in Mexico were concerned. Lawrence Summers, the Treasury Department's chief economist, convinced Robert Rubin, who was about to be confirmed as Clinton's Treasury Secretary, that Mexico needed \$25 billion to repay foreign holders of the *tesobonos* bonds that were coming due and to calm down creditors.²³¹ Rubin, Summers, and Federal Reserve Chairman Alan Greenspan warned Con-

218 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 110.

219 *Id.*

220 *Id.*; see also Riordan Roett, Mexico-Political Update: Chase Manhattan's Emerging Markets Group Memo, <http://www.hartford-hwp.com/archives/46/027.html> (last visited Jan. 16, 2009).

221 *Id.*

222 *Id.*

223 *Id.*

224 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 110-11.

225 *Id.*

226 *Id.* at 111.

227 *Id.*

228 *Id.*

229 *Id.*

230 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 111.

231 *Id.*

gress that if Mexico defaulted a global economic crisis would follow.²³² The Republican-controlled Congress would not help, so Rubin and Summers used \$20 billion from a Treasury Department fund set aside to defend the U.S. dollar.²³³ The IMF put up the remainder.²³⁴

The \$25 billion calmed things down, but the purpose was not about pumping up the Mexican economy.²³⁵ The money was not used to create jobs, to help small businesses, or to work on Mexico's infrastructure.²³⁶ The money was used to repay the Wall Street investors who held the *tesobonos* and had invested on the promise of high yields from Salinas. Mexican taxpayers were still on the hook for the funds the government borrowed to pay off Wall Street and the other financial burdens incurred by Salinas.²³⁷ The \$25 billion bailout simply added more financial pressures on Mexico.²³⁸ As Jorge Castaneda, who became Mexico's Secretary of Foreign Affairs from 2000-2003, put it, "the cost of that risk [which produced lavish returns for two or three years] has been transferred completely to the Mexican taxpayer Mexicans are left to pay, becoming more indebted and dooming our economy and that of our children to indefinite stagnation."²³⁹

Ordinary Mexicans were pummeled.²⁴⁰ The economy crashed.²⁴¹ In 1995, GDP fell 9%, wages fell 16%, unemployment doubled, and domestic consumption dropped 10%.²⁴² Business investments were curtailed by a third.²⁴³ Funds for social services, education, and health care were decimated.²⁴⁴ As Mexico's poor (half the population) got poorer, the middle class was crushed as well. Soon after NAFTA, they had taken out variable interest rate loans for cars, houses, and businesses, but their monthly interest payments spiked, along with consumer prices.²⁴⁵ Poor and middle class Mexicans were victims of Salinas's excessive borrowing which had inflated the Mexican economy in the early 1990s, and which enabled the purchase of U.S. goods and even created a U.S. trade surplus for awhile.²⁴⁶

232 *Id.*

233 *Id.* at 112.

234 *Id.* at 111-12.

235 *Id.* at 112.

236 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 112.

237 *Id.*

238 *Id.* at 112.

239 *Id.* at 114.

240 *Id.* at 113.

241 *Id.*

242 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 113.

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.* at 114.

Certain members of the upper class in Mexico were not affected as much as the middle and lower classes. A dozen years earlier the private banking industry in Mexico was contributing to the crisis of 1982 by facilitating flight of capital, so President Miguel de la Madrid nationalized the banks.²⁴⁷ Salinas, however, sold them back to the private sector beginning in the early 1990s.²⁴⁸ For example, Roberto Hernandez Ramirez organized a group with little banking experience to purchase Banamex for \$3.2 billion.²⁴⁹ Fraud and corruption became commonplace.²⁵⁰ One new banker, Carlos Cabal Peniche, used two banks to make loans to himself.²⁵¹ After the banks went bankrupt in the wake of the peso crisis, he fled the country.²⁵² Salinas sold Mexico's privatized telecommunications company, Telmex, to his friend Carlos Slim, essentially facilitating a private telephone monopoly.²⁵³ After raising rates 170%, Slim became the wealthiest person in Latin America.²⁵⁴ Today, he is the second richest person in the world.²⁵⁵

In contrast, small farmers in Mexico were disfavored by NAFTA and deserted by their own government. Many have charged that Salinas and Zedillo wanted small farmers off the land because they were inefficient.²⁵⁶ The best use of these farmers, in these presidents' view, was as part of the "cheap labor for foreign capital."²⁵⁷ In fact, parts of the Mexican Constitution that protected land distribution rights were rescinded under Salinas.²⁵⁸ Under NAFTA, tariffs against foreign corn were steadily decreased, and small Mexican farmers did not have a chance against subsidized U.S. and Canadian agribusiness.²⁵⁹ U.S. corn was being exported up to 30% below production cost.²⁶⁰ In contrast, the Mexican government reduced subsidies and technical assistance to farms from \$2 billion in 1994 to \$500 million in 2000.²⁶¹ Of the subsidies that continued, 85% went to larger Mexican farming enterprises.²⁶² Small farms tried to concentrate on home production and

²⁴⁷ *Id.* at 123.

²⁴⁸ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 123.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 125.

²⁵⁴ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 125.

²⁵⁵ Luisa Kroll, *Billionaires 2008*, FORBES, Mar. 24, 2008, at 80, <http://www.forbes.com/business/forbes/2008/0324/080.html> (last visited Jan. 25, 2009).

²⁵⁶ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 135.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 133-34.

²⁶⁰ *Id.* at 133.

²⁶¹ *Id.*

²⁶² FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 133.

bartering, but the government has not supported those efforts.²⁶³ These farmers have protested their abandonment by the Mexican government vociferously but to no avail.²⁶⁴

Mexico also has suffered from a post-NAFTA depression in domestic manufacturing in part because credit for small and medium-sized firms has been reduced. The fact that foreign banks like Citibank have come in has not helped.²⁶⁵ In theory, such banks have more money to lend and are not influenced by local politics.²⁶⁶ However, multinational banks compete with local banks for the good business found in the hands of the rich or multinational businesses.²⁶⁷ Hurting the small banks in turn hurts the small guy because the local banks do not have as much revenue from the profitable ventures to cover the risks associated with the smaller firms.²⁶⁸ The multinational banks thus are skimming the best business, and do not have much commitment to long-term development.²⁶⁹ Ownership of about 90% of Mexico's banks has been transferred to U.S., Spanish, and other foreign banks, and lending to the private sector has fallen to 10% of GDP.²⁷⁰

While we tend to view Mexican workers as vital to the U.S. economy, we tend to forget that they are vital to the future of Mexico as well. Mexican authorities share much of the blame for the condition of its workers. Incidents of exploitation, suppression of wages, and violations of civil rights are well known.²⁷¹ Organizing independent unions has not been strongly endorsed by the government.²⁷² Those who come to the United States are ambitious and hard working.²⁷³ If forced to remain in Mexico, they are likely to become restless amidst the lack of progress in the middle class and the fact that the poor are getting poorer.²⁷⁴ Yet, if Mexico is to develop, the ambitious and the industrious will be needed.²⁷⁵ If they are lost to the United States, Mexico has effectively subsidized the United States with the cost of their education and training.²⁷⁶ Many who have migrated to the United States maintain social, economic, and political influence back in Mexico.²⁷⁷

²⁶³ *Id.* at 133.

²⁶⁴ *Id.* at 129.

²⁶⁵ *Id.* at 137.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 137.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 137-38.

²⁷¹ *Id.* at 143.

²⁷² *Id.* at 144.

²⁷³ *Id.* at 142.

²⁷⁴ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 142.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 210-11.

The dark side of the Mexican political system's culpability in the country's economy woes has a sinister side.²⁷⁸ The Mexican marijuana business blossomed during the de la Madrid and Salinas administrations.²⁷⁹ Mexican drug traffickers also became major cocaine providers in the United States.²⁸⁰ By the time Salinas left office in 1994, drugs provided \$30 billion in foreign exchange for the Mexican economy.²⁸¹ Violence and government corruption associated with the drug trade reached new heights, and NAFTA free trade provisions actually stimulated illicit narcotics trafficking.²⁸² Today, U.S. law enforcement officials are unhappy with NAFTA's easing up on commercial trucks coming from Mexico because of the flow of methamphetamines across the border.²⁸³

As noted in the section on maquiladoras, wages in Mexico fell in the 1980s. One reason was the undervaluation of the peso to the dollar.²⁸⁴ Combined with wage ceilings, wages for Mexican workers decreased.²⁸⁵ A maquiladora worker earning \$7.00 per day in 1980 saw wages drop consistently to a daily rate of \$3.13 within ten years.²⁸⁶ But Mexico's financial restructuring also had a significant effect on the decline of wages.²⁸⁷ The government is the largest employer in Mexico, and by cutting its budget in response to fiscal deficits, public employees' wages were reduced.²⁸⁸ When the 1982 financial crisis struck, companies paid debts by restructuring and freezing wages.²⁸⁹ One commentator even attributes lower wages to the "ineffectiveness and corruption" of organized labor in Mexico.²⁹⁰

The 2000 presidential election of Vicente Fox, a prosperous rancher and former chief executive of Coca-Cola de Mexico, was significant.²⁹¹ He made political history when he defeated the candidate of the PRI.²⁹² This was the first time the PRI lost the presidency since its formation in 1921.²⁹³

Fox was fully aware that one-quarter of the Mexican population lived in extreme poverty. As a member of the conservative PAN party, Fox believed market forces alone were insufficient. He called for "selective and

278 *Id.* at 41.

279 *Id.* at 42.

280 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 42.

281 *Id.*

282 *Id.*

283 Interview with Curtis Hill, Sheriff, San Benito County, in Sacramento, Cal. (Jan. 9, 2008).

284 Béjar, *Industrial Restructuring*, *supra* note 176, at 907.

285 *Id.* at 909.

286 *Id.*

287 *Id.* at 908.

288 *Id.* at 908-09.

289 *Id.*

290 Béjar, *Industrial Restructuring*, *supra* note 176, at 911.

291 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 150.

292 *Id.* at 149.

293 *Id.*

temporary” state intervention to battle the causes of persistent poverty. In particular, Fox paid close attention to the plight of Mexico’s Native American populations, which were among the most impoverished groups in the nation. In an effort to combat the high mortality rates, low life expectancy, and systemic discrimination suffered by these groups, Fox created a cabinet-level office to address discrimination and launch Mexico’s first affirmative action program for the country’s minority populations. Although Fox took bold steps in calling for a reexamination of NAFTA, labor migration, and greater investments in Mexico, his efforts were thwarted by the events of 9/11, as these issues took a back seat to the U.S. war on terror.

After a controversial election, Fox’s Secretary of Energy, Felipe Calderón, assumed the presidency in late 2006. Calderón has exercised troubling loyalty to NAFTA, without the type of critique and call for reexamination exhibited by Fox. Calderón maintains that NAFTA has generally “been beneficial for Mexicans because it has given consumers access to a greater range of high-quality products at better prices, [while allowing] us to export more Mexican products.”²⁹⁴ His critics charge Calderón with “ignoring the plight of poor, subsistence farmers, and has had to pass legislation placing a ceiling on price of tortillas (which are made of corn) so that the Mexican poor could continue to eat, [and] doesn’t care if poor families are displaced and leave so long as U.S. products are in the supermarkets for those who can afford them.”²⁹⁵

V. GLOBALIZATION

As we have seen, Mexico is feeling a great deal of competitive pressure due to China’s success as a major exporter in the world market. China is a headache for Mexico in more ways than one. In addition to grabbing market share from the United States, which is Mexico’s chief destination for exports, China’s low cost products have flooded into Mexico. This has cost jobs in Mexico’s textile, toy, and electronics industries. In contrast, China buys little from Mexico, and the trade deficit between the two countries is over \$14 billion.²⁹⁶ In the United States, Canada continues to be the largest supplier of goods.²⁹⁷ China took over the second spot in 2003,²⁹⁸

²⁹⁴ David Seth, Docudharma Blog, *Responding to Striking Farmers, Mexico’s Calderón Pimps NAFTA*, Jan. 8, 2008, <http://www.docudharma.com/showDiary.do?diaryId=3614> (last visited Jan. 25, 2009).

²⁹⁵ *Id.*

²⁹⁶ Marla Dickerson, *China, Mexico Try to Ease Trade Ties*, L.A. TIMES, Sept. 13, 2005, at C-1, available at <http://articles.latimes.com/2005/sep/13/business/fi-mexchina13>.

²⁹⁷ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 137.

²⁹⁸ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 4.

and China's share of U.S. imports is about 16% to Mexico's 10%.²⁹⁹ The loss of jobs in Mexico, of course, creates migration pressure.

A. *Welcome to the Globalized Economy*

Since the end of World War II, the global economy has been rooted in the expansion of free markets and trade. Technology, communications, and modern travel have all played a role in this change. Societies and businesses are better connected, and life has become more modern except in the poorest or most isolated parts of the world. Private as well as public action has contributed to this system.³⁰⁰

International institutions have attempted to bring about one economic world. Under GATT, tariffs declined, and world trade grew at an impressive rate.³⁰¹ Trade expanded faster than world production, promoting interdependence.³⁰² The WTO replaced GATT in 1995, and while the goal was to produce one economic world, at least three were produced—North America, East Asia, and Europe.³⁰³ Thus, the EU, NAFTA, and the Asia-Pacific Economic Cooperation (APEC) represent three significant schemes for trade and production.³⁰⁴ The EU, now with twenty-seven members, has become an increasingly important intraregional trade phenomenon. NAFTA is different because the United States, buying and selling more than any other country in the world, is the major trading nation in the world.³⁰⁵ In fact, Asia recovered quickly after a financial crisis in 1997 in part because of U.S. open markets.³⁰⁶ But Canada and Mexico are, of course, quite important to U.S. businesses. In 1990, Canadians and Mexicans purchased 28% of U.S. goods, and within a decade, the figure had increased to 36.5%.³⁰⁷

The EU is not the only integrated regional trading regime. In 1989, APEC was founded with twelve member countries.³⁰⁸ Within a decade, that number increased to twenty-one and included China, Japan, Russia, and

²⁹⁹ U.S. Census Bureau, Foreign Trade Statistics, Top Trading Partners—Total Trade, Exports, Imports, Year-To-Date November 2008, <http://www.census.gov/foreign-trade/statistics/highlights/top/top0811yr.html> (imports from China made up 15.9% total imports while Mexico generated 10.3% imports to the United States). See Dickerson, *China, Mexico*, *supra* note 296.

³⁰⁰ Pastor, LESSONS FROM THE OLD WORLD, *supra* note 37, at 185.

³⁰¹ *Id.* at 20.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 21.

³⁰⁵ *Id.* at 21-22.

³⁰⁶ Pastor, LESSONS FROM THE OLD WORLD, *supra* note 37, at 22.

³⁰⁷ *Id.* at 22.

³⁰⁸ *Id.* at 31.

even the three NAFTA countries.³⁰⁹ This group accounts for about half of global output and 42% of world trade.³¹⁰ However, unlike the EU, the movement of people is not included in the APEC accord.

The fact that Mexico has faced job creation challenges under the NAFTA manufacturing model is even more troubling when placed in the context of the worldwide framework.³¹¹ Mexico was the first low-wage country that became a free trade partner with the United States and Canada.³¹² However, more and more free-trade agreements are being consummated, and WTO membership is growing.³¹³ China's acceptance to the WTO has created more competition for Mexico's manufacturing exports (especially in apparel and electronics).³¹⁴ After Japan, China is now the second-largest exporter to the United States, overtaking Mexico.³¹⁵ The United States and China are entering into more free-trade agreements with other countries, meaning other low-wage countries are gaining access to U.S. markets.³¹⁶ U.S. agreements with Central American countries also mean that countries other than Mexico are using low-wage labor to produce goods headed for the United States.³¹⁷

China's emergence is intimidating. A seemingly unlimited source of cheap labor and an authoritarian government that can still control its people and labor costs makes for quite a double threat; no one hides the relationship between business and government in China.³¹⁸ During the past twenty-five years, China's per capita GDP gained 8.2%.³¹⁹ At that rate, China will replace the United States as the largest national economy in about ten years.³²⁰

When the United States, in a bipartisan effort led by President Clinton and leading Republicans, advocated China's entry into the WTO in 1999, the American public was told to imagine the potential Chinese customer base.³²¹ We now know that the United States buys more from China than China buys from the United States. In 2004, U.S. exports amounted to about \$35 billion to China, but we bought \$197 billion in return.³²² After January 2005, when the limit on textile and apparel imports expired, cloth-

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 7.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 7-8.

³¹⁸ Faux, *THE GLOBAL CLASS WAR*, *supra* note 46, at 180.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 181.

³²² *Id.*

ing imports from China increased 60% within a year.³²³ Within months, 10,000 garment workers in the United States lost their jobs.³²⁴

Of course, outsourcing of labor does not end at the sweatshop. Given technology, many occupations, partially or entirely, can be outsourced to cheaper sites.³²⁵ Early in his administration, Clinton spoke in Hazard, Kentucky, praising a government-private investment partnership for establishing an information call center in town that would create hundreds of jobs.³²⁶ But within a few years, that company—Sykes Enterprises—withdrawed and reopened centers in India and the Philippines, leaving the town in debt and employees out of work.³²⁷

That countries such as India and China have their own supply of scientists, engineers, and technicians is also something that must be heeded.³²⁸ The United States and other industrialized countries cannot presume continued domination of sophisticated products.³²⁹ We cannot assume that our superior technology alone will help us remain prosperous and on top.³³⁰

Until the current economic crisis hit the country, the apparent economic success of the United States in the era of globalization and more open trade had an underside based on credit that was all too often ignored.³³¹ During the last quarter century, the United States has been buying more from abroad than selling.³³² Domestic income and the lack of savings cannot cover losses from international trade, so we borrow from foreign sources and sell our assets, such as U.S. stocks and other property.³³³ Americans do not save, the dollar may be overvalued, and the rest of the world is not buying U.S. exports at the same rate that we buy their products.³³⁴ This means the trade deficit grows each year.³³⁵

Each new trade agreement, such as NAFTA and the WTO, has actually resulted in a net of more imports, more outsourcing, and more debt.³³⁶ For example, one study concluded that a “10% increase in the level of U.S. direct investment in an industry in China is associated with a 7.3% increase

323 *Id.*

324 Faux, *THE GLOBAL CLASS WAR*, *supra* note 46, at 181.

325 *Id.* at 183.

326 *Id.*

327 *Id.*

328 *Id.* at 186.

329 *Id.*

330 Faux, *THE GLOBAL CLASS WAR*, *supra* note 46, at 186.

331 *Id.* at 190-91.

332 *Id.* at 190.

333 *Id.*

334 *Id.* at 191.

335 *Id.*

336 FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 191.

in the volume of U.S. imports from China and a 2.1% decline in U.S. exports to China in that industry.”³³⁷

As the United States has engaged in more international trade, its debt has climbed. Once the world’s largest creditor, in a span of twenty years, the United States became the largest debtor.³³⁸ At the close of 2004, the foreign debt was 25% of GDP and rising.³³⁹ One projection is that the United States is on pace to reach a foreign debt of \$11 trillion by 2015, requiring \$550 billion a year in interest payments alone.³⁴⁰ This could “produce significant political unrest.”³⁴¹

The fact that the dollar continues to be valued worldwide is important. The dollar serves as the “reserve currency” for the world’s central banks and is used to settle international transactions.³⁴² Foreign investors who have earned dollars from their exports to the United States often send their dollars back by purchasing U.S. stocks and bonds.³⁴³ The consequences are mixed. The U.S. companies and workers engaged in competition with the importers are losers.³⁴⁴ U.S. consumers are winners because they get cheaper foreign products.³⁴⁵ The high-valued dollar also means U.S. tourists do better abroad (spending dollars there), transnational companies can buy and invest in foreign factories as well as use cheap labor, and the U.S. military can operate bases abroad more economically.³⁴⁶

This type of “advantage” is not always good. Some foreign investors and banks are concerned about U.S. debt and have shifted towards U.S. bonds and securities.³⁴⁷ To protect their own currencies, the Chinese, the Japanese, and other foreign governments bought more U.S. bonds, and foreigners in fact hold about half of all outstanding U.S. bonds.³⁴⁸ In addition, the euro is getting stronger and also is considered one of the world’s “core” currencies.³⁴⁹

³³⁷ *Id.* (citation omitted).

³³⁸ *Id.* at 192.

³³⁹ *Id.*

³⁴⁰ *Id.* at 194-95.

³⁴¹ *Id.* (quoting financier Warren Buffett’s remark at a panel chaired by Senator Robert Kerrey, Omaha Nebraska, Dec. 4, 1998).

³⁴² FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 192.

³⁴³ *Id.*

³⁴⁴ *Id.* at 194.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 192-93, 195.

³⁴⁷ *Id.* at 193.

³⁴⁸ FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 192-93.

³⁴⁹ *Id.* at 193.

VI. THE FAILED ENFORCEMENT APPROACH

We need a new way of looking at the border because NAFTA and other aspects of globalization make it imperative that we consider other options. However, the need to explore other options also is apparent from the fact that current enforcement policies have failed to stem undocumented migration and, in the case of Operation Gatekeeper, are morally indefensible.

A. *Employer Sanctions*

Besides border enforcement, interior enforcement via enforcement of employer sanctions has been stepped up recently. The Immigration Reform and Control Act of 1986 (IRCA) contained the first federal-employer-sanctions law making the hiring of undocumented workers unlawful. In the past few years, an upsurge in employer sanctions enforcement has been evident. The highly-publicized Swift & Company raids in December 2006 resulted in the arrests of more than 1,200 workers,³⁵⁰ and about a year earlier a complaint against Wal-Mart resulted in a multi-million dollar fine.³⁵¹ The increase in enforcement seemed to be coordinated with President Bush's call for a guest worker program, in my view, as a tradeoff for more support from enforcement-minded legislators for the guest worker proposal.

The efficacy of employer sanctions is debatable. Many social and economic phenomena are at play, causing undocumented migration to the United States from Mexico. The push-pull factors are driven by cultural, social, and as we have seen, overwhelming global economic forces. As the Mexican consul from Douglas, Arizona has noted, the border could be "mined" and migrants would still attempt to cross. Consider Ismael Rojas who left his family in Mexico many times over a twenty-five-year period to work in the United States as an undocumented worker. In his words, "you can either abandon your children to make money to take care of them, or you can stay with your children and watch them live in misery. Poverty makes us leave our families."³⁵² Pitting employer sanctions against the phenomenon of Mexican migration in this context is misplaced.

³⁵⁰ ABC7: TheDenverChannel.com, *Swift Raids Impact Families, Economy, and ID Theft Victims*, Dec. 13, 2006, <http://www.thedenverchannel.com/news/10523648/detail.html?subid=22100484&q=1;bp=t>.

³⁵¹ FoxNews.com, *Wal-Mart Settles Illegal Immigrant Case for \$11M*, Mar. 19, 2005, <http://www.foxnews.com/story/0,2933,150846,00.html> (last visited Jan. 25, 2009).

³⁵² Ginger Thompson, *Mexican Leader Visits U.S. With a Vision to Sell*, N.Y. TIMES, Aug. 24, 2000, at A3, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE5D71731F937A1575BC0A9669C8B63>.

The other problem with employer sanctions is the discrimination that results. In its final report to Congress on employer sanctions in 1990, the GAO estimated that, of 4.6 million employers in the United States, 346,000 admitted applying IRCA's verification requirements only to job applicants who had a "foreign" accent or appearance. Another 430,000 employers only hired applicants born in the United States or did not hire applicants with temporary work documents in order to be cautious.³⁵³

Direct and indirect recruitment of Mexican workers has continued in spite of IRCA's implementation of employer sanctions. In 2001, researchers continue identified organized groups of farm labor contractors who traveled to Mexican cities and towns, where they offered loans and work guarantees to convince potential farm workers to cross the border into the United States. The process involves well-organized networks of contractors and contractor agents representing major U.S. agricultural companies. The headhunters are themselves often Mexicans who recruit in their own hometowns and farming communities where earning the trust of eager farm hands is not difficult. One of the contractors' favorite tactics to attract workers is to offer them loans to help pay off debts, coupled with a pledge to find work for the person north of the border. Due to the lack of willing farm hands in the United States, many U.S. companies rely on these networks of recruiters.

B. *Death Traps along the Border*

Perhaps the most disturbing aspect of the recent immigration debate in Congress is the virtual unanimous support for more fencing and the buildup of the Border Patrol. This militarization of the border is troubling enough when we pause to remember that this is a border that we share with a friendly, peaceful neighbor and trading partner. However, the strategy becomes indefensible when we realize that the policies have led to unconscionable death traps along the border.

A year after President Bill Clinton took office in January 1993, the Border Patrol embarked upon a strategy of "control through deterrence" that has proven deadly. During the presidential campaign, Clinton was asked what he proposed to do about "illegal immigration." He had no plan, declaring that "immigration is the most complex issue facing the nation."³⁵⁴ Early in 1993, his administration's Office of National Drug Control Policy commissioned a study of new methods to increase border security from Sandia National Laboratories, a federal government-supported facility de-

³⁵³ Laura C. Oliveira, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 170 (2002).

³⁵⁴ Richard Rothstein, *Immigration Dilemmas*, in ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA 48, 48 (Nicolaus Mills ed., 1994).

voted to research for the military. The study recommended that the Border Patrol focus on preventing illegal entries by deterring them rather than trying to apprehend the undocumented after they entered. The Sandia report recommended various measures to increase the difficulty of illegal entry, including the installation of multiple physical barriers, the use of advanced electronic surveillance equipment, and so forth.³⁵⁵

Around the same time in El Paso, Texas, the regional Border Patrol supervisor, Sylvestre Reyes (who is now a U.S. Congressman), had his own ideas. He stationed his agents in closely-spaced vehicles, right along the Rio Grande, and kept them there continuously thereby intimidating would-be illegal entrants from even trying to cross. With only half-hearted approvals from his superiors in Washington, D.C., Reyes implemented his strategy, which was called "Operation Blockade," and it had apparent dramatic short-term results; apprehensions of undocumented aliens plummeted within the El Paso sector, suggesting that migrants were being discouraged from entering.³⁵⁶ This outcome was noticed by the media and Congress. The Immigration and Naturalization Service (INS) (now repackaged and renamed within the Department of Homeland Security, or DHS) soon found itself under great pressure to replicate what was immediately dubbed as the "successful" El Paso experiment along other segments of the border, beginning with San Diego County. This set off a chain of policy decisions leading to the establishment of "concentrated enforcement" operations along other parts of the border. The deadliest was "Operation Gatekeeper." Operation Gatekeeper is described in the book, *Defining America Through Immigration Policy*.³⁵⁷

Operation Gatekeeper was one of several operations that resulted from the Clinton Administration's commitment to a new aggressive enforcement strategy for the Border Patrol. In August 1994, INS Commissioner Doris Meissner approved a new national strategy for the Border Patrol.³⁵⁸ The plan relied on a vision of "prevention through deterrence" in which a "decisive number of enforcement resources [would be brought] to bear in each major entry corridor," and the Border Patrol would "increase the number of agents on the line and make effective use of technology, raising the risk of apprehension high enough to be an effective deterrent."³⁵⁹ The specific

³⁵⁵ Wayne A. Cornelius, *Death at the Border: The Efficacy and "Unintended" Consequences of U.S. Immigration Control Policy 1993-2000* at 662-63 (Univ. of Cal., San Diego, Working Paper No. 27, 2001, available at <http://repositories.cdlib.org/ccis/papers/wrkg27> [hereinafter Cornelius, *Death at the Border*].

³⁵⁶ See Frank Trejo, *Putting Up Barriers: Proposed Border Wall Near El Paso Divides Community*, DALLAS MORNING NEWS, July 30, 1995, at 43A (on file with the author).

³⁵⁷ HING, *DEFINING AMERICA*, *supra* note 2, at 184-205.

³⁵⁸ U.S. BORDER PATROL, *BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND, NATIONAL STRATEGY*, July 1994 [hereinafter U.S. BORDER PATROL, *NATIONAL STRATEGY*] (on file with the author).

³⁵⁹ *Id.* at 6.

regional enforcement operations that resulted included: (1) Operation Blockade (later renamed Hold the Line), which commenced in September 1993 in the greater El Paso, Texas areas; (2) Operation Gatekeeper, which commenced in October 1994 south of San Diego, California; (3) Operation Safeguard, which also commenced in October 1994 in Arizona; and (4) Operation Rio Grande, which commenced in August 1997 in Brownsville, Texas.³⁶⁰ The idea was to block traditional entry and smuggling routes with border enforcement personnel and physical barriers.³⁶¹ By cutting off traditional crossing routes, the strategy sought to deter migrants or at least to channel them into terrain less suited for crossing and more conducive to apprehensions.³⁶² To carry out the strategy, the Border Patrol was to concentrate personnel and resources in areas of highest undocumented alien crossings, increase the time agents spent on border-control activities, increase the use of physical barriers, and carefully consider the mix of technology and personnel needed to control the border.³⁶³ In the San Diego Sector, efforts were concentrated on the popular fourteen-mile section of the border from the Pacific Ocean (Imperial Beach) stretching eastward.³⁶⁴ That stretch was a focal point for enforcement before Gatekeeper. Steel fencing and bright lighting were already in place in sections of the corridor, erected in part with the assistance of the U.S. military.³⁶⁵ Yet because of the persistent traffic of undocumented entrants along this corridor, phase I of Gatekeeper continued to concentrate on increased staffing and resources along the fourteen mile area.³⁶⁶

In implementing its national strategy beginning in 1994, the INS made a key assumption about its “prevention through deterrence” approach: “[a]lien apprehensions will decrease as [the] Border Patrol increases control of the border.”³⁶⁷ In other words, the INS anticipated that, as the show of force escalated by increasing agents, lighting, and fencing, migrants would be discouraged from entering without inspection, so the number of apprehensions naturally would decline. In fact, the Border Patrol thought a substantial border-wide drop in apprehension rates would result.³⁶⁸ The deterrence would be so great that “many will consider it futile to continue to

³⁶⁰ Cornelius, *Death at the Border*, *supra* note 355, at 663-64.

³⁶¹ U.S. BORDER PATROL, NATIONAL STRATEGY, *supra* note 358, at 6-9.

³⁶² *Id.* at 7; U.S. GEN. ACCOUNTING OFFICE, ILLEGAL IMMIGRATION: STATUS OF SOUTHWEST BORDER STRATEGY IMPLEMENTATION 3 (1999).

³⁶³ U.S. GEN. ACCOUNTING OFFICE, *supra* note 362, at 3.

³⁶⁴ *Id.* at 1, 4, 8.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 8.

³⁶⁷ U.S. BORDER PATROL, NATIONAL STRATEGY, *supra* note 358, at 4.

³⁶⁸ See generally U.S. DEP'T OF JUSTICE, BACKGROUND TO THE OFFICE OF THE INSPECTOR GENERAL INVESTIGATION, <http://www.usdoj.gov/oig/special/9807/gkp01.htm>.

attempt illegal entry through traditional routes.”³⁶⁹ These assumptions and predictions have not been accurate.

Apprehension data confirm that what Operation Gatekeeper actually achieved was to move the undocumented foot traffic relatively out of the public eye. Empirical research demonstrates that undocumented Mexicans keep trying to enter until they are successful. Thus, border enforcement strategies initiated in 1994 were “affecting migration patterns, but not preventing unauthorized entry.”³⁷⁰

The ineffectiveness of the INS’s attempts to “control the border” after several years of a new strategy would be easy enough to dismiss in a “so what else is new” attitude were it not for a dark side of border enforcement that resulted from Operation Gatekeeper. Certainly, southwest border control had a racist side to its targeting of Mexican migration during the 30-year period when Mexicans made up far less than half the undocumented population in the United States.³⁷¹ However, the tragedy of Gatekeeper is the direct link of its “prevention through deterrence” strategy to an absolutely horrendous rise in the number of deaths among border crossers who were forced to attempt entry over terrain that even the INS knew presented “mortal danger” due to extreme weather conditions and rugged terrain.³⁷²

As Operation Gatekeeper was implemented, closing the Imperial Beach corridor, the border-crossing traffic moved east. Frustrated crossers moved first to Brown Field and Chula Vista and subsequently to the eastern sections of the San Diego sector.³⁷³ Before Gatekeeper began in 1994, crossers were just as likely to make their second try in the westernmost part of the sector; that changed very quickly. By January 1995, only 14% were making their second try near Imperial Beach. The illicit border traffic had moved “into unfamiliar and unattractive territory.”³⁷⁴ Clearly, the increasing number of deaths by dehydration and exposure was the result of concentrated efforts to block the normal, easier crossing points, forcing migrants to “risk injury and death by trying to cross mountains, deserts, and rivers” as migration was redirected rather than deterred by Gatekeeper.³⁷⁵

³⁶⁹ U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED* 64 (1997). See also U.S. BORDER PATROL, *NATIONAL STRATEGY*, *supra* note 358.

³⁷⁰ U.S. COMM’N ON IMMIGRATION REFORM, *BINATIONAL STUDY: MIGRATION BETWEEN MEXICO AND THE UNITED STATES* 28 (1997), available at <http://www.utexas.edu/lbj/uscir/binational/full-report.pdf>.

³⁷¹ Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 532 (2000).

³⁷² U.S. BORDER PATROL, *NATIONAL STRATEGY*, *supra* note 358.

³⁷³ INS FACT SHEET, *FRUSTRATING ILLEGAL CROSSERS AT IMPERIAL BEACH AND MOVING THE TRAFFIC EASTWARD*, Oct. 17, 1997.

³⁷⁴ *Id.*

³⁷⁵ Cornelius, *Death at the Border*, *supra* note 355, at 676 (citation omitted).

The death statistics are indicative of this redirection. In 1994, twenty-three migrants died along the California/Mexico border. Of these twenty-three, two died of hypothermia or heat stroke and nine from drowning. By 1998, the annual total was 147 deaths: seventy-one from hypothermia or heat stroke and fifty-two from drowning. Figures for 1999 followed this unfortunate trend, and in 2000, there were eighty-four heat stroke or hypothermia casualties. The total death count along the entire border for the year 2000 was 499. Of those, 100 died crossing the desert along the Sonora-Arizona border.³⁷⁶ Since 2000, the number of such deaths along the border average 300 to 400 per year.³⁷⁷ In the first six months of 2007 alone, more than 275 bodies were found.³⁷⁸

Hing writes:

Why the radical surge in deaths? The new routes are death traps. The correlation between increasing deaths and Gatekeeper's closure of the westernmost corridors is clear. The Border Patrol chief stressed that although the distances migrants had to traverse in places like Texas were enormous, California had the "more difficult terrain." In fact, the San Diego and El Centro sectors encompass three of the four places considered by the Border Patrol as "the most hazardous areas," for example, East San Diego County, the Imperial Desert, and the All-American Canal. The fourth is Kennedy County in Texas. The INS recognized the challenges of the new routes: rugged canyons and high desert, remote, desolate stretches, and the risk of dehydration and exposure. On the other hand, the 14-mile area from Imperial Beach to the base of the Otay Mountains, the less rigorous original route, is "easy terrain and gentle climbs." A typical crossing there lasted only ten to fifteen minutes from point of crossing to pickup point. The eastern mountain route crossings can last anywhere from twelve hours to four days.³⁷⁹ The Otay Mountains are "extremely rugged, and include steep, often precipitous, canyon walls and hills reaching 4,000 feet." Extreme temperatures ranging from freezing cold in the winter to searing heat in the summer can kill the unprepared traveler. The Tecate Mountains are full of steep-walled canyons and rocky peaks. Nighttime temperatures can drop into the 20s and snow can fall to altitudes as low as 800 feet. From mid-October to mid-April, there is a greater than 50% probability of below-freezing temperatures. The All-American Canal parallels the border for 44 of its 85 Imperial County miles. It is unfenced, unlighted, 21 feet deep, and nearly as wide as a football field. It has strong currents and is one of the most polluted rivers in the United States.³⁸⁰

Sadly, Border Patrol agents acknowledge that the number of bodies recovered is only indicative of a much larger death toll; many bodies simply have not been discovered in the rugged territory.³⁸¹

Operation Gatekeeper has not stopped the flow of border crossers, but it has made crossing more dangerous. Gatekeeper and the increased militarizing of the border have ironically curtailed one thing: circularity. Mexi-

³⁷⁶ HING, *DEFINING AMERICA*, *supra* note 2, at 301.

³⁷⁷ Cornelius, *Death at the Border*, *supra* note 355, at 669.

³⁷⁸ Robin Emmott, *More Migrants Die as U.S. Tightens Border Security*, Reuters, July 12, 2007, <http://www.reuters.com/article/topNews/idUSN1231212420070712>.

³⁷⁹ HING, *DEFINING AMERICA*, *supra* note 2, at 192.

³⁸⁰ *Id.* One migrant had to have his foot amputated because an injury became infected while crossing the river.

³⁸¹ *Id.* (citation omitted).

can seasonal workers commonly traveled back and forth across the border because their families often remained in Mexico. But now the number of undocumented migrants who actually want to return to Mexico has been reduced. Given the difficulty in crossing into the United States, once many undocumented persons arrive, they remain to work and may even look for family members to join them. This has contributed to the increase in the undocumented population in the United States.³⁸²

VII. CONTEMPLATING SOLUTIONS

Understanding the effects of NAFTA and other aspects of the globalized economy provides us with the foundation to develop a better approach to the flow of Mexican workers to the United States.³⁸³ The failure of current militarized and racialized enforcement strategies to stem that flow further challenges us to step back and address the issue more thoughtfully.³⁸⁴ To begin that analysis, what we now know about the effects of NAFTA and globalization on the Mexican workforce at the very least demands that we tone down the rhetoric on the so-called immigration problem. Our perspective also must be broader if we keep in mind the fact that we very well may need immigrant workers—even those who are unskilled, low-wage workers.³⁸⁵

In addressing the phenomenon of labor and other migration across the border, the need to contemplate new responses is evident.³⁸⁶ The responses to date have failed to address the social and economic needs of migrants as well as of the United States. We must also begin to closely consider the forces of globalization on this border. In essence, we need to develop a new vision for the border.³⁸⁷ That vision must be developed with the recognition of our historical as well as our continuing economic and social relationship with Mexico and the social, economic, political, and strategic need for us to view our place in the world regionally, not simply nationalistically.³⁸⁸

³⁸² Massey, *Self-Deception*, *supra* note 77, at 41.

³⁸³ Bill Hing, *Contemplating Solutions to Migration Challenges*, in *THE RIGHT TO STAY HOME, ALTERNATIVES TO MASS DISPLACEMENT AND FORCED MIGRATION IN NORTH AMERICA* 46 (Global Exchange ed., 2008), available at <http://www.globalexchange.org/countries/americas/mexico/TheRighttoStayHome.html> [hereinafter Hing, *Contemplating Solutions*].

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

A. *The Need for Immigrant Workers*³⁸⁹

Undocumented immigrants account for about 4.3% of the civilian labor force—approximately 6.3 million workers out of a labor force of 146 million.³⁹⁰ Although they can be found in many different sectors of the economy, undocumented workers tend to be overrepresented in certain occupations and industries. They are much more likely to be in broad occupation groups that require little education or do not have licensing requirements.³⁹¹ Three times as many undocumented immigrants work in agriculture, construction, and extraction as do U.S. citizens.³⁹² In contrast, undocumented immigrants are conspicuously underrepresented in white collar occupations. While management, business, sales, and administrative support account for half of native citizen workers (52%), less than one-quarter of undocumented workers are in these areas (23%).³⁹³

This table shows the proportion of workers in “detailed occupation groups” who are undocumented. The list includes only those occupations in which undocumented workers are overrepresented—i.e., the percentage of undocumented workers in the particular occupation is greater than the proportion of undocumented workers in the entire workforce (4.3%).³⁹⁴

Drywall/ceiling tile installers	27%
Grounds maintenance workers	26%
Butchers/meat, poultry workers	25%
Dishwashers	24%
Misc. agricultural workers	23%
Cement masons & finishers	22%
Graders & sorters, agricultural products	22%
Hand packers & packagers	22%
Maids & housekeepers	22%
Roofers	21%
Cleaning/washing equipment operators	20%
Construction laborers	20%
Painters, construction, etc.	20%
Brick/block/stone masons	19%
Cooks	18%

³⁸⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 46.

³⁹⁰ JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 26 (2005), <http://pewhispanic.org/files/reports/46.pdf> [hereinafter PASSEL, PEW HISPANIC CTR.].

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 27.

Sewing machine operators	18%
Packaging/filling machine operators	17%
Dining & cafeteria attendants	14%
Food preparation workers	13%
Metal/plastic workers, other	13%
Carpenters	12%
Janitors & building cleaners	12%

Table 1. Proportion of workers in “detailed occupation groups” who are undocumented.³⁹⁵

Close to 60% of the undocumented population are from Mexico with another 24% from other Latin American countries.³⁹⁶ Although most undocumented immigrants in the United States today entered the country without inspection, about 40% entered lawfully as non-immigrants, for example, as students or tourists and overstayed their visas.³⁹⁷

The fact that undocumented immigrant workers greatly contribute to a U.S. labor force that will be decreasing in the foreseeable future due to demographic trends impels us to look upon these workers positively. Any policy related to “solving” the undocumented migration issue will be debated with value-laden rhetoric and overtones of what is the morally right thing to do. Policymakers may act on personal impulse and intuition or may look for objective guidance to help make a decision. For those looking for objective guidance, what will they find?

The United States is now reaching a new demographic reality that provides a new response to the immigration naysayer: the retirement of the baby boom generation. Fully aware of the situation, Federal Reserve Chairman Ben Bernanke has concluded that the U.S. economy will need 3.5 million additional laborers immigrating to the U.S. annually to replace the 79 million baby boomers who began to retire in 2008.³⁹⁸ The U.S. Chamber of Commerce cites these data:³⁹⁹

The Bureau of Labor Statistics (BLS) estimates that the number of people in the labor force ages 25 to 34 is projected to increase by only three million between 2002 and 2012, while those age 55 years and older will increase by 18 million. By 2012, those aged 45 and older will have the fastest growth rate and will be a little more than 50% of the labor force. Ac-

³⁹⁵ *Id.*

³⁹⁶ PASSEL, PEW HISPANIC CTR. *see supra* note 390, at 4.

³⁹⁷ Stephen Dinan, *Illegals Bill Drops Felony Provision; Lower Penalty Irks Republicans*, WASH. TIMES, Dec. 15, 2005, at A1; accord Hubert G. Locke, *Strike Some Words from National Lexicon*, SEATTLE POST-INTELLIGENCER, Dec. 29, 2006, at B6; Editorial, *The Fence Campaign*, N.Y. TIMES, Oct. 30, 2006, at A24.

³⁹⁸ Sue Kirchhoff, *Bernanke: Savings Situation Getting Dire*, USA TODAY, Oct. 5, 2006, available at http://www.usatoday.com/money/economy/fed/2006-10-04-bernanke-retirement-programs_x.htm.

³⁹⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 46.

ording to estimates . . . by the United Nations, the fertility rate in the United States is projected to fall below “replacement” level by 2015 to 2020, declining to 1.91 children per woman (lower than the 2.1 children per woman rate needed to replace the population). By 2010, 77 million baby boomers will retire and, by 2030, one in every five Americans is projected to be a senior citizen At the same time, we have, fortunately, projected job growth, including in lower-skilled occupations. Most jobs in our economy do not require a college degree. Close to 40% of all jobs require only short-term on-the-job training. In fact, of the top 10 largest job growth occupations between 2002 and 2012, all but two require less than a bachelor’s degree. At the same time, six of the top 10 occupations that only require short-term on-the-job training. Some of these top 10 occupations that only require short-term on-the-job training include: retail salespersons, nursing aides, janitors and cleaners, waiters and waitresses, and combined food preparation and serving workers A panel on the future of the health care labor force in a graying society concluded that ‘this will not be a temporary shortage Fundamental demographic changes are occurring in America, and the coming labor crisis will be with us for decades.’ Currently, the American Hospital Association reports high vacancy rates and more difficulty in recruiting workers for positions ranging from housekeeping and maintenance to nursing assistants and registered nurses. The impact of such workforce shortages, according to the Association, translates into severe emergency room overcrowding, emergency patients diverted to other hospitals, delayed discharge/increased length of stay, increased wait times for surgery, cancelled surgeries, discontinued programs, reduced service hours, and others However, shortages of essential workers are not limited to the largest growth occupations. In fact, the need for essential workers cut across industry sectors. In February 2004, Emily Stover DeRocco, Assistant Secretary of Labor for Employment Training, in a speech to the National Roofing Contractors Association, explained that BLS projected an increase in jobs between 2002 and 2012 for roofers of over 30,000, while at the same time there would be attrition in this occupation of about 40,000—a net deficit of 70,000. The Construction Labor Research Council issued a labor supply outlook earlier this year where it found that the industry would need 185,000 new workers annually for the next 10 years The National Restaurant Association projects that the restaurant industry will add more than 1.8 million jobs between 2005 and 2015, an increase of 15%. However, the U.S. labor force is only projected to increase 12% during the next 10 years, which will make it more challenging than ever for restaurants to find the workers they need. The National Restaurant Association study notes that the 16 to 24 year old labor force—the demographic that makes up more than half of the restaurant industry workforce—is only projected to increase 9% during the next 10 years Our own surveys, not surprisingly, reflect the problems these employers have in finding the workers that they need. [The surveys included] chambers, businesses, and associations [representing] a wide range of industries . . . including arts, entertainment and recreation, professional scientific, technical services, social assistance, and nonprofit organizations. Difficulties in finding both entry-level and skilled workers, and developing solutions for this problem, ranked extremely high in importance to those surveyed.⁴⁰⁰

The Cato Institute concurs:⁴⁰¹

While the fastest-growing occupations in the next decade in percentage terms will require high degrees of skill and education, the largest growth in absolute numbers will be in those categories that require only “short-term on-the-job training” of one month or less. In fact, of the top 30 categories with the largest expected growth between 2000 and 2010, more than half fall into that least-skilled category Those categories include: combined food preparation and servicing workers, including fast food; waiters and waitresses; retail salespersons; cashiers; security guards; nursing aides, orderlies, and attendants; janitors and cleaners; home

⁴⁰⁰ *The Need for Comprehensive Immigration Reform: Serving Our National Economy: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary, 109th Cong. 3-5 (2005) (statement of Thomas J. Donohue, President and C.E.O, U.S. Chamber of Commerce).*

⁴⁰¹ Hing, *Contemplating Solutions*, *supra* note 383, at 46.

health aides; manual laborers and freight, stock, and materials movers; landscaping and grounds keeping workers; and manual packers and packagers Across the U.S. economy, the Labor Department estimates that the total number of jobs requiring only short-term training will increase from 53.2 million in 2000 to 60.9 million by 2010, a net increase of 7.7 million jobs Meanwhile, the supply of American workers suitable for such work continues to fall because of an aging workforce and rising education levels. The median age of American workers continues to increase as the large cohort of Baby Boomers approaches retirement age. From 1990 to 2010, the median age of U.S. workers is expected to increase from 36.6 years old to 40.6. Younger and older workers alike are now more educated as the share of adult native-born men without a high school diploma have plunged, from 53.6% in 1960 to 9.0 in 1998. During that same period, the share with college degrees has gone up from 11.4% to 29.8%. . . . With the number of low-skilled jobs expected to grow by more than 700,000 a year, and a shrinking pool of Americans willing to fill those jobs, Mexican migrants provide a ready and willing source of labor to fill the growing gap between demand and supply on the lower rungs of the labor ladder.⁴⁰²

Without a doubt, we need immigrant workers of all stripes.

B. *Labor Movement in the European Union*⁴⁰³

In contrast to the failure of NAFTA to incorporate labor migration in its provisions, the development of the EU has proceeded with the movement of workers clearly in mind.⁴⁰⁴ For that reason, looking to the EU experience for guidance or even as a model is appealing, especially given the fact that the EU permits open labor, engages in development assistance to poorer nations to reduce migration pressures, and yet maintains border control.⁴⁰⁵

The first glimpse of the EU started in 1951 when Belgium, Italy, Germany, France, Luxembourg, and the Netherlands—all devastated by World War II—formed a partnership in hopes of forging economic progress.⁴⁰⁶ The 1957 Treaty of Rome, establishing the European Economic Community, developed a plan for free movement of people, goods, services, and capital among the member states.⁴⁰⁷ The Schengen Agreement provided for free movement of citizens between the member states beginning in 1995 while the Treaty of the European Union (Maastricht Treaty of 1992) enhanced the process by creating the notion of European citizenship.⁴⁰⁸

⁴⁰² DANIEL T. GRISWOLD, CATO INSTITUTE, *WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES*, 19 CATO INST. CTR. TRADE POL'Y STUD. 9 (2002), available at <http://www.freetrade.org/pubs/pas/tpa-019.pdf>.

⁴⁰³ Hing, *Contemplating Solutions*, *supra* note 383, at 49.

⁴⁰⁴ *Id.*

⁴⁰⁵ Ackleson, *Security and Prosperity*, *supra* note 22, at 1.

⁴⁰⁶ Harman, *Proposal for Expanding NAFTA*, *supra* note 23, at 214.

⁴⁰⁷ Ackleson, *Security and Prosperity*, *supra* note 22, at 4.

⁴⁰⁸ *Id.*; Harman, *Proposal for Expanding NAFTA*, *supra* note 23, at 214.

Thus, within the EU, a central component of economic integration is the mobility of persons.⁴⁰⁹ This is done with a commitment to “harmonizing” labor standards in terms of wages, work-week, and other labor cost factors.⁴¹⁰ Economic development aid was provided to poorer countries like Spain and Portugal to enhance broader economic opportunities throughout the region and to decrease pressure to migrate; although, meeting labor needs through movement was also contemplated.⁴¹¹ In order to enhance mobility of workers, a European Social Fund provides vocational training and retraining. This facilitates adaptation to business needs in different member countries.⁴¹² The idea is that, to integrate the member nations’ economies, the free movement of workers is necessary, and they should have the right to accept employment in any member nation.⁴¹³ The workers’ families have the right to follow and establish new residence with the workers.⁴¹⁴

Labor migration within the EU is not a hard sell to those who understand what is happening to the workforce in many parts of the EU, particularly in Western Europe. Europe needs migrant labor because of its aging population. For example, Great Britain’s National Health Service, one of the EU’s largest employers, would be in big trouble but for immigrant doctors, nurses, and other health care workers.⁴¹⁵ In an effort to reframe the immigration debate with the EU, Greece advocates concentrating on how to attract much-needed workers given the aging population.⁴¹⁶

The EU approach to labor migration has been thoughtful and deliberate.⁴¹⁷ At the outset, leaders and planners knew, as open migration was contemplated, a necessary underpinning was the reduction of economic difference between various regions of Europe.⁴¹⁸ Beginning with the 1973 enlargement to include Denmark, Ireland, and the United Kingdom, the British pushed for an approach to aid poorer regions.⁴¹⁹ When Greece (1981), and Portugal and Spain (1986) were added, all three nations, as well as Ireland, received infusions of capital and assistance with institutional planning.⁴²⁰ This shared responsibility model was based on “a commitment

⁴⁰⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 48.

⁴¹⁰ Harman, *Proposal for Expanding NAFTA*, *supra* note 23, at 216.

⁴¹¹ Ackleson, *Security and Prosperity*, *supra* note 22, at 4-5.

⁴¹² Condon & McBride, *Do You Know the Way to San Jose?*, *supra* note 44, at 291.

⁴¹³ Cassise, *The European Union*, *supra* note 32, at 1349.

⁴¹⁴ *Id.* at 1354.

⁴¹⁵ *World on the Move: Migration*, ECONOMIST.COM, June 11, 2003, http://www.economist.com/agenda/displayStory.cfm?story_id=1840765.

⁴¹⁶ *Id.*

⁴¹⁷ Hing, *Contemplating Solutions*, *supra* note 383, at 48.

⁴¹⁸ FAUX, *THE GLOBAL CLASS WAR*, *supra* note 46, at 224.

⁴¹⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 48.

⁴²⁰ *Id.*

to the values of internal solidarity and mutual support.”⁴²¹ To gain political support in the richer countries, funds were provided for impoverished “areas,” not poor countries, so that needy areas in rich countries could qualify as well; of course most of the funds went to Spain, Portugal, Greece, and Ireland.⁴²² The poorer nations had suffered from significant levels of underemployment and weak safety nets, so new investments focused on capital investment, infrastructure, technology, and boosting job creation. The new member countries also enacted social legislation aimed at assisting the unemployed.⁴²³

The adhesion fund approach worked.⁴²⁴ The gap between the poorer and richer nations narrowed.⁴²⁵ By the beginning of the new millennium, Ireland’s economy had transformed, and its per capita GDP was above the EU average.⁴²⁶ Incredibly, Ireland—a nation that for years had been a constant source of emigrants—began attracting immigrants.⁴²⁷ The feared “mass migration of the unemployed” fizzled. People stayed in their own countries because work opportunities were created.⁴²⁸ Only 2% of EU citizens looked for work in other EU countries.⁴²⁹

The EU has also adopted measures in response to some member concerns that nationals of certain countries might move to countries with better welfare systems. In order to move, individuals must demonstrate the financial ability to support themselves through work or other financial ability. Migrant workers are not automatically eligible for welfare benefits. For example, unemployment benefits are not available unless the worker has paid into the system. In short, workers and their families are not eligible for benefits in another EU country until a definite work history has been established.⁴³⁰

Understanding the adhesion fund approach in the EU can be useful in considering possible approaches to the relationship between the United States and Mexico.⁴³¹ The European approach was driven by concerns that nationals from poorer countries would flow heavily into wealthier nations if something was not done to help the economies of the poorer nations. Thus, looking at the financial assistance measures the EU has provided to the countries that most recently became members is relevant. The financial support consists of both pre-accession and post-accession assistance and

421 PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 29.

422 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 224.

423 PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 55, 81.

424 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 224.

425 *Id.*

426 *Id.*

427 *Id.*

428 *Id.*

429 *Id.*

430 FLANAGAN, *supra* note 43, at 98-99.

431 FAUX, THE GLOBAL CLASS WAR, *supra* note 46, at 226.

aims to help candidate countries achieve certain EU political, economic, and social standards. Given the financial assistance that the EU has provided its most recent members, a full open border policy, which will be realized in 2011, is not expected to lead to mass migration and is viewed as a positive development for the EU.

The EU recently added twelve new countries to its community which amounted to the biggest enlargement in its history. This fifth enlargement took place in two parts.⁴³² Part I allowed Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia into the EU on May 1, 2004.⁴³³ Part II of the enlargement led to Bulgaria and Romania joining the EU on January 1, 2007.⁴³⁴

The EU has established criteria for candidates to join the community. In order to join the EU, an applicant country must meet the following political standards, known as the Copenhagen Criteria, established by the European Council in 1993.⁴³⁵ The applicant country must have (1) stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; (2) a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU; and (3) the ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union.⁴³⁶

In order to help candidate countries meet these standards, the EU has developed pre-accession and post-accession financial assistance measures. This funding targets certain regions or economic sectors, allowing candidate countries to implement programs to develop their laws, infrastructure, and economy in order to become a competitive EU member.

1. Pre-Accession Assistance: IPA—The New Instrument for Pre-accession Assistance

The EU has a system of assistance measures to help candidate and potential candidate countries meet its criteria for eligibility and more easily integrate into the community. The overarching assistance program for countries not yet part of the EU is the Instrument for Pre-accession Assis-

⁴³² EUROPEAN COMMISSION DELEGATION, ENLARGEMENT STRATEGY 2004 1 (2004), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=504DC0657.

⁴³³ *Id.*

⁴³⁴ Press Release, European Commission, Bulgaria and Romania Latest to Join the EU (Jan. 1, 2007) http://ec.europa.eu/news/external_relations/070101_1_en.htm.

⁴³⁵ Copenhagen European Council, Presidency's Conclusions, EC Bull. 6-1993, ¶. I.13. *See also* Accession Criteria (Copenhagen Criteria), http://euramis.com/scadplus/glossary/accession_criteria_copenhague_en.htm (last visited Jan. 17, 2009).

⁴³⁶ *Id.*

tance (IPA).⁴³⁷ On January 1, 2007, the IPA came into force bringing all pre-accession support into one single, focused instrument.⁴³⁸ The IPA covers the countries with candidate status (currently Croatia, the Former Yugoslav Republic of Macedonia, and Turkey) and potential candidate status (Albania, Bosnia and Herzegovina, Montenegro, and Serbia).⁴³⁹

The IPA, which focuses on giving candidate countries transition assistance and helps them with institution building, has several components.⁴⁴⁰ The program aims to foster cross-border cooperation between its members.⁴⁴¹ The EU also uses the IPA to promote regional development, human resource development, and rural development in candidate countries.⁴⁴²

The five major pre-accession assistance programs currently included in the IPA are: (1) Poland and Hungary: Assistance for Restructuring their Economies (PHARE); (2) Instrument for Structural Policies for Pre-Accession (ISPA); (3) Special Accession Programme for Agricultural and Rural Development (SAPARD); (4) Community Assistance for Reconstruction, Development and Stabilization (CARDS); and (5) the Turkish Pre-Accession Programme.⁴⁴³

a. PHARE: Poland and Hungary: Assistance for Restructuring their Economies

PHARE was created in 1989 to help Poland and Hungary accede to the EU and was later expanded to cover other joining countries.⁴⁴⁴ PHARE's main objectives are (1) to strengthen public administrations and institutions to function effectively inside the EU; (2) to promote convergence with the EU's extensive legislation (the *acquis communautaire*) and reduce the need for transition periods; and (3) to promote economic and social cohesion.⁴⁴⁵ PHARE contributed €5.7 billion to ten candidate countries between 1999 and 2006 in order to help them achieve these objectives.⁴⁴⁶

⁴³⁷ European Commission, Regional Policy: Instrument for Pre-Accession Assistance, http://ec.europa.eu/regional_policy/funds/ipa/index_en.htm (last visited Jan. 7, 2009).

⁴³⁸ *Id.*

⁴³⁹ See generally Council Regulation 1085/2006, 2006 O.J. (L 210) 82, 92 (EC), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_210/l_21020060731en00820093.pdf.

⁴⁴⁰ *Id.* at 93.

⁴⁴¹ *Id.* at 83.

⁴⁴² *Id.*

⁴⁴³ European Commission, Regional Policy: Instrument for Pre-Accession Assistance, *supra* note 437.

⁴⁴⁴ European Commission, Enlargement: Financial Assistance: PHARE, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/phare/index_en.htm (last visited Jan. 17, 2009).

⁴⁴⁵ *Id.*

⁴⁴⁶ Forests and European Union Resource Network, Briefing Note: The EU Phare Programme, <http://www.fern.org/pubs/briefs/phare.htm> (last visited Jan. 17, 2009) [hereinafter Forests and European Union Resource Network, Briefing Note]; MWH CONSORTIUM, SUPPORTING ENLARGEMENT—WHAT

PHARE primarily involves two areas of action and funding: investment and institution building.⁴⁴⁷ Institution building projects are intended to strengthen the economic, social, regulatory, and administrative capacity of candidate countries.⁴⁴⁸ To accomplish this, assistance is given to various professional organizations, trade unions, government agencies, and NGOs.⁴⁴⁹

PHARE institution building assistance is provided specifically to implement the *acquis communautaire* (EU law) and to prepare for adherence to EU policies and fulfillment of the requirements of the Copenhagen political criterion.⁴⁵⁰ PHARE investment provides supports for key regulatory institutions whose equipment or infrastructure needs to be upgraded in order to monitor and enforce the *acquis communautaire* effectively.⁴⁵¹ By funding programs in candidate countries that aim to achieve PHARE objectives, the EU fosters cross-border cooperation with candidate countries, economic and social cohesion within the EU, and generally helps the potential members reach EU economic, social, and political standards.

b. ISPA: Instrument for Structural Policies for Pre-Accession

The Instrument for Structural Policies for Pre-Accession (ISPA) also now falls under the IPA. Launched in 2000, ISPA provides assistance for infrastructure projects in the EU priority fields of environment and transport.⁴⁵² ISPA has three principal objectives: (1) familiarizing the candidate countries with the policies, procedures, and funding principles of the EU; (2) helping them catch up with EU environmental standards; and (3) upgrading and expanding links with the trans-European transport networks.⁴⁵³

Candidate countries are eligible for ISPA grants until they accede to the EU.⁴⁵⁴ Once the countries join the EU, they become eligible for the Cohesion Fund, detailed below.⁴⁵⁵ The new members' ISPA projects become Cohesion Fund projects.⁴⁵⁶

DOES EVALUATION SHOW?: EX-POST EVALUATION OF PHARE 3 (European Commission, Directorate-General Enlargement 2007), available at <http://ec.europa.eu/enlargement/pdf/>

[financial_assistance/phare/evaluation/consolidated_summary_report_phare_ex_post_eval.pdf](http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/consolidated_summary_report_phare_ex_post_eval.pdf).

447 Forests and European Union Resource Network, Briefing Note, *supra* note 446.

448 *Id.*

449 *Id.*

450 *Id.*

451 *Id.*

452 *Id.*

453 Forests and European Union Resource Network, Briefing Note, *supra* note 446.

454 DG REGIO-ISPA, THE MINI ISPA REPORT 2000-2004, at 3 (2005), available at ec.europa.eu/regional_policy/funds/ispa/pdf/stat20002004_en.pdf. [hereinafter DG Regio-Ipsa]

455 *Id.*

456 *Id.*

During ISPA's first four years of implementation (2000-2003), ISPA grants aided over 300 large-scale infrastructure investments in the ten candidate countries of Central and Eastern Europe (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia).⁴⁵⁷ In 2004, assistance amounted to €7 billion for an investment value of over €11.6 billion (current prices).⁴⁵⁸ After the EU enlargement in 2004, the remaining ISPA beneficiary countries were Bulgaria and Romania because the other beneficiary countries had become eligible for the Cohesion Fund.

To accomplish their objectives, ISPA's grants focus on funding environmental and transportation infrastructure projects. Environmental projects fall under the following categories: water supply and sewage, wastewater treatment, solid waste collection, and air quality.⁴⁵⁹ Transportation projects include building infrastructure for road, rail, airport, inland waterways, upgrading and repairing transport infrastructure, and creating links to the EU transport networks (TEN-Ts).⁴⁶⁰

Beneficiary countries are responsible for implementing ISPA projects.⁴⁶¹ However, as long as decentralized implementation procedures are not in place, the European Commission exercises close control over all stages of project implementation.⁴⁶²

c. SAPARD: Special Accession Programme for Agricultural and Rural Development

The Special Accession Programme for Agricultural and Rural Development (SAPARD) finances agricultural and rural development measures for candidate countries.⁴⁶³ SAPARD financial assistance is designed to help candidate countries structurally adjust their agricultural sector and rural areas. SAPARD also helps candidate countries implement the *acquis communautaire* concerning the Common Agricultural Policy (CAP).⁴⁶⁴

CAP is responsible for improving the EU agricultural sector. CAP aims to provide farmers with a reasonable standard of living, provide con-

⁴⁵⁷ *Id.* at 4.

⁴⁵⁸ *Id.* at 7.

⁴⁵⁹ *Id.* at 11.

⁴⁶⁰ European Commission, Regional Policy-InfoREGIO: ISPA: Sectors Receiving Assistance, http://ec.europa.eu/regional_policy/funds/ispa/sectors_en.htm (last visited Jan. 17, 2009).

⁴⁶¹ DG REGIO-ISPA, *supra* note 454, at 5.

⁴⁶² *Id.*

⁴⁶³ EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR AGRICULTURE, BULGARIA AGRICULTURE AND ENLARGEMENT (2002), available at ec.europa.eu/agriculture/external/enlarge/countries/files/bulgaria.pdf.

⁴⁶⁴ European Commission, Enlargement: Financial Assistance: SAPARD, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/index_en.htm (last visited, Jan. 17, 2009).

sumers with quality food at fair prices, and preserve rural heritage.⁴⁶⁵ CAP is also increasingly focused on food safety, preservation of the environment, and crops for fuel programs.⁴⁶⁶ In order to meet CAP goals, candidate countries must improve their agricultural and production standards and implement certain changes in legislation and agricultural policy.⁴⁶⁷ SAPARD funding helps candidate countries achieve these goals.

Financial assistance to candidate countries under SAPARD is substantial. Until 2003, the annual budget for the 10 candidate countries of Central and Eastern Europe was €560 million.⁴⁶⁸ In 2004, the SAPARD budget for Romania and Bulgaria was € 225.2 million.⁴⁶⁹

Programs funded under SAPARD are divided by sector within a given candidate country. In Bulgaria for example, SAPARD-financed projects fell under categories such as “improving processing and marketing of agricultural and fishery products.”⁴⁷⁰ Funds were distributed based on how projects fit under these categories such as “adapt establishments to EU standards on hygiene and food quality” or “improve storage capacity.”⁴⁷¹

SAPARD comes under the authority of the Directorate-General for Agriculture of the EU,⁴⁷² and implementation is preceded by the approval of the European Commission of a National Plan for agriculture and rural development, the accreditation of a SAPARD Agency, and multi-annual and annual financing agreements.⁴⁷³

⁴⁶⁵ European Union, Europa: Overviews of the European Union, Agriculture: Meeting the Needs of Farmers and Consumers, http://europa.eu/pol/agr/overview_en.htm (last visited Jan. 17, 2009).

⁴⁶⁶ *Id.*

⁴⁶⁷ European Commission, Joint Research Centre, Institute for the Protection and Security of the Citizen, Institutional Action: Geo-Information Management and Control Methods (GEOCAP), <http://ipsc.jrc.ec.europa.eu/showaction.php?id=1> (last visited Jan. 17, 2009).

⁴⁶⁸ European Commission, Enlargement: Financial Assistance: SAPARD—Special Accession Programme for Agriculture & Rural Development, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/sapard_en.htm (last visited Jan. 17, 2009).

⁴⁶⁹ *Id.*

⁴⁷⁰ COMMISSION OF THE EUROPEAN COMMUNITIES, ANNUAL REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: SAPARD ANNUAL REPORT—YEAR 2001 38, COM (2002) 434 final (July 30, 2002), available at http://ec.europa.eu/agriculture/publi/reports/sapard2001/full_en.pdf.

⁴⁷¹ REPUBLIC OF BULGARIA, ANNUAL REPORT ON SAPARD IMPLEMENTATION IN THE REPUBLIC OF BULGARIA FOR THE PERIOD JUNE 1, 2001—DECEMBER 31, 2002 (June 2003), http://www.mzgar.government.bg/mz_eng/Sapard/News/03.11.06-Annual_Report-approved-11.2003-eng.htm (last visited Jan. 17, 2009) [hereinafter REPUBLIC OF BULGARIA, ANNUAL REPORT].

⁴⁷² European Commission, Directorate-General for Agriculture and Rural Development, http://ec.europa.eu/dgs/agriculture/index_en.htm (last visited Jan. 17, 2009).

⁴⁷³ REPUBLIC OF BULGARIA, ANNUAL REPORT, *supra* note 471.

d. CARDS: Community Assistance for Reconstruction, Development and Stabilization

Community Assistance for Reconstruction, Development and Stabilization (CARDS) is the Financial Instrument for the Western Balkans. The Stabilization and Association Process (SAP) is the most important element of CARDS and is the cornerstone of the European Union's policy towards the region.⁴⁷⁴ Through SAP, CARDS seeks to promote stability within the western Balkan region while also facilitating closer association with the EU.⁴⁷⁵

Through SAP, € 4.6 billion was provided to the Western Balkan region in the period 2000 to 2006 for investment, institution building, and other measures to achieve four main objectives: (1) reconstruction, democratic stabilization, reconciliation, and the return of refugees; (2) institutional and legislative development, including harmonization with EU norms and approaches, development of the rule of law, human rights, civil society and the media, and the operation of a free market economy; (3) sustainable economic and social development, including structural reform; and (4) promotion of closer relations and regional cooperation among the EU and the candidate countries of central Europe.⁴⁷⁶ CARDS financed hundreds of projects across all sectors, countries, and regions to help the Western Balkans meet these goals.⁴⁷⁷

e. The Turkish Pre-Accession Instrument

The Turkish Pre-Accession Instrument is geared specifically toward helping Turkey meet the economic, political, and social requirements of joining the EU.⁴⁷⁸ The program did not give financial assistance to the countries that joined the EU in the fifth enlargement.

⁴⁷⁴ European Commission, CARDS, http://ec.europa.eu/enlargement/financial_assistance/cards/index_en.htm (last visited Oct. 25, 2007).

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ European Commission, Enlargement: Financial Assistance, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/index_en.htm (last visited Jan. 17, 2009).

2. Post Accession Assistance

a. Post-Accession Transition Facility

Post-accession Transition Facilities provide funds to countries that recently joined the EU.⁴⁷⁹ The ten new member states that joined the EU in 2004 received this assistance until 2006, and Romania and Bulgaria began benefiting from a post-accession Transition Facility in 2007.⁴⁸⁰ This post-accession financial assistance is implemented by the Extended Decentralized Implementation System (EDIS) and provides new members with continued financial support in a number of core areas previously financed by the pre-accession assistance measures.⁴⁸¹

b. Cohesion Fund

Programs financed under ISPA are funded under the Cohesion Fund once the candidate country becomes a member of the EU. The Cohesion Fund, as described by the European Commission, is a structural instrument that helps Member States reduce economic and social disparities and stabilize their economies.⁴⁸² The Cohesion Fund finances up to 85% of eligible expenditures on major projects involving the environment and transport infrastructure.⁴⁸³ This financial support is intended to strengthen cohesion and solidarity within the EU.

Eligible countries are the least prosperous member states of the EU. Countries supported by the Cohesion Fund have a gross national product (GNP) per capita that is below 90% of the EU average (since January 5, 2004, these have been Greece, Portugal, Spain, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Romania, and Bulgaria).⁴⁸⁴ The Cohesion Fund's budget was 15.9 billion for the years 2004-2006. More than half of the funding is reserved for new Member States.⁴⁸⁵

⁴⁷⁹ European Commission, Enlargement: Financial Assistance: Former Assistance, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/former-assistance_en.htm (last visited Jan. 17, 2009).

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² European Commission, Regional Policy: The Cohesion Fund at a Glance, http://ec.europa.eu/regional_policy/funds/procf/cf_en.htm (last visited Jan. 17, 2009).

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

c. CAP: Common Agricultural Policy

CAP funds help new EU members, who received SAPARD funds as candidate countries, to further modernize their agricultural and rural sectors. When the EU was enlarged in May 2004 and January 2007, the number of farmers in the EU increased first by 55% and then again by 53%.⁴⁸⁶ Farmers and food processors in the new member countries face particular challenges when competing with agriculture in the rest of the EU.⁴⁸⁷ CAP therefore provides a special funding package to new member states tailored specifically to the needs of these farmers.⁴⁸⁸ A € 5.8 billion budget provides help for early retirement programs, impoverished areas, environmental protection, forestation, semi-subsistence farms, producer groups, and programs for compliance with EU food, hygiene, and animal welfare standards.⁴⁸⁹

The new EU countries also have access to benefits provided to all EU member states under CAP.⁴⁹⁰ The 2004 entrants into the EU have immediate access to price support measures (export refunds and intervention buying).⁴⁹¹ Direct payments will be phased in over ten years (2004-2013), starting at 25% of the rate paid to existing countries in 2004 and 30% for 2005.⁴⁹² CAP funds therefore provide continued financial support for rural and agricultural development in new EU member states.

The substantial amounts of EU aid to the acceding countries was intended to increase reform measures, boost the candidate countries' economies, raise income levels, and ultimately make Europe more democratic and stable.⁴⁹³ The EU, after providing this financial assistance, was able to welcome new members without fear that the new countries would have a long-term detrimental effect on the overall EU economy or its political and social systems. This assistance has for the most part been successful, having allowed the countries' economies and political and social infrastructure to develop. The pre- and post-accession assistance was therefore a key to

⁴⁸⁶ Overviews of the European Union Activities—Agriculture (June 2007), http://web.archive.org/web/20071018053439/http://europa.eu/pol/agr/overview_en.htm (last visited Jan. 25, 2009).

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ Overviews of the European Union Activities—Agriculture (September 2006), http://web.archive.org/web/20070312183501/http://europa.eu/pol/agr/overview_en.htm (last visited Jan. 25, 2009).

⁴⁹⁰ The Common Agricultural Policy—A Policy Evolving with the Times, CAP Leaflet, 10 (May 2004), http://ec.europa.eu/agriculture/publi/capleaflet/cap_en.htm.

⁴⁹¹ *Id.*

⁴⁹² *Id.*; EUROPEAN UNION, THE COMMON AGRICULTURAL POLICY—A POLICY EVOLVING WITH THE TIMES: THE CAP AND ENLARGEMENT 10, http://ec.europa.eu/agriculture/publi/capleaflet/cap_en.pdf (last visited Jan. 25, 2009).

⁴⁹³ See generally *Charlemagne: Post Enlargement Stress*, ECONOMIST.COM, Nov. 10, 2007, at 68.

helping new EU members achieve a certain amount of economic growth, which is predicted to continue over the coming years.⁴⁹⁴

3. Inter-EU migration

a. Border Controls

Even with these significant financial assistance measures, all concerned knew that new members would undergo a transition period before meeting all EU standards. The EU therefore allowed for certain transition period policies to alleviate concerns over the fifth enlargement.

One of the major transition period policies concerned open borders. Acceding countries, such as Poland, feared a “brain drain” to the EU-15.⁴⁹⁵ EU-15 countries worried about a potential overflow of migrants from new member states.⁴⁹⁶ The EU therefore created a transition period during which the freedom of movement of workers from acceding countries to the EU-15 would be limited.⁴⁹⁷ A similar policy had been adopted earlier when Spain, Greece, and Portugal joined the EU.⁴⁹⁸

EU members could choose to restrict the free movement of labor for up to seven years, and many of the EU-15 opted to impose such restrictions.⁴⁹⁹ Germany and Austria opted to use the full seven-year period; France and Belgium opted for two years.⁵⁰⁰ The United Kingdom (“UK”) never had any restrictions against workers from the first ten countries; however, in 2007, the UK did renew its restrictions for another year against workers from Romania and Bulgaria.⁵⁰¹ Of the EU-15, only Finland and Sweden have opened their labor markets fully to the two newest members.⁵⁰²

⁴⁹⁴ See generally Adam Roberts, *A World in Flux*, *ECONOMIST*, The World in 2008, at 76 [hereinafter Roberts, *ECONOMIST*].

⁴⁹⁵ Stefan Alscher, *Focus Migration Country Profile: Poland*, January 2008, at 2.

⁴⁹⁶ Andreas Schneider, *Analysis of EU-CEEC Migration with Special Reference to Agricultural Labour*, FLOWENA Discussion Paper 27, 2004, at 10 [hereinafter Schneider, *Analysis of EU-CEEC Migration*]. See also Europa, Eurofound, *European Industrial Relations Dictionary: Accession*, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/accession.htm> (last visited Jan. 25, 2009).

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 5.

⁴⁹⁹ *Id.* at 10.

⁵⁰⁰ *Id.*

⁵⁰¹ EU Free Movement of Labour Map, BBC News, <http://news.bbc.co.uk/2/hi/europe/3513889.stm> (last visited Jan. 25, 2009).

⁵⁰² *Id.*

After 2011, no restrictions will be allowed.⁵⁰³ In the meantime, these precautionary restrictions on labor movement are supposed to help curb mass migration and a “brain drain” from newly-acceded countries into the EU-15, which were otherwise anticipated even with the major financial assistance measures intended to help boost the candidate countries’ economies to meet EU standards.

b. More on the Consequences of the Fifth Enlargement on Intra-EU Immigration Patterns and the EU Economy

Despite some political and public backlash against intra-EU migration in countries like Italy and the UK, the fifth enlargement and the resulting migration has benefited all individual countries as well as the EU as a whole. The open labor market has allowed jobs to be filled by young foreign workers and boosted the EU’s overall economy.

After a period of transition, the boost in the economies of the new EU countries is expected to draw their natives back home, and immigration from East to West will self-regulate. Adam Roberts from *The Economist* asserts that in the near future more young Poles and Hungarians in the West will be tempted back home by rising wages.⁵⁰⁴ The financial assistance the EU has provided will allow the economies and income levels of the most recent members to meet those of the EU-15 after a transition period. People from the new member states are therefore expected to remain in place or return home as income levels rise and economies grow in their native countries.

Moreover, Roberts predicts that the labor market will further self-regulate with an open border policy and intra-EU immigration will be an overall benefit. He explains: “The human tide will ebb and flow. As housing booms end in countries which have seen lots of migrants—Ireland, Britain, Spain, Greece—young east Europeans may turn elsewhere. Germany faces severe shortage of skilled hands, and may see bigger flows.”⁵⁰⁵ An open labor market is highly advantageous for both host and home countries and for the EU as a whole. Such a market allows individuals to cross borders to find employment and causes migration patterns to adjust based on demand. The labor market therefore becomes more efficient with open borders.

An open border policy within the EU, which will be fully realized in 2011, is welcomed in most quarters. Open labor markets are largely self-regulating. The EU has taken sufficient precautionary measures and provided enough financial support to new members that a mass migration to

⁵⁰³ *Id.*

⁵⁰⁴ Roberts, *ECONOMIST*, *supra* note 494, at 68.

⁵⁰⁵ *Id.*

the EU-15 has not occurred. Moreover, the migration within the EU that does take place has proven to be beneficial to both host and home countries and should continue to help the economy.

Robert Pastor, director of the Center for North American Studies, provides this list of lessons that the NAFTA countries can learn from the EU experience:⁵⁰⁶

- i. A declaration of goals is needed. EU leaders defined a mission in terms of community and solidarity; the goal was that the people of Europe would cooperate in new ways to bring peace and well-being to all.
- ii. A few solid institutions are needed for guidance.
- iii. Economic convergence is essential. The spectacular reduction in the income gap between the rich and poor countries was achieved in a relatively short period (since 1986). Among the factors responsible were the establishment of a single market, foreign investment, and massive EU aid programs. The EU also insisted on democracy as a criterion for membership.
- iv. The effect of convergence in incomes and social policies was to reduce the level of emigration from the poor countries and regions in the EU. Although the gap within the EU was narrower than within NAFTA, the result is indisputable: reduction in disparities will also reduce the pressures to emigrate.
- v. Many different projects have been funded, but the most effective ones were aimed at infrastructure and higher-level education.
- vi. Reducing volatility is vital. First, sustained growth remains the most effective way to reduce disparities, and national policies are at least as important as the Union's regional policies. That is why Ireland did so much better than Greece, although it received only a third as much aid. Second, the Single Market and foreign investment may have contributed as much to the development of the poor countries in southern Europe as aid. Third, regional aid helped in significant ways—encouraging governments to maintain good macroeconomic policies, targeting bottlenecks in the economy, and multiplying investments. Of all regional aid projects, the two most effective ways to stimulate growth and reduce disparities were infrastructure and education. Rich countries need to find ways to cushion the swings that poor economies suffer. Opportunities and dangers of integration are much more serious for weak countries than for more advanced ones. Cohesion

⁵⁰⁶ Robert A. Pastor, *North America's Second Decade*, FOREIGN AFFAIRS, Jan./Feb. 2004, at 59-62, 135-36.

- countries outperformed the EU average in the boom years and did worse than the average during recessions.
- vii. Growing inequality within the successful poor countries can occur. Monitoring the progress of all regions of poor countries is needed.
 - viii. Politics and bureaucracy have to be balanced. The right balance is needed to keep democracy at the core of deliberations as an organization deepens.
 - ix. The magnitude of commitment must be great. The EU appropriated truly significant funds to reduce disparities between rich and poor governments and regions. When the EU first decided on a regional policy, its funds were scarce, but with each enlargement, the Union expanded the resources for poor regions to the point at which the sheer magnitude of investment helped lift some and gave a sense of community to all.⁵⁰⁷

Thus, when it comes to intra-regional labor migration, the EU has established a system that appears to work. Trade agreements included free labor migration. However, the feared massive labor migration from poorer countries to richer countries did not occur. Substantial investments in the poorer countries help to explain that result.

As exemplified by the EU enlargements, an open border policy works best when investments are focused on all areas of the economy and infrastructure. Such comprehensive investments are the best way to achieve economic growth as well as political and social stability and progress. Given the need to rethink our perspective towards the border, U.S. investment in Mexico must be part of the strategy. The United States can learn from the successes of EU investments in candidate countries, as the EU has been successful in integrating neighboring countries by investing heavily in these candidate members. The United States should follow two major policies. First, the United States should consider comprehensive funding that covers all areas of Mexico's economy as well as its social and political infrastructure. Such investments will ensure Mexican economic growth, political and social stability, and progress. Second, the United States should fund programs in Mexico that help its economy and labor market become more efficient and more efficiently employ people within a given economic sector. When people are employed efficiently, the need for migration is reduced. Through such investments, both the United States and Mexico are likely to benefit from an open border, an efficient labor force, and strong economic growth.

⁵⁰⁷ Ireland is the example: EU funds for Ireland had a special impact because they arrived in 1989 when there was a substantial backlog of projects and infrastructural needs. That is exactly where Mexico is today. PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 136 (Hans Johnson said Germany-Spain? The difference was like the United States and Mexico).

EU investments are concerned not only with a country's economic growth but also with the country's political and social stability. The idea of inclusive investment is to ensure that no political, economic, or social sector will lag behind.

The EU enlargement policy sets certain standards for candidate countries, known as the Copenhagen Criteria. These criteria require a country that wishes to join the EU to meet certain political, social, and economic standards. To help candidate countries meet these goals, EU investments target all aspects of the economy and the country's infrastructure. PHARE covers administrative and political infrastructure among other things, SAPARD covers the agricultural sector, and ISPA funds environmental and transportation development. Such large scale and all-inclusive funding ensures that no political, social, or economic sector of a country will lag behind and hinder a country from meeting EU standards.

Comprehensive investment by the United States in Mexico's economy and its political and social infrastructure will similarly ensure that Mexico's economy will grow and that it will remain politically and economically stable.

The United States should also emulate the EU's focus on funding programs that help promote an efficient labor force. As exemplified by SAPARD (agricultural investments), the EU funds programs in candidate countries that help the countries restructure their economies to be more efficient. In Romania, for example, the EU emphasized the need to restructure the agricultural sector. Romania has significant agricultural land that was historically family farmed.⁵⁰⁸ The EU believed that family farms, where whole families tend to one parcel, led to inefficient employment.⁵⁰⁹ Therefore, through SAPARD, the EU attempted to change this by funding programs to develop and diversify economic activities within the agricultural sector in order to employ people more efficiently within the field.⁵¹⁰ Creating more diverse jobs in agriculture was intended to better employ the rural population and curb migration to urban areas or other EU countries.⁵¹¹ Investing in more efficient employment within certain economic sectors or regions helps avoid unnecessary migration, creates a more efficient labor force, and strengthens their economies. Applied to Mexico, this approach would help the Mexican economy grow, likely reducing emigration.

If one of the goals of a new approach to the border is reducing Mexican migration to the United States, then the United States should not limit

⁵⁰⁸ European Commission Directorate-General for Agriculture, *Agricultural Situation in Candidate Countries, Country Report on Romania*, July 2002, at 7; Andreas Schneider, *Analysis of EU-CEEC Migration with Special Reference to Agricultural Labour*, HWWA 2004, at 16-17.

⁵⁰⁹ SAPARD, *National Agriculture Rural Development Plan 2000-2006, Financial Allocation for SAPARD Measures*, November 2000, at 352.

⁵¹⁰ *Id.* at 352.

⁵¹¹ *Id.* at 484.

the number of migrant workers from Mexico. This may be counterintuitive, but without an open migration policy, once investments in Mexico have been made the U.S./Mexico labor market will not function properly.

A problem has manifested in central Spain and some other agricultural areas of the EU-15 which have not adopted a fully open border policy. Reports on Romanian migrants in Castilla La Mancha, Spain made it clear that an open cross-border labor market is best for the economy. Romanian migrants with work permits who worked in the vineyards were earning a living wage, had adequate housing, and most importantly, had enough money to return to their families in their home country after the harvest season.⁵¹² Being part of a legal seasonal work force allowed these migrants to earn a good income and boost the economy in both countries: Spain, through their labor and the time they spend there, and their home country, by bringing home additional income. However, since a limited number of work permits were issued to Romanians, some agricultural employers felt the need to hire undocumented workers.⁵¹³ The undocumented workers lived in slums, were not protected in the workplace, and had unpredictable income flows.⁵¹⁴ Moreover, because these Romanians were not earning a living wage, they could not afford to pay their way home.⁵¹⁵ They were not able to take part in the seasonal migration patterns that followed job demands. Instead of becoming part of a labor flow that most efficiently helped build the economies of both the host and home countries, these workers were stranded in Spain without necessary protection or means of income.

The problem with limiting the number of seasonal and other workers is presented in other parts of Europe as well. In Germany, the number of work permits granted to agricultural laborers from other countries does not meet actual demand for agricultural workers.⁵¹⁶ Foreign workers who come in following job demands then end up working as undocumented migrants, much the same as the undocumented Romanians in Spain.⁵¹⁷

The lesson of the EU situation is that with open trade, limiting the number of migrant workers is a mistake.⁵¹⁸ Open migration of workers creates the most efficient labor market and allows the flow of workers to properly follow job demand.⁵¹⁹ In this way, workers remain above ground, earn a protected wage, and help both the local and home country econo-

⁵¹² *Special Report: Romanians Workers in Spain* (French Euro News television broadcast Jan. 3, 2008).

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ Sebastian Hess, *The Demand for Seasonal Farm Labor from Central and Eastern European Countries in German Agriculture*, AGRIC. ENGINEERING INT'L: CIGR EJOURNAL, May 2006, at 8.

⁵¹⁷ *See id.*

⁵¹⁸ Hing, *Contemplating Solutions*, *supra* note 383, at 49.

⁵¹⁹ *Id.*

mies.⁵²⁰ Such an open border policy helps to guarantee workers' rights and ensure that migrant workers are not subjected to substandard living conditions.⁵²¹

C. *Considering Open Borders/Migration Without Borders*⁵²²

Many scholars have raised the idea of open borders for serious consideration. For example, Kevin Johnson has made the case for open borders given the era of globalization in which we live and the range of related questions.⁵²³ And in Gerald López's seminal work on undocumented Mexican migration, an ethics-driven notion of an open border with Mexico is implicit in his description of the cultural, sociological, and economic history between the United States and Mexico.⁵²⁴

Other arguments for a more open border range from the theoretical to the practical. For example, after his landslide victory for the Mexican presidency in 2000, Vicente Fox advocated an open border concept, acknowledging that Mexico could not offer its workers the same salaries or living standards offered in the United States but arguing that Mexican workers were able to fill much-needed job openings north of the border.⁵²⁵ In fact, as governor of his home state of Guanajuato, he had instituted job training for residents in landscaping, construction, factory work, and domestic work.⁵²⁶ Political philosophers such as Mark Tushnet, Joseph Carens, and R. George Wright have argued that restricting law-abiding immigrants is antithetical to the notion of an open society.⁵²⁷

In the theoretical realm, Antoine Pécoud sets forth arguments for the concept of open borders or what he terms "migration without borders."⁵²⁸ He begins by noting that Article 13-2 of the Universal Declaration of Human Rights states that "[e]veryone has the right to leave any country, including his own, and to return to his country."⁵²⁹ This recognition of emi-

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ Kevin R. Johnson, *Open Borders?*, 51 *UCLA L. REV.* 193, 205 (2003) [hereinafter Johnson, *Open Borders?*].

⁵²⁴ See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615, 713 (1981) [hereinafter López, *Undocumented Mexican Migration*].

⁵²⁵ Ginger Thompson, *Mexican Leader Visits U.S. with a Vision to Sell*, *N.Y. TIMES*, Aug. 24, 2000, at A3.

⁵²⁶ *Id.*

⁵²⁷ Johnson, *Open Borders?*, *supra* note 523, at 205-11.

⁵²⁸ UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, *MIGRATION WITHOUT BORDERS: ESSAYS ON THE FREE MOVEMENT OF PEOPLE 1* (Antoine Pécoud & Paul de Guchteneire eds., UNESCO Publishing/Berghahn Books 2007) [hereinafter Pécoud, *MIGRATION WITHOUT BORDERS*].

⁵²⁹ *Id.*

gration as a fundamental right, in his view, necessarily has no meaning without the ability to immigrate and a right to mobility.⁵³⁰ He states that mobility is a resource to which everyone should have access.⁵³¹

As if speaking about the U.S.-Mexico border specifically, Pécoud recognizes that migration has become part and parcel of the economy and social life of countries and that sending and receiving countries often become dependent on migration that is difficult to stop. In spite of this dependence, the conventional wisdom is that an open border is not feasible because massive migration would result. But Pécoud submits that such fear is not grounded on any empirical understanding.⁵³² While we do not know what would happen if borders were opened, we do know that the results of immigration policies are hard to predict.⁵³³ As the United Nations High Commissioner for Refugees has stated, "It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason."⁵³⁴ As we know from the EU experience, massive migration from poorer countries did not occur.⁵³⁵ Furthermore, this continued immigration flow and the apparent inability of a government to control the flow can lead to lack of confidence on the part of the public and even anti-immigrant sentiment.⁵³⁶ More walls and fences are essentially an admission that the system is not working.⁵³⁷ Curiously, restrictions on mobility curtail circularity, which can lead to undocumented migrants residing more permanently.⁵³⁸ It should be remembered that open borders enable migrants to return as well.⁵³⁹

To Pécoud, border controls raise questions about our values:

[T]he human costs of border controls raise the issue of whether such controls are compatible with the core values of the international community. To what extent can tough border-control measures coexist with the harmonious functioning of democracies? The liberal values and human rights principles that guide our societies cannot stop at their borders; they must inspire countries to behave accordingly towards outsiders arriving at their gates. The way society handles the fate of foreigners ultimately reflects the values upon which it is based and the price—in terms of dignity and human rights—developed countries are prepared to pay to control their borders. In other words, the evolution of migration controls to-

530 *Id.*

531 *Id.* at 11.

532 *Id.* at 2.

533 *Id.* at 15.

534 Pécoud, *MIGRATION WITHOUT BORDERS*, *supra* note 528, at 16.

535 *Id.* at 16.

536 *Id.* at 7.

537 *Id.*

538 *Id.* at 16.

539 *Id.* In fact, in the United States, stricter border enforcement after 9/11 has reduced circularity, and many undocumented migrants, who would regularly return home, no longer feel that they can do so. In many respects, this has increased the undocumented migrant population.

wards greater harshness might eventually backfire and threaten the liberal principles and freedoms that lie at the core of democratic societies.⁵⁴⁰

Pécoud reminds us that class has its privileges when it comes to migration.⁵⁴¹ The ability to travel and settle in different parts of the world is certainly more available to those from developed countries than to those from less-developed countries.⁵⁴² Migration controls actually distort the world economically.⁵⁴³ Free migration would lead to more equality.⁵⁴⁴ The movement of labor from poor to rich countries would increase world GDP, and ironically, would reduce the pressure to migrate as wages converge.⁵⁴⁵ Inequalities would then be addressed through market forces.⁵⁴⁶

Thus, to Pécoud, the fortune of undocumented migrants would improve in an open border scenario; underground economies would decrease, and employers' and workers' contributions to the welfare system would increase.⁵⁴⁷ In order to give such a system the best chance to succeed, migrants should be welcomed into our communities. A more welcoming approach would reduce levels of resentment and feelings of ostracism that many migrants experience.⁵⁴⁸

In Pécoud's view, migration without borders is consistent with globalization and free trade. Borders were once used to stop capital, goods, and people, but after free trade movements, borders now just stop people. Migration becomes the exception to globalization.⁵⁴⁹ The EU appears to be the only region with open migration; even MERCOSUR in the South American Cone, the Association of South East Asian States (ASEAN), and the Asian Pacific Economic Cooperation Forum (APEC) do not allow free movement.⁵⁵⁰

While his arguments are idealistic and morally driven, Pécoud recognizes that open borders would affect a multitude of issues such as wages, welfare, and race. Thus, cooperation between nations and affected communities must take place, and opening borders must not be about one country taking advantage of another country's goodwill.⁵⁵¹ While not perfect, the

540 Pécoud, *MIGRATION WITHOUT BORDERS*, *supra* note 528, at 7 (citations omitted).

541 *Id.* at 9.

542 *Id.*

543 *Id.* at 12.

544 *Id.*

545 *Id.*

546 Pécoud, *MIGRATION WITHOUT BORDERS*, *supra* note 528, at 12-13.

547 *Id.* at 17.

548 *Id.*

549 *Id.* at 13.

550 *Id.* at 14.

551 *Id.* at 21.

EU is a good example of the type of cooperation that is needed, where workers tend to stay in their native countries in spite of open borders.⁵⁵²

The consequences of migration without borders may be difficult to anticipate, but at least to Pécoud, the notion is ethically defensible.⁵⁵³ At a minimum, in my view, raising the concept is at least important to seriously contemplate in order to understand the movement of people.

Robert Flanagan provides another perspective that supports the liberal movement of labor migration across borders. In reviewing the long history of the waves of workers around the globe, he concludes that, as trade and migration expanded, wage differences between nations narrowed; in essence, international inequality in work conditions was reduced.⁵⁵⁴ World output increases because migrants get better wages in the receiving country and the value of their work product exceeds the output lost in the country they left.⁵⁵⁵ Open migration has the other extremely important added benefit of reducing human trafficking in forced labor.⁵⁵⁶

When it comes to labor migration, the concern often focuses on the effect on receiving countries. Flanagan encourages us to look at the effect on the sending countries as well. By doing so, he finds that workers who stay behind in the sending country benefit in terms of more work, higher wages, and even better work conditions because of less competition.⁵⁵⁷ Flanagan argues that even “modest relaxation of migration barriers” would result in important improvement in working conditions around the world.⁵⁵⁸

Of course, Flanagan also reminds us that remittances sent back from abroad are beneficial to the sending country as well. In fact, he argues that remittances help to offset any concern one might have about drain as well—where the educated from the poorer country leave. Remittances are increasingly used for investment in developing countries and provide a stable source of foreign exchange. He also argues, perhaps not convincingly, that emigration of the educated from a poorer country puts pressure on that country to invest more in education and other human capital.⁵⁵⁹ He posits that more people in the poorer country will want to become educated, lured by job prospects abroad, but not every educated person will in fact leave, which increases the country’s pool of skilled workers.⁵⁶⁰

⁵⁵² Pécoud, *MIGRATION WITHOUT BORDERS*, *supra* note 528, at 23-24.

⁵⁵³ *Id.* at 21.

⁵⁵⁴ FLANAGAN, *GLOBALIZATION*, *supra* note 43, at 88, 93. Flanagan complains that immigration restrictions have damaged the ability of migration to help equalize labor conditions across the globe today. *Id.* at 112.

⁵⁵⁵ *Id.* at 108.

⁵⁵⁶ *Id.* at 89.

⁵⁵⁷ *Id.* at 88-89.

⁵⁵⁸ *Id.* at 115-16.

⁵⁵⁹ FLANAGAN, *GLOBALIZATION*, *supra* note 43, at 104-06.

⁵⁶⁰ *Id.* at 107.

In his influential article on open borders,⁵⁶¹ Kevin Johnson outlines the most salient points in support of a new way of looking at immigration.⁵⁶² Under liberal theory, closed borders are antithetical to the rights of non-citizens; liberals ought to be supportive of “relatively unrestricted immigration.”⁵⁶³ The moral grounds to exclude “ordinary, peaceful people, seeking only the opportunity to build decent secure lives” are simply hard to locate.⁵⁶⁴ Our religious foundations also provide a “moral imperative” to treat immigrants in a humanitarian way.⁵⁶⁵

In Johnson’s view, the special relationship between the United States and Mexico suggests a greater moral obligation to Mexican migrants.⁵⁶⁶ That relationship has led to a culture of migration from Mexico built on economics and family reunification, and as such, broad immigration restrictions are impossible to enforce because they run counter to migration pressures.⁵⁶⁷ Those restrictions have led to policies such as the institution of Operation Gatekeeper and other militarization of the border that has resulted in an untenable death toll among border crossers.⁵⁶⁸

Johnson observes that today’s immigration laws contribute to racism in the United States, and their enforcement leads to civil rights harms.⁵⁶⁹ The current regime, which contributes to an environment conducive to discriminatory sentiment, has fostered the creation of a large pool of undocumented workers who are subject to exploitation by U.S. employers.⁵⁷⁰

Advocating open borders is not a challenge to a nation’s sovereign authority to restrict immigration. Johnson notes that a nation can “affirmatively choose open borders in its exercise of sovereign power.”⁵⁷¹ One advantage to a more open system in the post-9/11 era is that resources would be freed up, allowing more attention to be paid to true dangers to public safety and national security.⁵⁷² Another advantage is that a more open immigration system promoting labor mobility would be very economically beneficial to the United States in this period of globalization.⁵⁷³

⁵⁶¹ Johnson, *Open Borders?*, *supra* note 523. See generally, KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (New York University Press 2007).

⁵⁶² Hing, *Contemplating Solutions*, *supra* note 383, at 49.

⁵⁶³ Johnson, *Open Borders?*, *supra* note 523, at 205 (quoting Mark Tushnet).

⁵⁶⁴ *Id.* at 208 (quoting Joseph Carens).

⁵⁶⁵ *Id.* at 205-06.

⁵⁶⁶ *Id.* at 230-32.

⁵⁶⁷ *Id.* at 244-52.

⁵⁶⁸ *Id.* at 221-22.

⁵⁶⁹ Johnson, *Open Borders?*, *supra* note 523, at 216-17. Considers racist sentiment directed at Latinos in the United States and the increased discrimination and hate crimes directed at Arabs, Muslims, and South Asians after 9/11. *Id.*

⁵⁷⁰ *Id.* at 226-30.

⁵⁷¹ *Id.* at 211 (citing R. George Wright).

⁵⁷² *Id.* at 203-04.

⁵⁷³ *Id.* at 233-35.

Johnson challenges us to take a broader world view:

[We need] a far-reaching immigration response to the changing world. Open borders would mark a true revolution in current U.S. immigration law, and would create an admissions system in which migration effectively approximated demand. The fundamental premise of the U.S. immigration laws is that exclusion of immigrants is the norm and admission of non-citizens is the exception to the rule. This need not be. [We must] shift the debate over immigration to consider the possibility of making the United States' borders more permeable to people, as well as to goods, services, and capital No coherent intellectual justification for immigration restrictions like those enforced by the United States has emerged. More importantly, the U.S. elimination of border controls would offer many benefits. Elimination of border controls would end the brutality inherent in enforcement of the current immigration controls, which result in physical abuse, promote racial discrimination, and relegate certain groups of U.S. citizens and lawful immigrants to second-class status. Rampant civil rights deprivations have resulted. Such consequences render U.S. immigration enforcement immoral Moreover, the nation stands to reap economic benefits from free labor migration in a globalizing world economy. As a matter of economic theory, international trade with Mexico and much of the world, which the United States has eagerly embraced, differs little from labor migration. A utilitarian argument would allow for labor migration and add the benefits of a low-wage labor force to the national economy Last but not least, strong policy arguments exist for the abolition of border controls. Experience demonstrates that, at least within modern sensibilities, border controls cannot be enforced: Undocumented immigration is not viewed as criminal by most law-abiding Americans, nor is the employment of undocumented immigrants. Abolition of border controls would recognize the economic and social reality of immigration, including the fact that millions of undocumented immigrants make valuable contributions to the U.S. economy but are forced to live on the margins of society and, subject to exploitation because of their uncertain immigration status, work in poor conditions for substandard wages. Foreign policy benefits also would accrue from a system in which the nationals of other societies were in fact welcomed rather than labeled a public menace, barred from entry, and treated as pariahs in our midst.⁵⁷⁴

Gerald López provides a clear picture of the historical relationship between Mexican migration and the United States.⁵⁷⁵ Long before NAFTA and terms like *globalization* or *transnationalism* were vogue, Mexicans and Americans were living the reality of inter-connected economies and societies.⁵⁷⁶ Today, the effects of that reality remain.

López points out that, in entering into the Treaty of Guadalupe Hidalgo in February 1848, the United States gained California and New Mexico (including present-day Nevada, Utah, and Arizona) and the recognition of the Rio Grande as the southern boundary of Texas.⁵⁷⁷ This represented 55% of former Mexican territory. Although some Mexicans moved to Mexico, most remained in what became U.S. territory. In the years immediately following the treaty, many Mexicans, especially those migrating from the annexed territories, thought of the territories as still a part of Mexico.⁵⁷⁸ Mexicans and Americans paid little heed to the newly created inter-

⁵⁷⁴ Johnson, *Open Borders?*, *supra* note 523, at 263-64.

⁵⁷⁵ López, *Undocumented Mexican Migration*, *supra* note 524, at 641.

⁵⁷⁶ *Id.* at 643.

⁵⁷⁷ *Id.* at 642.

⁵⁷⁸ *Id.*

national border, which was unmarked and wholly unreal to most.⁵⁷⁹ In essence, the boundary was at first an artificial one and did not effectively separate the new United States' possessions from those of the territories south of the border.

López argues that promotion of Mexican migration was part of a larger pattern of labor recruitment that began to emerge in the United States in the late 19th century.⁵⁸⁰

López writes:

With the exclusion of the Chinese, widespread and long-distance Mexican migration began. Expansion of agriculture, particularly in the Rio Grande Valley of Texas and the central valley of California, created the demand for Mexican migration.⁵⁸¹ What emerges from this brief account is American involvement in a pattern of recruitment designed to serve the self-perceived needs of American employers for cheap, temporary labor.⁵⁸² The most vital aspect of the process, at least for purposes of later analysis, is Mexican workers' growing dependence on wages earned in the United States.⁵⁸³ From 1910 to 1920, approximately 200,000 Mexicans were admitted into the United States During World War I, others were actively recruited to fill severe manpower shortages resulting from American involvement in military service and the curtailment of the migration of cheap European labor.⁵⁸⁴

Events in the decade after World War I provide evidence that American recognition of Mexican labor's value grew due to an appreciation for its economic necessity.

López continues:

During the 1919-20 and 1920-21 seasons, the Arizona Cotton Growers' Association spent approximately \$425,000 recruiting and transporting Mexican workers. According to one official, the Association's recruitment of Mexican workers saved the cotton growers \$2.8 million in picking costs by maintaining 'as perfectly an elastic supply of labor as the world has ever seen.'⁵⁸⁵ In the face of a post-World War recession, an increasingly powerful domestic labor movement and mobilized restrictionist sentiment, the success of southwestern employers during the 1920s was remarkable Employers argued that domestic workers, despite the recession, would not fill available jobs at any wage Some jobs were seasonal or casual at best.⁵⁸⁶ Judging from numbers and from the cooperation of the federal government, the employers' strategy worked. The best evidence available indicates that nearly 500,000 Mexican workers crossed the border during the 1920s.⁵⁸⁷

In 1942, the United States negotiated a treaty with Mexico in the form of the Labor Importation Program, providing for the use of Mexicans as

⁵⁷⁹ *Id.* at 643.

⁵⁸⁰ *Id.* at 644.

⁵⁸¹ López, *Undocumented Mexican Migration*, *supra* note 524, at 651.

⁵⁸² *Id.* at 654.

⁵⁸³ *Id.* at 655.

⁵⁸⁴ *Id.* at 655-56.

⁵⁸⁵ *Id.* at 658.

⁵⁸⁶ *Id.* at 659.

⁵⁸⁷ López, *Undocumented Mexican Migration*, *supra* note 524, at 660-61.

temporary workers in U.S. agriculture. This was more commonly referred to as the Bracero Program.⁵⁸⁸ López writes: “Unlike previous measures, the treaty purported to regulate the employment of Mexicans as temporary agricultural workers through qualitative and quantitative provisions.”⁵⁸⁹ In terms of servicing American economic interests, however, the program was a historical first.⁵⁹⁰ Even with influential organizations such as the AFL-CIO in opposition to the migrant labor exploitation that was inherent to the Bracero Program, it was renewed consecutively throughout the administrations of five U.S. presidents. Braceros constituted a quarter of the farm labor force in California, Arizona, New Mexico, and Texas, contributing not only to the vital food production of the time period but also to increasing U.S. dominance in agriculture.

López points out that the United States’ role in undocumented entry cannot be depicted as “unintentional, naïve, or innocent.”⁵⁹¹ López writes: “Policy makers in the United States must have been aware that recruitment activities designed to promote the Bracero Program would encourage poor Mexicans to believe the United States was a land of opportunity, thereby encouraging those who could not be admitted legally to enter” without inspection.⁵⁹² López continues: “The relative attractiveness of undocumented entry was increased by the failure to enforce the promises that had been made in connection with the adoption of the Bracero Program.”⁵⁹³ In 1954, over one million undocumented Mexicans were deported as part of an INS initiative dubbed *Operation Wetback*.⁵⁹⁴

López writes:

Southwestern employers, who probably saw the operation as little more than a temporary setback, responded by making more extensive use of workers under the Bracero Program Despite the continuing assaults on the Bracero Program’s legitimacy, the ‘emergency wartime measure’ survived twenty-two years through 1964 and employed nearly 5,000,000 Mexican workers.⁵⁹⁵ With immunity intact, employers have had little to do after 1964 but reap the benefits of a century of promotion. Direct and indirect recruitment, though still undertaken, are most likely unnecessary. Tradition alone provides an adequate pool of potential workers. In addition, labor’s traditional reliance on access to American wages is magnified by population growth and patterns of development in Mexico. Finally, to the extent that the border serves as a barrier, employers have learned to rely on the wily skills and self-interest of *coyotes* (commercial smugglers) and on the undocumented worker’s knowledge of evasive tactics, now an integral part of the migratory culture.⁵⁹⁶

588 *Id.* at 664.

589 *Id.*

590 *Id.* at 666.

591 *Id.* at 668.

592 *Id.* at 668.

593 López, *Undocumented Mexican Migration*, *supra* note 524, at 668.

594 *Id.* at 670.

595 *Id.* at 670-71.

596 *Id.* at 672.

Many commentators, including Kevin Johnson and myself, have also argued that there are national security reasons for being more flexible in our approach to the border. More liberal admission policies across our southern border would enhance our country's security because we would know the identities of those who cross. Resources currently wasted on border militarization could be spent more efficiently on ferreting out those who may be attempting to enter in order to harm the nation.

Robert Pastor also argues that NAFTA had a national security purpose that should not be neglected. The hope was to reduce migration pressures by supporting a stable Mexico. Thus, he submits that we should act to prevent a "serious internal crisis" in Mexico that could lead to massive migration; we should help Mexico, for example, to prepare its natural gas and oil industries for economic development as well as for security purposes.⁵⁹⁷

No one knows for sure what would happen if the borders with Mexico and Canada were opened. As Kevin Johnson notes, we should not forget that a life-altering immigration decision is not made easily and a floodgates response should not be assumed.⁵⁹⁸ Douglas Massey also reminds us that most undocumented workers from Mexico want to work in the United States only temporarily to finance projects back home, such as building a house, purchasing land, buying consumer goods; if given the opportunity, these migrants would work on temporary trips to the United States and retire back home to "enjoy the fruits of their labors in the United States."⁵⁹⁹ Demographic changes also suggest some slowing of migration to the United States from Mexico over time. The Mexican birth rate is dropping, the population growth rate is lower, and fewer youngsters are approaching working age.⁶⁰⁰

D. *Investing in Mexico*⁶⁰¹

Economic development in Mexico is often cited as the real way to stop undocumented migration.⁶⁰² The idea is that economic development would create more jobs, and the availability of more jobs would reduce the incentive for Mexicans to come to the United States to find work.⁶⁰³ The question, then, is whether this incentivized idea actually works, and if it does work, what would be necessary for it to take effect.⁶⁰⁴

⁵⁹⁷ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 189.

⁵⁹⁸ Johnson, *Open Borders?*, *supra* note 523.

⁵⁹⁹ Massey, *Self-Deception*, *supra* note 77, at 41.

⁶⁰⁰ *Northward, Ho!*; Fox and Bush, ECONOMIST.COM, Aug. 31, 2001.

⁶⁰¹ Hing, *Contemplating Solutions*, *supra* note 383, at 50.

⁶⁰² *Id.*

⁶⁰³ *Id.* See also *Mexico and the Migration Phenomenon*, Embassy of Mexico, distributed at MPI Immigration Task Force meeting in Washington, D.C. (Feb. 28, 2006).

⁶⁰⁴ *Id.*

As noted in the EU experience,⁶⁰⁵ the establishment of a European Social Fund appeared to moderate significant immigration from poorer countries to wealthier countries. This may provide a model for the United States to emulate.⁶⁰⁶ For example, the fund increased living standards in Spain, Portugal, and Ireland as they entered the EU.⁶⁰⁷ President Vicente Fox has urged all three NAFTA countries (especially the United States) to contribute to an analogous North American development fund, but the timing of his comments was unfortunate because they came shortly before September 11, 2001.⁶⁰⁸ Among other things, the funds would have been used for highways to bridge the three countries, for development in rural parts of Mexico, and to improve the Mexican education system in order to create opportunities for the next generation of Mexicans.⁶⁰⁹ In essence, the EU was able to reduce the volatility that would prey most heavily on weak economies. The key was to narrow the disparities in income between its rich and poor members.⁶¹⁰

Investment was part of the NAFTA debates. In fact, President Clinton favored the establishment of a North American Development Bank (NAD-Bank).⁶¹¹ Resources were limited, however, and when the NADBank became operational, the mandate was limited to loans for environmental border projects.⁶¹² Furthermore, NADBank's mandate is to lend at market rates of interest for "sustainable" projects alone.⁶¹³ Most Mexican communities cannot afford to take on the kind of debt needed to fund such projects; there simply is not enough revenue to repay such loans and charging higher utility rates to residents to fund investments is not possible.⁶¹⁴

Mexico's infrastructure also needs attention. A national plan for infrastructure and transportation has not been developed.⁶¹⁵ Reducing geographical disparities within Mexico would likely decrease pressures to emigrate, and a first priority should be improving the road system from the U.S. border to the central and southern parts of Mexico.⁶¹⁶ If that were done, investments may increase. The states of Oaxaca, Zacatecas, Michoacan, and Guanajuato, in the central and southern parts of Mexico, have the highest unemployment rates and are the primary sources of migrants to the

⁶⁰⁵ See *supra* notes 409-14, and accompanying text.

⁶⁰⁶ *Id.*

⁶⁰⁷ Hing, *Contemplating Solutions*, *supra* note 383, at 50. See also Harman, *Proposal for Expanding NAFTA*, *supra* note 23, at 220.

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.*

⁶¹⁰ PASTOR, *LESSONS FROM THE OLD WORLD*, *supra* note 37, at 9.

⁶¹¹ Hing, *Contemplating Solutions*, *supra* note 383, at 50.

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ PASTOR, *LESSONS FROM THE OLD WORLD*, *supra* note 37, at 77.

⁶¹⁵ *Id.* at 93.

⁶¹⁶ *Id.* at 137.

United States.⁶¹⁷ Yet, in spite of the growth in trade under NAFTA, significant investment in transportation and infrastructure has not occurred. Before NAFTA, Mexico invested in poorly designed toll roads under the Salinas administration (1988-94), and the roads charged hefty tolls that few were willing to pay. As Mexico's debt rose, investment in infrastructure was slashed from about 10% in the 1980s to less than 2% in 1998. Thus, all transportation sectors—roads, rail, air, and ports—currently face serious challenges.⁶¹⁸

Taking a cue from the EU's European Social Fund, Robert Pastor has made a similar investment proposal for North America. He believes that the three NAFTA countries should establish an investment fund to invest in roads, telecommunications, and post-secondary education in Mexico.⁶¹⁹ Recall that the EU invested huge sums in roads and education in new and poorer member states, narrowing their income gap with the rest of Europe and providing workers an incentive to stay home.⁶²⁰ Mexico lacks the capital to build the infrastructure that is necessary to help narrow the gap with Canada and the United States.⁶²¹ Pastor argues that if its northern neighbors contributed 10% of what the EU spends on aid, with wise investments in infrastructure and education, Mexico could experience growth at a rate twice that of Canada and the United States. "The psychology of North America would change quickly, and the problems of immigration, corruption, and drugs would look different. North America would have found the magic formula to lift developing countries to the industrial world, and that would be the 21st century equivalent of the shot heard 'round the world.'"⁶²²

Although Mexico and the United States have developed the border area and NAFTA has helped to infuse new investment, the border region is burdened. By building up the central part of the country, border congestion could be relieved, and the whole system could be better managed.⁶²³

Focusing on the educational system in Mexico appears to be the key. Mexican students fall near the bottom in cross-country comparisons on basic literacy, math, and science.⁶²⁴ While the adult education level in the United States is almost thirteen years, in Mexico, the level is about seven years.⁶²⁵ This low education level has severe implications for economic

617 *Id.*

618 *Id.* at 93.

619 *Id.* at 136.

620 Thomas L. Friedman, *Out of the Box*, N.Y. TIMES, Apr. 4, 2004.

621 PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 145.

622 *Id.* at 191.

623 *Id.* at 139.

624 Condon & McBride, *Do You Know the Way to San Jose?*, *supra* note 44, at 255.

625 *Id.*

competitiveness and the standard of living for Mexicans whether they remain in Mexico or migrate to the United States.⁶²⁶

Infusing new energy and investment in education in Mexico can bear fruit. Mexico's "Progresa" or "Oportunidades" programs provide incentives to poor families to keep their children in school by providing grants of about two-thirds of what these children would earn while working.⁶²⁷ About 2.5 million rural families received \$1 billion through the program in 2000.⁶²⁸ The percentage of Mexican students progressing from elementary school to high school has increased by 20% due to the program.⁶²⁹ Other data indicate that Mexico is taking its responsibility to support education seriously. The average adult education level of seven years is up from three years two decades ago.⁶³⁰ School enrollment for children (aged six to fourteen years) reached 92.1% in 2000, compared to 85.8% in 1990 and 64.4% in 1970.⁶³¹ Students are required to complete nine years of school, and in general, enrollment has increased more than 80% at the primary level.⁶³²

One thing NAFTA has taught us is that, if we expect employment growth in Mexico to materialize as a result of trade agreements, investments must be targeted. We have to determine how to help Mexico's domestic industries by, for example, using domestic parts and supplies in production exports.⁶³³

The rural parts of Mexico suffered under NAFTA. Subsistence farmers did not receive assistance or time to adjust to the new trade regime.⁶³⁴ Nothing was done to help protect their incomes as trade conditions changed.⁶³⁵ Forced to leave agriculture, these rural workers had little help moving into other sectors.⁶³⁶

In order for any significant effect on Mexican migration to take place, significant investment in new technologies in small and medium-sized industries is necessary.⁶³⁷ Some of this new investment can be achieved through tax incentives to spur economic growth in the country's interior. Fruit and vegetable production development can absorb some of the rural

⁶²⁶ *Id.* at 267.

⁶²⁷ *Id.* at 267-68.

⁶²⁸ Hing, *Contemplating Solutions*, *supra* note 383, at 51.

⁶²⁹ *Id.*

⁶³⁰ Condon & McBride, *Do You Know the Way to San Jose?*, *supra* note 44, at 256.

⁶³¹ *Id.*

⁶³² PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 141. Portugal and Spain, with EU help, established small colleges in rural provinces. These colleges served as magnets that attracted professionals from more advanced regions, and they also radiated their influence into the wider rural community, helping to upgrade their education.

⁶³³ Polaski Testimony, *The Employment Consequences of NAFTA*, *supra* note 52, at 19.

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ Heppel & Torres, *Mexican Immigration*, *supra* note 48, at 63.

workers previously displaced. Mexico's public infrastructure should be a major priority.⁶³⁸

Businesses in Mexico also need access to financing. For example, Koos Mexico, a denim jeans maquiladora with 1,200 workers had access to U.S. investment capital because its parent company, based in Los Angeles, helped secure capital necessary to invest in new machinery. But even then, international competition cannot be ignored. In 2003, Koos lost its contract with Gap when the company moved most of its orders to China.⁶³⁹

Mexico has not been ignored by the World Bank. Since its formation, Mexico ranks third (after India and China) in receiving loans. In 1999, for example, the World Bank loaned \$5.2 billion to Mexico for two years for improvement of social conditions for the poor, strengthening public-sector reforms, and reinforcement of macroeconomic stability. Also, Mexico has received more loans from the Inter-American Development Bank than any other country.⁶⁴⁰

Economic investment in Mexico will not be made without some close monitoring. The image of Mexico as corrupt or a political gamble, especially in light of its recent rocky presidential transition, is strong. For example, U.S. Vice President Joe Biden, recently warned that "Mexico is a country that is an erstwhile democracy where they have the greatest of wealth It is one of the wealthiest countries in the hemisphere, and because of a corrupt system that exists in Mexico, there is the 1% of the population at the top, a very small middle class, and the rest is abject poverty."⁶⁴¹ Even with meaningful economic investment in Mexico, the Mexican economy is not going to miraculously turn around over night. That type of change may take generations.⁶⁴²

Mexican migrants are among the country's most able workers.⁶⁴³ They leave Mexico for better wages, not necessarily because they were unemployed.⁶⁴⁴ Their income in the United States is better than what they were earning in Mexico.⁶⁴⁵ What remains unclear is whether their productivity, measured in part by their remittances, is higher than what it would have been if they remained in Mexico.⁶⁴⁶ By concentrating on investments in Mexico to create more jobs, even if labor movement is opened completely, Mexicans would migrate in fewer than previously expected num-

⁶³⁸ *Id.*

⁶³⁹ Barclay, *An Unraveling Industry*, *supra* note 185.

⁶⁴⁰ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 138.

⁶⁴¹ Jim Davenport, *Biden: Blame Immigration Woes on Mexico*, Associated Press, Nov. 28, 2006.

⁶⁴² Interview with Josiah McC. Heyman, Chair, Professor of Anthropology, Anthropology Department, University of Texas at El Paso (Feb. 21, 2006); *see also America's Border Troubles, North and South*, ECONOMIST.COM, Aug. 25, 2005.

⁶⁴³ Hing, *Contemplating Solutions*, *supra* note 383, at 51.

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

bers because incentives for able Mexican workers to remain home will have been created.⁶⁴⁷

E. *Immigrant Enterprise Zones*⁶⁴⁸

In spite of tensions over immigration that have risen in some American communities, certain areas of the United States regard immigration as an answer to regional economic problems.⁶⁴⁹ Some Americans understand the extreme economic benefit of immigration for many areas of the country. Thus, efforts are under way in many regions to recruit more immigrants.⁶⁵⁰

Iowa is one such area.⁶⁵¹ Like states and cities in other regions of the country, Iowa's population has dramatically decreased over the past two decades.⁶⁵² A large portion of its high school graduates leave the state each year shortly after graduation.⁶⁵³ Even if Iowa were able to retain every high school senior after graduation, Iowa would still face a 3% decline in its adult work force within five years.⁶⁵⁴ Iowa also ranks third in the nation for elderly citizens.⁶⁵⁵ For example, an average Iowa farmer is fifty-eight years old, and the average assembly-line worker at the Maytag Company, before its closure, in Newton, Iowa was fifty-seven years old.⁶⁵⁶ Iowa's loss of its young homegrown population comes at a time when the state has been enjoying a vibrant and growing economy for the past decade with an annual unemployment rate of only about 4.2%.⁶⁵⁷ Iowa's farms employ fewer workers than ever; its population is aging at a time when it needs younger workers and the state wants to attract high tech industries.⁶⁵⁸

As Iowa is losing its native population, it wants to increase its immigrant population.⁶⁵⁹ A bipartisan state commission, established when Tom

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

⁶⁴⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 51.

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

⁶⁵⁵ Hing, *Contemplating Solutions*, *supra* note 383, at 51-52.

⁶⁵⁶ *Id.* at 52.

⁶⁵⁷ *Id.* Iowa's seasonally adjusted unemployment rate eased to 4.2% in September 2008 from a revised August rate of 4.5%. By September, most of the workers affected by the June floods had returned to work. The September jobless rate compares with a year ago rate of 3.8% and remains substantially below the current U.S. rate of 6.1%. See Press Release, Iowa Workforce Development, Iowa Unemployment Rate Drops to 4.2 Percent (Oct. 21, 2008), <http://www.iowaworkforce.org/news/2008/10212008.pdf>.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

Vilsack was governor, comprises thirty-seven prominent Iowans.⁶⁶⁰ Its mandate was to devise a plan to improve the state's economy by the year 2010. Having set these economic goals, members realized the state did not have the population to meet them. This "2010 Commission" concluded that Iowa's population needed to increase by 310,000 residents by 2010.⁶⁶¹ Some of its recommendations included the following:

1. Make Iowa technologically competitive by developing non-agricultural industries.
2. Establish "Diversity Welcome Centers" to help immigrants locate housing, learn English, and find health care.
3. Designate Iowa an "immigrant enterprise zone," and seek a federal exemption from immigration quotas.
4. Assist Iowa companies in recruiting prospective employees from abroad.⁶⁶²

Another example of a U.S. region facing population loss is Philadelphia, Pennsylvania.⁶⁶³ During the past decade, Philadelphia has lost over 68,000 residents—about 4% of its population.⁶⁶⁴ This downward trend in the population began in the late 1950s.⁶⁶⁵ As more and more residents depart—primarily middle income residents looking for better schools and safe neighborhoods—the city faces a further erosion of its already shrinking tax base and potential reductions in its federal dollar allocation.

Many Philadelphia leaders believe that the city must act to maintain its residential base and explore ways to attract residents from other regions of the country and from around the world.⁶⁶⁶ They believe that this strategy is critical for revitalizing many neighborhoods in addition to increasing local tax revenues.⁶⁶⁷

Not to be outdone across the state, Pittsburgh is also embracing new strategies to attract immigrants.⁶⁶⁸ While Philadelphia lost 4% of its population in the 1990s, Pittsburgh's population fell by 9.5%.⁶⁶⁹ Local organizations have received foundation grants to help attract immigrants with jobs, encourage foreign students to stay after graduation, and teach the commu-

⁶⁶⁰ Iowa 2010, *The State of Our Future*, Governor's Strategic Planning Council, June 26, 2000, <http://www.state.ia.us/government/governor/y2010/about/summary.html>. See generally *The Vision: Governor's Strategic Planning Council Update*, July 2000 (final issue), <http://www.state.ia.us/government/governor/y2010/news/july%20newsletter2.pdf>.

⁶⁶¹ *Id.*

⁶⁶² Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁶⁶³ *Id.* at 52.

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

⁶⁶⁸ Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁶⁶⁹ *Id.*

nity about diversity.⁶⁷⁰ The city hopes to remake its outdated image in order to attract immigrants to thousands of jobs in new health care, biotechnology, and computer software industries.⁶⁷¹

Kentucky also relies heavily on immigrants for reasons similar to Iowa, Philadelphia, and Pittsburgh.⁶⁷² Farmers have come to depend on immigrants when native sources of labor find other jobs or remain in school. Initially, migrant workers arrived in Kentucky to cut tobacco on their swing through the nation before heading home for the winter.⁶⁷³ They became invaluable when other workers could not be found. Kentucky's chief demographer put the immigrant reliance a little differently, as he recognized immigrant labor as a hedge against the aging of Kentucky's population.⁶⁷⁴ "I don't think we're going to have an indigenous labor force. Boomers are done having kids. The boomlet is over."⁶⁷⁵ Louisville officials also want to attract immigrants.⁶⁷⁶ The city's population fell 5% in the 1990s and would have dropped more had it not been for the approximately 20,000 immigrants and refugees from places like Cuba, Somalia, and Vietnam during the decade.⁶⁷⁷ Louisville is making every effort to welcome its immigrant population.⁶⁷⁸ For example, a new city office of international and cultural affairs plans to post a list of interpreters on the Internet for community service providers to use.⁶⁷⁹ Efforts to help immigrants establish their own businesses are also underway.⁶⁸⁰

Recently, many residents of places such as Pittsburgh, Cleveland, Erie, Youngstown, Detroit/Ann Arbor, and Buffalo have come together to rally around a proposal that would create an immigrant enterprise zone in these "rustbelt" or manufacturing cities.⁶⁸¹ Their proposal is to infuse these regions with new immigrant talent, matched with incentives for companies to locate to the city, by convincing Congress to relax immigration restrictions in parts of the country that are lagging economically. Proponents advocate a lobbying strategy to create immigration incentives that would attract companies to co-locate, remain, and grow within these regions. If successful, the companies would be free of many of the immigration restrictions

670 *Id.*

671 *Id.*

672 *Id.*

673 *Id.*

674 Hing, *Contemplating Solutions*, *supra* note 383, at 52.

675 *Id.*

676 *Id.*

677 *Id.*

678 *Id.*

679 *Id.*

680 Hing, *Contemplating Solutions*, *supra* note 383, at 52.

681 Richard Herman, an attorney in Cleveland, Ohio, is a principal organizer behind this effort that promotes much of its activities at GoGlobalTrain.com.

severely limiting their ability to hire foreign-born talent within U.S. borders.⁶⁸²

F. *Broaden the Permanent Visa System*

America's immigration system requires comprehensive reform that serves everyone who lives and works in America. Our country's outdated immigration policy is incapable of dealing with the 21st century immigration patterns or economic realities. In effect, it undermines the very ideals and values our country was built on and serves neither business nor workers.

Each year, 500,000 undocumented immigrants are absorbed into the U.S. labor force. These numbers likely will increase until U.S. immigration laws are reformed to adequately address the global economic realities of the 21st century.

Given the risks, why do migrants from Mexico continue the harrowing trek?⁶⁸³ The attraction of the United States is obvious.⁶⁸⁴ The strong economy pays Mexican workers eight to nine times more than what they would earn in Mexico.⁶⁸⁵ For many migrants, it is a matter of economic desperation, and some observers think that migrants would continue to travel to the U.S. even if we mined the border.⁶⁸⁶ In a sense, they do not have a real choice.⁶⁸⁷ Jobs are plentiful here because a variety of industries rely on low-wage migrant workers.⁶⁸⁸ The migrants may know the risks but also figure the benefits of crossing outweigh the risks.⁶⁸⁹

Motivations for continued migration call into question the likely effectiveness of the expansion of Operation Gatekeeper if the goal is to discourage border-crossers.⁶⁹⁰ Beyond the economic attraction, the phenomenon is part of a long, historical travel pattern between Mexico and the U.S. and reflects the interdependency of the two regions.⁶⁹¹ Migration from Mexico

⁶⁸² Richard Herman, Realneo Blog, *Immigration Opportunities...*, Dec. 26, 2007, <http://realneo.us/blog/ed-morrison/immigration-opportunities> (last visited Jan. 24, 2009), reprinted in R2P: Return to Pittsburg Blog, *Rust Belt 2.0: Immigration Initiative*, Dec. 26, 2007, <http://burghdiaspora.blogspot.com/2007/12/rust-belt-20-immigratin-initiative.html> (last visited Jan. 24, 2009).

⁶⁸³ Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.* at 53.

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 52.

⁶⁸⁹ Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

is the manifestation of these economic problems and social phenomena.⁶⁹² The militarization of the border does not address these issues.⁶⁹³ Instead, it is killing individuals who are caught up in the economic and social phenomena.⁶⁹⁴

Instead of short-term “guest worker” visas, labor shortages should be filled with workers with full employment rights, a path to permanent residence, and if they choose, citizenship.⁶⁹⁵ Congress has arbitrarily set the annual number of employment-based admissions for permanent visas at 140,000.⁶⁹⁶ This number falls far short of satisfying the actual need for visas based on the U.S. demand for labor and family reunification.⁶⁹⁷

The number of visas available should respond to actual, demonstrated labor shortages.⁶⁹⁸ The new visa program must ensure that U.S. workers are the first to be considered for available jobs and that the economic incentives are in place for U.S. employers to hire primarily U.S. workers.⁶⁹⁹ Businesses should be required to search widely for workers already in the United States, and wage rate requirements should be high enough to make jobs attractive to U.S. workers.⁷⁰⁰ Access to an immigrant program should be frozen in areas with high unemployment, and the employer application fees for hiring new foreign workers should be significant.⁷⁰¹

This approach would satisfy employers’ need for workers.⁷⁰² More importantly, it would prevent the creation of an underclass of workers since immigrants would have full employment rights and access to a permanent future in the American community and economy.⁷⁰³

Additionally, under the current visa program, families often have to wait five to twenty years to be reunited with their family members in the United States.⁷⁰⁴ These unreasonable waiting periods contribute to undocumented migration. The visa limits and structural delays must be revamped to end the separation of families and reduce the number of undocumented immigrants entering the country.⁷⁰⁵

692 *Id.*

693 *Id.*

694 *Id.*

695 Hing, *Contemplating Solutions*, *supra* note 383, at 52.

696 *Id.*

697 *Id.*

698 *Id.*

699 *Id.*

700 *Id.*

701 Hing, *Contemplating Solutions*, *supra* note 383, at 52.

702 *Id.*

703 *Id.*

704 *Id.*

705 *Id.*

G. *Revise Harmful Policies on Trade and Craft Meaningful Labor Standards*⁷⁰⁶

Economic globalization and harmful U.S. trade policies serve as the foundation of our failed immigration system.⁷⁰⁷ U.S. trade policies have consequences for workers around the world.⁷⁰⁸ Thirteen years of NAFTA has resulted in the loss of millions of American jobs.⁷⁰⁹ In Mexico, real wages have declined by 20%, millions of farmers have been dislocated, and millions more consigned to poverty, fueling the labor flight into the United States.⁷¹⁰

Our lawmakers should choose to revise these harmful trade policies, to craft meaningful international labor standards, and to work with unions, corporations, and community organizations around the globe in order to promote better jobs, living standards, and stable communities.⁷¹¹ If these policy changes are not made, the pressure for undocumented immigration will persist.⁷¹² We can craft trade policies in an era of globalization that respect the rights and dignity of working people and their families throughout the world.⁷¹³

Too often, when companies cannot export jobs in search of cheap wages and weak labor laws, they import workers to create a domestic pool of exploitable labor, effectively importing the labor standards of developing nations into the United States.⁷¹⁴ Immigration reform must provide meaningful and enforceable penalties for companies that violate health, safety, and labor laws, regardless of the status of their workforce.⁷¹⁵ The resources and investigative authority of the U.S. Department of Labor and the Occupational Safety and Health Administration should be expanded to allow for the consistent, coordinated, and adequate enforcement of health, safety, and labor laws.⁷¹⁶

VIII. THE ETHICAL BORDER

As I stated at the outset, the anti-immigrant contingent claims the moral high ground in opposing legalization, arguing that granting amnesty

⁷⁰⁶ *Id.*

⁷⁰⁷ Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁷⁰⁸ *Id.*

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.*

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ Hing, *Contemplating Solutions*, *supra* note 383, at 52.

⁷¹⁴ *Id.*

⁷¹⁵ *Id.*

⁷¹⁶ *Id.*

would reward illegal activity. However, based on our historical relationship with Mexico, NAFTA's origins, and its effects on Mexican migrant workers, the case for legalization is clear. The case can be made that legalization is not only the right thing to do, but it is the least we can do. In fact, the circumstances compel us to consider an altogether new approach to the border.

A new approach proceeds with the lessons we have learned from NAFTA and globalization and from the failures of the current enforcement regime. We now know that Mexico has suffered severe job loss as a result of trade agreements, but we also know that the United States has a great demand for immigrant workers. These lessons teach us that a new approach to the border demands a vision of North America as one region.

When we consider the devastating impact on Mexico of NAFTA and other international monetary and trade agreements supported by the United States, we should begin to take responsibility for exploring creative answers to assist Mexico out of its current economic quagmire. The serious conversations involving the United States, Mexico, and other Central American countries start with an understanding that border crossers from Mexico are not simply migrant workers; they are "economic refugees."⁷¹⁷

In considering the U.S. relationship with Mexico and migration, we should not be guided solely by strict economic concerns. After all, "migration policies have important implications in terms of ethics, human rights, or global justice."⁷¹⁸ The values that underlie a more expansive view of migration are likely far different from those that some may regard as the populist views of the Minutemen or Lou Dobbs. However, the ethics or values of a more expansive view of migration are not elitist. Formally defined, ethical behavior is that which is morally accepted as "good" and "right" as opposed to "bad" or "wrong" in a particular setting.⁷¹⁹ Most people have convictions about what is right and wrong based on religious beliefs, cultural roots, family background, personal experiences, laws, organizational values, professional norms, and political habits. These may not be the best values with which to make ethical decisions—not because they are unimportant, but because they are not universal.⁷²⁰

In contrast to consensus ethical values—such basics as trustworthiness, respect, responsibility, fairness, caring, and citizenship—personal and professional beliefs vary over time, among cultures, and among members of

⁷¹⁷ GEORGE LAKOFF & SAM FERGUSON, ROCKRIDGE INSTITUTE, *THE FRAMING OF IMMIGRATION*, May 25, 2006, <http://www.rockridgeinstitute.org/research/rockridge/immigration> (last visited Jan. 24, 2009) (describing framing of immigration. The Rockridge Institute closed in April 2008).

⁷¹⁸ Pécoud, *MIGRATION WITHOUT BORDERS*, *supra* note 528, at 12.

⁷¹⁹ See Ronald R. Sims, *The Challenge of Ethical Behavior in Organizations*, 11 J. OF BUS. ETHICS, 505 (1992).

⁷²⁰ MICHAEL JOSEPHSON, JOSEPHSON'S INSTITUTE OF ETHICS, *MAKING ETHICAL DECISIONS* § 1 (2002), available at <http://josephsoninstitute.org/MED/index.html>.

the same society. They are a source of continuous historical disagreement that has even resulted in war. There is nothing wrong with having strong personal and professional moral convictions about right and wrong, but unfortunately, some people are “moral imperialists” who seek to impose their personal moral judgments on others. The universal ethical value of respect for others dictates honoring the dignity and autonomy of each person and cautions against self-righteousness in areas of legitimate controversy.⁷²¹ The universal ethical values of fairness and respect for others are the ones to which I would appeal.

Our current border policy is unethical. We have exacerbated the economic imbalance between the United States and Mexico. Certainly, corruption and ineffective leadership in Mexico deserves much of the blame for Mexico’s economic woes, but we helped to set the stage for these circumstances. Thus, the current militarization of the border and increased emphasis on raids in U.S. residential neighborhoods and work sites are unjustifiable.

We can be innovative in creating an ethical border. Under the circumstances, one approach to the ethical border is an open border. Another approach may be a more flexible, innovative visa program. Still another approach—which may be more beneficial to Mexico in the long term—is enabling Mexico to keep committed and dedicated workers in Mexico by improving the native economic and social opportunities. Of course this final approach is more difficult, but we have seen a similar success in the EU: “policies that diminish migration incentives provide an alternative to direct barriers.”⁷²² Vicente Fox’s pre-9/11 call for a common market in North America with the free movement of labor as well as goods, services, and capital is another example of a more ethical approach to the border “problem.”⁷²³ The United States, Canada, and Mexico could establish heightened “leverage and credibility,” and influence on the international stage with this type of common market.⁷²⁴

Given what we now know about NAFTA as well as the political-economic history of Mexico in recent years, advocating for a more open U.S.-Mexico border makes sense. Yet, while a flexible border may be necessary because of our special relationship with Mexico, a completely open border may not be a wise policy decision. We also have to consider what is best for Mexico. Setting up a system where Mexico loses large numbers of its able-bodied workers will harm Mexico. Consider the Mexican state of Zacatecas, a major source of labor migration to the United States. Approximately one million dollars in remittances flow into the state each day from U.S. migrant labor. Yet, local assembly plants had to close for lack of

⁷²¹ *Id.*

⁷²² FLANAGAN, GLOBALIZATION, *supra* note 43, at 117.

⁷²³ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 98.

⁷²⁴ *Id.* at 111.

workers.⁷²⁵ An open border could hurt Mexico psychologically as well. Workers may focus on their plans to leave Mexico over their desire to use their talents in Mexico.⁷²⁶

In my view, the better strategy is to concentrate on investments in Mexico to create more jobs so that, if labor movement is opened with the United States, fewer Mexicans than expected would migrate thus providing incentives for able Mexican workers to remain home as well.

IX. CONCLUSION

Limiting the terms of NAFTA created problems for the people of Canada, the United States, and Mexico. Given globalization and other world developments, our societies are converging in values and interests. All three North American countries are multinational, and migration as well as trade melds the region together.⁷²⁷ There is no doubt that we need to create a development fund to address the economic development needs of the poorest regions of North America. Without a serious effort in this regard, we are doomed to see the current migration situation perpetuated. We need a more flexible method of border movement for NAFTA nations.

Many recent calls for immigration reforms that would benefit Mexican migration tend to fall into the trap of viewing such migration purely in terms of filling the employment needs of U.S. businesses or emphasizing the economic boon that immigrants represent to the United States. Nobel laureate Gary Becker argues that we should give priority to immigrants from our NAFTA partners, recognizing them as human capital, resembling the movement of goods, services, and financial capital.⁷²⁸ This is an alluring approach that caters to economic concerns that apparently matter a great deal in the public's attitude toward immigration.

However, when we focus purely on the economic well-being of the country in judging immigration, we miss an opportunity to make a bold statement on immigration and to reframe the debate in a manner that can demonstrate our humanity. I believe that the vast majority of Americans, if given the choice, would not endorse the mistreatment of immigrants—documented or undocumented. Currently, Americans see no immediate way to intervene in uncivil immigration enforcement methods such as Operation Gatekeeper and Gestapo-type ICE raids. If Americans understood

⁷²⁵ *Id.* at 125.

⁷²⁶ *Id.* As long as the ratio in incomes between the U.S. and Mexico ranges from 4 to 30, the incentives to migrate will be compelling. Until that differential can be reduced about half—and, under very optimistic projections, that could take 30 to 40 years—a deliberate decision to relax U.S. immigration laws would have serious adverse consequences for Mexico's economy. *Id.*

⁷²⁷ *Id.* at 97.

⁷²⁸ Gary Becker, *The Wise Way to Stem Illegal Immigration*, BUSINESS WEEK, Apr. 26, 2004, at 28.

the impact of NAFTA and globalization on Mexico, they would recognize the need to work with Mexico as regional partners with much to gain. But a vocal minority represented by Lou Dobbs and the Minutemen have hijacked the issue. As with many other policy debates, in the area of immigration policy and enforcement, “[the] fervor and activism of [a] small minority greatly magnify their influence, especially within the U.S. Congress.”⁷²⁹

When it comes to the treatment of our fellow human beings who have crossed into our territory, we should consider what has driven or attracted them to travel before we become overly judgmental. As American culture, economic influence, political power, and military presence affect the far reaches of the globe, we cannot be too surprised at the attraction that the United States holds throughout the world. Coupled with the ubiquity of American culture, the United States appeals to would-be immigrants and refugees who seek the American dream of freedom, prosperity, and consumerism. Migrant workers, refugees, high-tech workers, multi-national executives, and familial relatives (both professionals and those from the working class) all respond to this attraction. Thus, America itself is responsible for luring countless migrants to our shores each year, as the phenomenon reinvigorates the Statue of Liberty’s call to those “yearning to breathe free.”

In many respects, the problem with NAFTA was not what it included, but what it did not include—a “unified approach” that recognized the need for the three countries to come together across social and economic lines.⁷³⁰ At the same time, we must balance the fact that open borders could actually harm Mexico through the continued loss of workers that Mexico itself needs to thrive. Thus, as part of the North American community, the United States, along with Canada, must help Mexico in its economic development. We must finally address the missing parts of NAFTA as we all recognize our responsibility for the entire region.

The debate over trade and migration needs to be reframed.⁷³¹ NAFTA and similar agreements have had tremendous influence on migration pressures from Mexico.⁷³² Mexico needs infrastructure and economic assistance.⁷³³ We need a new vision of the border and labor migration.⁷³⁴ In short, we need to stand back and re-examine these issues in order to craft solutions to benefit both the United States and Mexico.⁷³⁵

⁷²⁹ JIMMY CARTER, OUR ENDANGERED VALUES: AMERICA’S MORAL CRISIS 11 (2005).

⁷³⁰ PASTOR, LESSONS FROM THE OLD WORLD, *supra* note 37, at 2.

⁷³¹ Hing, *Contemplating Solutions*, *supra* note 383, at 53.

⁷³² *Id.*

⁷³³ *Id.*

⁷³⁴ *Id.*

⁷³⁵ *Id.*

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THE STATE OF U.S. IMMIGRATION POLICY: THE QUANDARY OF ECONOMIC METHODOLOGY AND THE RELEVANCE OF ECONOMIC RESEARCH TO KNOW

*Vernon M. Briggs Jr.**

I. INTRODUCTION

Since 1965, the United States has been in the midst of the largest and most sustained period of mass immigration in its history.¹ In 1965, the foreign-born population of the United States numbered 8.5 million people (or 4.4% of the population—the lowest percentage in U.S. history). The number of immigrants had been declining as a percentage of the population since 1914 and in absolute numbers since 1930. For all intents and purposes, immigration had ceased to be an important labor market policy. But, in 1965, legislative changes were made to the immigration system as part of the broader civil rights movement of that era. These modifications were not intended to increase the level of immigration; they were intended to rid the admission system of its overtly discriminatory features that had been in place since 1924.² These compositional changes, however, had unexpected consequences. The lengthy decline of immigration was reversed, and it began to rise in the late 1960s and early 1970s. The phenomenon of mass immigration was revived from out of the nation's distant past. Over the ensuing years, Congress's political dicker and indifference to this inadvertent outcome perpetuated the process and allowed it to accelerate. Mass immigration will continue until public policy makers decide to bring it to a halt.

By 2006, the foreign-born population had soared to 37.2 million persons (or 12.6% of the total population). In addition to the "official" figures that come from survey data, there is an acknowledged statistical undercount due principally to the large number of illegal immigrants involved in this

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¹ VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST; POLICY DIRECTIONS FOR THE NEW CENTURY* 134 (3d ed. 2003).

² *Id.* at 124-30.

human resource inflow. Thus, the “official” figures must be viewed as the low boundary of the undoubtedly higher true level.

As the 21st Century commences, immigration has once again become a major source of the nation’s labor force growth. The public policies that enable mass immigration to occur do more than simply increase the size of the nation’s labor force; they also affect such key compositional matters as its human capital, demographics, and geographic attributes. Immigration policy, however, has more than just immediate economic consequences; it also helps to mold the nation’s future as long-term citizenship obligations are usually involved.

For economists, demographic variables (such as immigration flows) are transformed into economic variables pertaining to employment, earnings, and income largely through labor force participation. The importance of this linkage to the labor market was recognized a century ago by the nation’s foremost labor leader, Samuel Gompers, the founding and long-time president of the American Federation of Labor. In his autobiography, he wrote that “immigration is, in its most fundamental aspects, a labor problem.”³ Regardless of how or why people immigrate into the United States, most immigrants must work to survive, and, usually, their spouses and eventually, their children, must also work. As of 2006, over 23.1 million foreign-born workers were “officially” in the U.S. labor force (representing 15.3% of the civilian labor force). Between 2000 and 2006, foreign-born labor accounted for 47% of the overall growth of the labor force. It is estimated that 7.1 million members of the foreign-born work force in 2005 were illegal immigrants (about 30% of the total foreign-born workforce).

The aggregate population and labor force indicators can be reliably used to confirm the approximate order of magnitude (which is large) and the general trend (which is increasing) of the current immigration phenomenon. Accordingly, there is no doubt that immigration policy exerts a powerful influence on the nation’s contemporary labor force. Methodology and data limitations, however, greatly impair the ability of researchers to interpret how immigration policy exerts its influences, to decipher its positive and negative effects, and to assure that its component parts are individually and collectively congruent with the national interests that change overtime. However, answers to these concerns are what the public in general and policy makers in particular need when immigration reform is under discussion.

II. THE ISSUE OF PERSPECTIVE

For perspective purposes, the aggregate data reliably show that the foreign-born population and labor force are not randomly distributed across

³ SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR 157 (1925).

the nation geographically. They are disproportionately concentrated in the urban centers of six large states (California, New York, Texas, New Jersey, Illinois, and Florida) which contain over two-thirds of the entire foreign-born population and labor force.⁴ Thus, the impact of immigration is geographically specific to certain local labor markets.

Moreover, the same aggregate data show that among the adult foreign-born population, paucity of human capital exists at a time when all of the nation's labor market trends are emphasizing the need for higher levels of skill and education. The 2000 Census reported that almost 57% of the adult foreign-born population had attained the equivalent of only a high school diploma or less. Data based on samples of the population since 2000 have confirmed that this was still the case as late as 2006.⁵ Thus, the labor force impact of this mass inflow has been disproportionately felt by the 48 million workers in the low skilled sector of the American economy. The disproportionate infusion of unskilled and poorly educated workers (many of whom are illegally employed as well) tends to cause low wages for all similar workers; consequently, low wages contribute to the spread of poverty, and mounting poverty creates widening income inequality within society. These associations are also related to increases in such other social maladies as infant mortality, child poverty, adult illiteracy, welfare dependency, school drop-out rates, unvaccinated children, persons lacking health insurance, crime, the resurgence of street gangs, and declining union membership—to mention a few. No discussion of any of these vital public issues can be taken seriously unless mention is made of the influences of prevailing immigration policy. As the late economist John K. Galbraith once observed, “issues are made not by parties and politicians but by circumstance.”⁶

Mass immigration has been a distinguishing feature of the post-1965 American economy. Immigration, as previously mentioned, had been in a state of decline during the preceding forty years of the nation's economic development. Its resurgence since the late 1960s represents a major change in “circumstance.”

III. THE PRIMACY OF PUBLIC POLICY

Just as public policy brought a close to the earlier era of mass immigration in the 1920s, it has also provided the springboard for its revival since the 1960s. In the modern world, every inch of the Earth's surface is

⁴ Steven A. Camarota, Center for Immigration Studies, *Immigrants in the United States, 2007: A Profile of America's Foreign-Born Population* 6-8 (Nov. 2007), <http://www.cis.org/articles/2007/back1007.pdf>.

⁵ *Id.* at 22-24.

⁶ John Kenneth Galbraith, *Power and the Useful Economist*, 63 AM. ECON. REV. 1, 10 (1973).

claimed by individual nation states. In this setting, no person who is a citizen of one nation state has the legal right to enter, to work, to visit, to study, to seek refuge, or to travel in the land space of another nation without the expressed permission of that nation's government. The exercise of such physical control of the movement of people goes to the very essence of the metaphysical concept of "national sovereignty" that defines the existence of a nation state itself. Given the tragic terrorist events that have marked the beginning of the 21st Century, the control of the movement of people across borders has become an even more urgent concern of national governments—especially in the United States. National security considerations alone are a powerful justification for the regulation of the flow of people across national borders regardless of economic considerations.

Thus, despite the parallel policy trend over this post-1965 era toward trade globalization which has enhanced world interdependency, the re-emergence of immigration issues only re-emphasizes the fact, long recognized before, that the reciprocal of free trade policies is not free labor mobility. As Henry Simons, one of the intellectual founders of the famed "Chicago-School" of free market economics, explained:

Wholly free immigration, however, is neither attainable nor desirable. To insist that a free trade program is logically or practically incomplete without free migration is either disingenuous or stupid. Free trade may and should raise living standards everywhere . . . Free immigration would level standards, perhaps without raising them anywhere.⁷

For this reason, he concluded that "as regards immigration policy, the less said the better."⁸

Immigration policy cannot be ignored. To the contrary, it must be recognized as the most fundamental—and, in many ways, the most important—labor market policy. In broad terms, it establishes who is eligible to be in the nation's labor force. Some restrictions may be made that limit the ability of citizens to work in certain jobs at certain times, but citizens cannot be kept out of the labor force entirely. Non-citizens, on the other hand, can be and most are. Melvin Reder, a pioneer labor economist in the study of the economics of immigration, provided this economic rationale:

[O]ur immigration policy inevitably reflects a kind of national selfishness of which the major beneficiaries are the least fortunate among us. We could not completely abandon this policy, even if we so desired.⁹

⁷ HENRY C. SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 251 (1948).

⁸ *Id.*

⁹ Melvin W. Reder, *The Economic Consequences of Increased Immigration*, 45 *REV. ECON. & STAT.* 221, 230 (1963).

In short, immigration policy ensures that the belief in a free market economy is not absolute. It has efficiency limits. Internal equity considerations among the work force are also essential to a nation's economic well-being and its political stability, which also justify the implementation of policy restrictions.

Since the existence of national borders is a parameter of the world today, understanding the policies that permit and regulate immigration flows is essential for assessing prevailing labor market conditions. As economic circumstances in a nation state change over time so should its immigration policies. To know what public policy changes are in order, however, it is necessary to know the statutory laws, administrative regulations, enforcement practices, and court decisions that constitute the nation's existing immigration system and to understand the evolutionary process of how these policies developed. Invisible market forces do not govern the movement of people across borders of the United States; man-made public policy does by what it permits, limits, and tolerates as abuse of its provisions.

Immigration policy is unique in the panoply of public policy measures that are intended to affect the size, composition, and wellbeing of the labor force of the United States. This power is reserved exclusively to the federal government. Despite the importance of immigration to the history of the United States, the word "immigration" does not appear anywhere in the U.S. Constitution. Accordingly, there is no mention of any expressed power given to any governmental authority to regulate the inflow and outflow of people across the nation's boundaries. Although immigration has been a contentious issue from the earliest days of the Republic, it was not until the late 19th Century that a series of Supreme Court cases established the principle that the federal government had the exclusive authority to regulate all aspects of the nation's immigration system.¹⁰ Since then, state and local governments and their associated communities must absorb the economic, political, and social consequences of federal immigration policies over which they have no power to design and little power to enforce.

Immigration policy is a plenary power of the government of the United States. Literally, immigration policy can be anything Congress wants it to be: there are no constitutionally imposed requirements. Over the years, Congress has imposed some restrictions as have certain international treaties with which federal courts can require compliance. Nevertheless, Congress could change all of these restrictions with further action. Essentially, immigration policy is a form of administrative civil law—albeit one with enormous economic consequences for both the individuals involved and the nation as a whole.

¹⁰ See *Ekiu v. United States*, 142 U.S. 651 (1892); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Lung v. Freeman*, 92 U.S. 275 (1876). All state laws and regulations pertaining to the regulation of immigration were invalidated by these decisions.

The only way to understand the economic significance of the nation's immigration policies, then, is to study their evolution and their associated enforcement practices. Rightly or wrongly, prevailing policies are a response to past experiences. They have determined the existing level and composition of the immigration experience. Policy making, however, does not happen in a vacuum. A host of special interests seek to influence the outcome. Once made, the extant immigration policy is the appropriate focal point for analysis of what transpires. Man-made actions by policy makers are what counts in this realm. Deductive theoretical approaches about market forces shaping outcomes and preconceived notions about the alleged merits of unrestricted labor mobility, such as those embodied in mainstream neoclassical economic theory, have little practical relevance. Indeed, neoclassical economics views the "economic benefits" of immigration as being a means to lower wages or temper wage increases (i.e., as a means to suppress wage increase pressures of workers by bolstering the supply of labor)—a motivation that is hardly in the best interest of real working people who are citizens (native-born or naturalized).¹¹

Moreover, as circumstances change, immigration policy will change as well. There is no ideal policy for any nation to pursue at all times under all circumstances. Like all economic policies, immigration policy is time sensitive. What makes sense at one period in a nation's history may be inappropriate for another. There is no universal immigration policy applicable for all countries or for any one country to pursue at all times.

The purpose of this paper, however, is not to discuss the current state of immigration policy in the United States *per se*. Rather, the purpose is to discuss the inability of economic research and methodology to assist policy makers in analyzing current trends, assessing policy outcomes, and formulating policy alternatives at any given time.

IV. THE NECESSITY OF AN INSTITUTIONAL APPROACH

Contrary to the conventional wisdom of contemporary academia that favors econometric manipulation of numbers to understand and evaluate the current trends, this approach is grossly inadequate when it comes to immigration. The only way to meaningfully understand the contemporary immigration experience is to adhere to an inductive methodology that focuses on a description of the development, implementation, and enforcement practices associated with the separate policy components of the nation's collective immigration system. The reasons are threefold: (1) the available data

¹¹ RONALD EHRENBERG AND ROBERT SMITH, MODERN LABOR ECONOMICS 323-43 (1985). See also PANEL ON THE DEMOGRAPHIC AND ECONOMIC IMPACTS OF IMMIGRATION, NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION 220 (Barry Edmonston & James P. Smith eds., 1997).

are inadequate for policy determination and evaluation; (2) it is necessary to master relevant legal definitions; and (3) understanding how history has influenced policy evolution is mandatory.

A. *The Available Data are Inadequate for Policy Determination and Evaluation*

The nation's immigration data are grossly inadequate for informative use by existing econometric techniques. Though the political, academic, and media circles demand numbers as a predicate to action, no matter how advanced these techniques are or how dedicated the researchers are to impartial findings, the prevailing data sources cannot be tortured enough to confess information they do not possess. Statistics never speak on their own. Data, after all, provide information, not knowledge. Except as a measure of magnitude, a means of determining the direction of trends, and a way to describe general demographic characteristics of a population, the available data are poorly suited for meaningful research on policy design or assessing policy outcomes—especially with respect to the key issue of influence on the labor market.

A special panel created in 1985 by the National Research Council (NRC) to study the efficacy of the nation's immigration statistics called them the "Cinderella of the federal statistical system."¹² In other words, they are the neglected step-child of the nation's data collection system. Little has changed over the intervening years to improve this state of affairs. In 1994, as part of its six-year study of the nation's immigration system, the U.S. Commission on Immigration Reform concluded: "We have found it difficult to assess the effects of immigration policy and of immigration itself because of inadequacies in the data."¹³

In addition, the data problem concerns more than the mere *quality* of data. There are fundamental barriers associated with how the relevant data are *classified*. Unless one works with the data, it is very easy to be deceived by what is published. This problem arises because the federal government uses two distinctly different definitions of the basic word "immigrant" in its published reports: one by the U.S. Department of Commerce Bureau of the Census (BC) and the other by the Department of Homeland Security Office of Immigration Statistics (DHS).

The BC collects and publishes data on the "foreign-born population" as part of its decennial "Census" population count and, since 1994, its "Current Population Survey" (CPS), which provides such data annually (usually

¹² PANEL ON IMMIGRATION STATISTICS, NAT'L RESEARCH COUNCIL, IMMIGRATION STATISTICS: A STORY OF NEGLECT 3 (Daniel B. Levine et al. eds., 1985).

¹³ U.S. COMM'N ON IMMIGRATION REFORM, IMMIGRATION POLICY: RESTORING CREDIBILITY, Executive Summary at xxxi (1994).

collected in March of each year). Typically, most researchers use these data as the basis for their work on the subject. The term “foreign-born population” is used as a synonym for “immigrants.” They, in turn, use this term to compare the economic and social characteristics of the foreign-born population with those persons born in the United States (who are described as “native-born”). The general assumption, as noted by Douglas Massey and Katherine Bartley, is that these “immigrants” are all residing permanently in the United States, have the same legal rights and privileges, and are striving to improve their wellbeing by working.¹⁴ Nothing could be further from the truth. In fact, as Massey and Bartley conclude, such an assumption is “untenable.”¹⁵ As it turns out, the term “foreign-born population” is comprised of four distinctly different subgroups of persons. The first group includes foreign-born persons who have become naturalized U.S. citizens and have virtually the same rights as native-born citizens (except they may not be President of the United States since the Constitution limits the office to native-born citizens). The second group includes foreign-born persons who have been admitted as permanent, legal residents but are not U.S. citizens (they are still considered foreign nationals). They are permitted to work in certain occupations (e.g., some states do not permit them to teach or to be “peace officers,” and the Federal government restricts them from certain jobs under Executive Order 11935) but are subject to a number of restrictions including the denial of the right to vote. Furthermore, their immigration status may be revoked if they do certain things (e.g., commit certain felony offenses, serve as a strikebreaker, become a “public charge,” or even remain unemployed for more than 6 months). The third group is made of foreign-born persons who have been legally admitted as “non-immigrants,” which means they may live temporarily in the country, but they do not have the right to remain or participate in the political process. Also, only a small minority of these non-immigrants may work temporarily under restrictive circumstances (e.g., workers in “specialty occupations,” exchange students, foreign students, foreign diplomats, members of the foreign news media, and political asylum seekers whose status is pending). The fourth and final group includes foreign-born persons who have illegally entered the country or who have violated a restrictive provision of an otherwise legally issued non-immigrant visa, all of whom have no political rights, limited civil rights, and are supposedly subject to deportation if their presence is detected.

Thus, the BC definition of foreign-born persons is not a homogeneous group. The four component categories vary widely in terms of their rights, privileges, and entitlements.¹⁶ Changes in public policy can and often do

¹⁴ Douglas S. Massey & Katherine Bartley, *The Changing Legal Status Distribution of Immigrants: A Caution*, 39 INT'L MIGRATION REV. 469, 469 (June 2005).

¹⁵ *Id.*

¹⁶ *Id.* at 481-83.

have significant impacts that differentially affect both the size and composition of each of these component groups.

On the other hand, the DHS, acting in its capacity as administrator of the nation's immigration laws, has an entirely different set of definitions for the relevant admission and enforcement terminology. Its definition for "immigrant" is restricted to "an alien admitted to the United States as a lawful permanent resident."¹⁷ This grouping, therefore, includes only one of the four groups contained in the BC data series mentioned above (the second group). Moreover, DHS even acknowledges that its definition does not comport with the strict legal definition that an immigrant is an alien in the United States except one who is legally admitted as a non-immigrant.¹⁸ In other words, the legal definition of "immigrants" includes "illegal immigrants," but the data category used by DHS does not.

The DHS also publishes separate data for those admitted as refugees, asylum seekers, non-immigrants, and the number of apprehensions of illegal immigrants made each year (but this latter series does not represent the number of individuals involved as some persons are caught more than once). However, many—if not most—illegal immigrants are not apprehended, so obviously, they do not appear in any of the official apprehension data tabulated by DHS. These phantom workers nevertheless influence labor market conditions despite not being adequately tabulated.

Because immigration policy embraces a number of distinctly different policies, only DHS data can be used to garner information about the separate entry categories that comprise the overall immigration system. Unfortunately, these admission category data cannot be related to most of the descriptive economic and social characteristics found in the CB data on foreign-born persons mentioned above. However, DHS data can provide evidence (that the CB data cannot isolate) of categorical trends in specific policies that may need attention.

Periodically, DHS does prepare an independent estimate of the total number of illegal immigrants in the country. In 2003, the DHS estimated that there were 7 million illegal immigrants in the U.S. population in 2000.¹⁹ Seeking to update this figure, the Pew Hispanic Center—using an estimation process that is essentially the same as that used by the BC (except it added an estimate of those undercounted to the official data)—calculated that the illegal immigrant population was between 11.5 and 12

¹⁷ U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS, at 191 (Sept. 2004).

¹⁸ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (2008).

¹⁹ OFFICE OF POL'Y & PLAN. U.S. IMMIGRATION & NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1900-2000, at 1 (Jan. 2003) (Technically, the INS was in the U.S. Department of Justice at the time this report was issued. It became part of the DHS in March 2003).

million persons in 2005 and was increasing by 500,000 a year.²⁰ Some researchers believe that most illegal immigrants were included in the CB data, but estimate that about 1.1 million were not.²¹ Illegal immigrants are not omitted from official data, but as discussed, it is acknowledged that they are undercounted.

B. *There is a Necessity to Master Relevant Legal Definitions*

An institutional approach to policy analysis requires mastery of the details of the subject matter. Immigration policy in the United States is highly legalistic in its terminology. Useful analysis requires an understanding of key concepts that are unique to the immigration system and that often defy logical understanding if taken out of context. The following examples illustrate the importance of mastering the relevant legal definitions:

Example A:

A non-immigrant is *not* a U.S. citizen despite what linguistic logic might suggest. Rather, as previously noted, a non-immigrant is a foreign national who is allowed to reside only temporarily in the United States. Of the 810,000 non-immigrants who enter the United States each day on average, very few are permitted to be employed legally but under very restrictive terms. Some do work illegally; in fact, about 40% of the illegal immigrant population is believed to be “visa abusers.” By far, however, most non-immigrants are admitted as visitors or for the purpose of conducting business. As of 2007, there were at least 54 different non-immigrant visa categories, and this number tends to increase with every session of Congress. Each category has its own special provisions and permissions. Some visa categories are capped with a fixed ceiling but most are not.

Example B:

A permanent resident alien is often referred to as a “greencard”—the original color of the identity card they are required to carry was green when it was first issued in 1940. Over the years, however, the color of the card has changed. It is now pinkish-blue with a silver hologram on its face. It

²⁰ Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, *Research Report Executive Summary*, PEW HISPANIC CENTER RES. REP., Mar. 7, 2006, at i, available at <http://pewhispanic.org/files/reports/61.pdf>.

²¹ Camarota, *supra* note 4, 44.

does have a green stripe on the back for old time's sake, but any "green card" that is actually green is clearly a fraudulent document today.

Example C:

Under the employment-based admission categories of the legal immigration system, there are separate definitions and numerical ceilings for workers "of extraordinary abilities," workers "of exceptional abilities," and "skilled workers, professionals and other workers." Basic knowledge of the English language suggests that these phrases describe the same class of worker. Under immigration law, however, they are not the same thing. Additionally, the term "other workers" under the current law is a euphemism for "unskilled workers."

Example D:

Each year since 1991, the legal immigration system has permitted about 50,000 visas to be issued on the submission of postcards that are then chosen by a random lottery for an admission category known as "diversity immigrants." The term "diversity," however, carries a meaning that is virtually the exact opposite of its contemporary meaning on most college campuses and in most business enterprises. The category was introduced because one of the many unexpected consequences of the post-1965 reforms was that, on average, over 85% of the legal admissions each year were people of either Asian or Hispanic heritages. Consequently, persons of either African or European heritage (who are associated with the founding of the country and the building of its major institutions) were largely cut off from legal entry. To reverse this unintended consequence, the new category of "diversity" was introduced to exclude persons from countries of recent high levels of immigration—mostly persons from Asian or Hispanic origin countries. Only persons from countries with low levels of immigration in the preceding five years are eligible to be included in the "diversity" selection pool. Ironically, the addition of this category in 1991 represents the return to a form of ethnic and geographic discrimination that reformers had sought to purge from the nation's immigration policy in 1965.

Example E:

The political rhetoric that surrounded the passage of the Immigration Act of 1990, on the last day of the 101st Congress, introduced the term "pierceable cap." The legislation passed behind the smokescreen of a budget battle with President George H. W. Bush that had raged for almost a month and had led to the shutdown of various parts of the federal govern-

ment for short intervals. Proponents claimed that the new legislation would finally establish an annual cap on the number of legal immigrants who could be admitted each year. One key component of the new admission system, however, could not be determined in advance—the number of unrestricted immediate relatives (i.e., spouses, minor children, and adult parents) who can accompany an admitted adult legal immigrant. Hence, the heralded “cap” has to be flexible to allow for a larger number of immediate relatives who must be admitted in any given year. In the process, a new oxymoron was born.

Example F:

It is also necessary to know that the immigration system contains various language tricks used by legislators to mask public recognition of what they are trying to accomplish for political purposes. These language tricks have had significant consequences on specific groups and, thus, have affected overall policy outcomes. For example, who would know that the Immigration Act of 1924 completely excluded persons of Japanese origin (no matter what their citizenship) from entering the United States for the following 28 years when the word “Japan” does not appear anywhere in the statute? Or who would know that the Immigration Act of 1990 contained an Irish preference that enabled 16,000 immigrants from Ireland per year for three years to adjust their status to become permanent resident aliens when the word “Ireland” does not appear anywhere in the legislation? Or who would know that since 1994 there is a “wet foot, dry foot” policy that allows persons from Cuba to be admitted automatically to the United States as refugees if they are able to set foot on any land surface of the country but are denied such status and returned to their homeland if they are intercepted at sea? Or who would know that 100,000 Mexican nationals who hold U.S. permanent resident alien cards (requiring that their “permanent homes” be in the U.S.) commute on a daily basis from their permanent homes in Mexico to jobs in the United States under a court ruling that says that “employment equals residence” while acknowledging that, in fact, this is all “amiable fiction?”

Intimate familiarity with the definitions of the immigration laws as well as the practices of the agency that administers the immigration system is the only way that one could understand the results of these policy actions. No manipulation of the data itself would ever explain the results of such common political maneuvers.

C. *Understanding How History Has Influenced Policy Evolution is Mandatory*

It is an axiom of public policymaking that “policy is not made, it emerges.” Policy evolves over time in response to changing circumstances and influences. Such insight is an absolute truth when it comes to formulation of immigration policy. The details of policy evolution can be found elsewhere, but it is sufficient to say that, historically, immigration policy has been linked to the accomplishment of a multitude of completely different national objectives. Among these have been changes in the racial, ethnic, and religious composition of the population; development of an urban industrial labor force; a surplus of labor in the agricultural sector of the economy; accommodation of foreign policy objectives; opportunities for family reunification; protection of certain perceived moral values in society; defense of public health; minimization of welfare dependency; prevention of the spread of certain political ideologies deemed harmful to society; pursuit of specific humanitarian goals; a ban on tax evaders; and assurances of national security measures.

Given the many implications inherent in immigration policy, it is no surprise that numerous special interest groups have had a significant impact on the formulation of these policies—an influence that remains in the current immigration debate. However, the highly politicized environment resulting from that influence has obscured Gomper’s essential observation that immigration has significant economic effects on labor markets. The outcome of policy debates is too often determined by the extensive use of lobbying and the exercise of raw political power. In such a contentious environment, political considerations usually trump basic economic concerns pertaining to job displacement, wage depression, income disparity, union suppression, and poverty inducement.

Unfortunately, most economic studies do not account for the ability of “power” to influence outcomes. Galbraith long assailed this omission as a central weakness of most economic studies:

The most commonplace features of neoclassical and neo-Keynesian economics are the assumptions by which power, and therewith political content, is removed from the subject . . . [By so doing,] . . . economics is relegating its players to the social sidelines where they either call no plays or urge the wrong ones.²²

With regard to immigration policy, recognizing the extent to which special interest groups influence policy outcomes is the difference between research relevance and research nonsense in discussing the state of national policy and efforts to change it. The use of power to affect outcomes means

²² Galbraith, *supra* note 6, 2.

that politics—not economic research—has become the central force determining policy. This political influence means that emotional appeals and pejorative charges frequently engulf the debate over policy options. As former Senator Alan Simpson (R-WY) once lamented, “there is no way ‘to de-fang’ the discussion when immigration reform is on the table.”

In assessing the debacle of the immigration reform movement in the mid-1990s and following the U.S. Commission on Immigration Reform’s comprehensive recommendations for changes, political scientists James Gimpel and James Edwards wrote, “[t]he voice of the people has had little impact on the tone or direction of the immigration debate in Washington.”²³ They point out that despite extensive research findings demonstrating the need for significant legislative changes and public opinion polls consistently showing that the citizenry wants these changes to take place, neither factor has mattered to professional politicians. Instead, immigration policy has been captured by an unholy alliance that links the private agendas of various religious organizations, ethnic groups, human rights advocates, libertarian economists, and the powerful American Immigration Lawyers Association (all of whom have individual and financial interests in maintaining the *status quo* of mass immigration) with corporate America and agri-business who have vested interests in the pursuit of cheap labor policies. Under these circumstances, it is no small wonder that immigration policy has always been controversial.

The upshot is that, as the nation enters the 21st century, U.S. immigration policy is a hodge-podge product of years of dubious political compromises that desperately needs a complete overhaul. Two national commissions created by Congress over the past 30 years have recognized the imperative of major immigration reform. In 1981, the Select Commission on Immigration and Refugee Policy found that immigration was “out of control,” while in 1997, the U.S. Commission on Immigration Reform concluded that immigration policy was in need of “a significant redefinition of priorities and reallocation of existing admission numbers.”²⁴ Both stressed the imperative of enhanced enforcement of immigration laws.

Indeed, at the end of the 20th Century, the Brookings Institution examined all of the major federal statutes enacted during the preceding 50 years and ranked them in terms of their perceived effectiveness. “Controlling

²³ James G. Gimpel and James R. Edwards, Guest Opinion, *The Silent Majority*, J. OF COM., June 23, 1998, at 8A. See also JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* (1998).

²⁴ SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, *U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT 5* (G.P.O., Mar. 1981); U.S. COMMISSION ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY 60* (Sept. 1997).

immigration” ranked 49th on a list of 50 policies and was deemed to be one of the federal government’s “greatest failures.”²⁵

V. CONCLUSION

As the United States enters the 21st Century, its immigration policy is functioning as a rogue labor market policy. If immigration flows were small, the vast incongruity would not matter. However, the sheer scale of contemporary immigration means that the nation can ill afford the luxury of having an immigration policy that functions without respect to its economic consequences. The national interest, as clearly stated by the national commissions mentioned above, is to move as much as possible away from the admission of unskilled workers toward the admission of high skilled workers and to curb illegal immigration. The question, then, is how immigration policy can accomplish these feats.

The research barrier to reform efforts rests with the fact that immigration policy consists of a host of separate components, each of which requires specific attention. Most data-based research on immigration and its economic impacts is based on the manipulation of the aggregate data describing the foreign-born population. All are treated as being immigrants, regardless of how they were admitted. No distinction is made between legal immigrants, illegal immigrants, refugees, asylum seekers, border commuters, non-immigrants who can legally work in certain instances, and non-immigrants who cannot legally work under any circumstance. The human capital attributes that immigrants bring to the labor market vary significantly when it comes to which admission policy they used to enter.

Moreover, no distinction is provided as to the legal status of such persons in local labor markets. Are they naturalized citizens, permanent resident aliens, illegal immigrants, border commuters, non-immigrants who can work, or non-immigrants who cannot legally work? These distinctions make a big difference when it comes to employment rights and government entitlements.

Accordingly, different local labor markets and different labor force segments may be affected in ways that are totally ignored in analyses based solely on aggregate foreign-born data. The negative effects of certain policies can easily cancel out the positive benefits of other policies. Thus, the aggregation of data on the collective foreign-born population produces an average picture of a conjectural reality that does not actually exist. From that vantage point, one could easily conclude that no policy changes (or only minor tinkering) would be needed when, in fact, considerable im-

²⁵ Paul C. Light, *Government's Greatest Achievements of the Past Half Century*, BROOKINGS REFORM WATCH, Nov. 2000, at 5, 7, available at http://www.brookings.edu/~media/Files/rc/papers/2000/11governance_light/rw02.pdf.

provements could be achieved from expanding one policy component and contracting another. Without research that can discern the effects of the different policy components on labor markets and knowledge of the differential legal status of the immigrant labor force in these markets, it is difficult for policymakers to design remedies that will serve the national interest rather than merely placate the pleadings of special interest groups.

In any event, the fact remains that most of the available data relating to the current wave of mass immigration are insufficient bases for or guides to policy formulation. This insufficiency does not mean, however, that no legislative action is needed. To the contrary, economic research is desperately needed to identify policy strengths and deficiencies. However, this research needs to focus on the separate experiences of those immigrants who enter the country by different routes and who occupy different legal statuses as each separate grouping will tend to have a different influence on the labor market. Furthermore, it is important to remember that the multiple components of the immigration system, when aggregated, can also raise a separate set of accommodation concerns for communities other than those that pertain solely to the labor market (e.g., stress on housing, transportation, and educational capacities).

With respect to methodological approaches, it makes little sense to use the rigorous tenets of neo-classical labor market theory, which favors the merits of unrestricted labor mobility in the abstract, to assess the impact of mass immigration on the present-day labor market. The very existence of immigration policy means that the national interest dictates that international labor flows are to be regulated. Under these circumstances, a more nuanced methodology that encourages an understanding of historical experiences, an awareness of changing domestic economic conditions, and an appreciation of the evolutionary development of the component policies that comprise immigration policy would be a preferred option.

When it comes to economists addressing “real world” policy issues, the words of R. A. Gordon, the former president of the American Economic Association, seem most appropriate: “I ask only that our credo be: ‘relevance with as much rigor as possible,’ and not ‘rigor regardless of relevance.’ And let us not be afraid to ask—and try to answer—the really big questions.”²⁶ He urged economists to pay more attention to “the changing institutional environment” and to study how those changes, including mass immigration, affect society.²⁷

The study of immigration and its policy manifestations in the United States raises truly “big questions” about the proper role of a completely discretionary element of federal government labor market policy in a climate of vast economic transformation. The economy has only recently

²⁶ Robert A. Gordon, *Rigor and Relevance in a Changing Institutional Setting*, 66 AM. ECON. REV. 1, 12 (1976).

²⁷ *Id.* at 1.

shifted from being a predominately goods-producing to a predominately service-producing economy. In the process, it is sustaining both rapid technological change and attempting to absorb the effects of enhanced international trade due to unprecedented globalization pressures. Immigration policy must be part of the adjustment process and cease being part of the adjustment problems confronting the nation's labor force.

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COMMENTS ON VERNON BRIGGS'S THE STATE OF U.S.
IMMIGRATION POLICY: THE QUANDARY OF
ECONOMIC METHODOLOGY AND THE RELEVANCE OF
ECONOMIC RESEARCH TO KNOW

*Rimvydas Baltaduonis**

Professor Briggs provides a broad picture of the scope and complexity of U.S. immigration law. His paper acknowledges our inability to completely understand this complicated system and calls for policy research so that the law can be reformed to serve U.S. national interests.

The migration of humans in search of opportunities and a better life is probably as old as the human race itself. It precedes the emergence of nation-states by thousands of years.

[A] growing number of researchers believe that the New World was occupied by a single small group that crossed the Bering Straight, got stuck on the Alaska side, and straggled to the rest of the Americas in two or three separate groups, with the ancestors of most modern Indians making up the second group . . . [S]ome scientists have theorized that the Americas may have been hit with as many as five waves of settlement before Columbus, with the earliest occurring as much as fifty thousand years ago.¹

I moved from Lithuania to the United States in 2001. Given my legal status in the United States, Professor Briggs would classify me under the third sub-group of “foreign-born” persons. In other words, the group of

foreign-born persons who have been legally admitted as “non-immigrants,” which means they may live temporarily in the country but they do not have the right to remain or partici-

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¹ CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 16-17 (2005).

pate in the political process [and] only a small minority of these non-immigrants may work temporarily under restrictive circumstances.²

Whether it was fifty thousand or only a few years ago, people unwarily traveled the globe in search of new opportunities to prosper.

I was born in a country that was an involuntary member of the Soviet Union, where human migration was highly restricted not only between the member countries but also within the individual countries themselves. I watched the Iron Curtain fall and saw many people taking an opportunity to travel and discover new ways of life in the post-Cold War era. I witnessed Lithuania acquire membership in the European Union (EU), a voluntary political and economic union of twenty-seven member states that has adopted the free movement of labor as one of its central principles. Since I entered the United States, I have endeavored to comply with its immigration policies. In light of all of my experiences, I urge readers not only to be critical of my impartiality but also to lend their ears to my perspective regarding the state of U.S. immigration policy today.

As important as they are in the labor market, immigration issues reach far beyond the labor problem. In his article, Professor Briggs mentions the disproportionate infusion of unskilled and poorly educated workers and the multiple maladies (the spread of poverty, widening income inequality, adult illiteracy, welfare dependency, school drop-outs, etc.) commonly associated with this category of immigrants. In doing so, Professor Briggs fails to acknowledge the following:

1. the value of new bonds between people of different cultures;
2. the new opportunities that these immigrant families enjoy;
3. the new schools, hospitals, churches, and roads that these immigrants build;
4. the incentives created for other workers to obtain higher levels of education and to acquire more highly valued skills; and
5. the taxes, Social Security, and Medicare payments that these immigrants contribute despite the fact that many of them will have no legitimate right to claim these social benefits.³

Before World War II, many poor and unskilled immigrants from Eastern and Central Europe found their way to the United States.⁴ I met many

² Vernon M. Briggs Jr., *The State of U.S. Immigration Policy: The Quandary of Economic Methodology and the Relevance of Economic Research to Know* 5 GEO. MASON J. L. ECON. & POL. 1 184 (May 2009).

³ Douglas S. Massey & Katherine Bartley, *The Changing Legal Status Distribution of Immigrants: A Caution*, 39 INTERNATIONAL MIGRATION REVIEW 469, 474 (2005).

who worked hard, educated their kids, and advised the U.S. Government in supporting freedom for their countries. When the Soviet Union collapsed, many returned to their homeland to assist their countrymen in quickly transitioning the region into democratic societies. These countries, which are now strong allies of the United States (Czech Republic, Poland, Lithuania, Latvia, Estonia, etc.), continue promoting democratic values in the extended region. The impact that these immigrants had in ending the Cold War transcended the effects on the U.S. labor force.

Professor Briggs rightly concludes that the available statistics cannot accurately convey the magnitude and complexity of the immigration issues in the United States. Perhaps they never will. How could the value of initiatives, ideas, exchanges, and relationships that emerge due to global interactions between migrating people be measured? One might, however, identify the general principles that facilitate the environment where beneficial interactions thrive.

Like the United States, Ireland does not have reliable data on the number of immigrants residing legally or illegally within its borders.⁵ When ten countries joined the EU in May of 2004, more populated member countries like Germany and France requested a gradual transition period to open its labor market to the new member states. Ireland, on the other hand, was one of the few member states to open its labor market immediately. The decision was bold for a country of four million people.⁶ The ten new member countries contained 74.3 million residents (almost twenty times Ireland's total population), all of whom were potential immigrants to the country with the fourth highest GDP per capita in the entire EU.⁷ In 2007, Ireland was the country with the second *highest* GDP per capita in the EU leaving protective Germany and France even further behind.⁸ Professor Briggs's reference to Henry Simon's quote that "[f]ree trade may and should raise living standards everywhere . . . Free immigration would level standards, perhaps without raising them anywhere" calls for an explanation here.⁹

⁴ Douglas S. Massey, *The New Immigration and Ethnicity in the United States*, in *AMERICAN DIVERSITY: A DEMOGRAPHIC CHALLENGE FOR THE TWENTY-FIRST CENTURY* 77-93 (Nancy A. Denton & Stewart E. Tolnay eds., 2002).

⁵ *Number of immigrants in Ireland is out by least 85,000, admits CSO*, TRIBUNE (Dublin), December 2, 2007, available at <https://www.tribune.ie/archive/article/2007/dec/02/number-of-immigrants-in-ireland-is-out-by-least-85/>.

⁶ *Ireland*, THE WORLD FACTBOOK 2004, Central Intelligence Agency, available at <http://www.umsl.edu/services/govdocs/wofact2004/geos/ei.html>.

⁷ *Continuing Enlargement, Strategy Paper and Report for the European Union*, at 42, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0676:FIN:EN:PDF>.

⁸ *Ireland*, THE WORLD FACTBOOK 2007, Central Intelligence Agency, available at <http://www.umsl.edu/services/govdocs/wofact2007/geos/ei.html#Econ>.

⁹ Briggs, *supra* note 2, at 180.

Professor Briggs's article highlights "a necessity to master relevant legal definitions" of the subject matter.¹⁰ I have heard many anecdotal stories told by aliens that have asserted their rights—as codified in the numerous immigration statutes—before officials charged with executing the various immigration laws. That these aliens are forced to explain the pertinent legal definitions to the immigration enforcement officials only begs the question: should it not be the other way around? For the sake of argument, however, suppose that government officials become "intimately familiar" with the definitions and U.S. immigration practices; suppose that policy makers obtain capabilities to account for different types of immigrants. What do they learn or gain from mastering the regulatory jargon? How would they calculate the golden cap for immigrants "of extraordinary abilities" or "of exceptional abilities"?¹¹ How could the optimal rate of mass immigration be determined unless all of the positive and negative effects of the migration were taken into account? Seeing how such planning and regulation of labor migration was attempted in the Soviet Union at the municipal level, where the needed information should be more readily available, and knowing now that many opportunities for economic and personal growth were wasted by such ambitions, it is hard to ignore the skepticism for policymakers' ability and willingness "to design remedies that will serve the national interest."¹² This skepticism is even more compelling when one considers the enormous costs associated with governmental efforts to enforce such regulations and to shut down the illegal markets that emerge to avoid the regulations.

Professor Briggs's article recognizes that employment rights and entitlements matter. Relatively recent research in experimental economics attempted to shed some light on how various rights and entitlements affect the development of exchange and the discovery process of gainful opportunities.¹³ Extending such research into the field of immigration policies would help scholars identify the general principles that should shape our institutions and aid humanity's search for a better life.

¹⁰ *Id.* at 186.

¹¹ *Id.* at 187.

¹² *Id.* at 192.

¹³ Erik O. Kimbrough, Vernon L. Smith & Bart J. Wilson, *Historical Property Rights, Sociality, and the Emergence of Impersonal Exchange in Long-Distance Trade*, 98(3) AMERICAN ECONOMIC REVIEW 1009-1039 (2008); Elizabeth Hoffman, Kevin McCabe, Keith Shachat & Vernon Smith, *Preferences, Property Rights and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346-80 (1994).

SOME BASIC ECONOMICS OF IMMIGRATION

*Donald J. Boudreaux**

Ever since the 1776 publication of Adam Smith's seminal book, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, economists have been skeptical of the economic relevance of political borders.¹ This skepticism is strongest for the exchange of goods and services.² At its base, the economists' case for free international trade rests on the recognition that all trade is between people, that people trade internationally for the very same reasons, and with the very same consequences, that they trade domestically.³ It does not make sense to treat some trades one way and other trades another way.

The same basis for the skepticism surrounding the economic relevance of political borders should also apply to people. People, after all, are assets, or using a term coined by the pioneering scholar Gary Becker, "human capital."⁴ People, of course, are not *only* assets. Each of us is a consumer, son or daughter, friend, student, lover, or fan. We are many things. We cannot deny the fact that nearly every one of us, as adults, are producers,⁵ and that the value of what we produce is positively enhanced by our knowledge, work skills, and opportunities to work in complementary relationships with others.⁶ Being producers, when people move across borders, many of the same economic issues at the forefront of the debate over international trade in goods and services are in play. Just as more imports of lumber puts downward pressure on both the domestic price of lumber and the wage rates earned by some domestic lumberjacks, so too, would in-migration of lumberjacks tend to lower the price of domestic lumber and lower the compensation earned by domestic lumberjacks.

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¹ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., The University of Chicago Press 1976) (1776).

² *Id.* at BK. II, 385 ("The capital of a wholesale merchant, on the contrary [to agriculture or retail trade], seems to have no fixed or necessary residence anywhere, but may wander about from place to place, according as it can either buy cheap or sell dear Whether the merchant whose capital exports the surplus produce of any society be a native or a foreigner, is of very little importance.").

³ *Id.* at BK. II, 389-96 (describing the similar dynamics of domestic trade and foreign trade on labor expenditures and trade balance).

⁴ GARY S. BECKER, *HUMAN CAPITAL* 15 (The University of Chicago Press 3d ed. 1993) (1975).

⁵ SMITH, *supra* note 1, at BK I, 21 ("As it is the power of exchanging that gives occasion to the division of labour . . .").

⁶ SMITH, *supra* note 1, at BK I, 26 ("Every man thus lives by exchanging, or becomes in some measure a merchant, and the society itself grows to be what is properly a commercial society.").

A chief difference between trade and migration is that people are not producers only; workers and entrepreneurs are also consumers. In contrast, imported goods and services are consumed; they do no consuming of their own. So one unique economic concern raised by immigration is that the domestic economy will grow poorer as the domestic population rises.⁷ National wealth, however measured, would indeed fall if the total value of what immigrants consume exceeds the total value of what they produce. However, there is every reason to believe that immigrants are comparable to domestic citizens as net producers.⁸ For the present, pretend that taxpayer-funded welfare and other social services are unavailable to immigrants. Would immigrants still relocate to America? The answer is almost certainly yes. A handful would come because some Americans are willing to use their own resources to care for them. Most immigrants would come because each has sufficient skill and ambition to profit in the market.

Absent government welfare payments to immigrants, immigrants who do not seek employment burden no one other than the family or friends who voluntarily use their own resources to care for them. Nevertheless, even in a world where immigrants are not entitled to taxpayer-funded welfare, many persons object that immigration is economically harmful because of the risk that immigrants will consume more than they produce. Such objections are mistaken and without merit.⁹

Consider Juan, a hypothetical immigrant. He arrives in the United States and immediately begins looking for employment. Before finding a job, he must secure food, clothing, and shelter. He may do so from funds brought with him from his native country, or he may depend upon the kindness of family, friends, or private charities. Regardless of the case, no American is harmed because such transfers are voluntary.

If Juan resorts to theft, however, the story is different. Some Americans are indeed harmed. But criminal law is the appropriate tool for dealing with such thievery. Restricting immigration on the grounds that a handful of immigrants behave criminally would be like denying drivers licenses to everyone just because a small percentage of people drive recklessly. Such a ham-fisted approach is unnecessary when means are available for weeding out the relatively few bad apples from the good.

⁷ See generally Mary Fitzgerald, *Illegal Immigrants' Cost to Government Studied*, WASH. POST, Aug. 26, 2004, at A21, available at <http://www.washingtonpost.com/wp-dyn/articles/A33783-2004Aug25.html> (describing a controversial report issued by the Center for Immigration Studies estimating that illegal immigrants cost the United States government more than \$10 billion a year).

⁸ *Id.* (quoting a critic of the report for failing to incorporate the "contributions [of illegal immigrants] to the economy as workers and taxpayers").

⁹ GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, BROOKINGS INSTITUTION PRESS, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION*, CSR No. 26 (Apr. 2007), available at <http://www.brookings.edu/press/Books/2007/economiclogicofillegalimmigration.aspx> (concluding that stemming illegal immigration would drain the U.S. economy).

Juan, however, is not a thief. He is a worker. Suppose that Juan has no skills of any value to any American; no American is willing to pay him for anything that he can do. In this case, Juan will eventually return home and no American is harmed. Indeed, under such circumstances, Juan would probably not have come to the United States in the first place. People so destitute of skills are unlikely to leave home in search of work in a foreign and highly competitive economy. In reality, Juan almost certainly has skills for which Americans are willing to pay some mutually agreeable wage. Readers who doubt this claim should consult that cornerstone of economics called the theory of comparative advantage—a theory, by the way, that exposes the senselessness of identifying people economically as being “above average” or “below average.” The theory of comparative advantage makes clear that everyone is above average at some tasks and below average at many others.

When Juan finds employment, Juan and his employer are made better off. Consumers are also made better off; Juan’s availability as a worker means higher output or lower costs for his employer, which is shared with consumers through reduced prices or improved product quality. There is nothing to complain of so far.

Some people, however, are in fact harmed by Juan’s availability—namely, American workers who compete directly with Juan. If Juan’s most marketable skill is nearly identical to the most marketable skill possessed by Sam, a hypothetical American, Juan is a potential rival for Sam’s job. Because of Juan, Sam’s earnings might fall. Protecting Sam from income loss, though, is economically inappropriate. Preventing Juan from entering America is no more virtuous than protecting Sam from competition. Sam then gains unwarranted monopoly power under immigration restrictions in the same way that he would gain such monopoly power if government were to protect him from competition by restricting imports that compete with his own outputs. Thus, the very same reasons that compellingly argue in favor of free trade also argue in favor of free immigration. Widespread prosperity is not bred by granting monopoly privileges.

Immigration opponents also fear that open immigration will lead to overcrowding. This concern, however, is overblown. First, the United States is sparsely populated with about 104 persons per square mile in the lower forty-eight states. If the area of Alaska and Hawaii are included, the United States’ density of population is a mere 84 persons per square mile. By comparison, Belgium has 882 persons per square mile; France has 256 persons per square mile; Japan has 874 persons per square mile; and the United Kingdom has 643 persons per square mile. Second, owners of private property have incentives to keep their properties from becoming overcrowded. The best solution to overcrowding is to privatize those property holdings not yet privatized rather than forcibly stopping productive immi-

grants from entering the country.¹⁰ Finally, overcrowding itself is an elusive concept. Consider that Manhattan, an area within New York City, is one of the most densely populated spots on earth. Yet it is also one of the wealthiest. New Yorkers often complain of crowds, but no one is compelled to live there. The reason so many people live there is because the economic opportunity in New York City is so vast. Living in close contact with lots of people is a price that many choose to pay for the opportunity to take advantage of the wealth-producing capacities of an extensive division of labor.

New York City and Los Angeles are crowded but wealthy. Oklahoma and Mississippi are sparsely populated but much poorer.¹¹ This fact alone is highly suggestive of the great economic benefits of immigration—an economic phenomenon that increases the supply of labor, thickens markets, and deepens the division of labor.¹²

¹⁰ GERALD P. O'DRISCOLL, JR. AND LEE HOSKINS, CATO INSTITUTE, PROPERTY RIGHTS: THE KEY TO ECONOMIC DEVELOPMENT, EXEC. SUMMARY 8, POLICY ANALYSIS No. 482, Aug. 7, 2003, available at <http://www.cato.org/pubs/pas/pa482.pdf> ("In short, the stronger the private property rights system, the better the economy is at efficiently allocating resources . . ."); see also SVETOZAR PEJOVICH, THE ECONOMICS OF PROPERTY RIGHTS: TOWARDS A THEORY OF COMPARATIVE SYSTEMS 3, 27-29 (Kluwer Academic Publishers 1990) (detailing the incentives and effects of privatization).

¹¹ BETTINA H. ATEN, BUREAU FOR ECONOMIC ANALYSIS, U.S. DEPT. OF COM., REPORT ON INTERAREA PRICE LEVELS 28-29 tbl.15, 40 tbl.x (legend), No. WP2005-11, Nov. 30, 2005, available at <http://www.bea.gov/papers/pdf/InterareaPriceLevels.pdf> (displaying price levels and adjusted gross income. One can see that while, for example, New York City has a 1.26 price level and an adjusted income of \$68,200, and South C, which includes parts of Mississippi, has a 0.77 price level and an adjusted income of \$34,500, New York City's income is 34.8% higher than the mean while the price level is 26% higher than the mean, whereas in South C, income is 31.8% lower than the mean and there is only 23% difference in the mean price level. Thus, highly populated areas are wealthier even considering differences in cost of living).

¹² *Who Gains?: Not Only The Immigrants, But Americans, Too*, ECONOMIST, Mar. 9, 2000, available at http://www.economist.com/surveys/displaystory.cfm?story_id=E1_NRJSRJ ("The main economic gain from immigration, however, comes not from the fact that newcomers have more skills, but that they have different ones . . . Immigrants, not surprisingly, are far more heterogeneous than the native population."); see also Alexander Tabarok, The Independent Institute, Presentation before the Santa Clara Student Debate Conference: Economic and Moral Factors in Favor of Open Immigration (Sept. 14, 2000), available at <http://www.independent.org/issues/article.asp?id=486> (" . . . [T]ens of millions of people have come to the United States and there are more jobs here than ever [I]mmigrants . . . [bring] new ideas and new opportunities to America . . . Immigrants are creating jobs and raising wages for the bulk of native workers.").

I. DECLINING CAPACITY TO ABSORB

Related to the concern about over-crowding is the concern that the United States' capacity to absorb immigrants is declining.¹³ However, it is likely that immigration contributed importantly to the growth and abundance of the U.S. economy because Americans' standard of living increased steadily and impressively up to the 1920s, a time of open immigration. While many pundits today recognize this fact and celebrate the United States' history of open immigration, they insist that the country has changed.¹⁴ Allegedly, the United States is less able to absorb immigrants today than it was during the period of open immigration.

The United States has indeed changed, but these changes have made us more, not less, able to absorb immigrants. Consider that in 1915 the typical dwelling in the United States housed 4.76 people; today it houses almost half that number—2.57 people.¹⁵ Combined with the fact that today's typical dwelling is about 25% larger than it was a century ago, our ability to "absorb" immigrants into residential living spaces today is more than twice what it was a century ago.

As for land, even today only 3% of the land area of the lower forty-eight states is devoted to urban and suburban uses.¹⁶ So we still have 97% of this land for living, working, and recreation.¹⁷ Furthermore, since 1950, the amount of land devoted to public recreation uses and wildlife refuges has increased faster than has the amount of land devoted to urban and sub-

¹³ Richard Vedder, Lowell Gallaway, and Stephen Moore, *The Immigration Problem: Then and Now*, 4 THE INDEPENDENT REVIEW 347-64 (The Independent Institute 2000), available at http://www.independent.org/pdf/tir/tir_04_3_vedder.pdf.

¹⁴ Cecil E. Bohanon and T. Norman Van Cott, *Tariffs, Immigration, and Economic Insulation: A New View of the U.S. Post-Civil War Era*, 4 THE INDEPENDENT REVIEW 529-42 (The Independent Institute 2005), available at http://www.independent.org/pdf/tir/tir_09_4_4_bohanon.pdf (stating that large scale immigration counter balanced tariffs imposed from the 1860s through the 1910s and allowed for massive and rapid economic growth of the late 19th century); see also Warren A. Bilotta, *Economic and Social Impact of Open U.S. Immigration Policy Civil War to World War I* 9-10 (Social Science Research Network, Aug. 27, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010760 (describing economic benefits of immigration from the Civil War to WWI).

¹⁵ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 2000-1996, SECTION 31: 20TH CENTURY STATISTICS, available at <http://www.census.gov/prod/99pubs/99statab/sec31.pdf>; see also U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2006, AVERAGE NUMBER OF PEOPLE PER HOUSEHOLD, BY RACE AND HISPANIC ORIGIN, MARITAL STATUS, AGE, AND EDUCATION OF HOUSEHOLDER: 2006, tbl.AVG1 (2006), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html>.

¹⁶ JULIAN L. SIMON, THE ULTIMATE RESOURCE 2, at 140 (Princeton University Press 1998) (explaining that of 2.3 billion acres of land in the U.S., only 82 million, 3.6%, is used for urbanization needs).

¹⁷ *Id.* at 140 fig.9-1 (showing usage divisions of the remaining land).

urban uses.¹⁸ Today, the land area devoted to parks and refuges is more than seven times greater than it was in 1900.¹⁹ The United States is not close to being crowded.

Americans are also better able to feed themselves today, even though the amount of land used for growing crops and pasturing animals is no larger now than in 1900.²⁰ Higher agricultural productivity has enabled farmers and ranchers to produce more output on the same amount of land.²¹

What about workers? A measure of the ability to absorb workers is capital invested per worker.²² Today, the amount of capital invested per worker is 7.5 times greater than it was just after World War I.²³ A worker's productivity rises when he has more capital to work with and his pay is tied closely to his productivity. As a result, workers today produce and earn more than workers during the open-borders era.²⁴ Do not lose sight of the United States' labor market's great flexibility. It easily absorbed the 46 million women who entered the work force during the second half of the 20th century.²⁵

¹⁸ *Id.* at 141-43, 418, 422 (describing the nearly fourfold increase in recreational and refuge land as compared to the slightly more than doubling of acres used for urbanization purposes).

¹⁹ JULIAN L. SIMON, *THE STATE OF HUMANITY* 324 fig.32.1 (Blackwell 1995) (showing that recreational land for public use went from 50 million acres in 1900 to 350 million acres in 1990).

²⁰ SIMON, *THE ULTIMATE RESOURCE 2*, *supra* note 16, at 141 fig.9-2 (showing the total number of acres used for pasture and crops has remained roughly 1.2 billion acres since 1900).

²¹ *Id.* at 88, 99 (reporting that output has "increased because of agricultural knowledge resulting from research and development that was induced by the increased demand, together with the improved ability of farmers to get their produce to market on better transportation systems."); see also BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST* 62-65 (Cambridge University Press 2001) ("High yield crops, irrigation and controlled water supply, fertilizers and pesticides, [and] farmers' management skills" have made possible a significant leap in agricultural yield.); see also SIMON, *THE STATE OF HUMANITY*, *supra* note 19, 392-93 (presenting indexes of crop and livestock productivity).

²² SIMON, *THE ULTIMATE RESOURCE 2*, *supra* note 16, at 357-59, 368.

²³ Press Release, U.S. Census Bureau, *Capital Spending Reaches All-Time High*, Jan. 24, 2008, available at <http://www.census.gov/csd/ace/PressRelease06.htm>; see also U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES, 2008, LABOR FORCE, EMPLOYMENT, AND EARNINGS* 402 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/labor.pdf>; see also U.S. CENSUS BUREAU, *PART I: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 126, available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-05.pdf>; BUREAU OF THE CENSUS, *DEPT OF COM., CENSUS OF POPULATION AND HOUSING, 1920, VOLUME VIII, MANUFACTURES* 14 (1920), available at <http://www2.census.gov/prod2/decennial/documents/06229683v8ch2.pdf> (reporting that non-farm capital expenditures were \$11,473 per non-farm civilian worker in while in 1919, it was \$1,530 per worker).

²⁴ SIMON, *THE STATE OF HUMANITY*, *supra* note 19, at 161, 305 (describing productivity and real wage gains from the mid-19th century to 1920 as modest but rapidly rising after 1940).

²⁵ MARLENE A. LEE AND MARK MATHER, *POPULATION REFERENCE BUREAU, POPULATION BULLETIN, U.S. LABOR FORCE TRENDS* (June 2008) (describing how the economy absorbed the increase of women into the workforce with an increase of the labor force participation rate and an increase of women's income in comparison to men's); see also *Leaders: The Importance of Sex; Women in the Workforce*, *ECONOMIST* 14, Apr. 15, 2006 ("Furthermore, the increase in female employment in the rich world has been the main driving force of growth in the past couple of decades.").

In many other ways, the United States today can better absorb immigrants. For example, a statistical per person comparison to 1920 reveals that Americans today (1) have three times more miles of paved roads,²⁶ (2) have more than twice as many physicians,²⁷ (3) have twice as many teachers,²⁸ (4) have 427% more police officers,²⁹ (5) have nearly three times as many firefighters,³⁰ (6) produce 2.4 times more oil—as known reserves of oil grow,³¹ (7) produce almost two times more cubic feet of lumber—as

²⁶ In 1920, there were 282 miles paved roads per 100,000 population and in 2006 there were 880 miles paved roads per 100,000 population. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1920, at 307 (1920), available at <http://www2.census.gov/prod2/statcomp/documents/1920-05.pdf> (reporting 299,135 miles of surfaced roads in 1920); FED. HWY. ADMIN., U.S. DEP'T OF TRANS., HIGHWAY STATISTICS 2006, available at <http://www.fhwa.dot.gov/policy/ohim/hs06/pdf/hm12.pdf> (reporting 2,629,000 miles of paved roads in 2006); STATISTICAL ABSTRACT OF THE UNITED STATES, 2008, tbl.1, POPULATION, NATIONAL ESTIMATES AND PROJECTIONS, POPULATION AND AREA, 1790-2000, available at <http://www.census.gov/compendia/statab/tables/09s0001.pdf> (hereinafter POPULATION STATISTICS 1920 & 2008) (reporting population of 106,021,537 in 1920); STATISTICAL ABSTRACT OF THE UNITED STATES, 2008, tbl.7, RESIDENT POPULATION BY AGE AND SEX, available at <http://www.census.gov/compendia/statab/tables/09s0007.pdf> (hereinafter POPULATION STATISTICS 1920 & 2008) (reporting population of 298,755,000 in 2006).

²⁷ In 1921, there were 137 physicians per 100,000 population, while in 1997 there were 282 physicians per 100,000 population. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 7 (2000), available at <http://www.census.gov/prod/2001pubs/statab/sec01.pdf>; GEORGE THOMAS KURIAN, DATAPEDIA OF THE UNITED STATES 1790-2005: AMERICA YEAR BY YEAR 55-56 (Bernan Press 2d ed. 2001).

²⁸ In 1920, there were 620 teachers per 100,000 population, and in 2005 there were 1,333 teachers per 100,000 population. See U.S. DEP'T OF ED., INST. OF EDUCATION SCI., NAT'L CTR. FOR EDUCATION STATS., DIGEST OF EDUCATION STATISTICS (2007), tbl.32, available at http://nces.ed.gov/programs/digest/d07/tables/dt07_032.asp; POPULATION STATISTICS 1920 & 2008, *supra* note 26.

²⁹ In 2004, there were 402 full- and part-time police officers per 100,000 population, while in 1920 there were 94 law enforcement officers, including marshals, constables, and sheriffs as they were included in the 2006 data. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 2 (June 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cslllea04.pdf>; BUREAU OF THE CENSUS, DEP'T OF COM., CENSUS OF POPULATION AND HOUSING, 1920, VOLUME IV, OCCUPATIONS 41-42 (1920), available at <http://www2.census.gov/prod2/decennial/documents/41084484v4ch02.pdf> (hereinafter BUREAU OF THE CENSUS, OCCUPATIONS 1920); POPULATION STATISTICS 1920 & 2008, *supra* note 26.

³⁰ In 2006, there were 121 firefighters per 100,000 population and in 1920, there were 48 firefighters per 100,000 population. See U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2008-09 LIBRARY EDITION 455 (January 2008); BUREAU OF THE CENSUS, OCCUPATIONS 1920, *supra* note 29, at 41; POPULATION STATISTICS 1920 & 2008, *supra* note 26.

³¹ In 1920, there were 4.2 barrels of oil produced per person, in 1992, there were 10.2 barrels produced per person; and in 2006, there were 6.2 barrels produced per person. See ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, U.S. CRUDE OIL FIELD PRODUCTION, 1859-2007, available at <http://tonto.eia.doe.gov/dnav/pet/hist/mcrfpsus1A.htm>; POPULATION STATISTICS 1920 & 2008, *supra* note 26; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (1997), available at <http://www.census.gov/prod/3/97pubs/97statab/pop.pdf>. U.S. total oil reserves were 7.2 million barrels

America's supply of lumber stands grows;³² and (8) have conquered most of the infectious diseases that were major killers in the past.³³ The fact remains, the United States today is far wealthier, healthier, spacious, and resource-rich than it was a century ago. Its ability to "absorb" immigrants is greater now than ever before.

There are powerful reasons to believe that, over the long run, more immigrants into America will improve the lives of all Americans, not to mention those of immigrants and their children and grandchildren.

II. WELFARE AN ATTRACTION?

Of course, immigrants to the United States today have access to a wide range of taxpayer-funded services, including emergency medical care in government-owned and operated hospitals, and education in primary and secondary public schools.³⁴ Many persons, including even the late libertarian economist Milton Friedman, insist that providing extensive taxpayer-funded amenities to immigrants justifies restricting immigration.³⁵ The

of oil in 1920 and 20.972 million barrels of oil in 2006. See ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, CRUDE OIL PROVED RESERVES, RESERVES CHANGES, AND PRODUCTION, available at http://tonto.eia.doe.gov/dnav/pet/pet_crd_pres_dcu_NUS_a.htm. See also STEPHEN MOORE AND JULIAN L. SIMON, CATO INSTITUTE, THE GREATEST CENTURY THAT EVER WAS: 25 MIRACULOUS TRENDS OF THE PAST 100 YEARS 29, POLICY ANALYSIS NO. 364, Dec. 15, 1999, available at <http://www.cato.org/pubs/pas/pa364.pdf> ("Fifty years ago the world had about 20 years' worth of known reserves of oil. Thanks to technological innovation, which is outstripping the pace of depletion of reserves, the world now has at least 50 years of reserves.").

³² In 1920, the United States produced 3,764 cubic feet of lumber per 100,000 population and nearly twice as much in 1999 at 6,621 cubic feet of lumber per 100,000 population. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 666 (1924), available at <http://www2.census.gov/prod2/statcomp/documents/1924-08.pdf>; JAMES L. HOWARD, U.S. DEP'T OF AGRIC., FOREST SERV., FOREST PRODUCTS LAB., U.S. TIMBER PRODUCTION, TRADE, CONSUMPTION, AND PRICE STATISTICS: 1965-1999, at ii, 2-4, available at <http://www.fpl.fs.fed.us/documnts/fplrp/fplrp595.pdf>; POPULATION STATISTICS 1920 & 2008, *supra* note 26. Lumber stands have also grown for the past 40 years due to a net volume per acre increase of 33%. See U.S. DEP'T OF AGRIC., FOREST SERV., ROCKY MTN. FOREST AND RANGE EXPERIMENT STATION, FOREST RESOURCES OF THE U.S., GENERAL TECHNICAL REPORT RM-234, 1, 16 (1992), available at http://www.fs.fed.us/rm/pubs_rm/rm_gtr234/rm_gtr234_01.pdf.

³³ SIMON, THE ULTIMATE RESOURCE 2, *supra* note 16, at 54-55.

³⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 562 (1996) at 683-84, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.104.pdf (listing exceptions for emergency medical and ambulatory care); see also Plyler v. Doe, 457 U.S. 202 (1982) (U.S. Supreme Court affirming the District Court holding, 458 F. Supp. 585, that "illegal aliens are entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment" and therefore are entitled to public education up to twelfth grade).

³⁵ George J. Borjas, The Concise Encyclopedia of Economics, Immigration, available at <http://www.econlib.org/library/Enc/Immigration.html> ("Many people believe that because a large per-

understandable fear is that too many foreigners, wishing to free-ride off of American taxpayers, will immigrate to the United States.

In principle this effect is possible, but the case it makes for restricting immigration is much less solid than it might first appear. First, rather than restrict immigration, conditions could be put on immigrants, such as “you are not entitled to free schooling for your children until you become a permanent resident,” or whatever the condition(s) might be. Practically speaking, it is impossible to keep immigrants from using some services, such as emergency rooms at hospitals, but it is not at all difficult to prevent them from using public schooling or from receiving food stamps and other forms of government welfare payments. Immigrants who refused to agree to such conditions would not gain the right to come to the United States. This paper does not argue for or against such conditions as a matter of policy. These conditions only illustrate that restricting immigration is not the only way to reduce, if not completely stop, immigrants from being attracted to the United States by the availability of federal and state taxpayer-funded amenities.

Second, much of U.S. immigration policy involves efforts to prevent immigrants, legal and illegal, from finding gainful employment in the United States.³⁶ Imposing barriers on immigrants’ abilities to find work in the United States is very difficult, if not impossible, to reconcile with the concern that significant numbers of immigrants come to this country to soak American taxpayers. Similarly, any statistics, experiences, and anecdotes about immigrants overusing emergency-room medical care or government welfare must be discounted because so many immigrants are kept from work—or kept from working at the most attractive jobs—by these employment restrictions. This fact is doubly true for illegal immigrants; their income-earning prospects in the United States are worsened by their illegal status.

Third, any costs that taxpayers pay today to support immigrants must be weighed against the benefits that immigrants bring in terms of greater work effort and entrepreneurial potential, all leading to greater economic output over the long-run.

centage of immigrants go on welfare, the costs to American taxpayers may wipe out the gains from immigration.”).

³⁶ U.S. COMM’N ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY*, REPORT TO CONGRESS, EXEC. SUMMARY xxxiv (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/ex-summary.pdf> (“The Commission reiterates its 1994 recommendations supporting a comprehensive strategy to deter illegal migration. . . Reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful migration.”).

III. CONCLUSION

The economic case for open immigration is as straightforward as the case for free trade: while some workers might be made worse off in the short-run, the resulting expansion of economic activity generates widespread benefits for nearly everyone in the long run. Of course, other factors—non-economic factors—are in play. National-security issues, public-health issues, and cultural issues loom large. I do not address these issues in this brief paper. I do, however, insist that the properly understood economics of immigration create a presumption in favor of opening the United States' borders much more widely to immigrants.