

Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States

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INTRODUCTION

Nineteen ninety-three was the year of immigration in the United States. Immigration emerged as a volatile, if not incendiary, public issue, beginning with a debacle concerning the employment of undocumented persons by two prominent women considered by a new President to serve as Attorney General.¹ Several incidents further heightened public scrutiny of immigration: Haitian interdiction and repatriation,² the plight of unfortunate Chinese smuggled in ships under inhumane conditions,³ and the indictment of an asylum-seeker allegedly involved in the much-publicized World Trade

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¹ See Ruth Marcus, *Babysitter Problems Sink Second Clinton Prospect; Wood Withdraws From Consideration as Attorney General*, WASH. POST, Feb. 6, 1993, at A1; Ruth Marcus & Michael Isikoff, *Clinton Withdraws Baird's Justice Nomination*, WASH. POST, Jan. 22, 1993, at A1.

² See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (upholding lawfulness of Haitian interdiction and repatriation policy).

³ See, e.g., Steven L. Myers, *Captain and Crew Charged in Voyage of Chinese to United States*, N.Y. TIMES, June 8, 1993, at A1.

Center bombing in New York City.⁴ Moreover, a poor economy with ever-tightening government budgets led to growing concern about the perceived impact that undocumented immigrants from Mexico were having on the nation (*e.g.*, displacing citizens in the job market and filling the welfare rolls). Consequently, demands for heightened border enforcement, focusing primarily on the United States southern border with Mexico, enjoyed increasing bipartisan support. Ironically enough, these demands came on the heels of serious and credible reports of excessive force used by U.S. Border Patrol officers against Mexican citizens.⁵

Immigration touches upon deeply controversial questions concerning race, class, ethnicity, culture, language, and national identity. As the context of the current public dialogue on the issue suggests, concern with immigration often has been roughly correlated with the nation's economic well-being. The concern sets in motion a series of almost predictable reactions. An emphasis on limiting the numbers of immigrants, particularly "illegal" ones, generally brings forth increased demands for border enforcement. Border enforcement, in turn, implicates human rights issues ranging from the morality of imposing restraints on freedom of movement to the proper use of force to ensure the integrity of the borders. In light of the many complex and controversial issues raised by immigration, as well as increased migration pressures resulting from the growing interdependence of the world economy, it is not surprising that one prominent immigration scholar has predicted that, "in the United States, immigration policy will become *the* civil rights issue of the 21st century."⁶

The much-publicized North American Free Trade Agreement (NAFTA),⁷ a tripartite trade pact between the United States, Can-

⁴ See Mary B.W. Tabor, *Specter of Terror; U.S. Indicts Egyptian Cleric as Head of Group Plotting 'War of Urban Terrorism,'* N.Y. TIMES, Aug. 26, 1993, at A1.

⁵ See, *e.g.*, *infra* note 41 (citing authorities). To add to the irony, the agency of which the Border Patrol is a part, the Immigration and Naturalization Service, is one of the most consistently and harshly criticized in the federal government. See, *e.g.*, H. REP. NO. 216, 103d Cong., 1st Sess. (1993) (entitled "The Immigration and Naturalization Service: Overwhelmed and Unprepared for the Future").

⁶ Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L. L. 319, 320 (1993) (emphasis in original).

⁷ The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296-456, 612-799, 33 I.L.M. 649-57, 663-64, 671-80 (1994) [hereafter NAFTA].

ada, and Mexico, also stirred up a good deal of controversy.⁸ Arguments about NAFTA touched on unusually sensitive concerns—strikingly similar in tone to those raised by immigration—such as economics, race, and class. Free trade proponents immediately, seemingly reflexively, embraced the trade accord, while liberal interest groups almost universally condemned it. On one side, economists and business interests almost unanimously backed the accord as economically beneficial for all nations involved.⁹ On the other side, organized labor claimed that NAFTA would encourage employers to flee the United States to re-establish operations in Mexico, resulting in a loss of “American jobs.”¹⁰ Some environmental groups, emphasizing Mexico’s allegedly lax environmental standards, criticized the treaty’s adverse impact on the environment.¹¹

⁸ See Paul Krugman, *The Uncomfortable Truth About NAFTA*, 72 FOREIGN AFF. 13 (1993) (“The debate over [NAFTA] has taken on an astonishing salience in American politics. Not since the Smoot-Hawley tariff has trade legislation produced such a bitter polarization of opinion.”).

Professor Alford has observed that, in the controversy, NAFTA supporters and detractors frequently failed to deal in candor with the intricate questions raised by the trade agreement. See William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT’L L. J. 293 (1993).

⁹ See David Rosenbaum, *Good Economics Meet Protective Politics*, N.Y. TIMES, Sept. 19, 1993, at D5 (noting that 300 economists signed letter to President Clinton expressing support for NAFTA).

¹⁰ See, e.g., LABOR ADVISORY COMMITTEE FOR TRADE, REPORT OF THE LABOR ADVISORY COMMITTEE ON THE NORTH AMERICAN FREE TRADE AGREEMENT I (1992) (arguing against congressional ratification of NAFTA and emphasizing that “[s]tudies have shown that the NAFTA will result in the loss of between 290,000 and 550,000 jobs through the end of the decade and place serious downward pressure on U.S. wages”); see also William B. Richardson, *Congressional Approval of NAFTA*, 15 LOY. L.A. INT’L & COMP. L.J. 115 (1992) (stating that some NAFTA critics “basically oppose the free trade agreement, but use the jobs issue to mask their total opposition”); *Perot and Jesse Jackson Join Forces to Oppose Trade Pact*, L.A. TIMES, Aug. 27, 1993, at A4 (quoting Jesse Jackson: “NAFTA . . . is a shaft, shifting our jobs out of the country.”). Typical of organized labor’s explanation for opposing NAFTA is that offered by the Secretary-Treasurer of the AFL-CIO in Thomas R. Donahue, *The Case Against a North American Free Trade Agreement*, 26 COLUM. J. WORLD BUS. 93 (1991).

¹¹ See Carl F. Schwenker, Note, *Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal*, 71 TEX. L. REV. 1355 (1993) (outlining parameters of environmentalists’ concerns); see also Henry W. McGee, Jr., *Mexican Perspectives on Economic, Political and Cultural Implications of Free Trade*, 12 CHICANO-LATINO L. REV. 1, 4 (1992) (“[E]nvironmentalists have sounded the alarm bell of environmental degradation, arguing that Mexico

Like immigration, international trade, especially so-called free trade, periodically has provoked controversy in the United States. NAFTA certainly was not the first time that free traders and protectionists locked horns.¹² Nonetheless, the vehemence of the debate, to the surprise of many, for a time appeared to place the prospects of a fledgling Presidency in jeopardy.¹³

At least initially, the heated political discourse about immigration and NAFTA was disconnected. Those debating the issues did not view the trade agreement and immigration as related.¹⁴ 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.¹⁵ Consequently, while NAFTA provides for a

lacks the means, if not the will, to prevent *maquiladoras*, American firms which have relocated in Mexico, from continuing their grim record of pollution.”). For analysis of the environmental issues raised in trade agreements between the three parties to NAFTA, see Conference Proceedings, *The Law and Economics of Environmental Regulation in the Canada/U.S. Context*, 18 CAN.-U.S. L.J. 1 (1992), and Symposium, *Trade and the Environment: The Role of Regional Trade Agreements, Special Focus: North American Free Trade Agreement*, 5 GEO. INT’L ENVTL. L. REV. 515 (1993).

¹² See Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 288-98 (1986).

¹³ See Thomas L. Friedman, *Clinton Calls Trade Debate World Issue*, N.Y. TIMES, Nov. 7, 1993, at A1.

¹⁴ See Alan C. Nelson, *NAFTA: Immigration Issues Must be Addressed*, 27 U.C. DAVIS L. REV. 987 (1994). Of course, immigration and other issues central to U.S.-Mexico relations at some level affected the discussion of the free trade agreement. See U.S. Congressman Esteban Torres, *The Proposed North American Free Trade Agreement and the Implications for U.S.-Mexico Relations*, 12 CHICANO-LATINO L. REV. 101, 106 (1992) (“Mexico’s close proximity, its low wages, its poverty, its human rights abuses, environmental degradation, and its steady stream of immigrants unavoidably will shape the debate.”).

Concern was expressed about NAFTA’s failure to address “human rights” issues without a direct focus on migration. See, e.g., Thomas Gibbons, *Tough Trade-Offs: A Free Trade Proposal with Mexico Raises Doubts About Our Country’s Commitment to Human Rights*, 19 HUMAN RIGHTS 26 (1992). Human rights concerns voiced about NAFTA related to abuses by both the Mexican and U.S. governments. See James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 823 (1994). Even before a recent indigenous uprising in Chiapas, see *infra* note 97, Mexico has been criticized for human rights abuses. See, e.g., AMNESTY INT’L, AMNESTY INT’L REPORT 1993 207 (1993). The United States has been as well. See *infra* notes 41-44 and accompanying text.

¹⁵ See EXCHANGE OF LETTERS ON ISSUES CONCERNING THE NEGOTIATION OF A NORTH AMERICAN FREE TRADE AGREEMENT, H.R. DOC. NO. 10, 102d Cong., 1st Sess. 6 (Comm. Print 1991) [hereafter EXCHANGE OF LETTERS] (statement in

reduction of restraints on trade with the hopes of increasing commerce between the three nations, it for the most part does not deal with the flow of people between those same nations. In fact, NAFTA authorizes each member nation to restrict immigration from other member nations into its territory and to take whatever steps necessary to ensure border security. Until it came time for Congress to consider whether to ratify the trade agreement, the anomaly of NAFTA's endorsement of free trade and closed borders went largely undiscussed, if not unnoticed.

Relatively late in the NAFTA debate, however, an interesting coalition of groups linked migration issues with ratification of the treaty. Although difficult to say for certain, some seemed to want to derail the trade accord while others appeared more committed to restricting illegal immigration. These NAFTA opponents argued that, absent some agreement by Mexico to take steps to stem illegal immigration by its citizens into the United States, Congress should reject NAFTA. In response, proponents claimed that the treaty represented this nation's long-run solution to the nagging problem of illegal immigration from Mexico. Most notable for its absence from the debate was any discussion of immigration to the United States from NAFTA's third party, Canada. Although such immigration exists, it does not appear to worry most Americans.

In essence, linkage between NAFTA and immigration from the U.S. perspective meant a trade agreement that would limit immigration from Mexico. From a Mexican perspective, however, such a demand might well have proven unacceptable. Emigration of Mex-

letter from Bush administration to Congress: "We have agreed with Mexico that labor mobility and our immigration laws are not on the table in NAFTA talks, with the possible exception of a narrow provision facilitating temporary entry of certain professionals and managers."); UNITED STATES EXECUTIVE OFFICE OF THE PRESIDENT, REPORT OF THE ADMINISTRATION ON THE NORTH AMERICAN FREE TRADE AGREEMENT AND ACTIONS TAKEN IN FULFILLMENT OF THE MAY 1, 1991 COMMITMENTS 109 (1992) (stating that, because President shared concern of some in Congress that "NAFTA should not lead to increased immigration to the United States of foreign workers, . . . NAFTA does not provide for the movement of labor"). Even though migration questions were excluded from the NAFTA bargaining table, some realized at the outset that a trade accord between the United States and Mexico would have migration consequences. See Gene McNary, *Moving Goods and People in International Commerce*, 2 DUKE J. COMP. & INT'L L. 247, 247 (1992) (Commissioner of Immigration and Naturalization Service stating that "if immigration is not formally on the table, someone . . . will sooner or later realize as a practical matter that moving goods and services in international commerce also involves moving the people who trade in those goods and services").

ico's citizens affords the ruling party a political safety valve for civil discontent resulting from an unstable economy.¹⁶ The divergent interests of the United States and Mexico on the question meant that, if NAFTA's approval was conditioned on a meaningful agreement on restricting immigration, chances for agreement on a trade accord appeared doubtful.

The U.S. Congress, after heavy lobbying by the President, approved NAFTA by a relatively small margin.¹⁷ This Article does not take a position on the overall wisdom of the trade agreement, particularly from an economic standpoint. It instead sketches some tentative observations about the relationship between NAFTA and migration between the three signatory nations. I will analyze how and why, in the hopes of securing a free trade agreement, the United States, Mexico, and Canada found it politically expedient, if not essential, to separate the interrelated issues of trade and labor flow. The fortuitous events of 1993 brought to the fore the artificial nature of this separation.

In my view, NAFTA opponents advocating the linkage of immigration and NAFTA correctly argued that the trade agreement implicated migration issues and might well affect future migration from Mexico to the United States. For many reasons, most notably history and geography, the trade/migration separation is a false dichotomy in the context of U.S.-Mexico relations. Such issues are deeply interwoven into the fabric of all relations between the two nations. Of course, the political feasibility of dealing with migration issues in NAFTA is an entirely different matter. In the United States at least, political necessities not infrequently prohibit sensible policies.

I part company with the restrictionists/protectionists in prescribing how labor migration should have been treated in NAFTA.

¹⁶ See Juanita Darling, *How Far Will Mexico Go For Free Trade Pact?*, L.A. TIMES, Aug. 21, 1993, at A1 (reporting that Mexican immigration specialist opined that migration from Mexico helped cushion effects of economic stagnation by allowing poor to leave rural communities and by ensuing flow of money to Mexico from United States by Mexican citizens employed there); Doris E. Meissner, *Control Immigration Now; U.S. Can't Forever Be Mexico's Domestic Safety Valve*, L.A. TIMES, Sept. 26, 1986, at B5 (making similar observations).

Immigration is simply one issue on which U.S. and Mexican perspectives diverge. For a fascinating comparison of the nations' divergent views on a number of issues, see generally ROBERT A. PASTOR & JORGE G. CASTAÑEDA, *LIMITS TO FRIENDSHIP: THE UNITED STATES AND MEXICO* (1988).

¹⁷ See Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1.

Freer movement between member nations modelled on the European Union, formerly known as the European Community, might have proven more compatible with trade and other goals than allowing migration restrictions to remain. Despite the United States and Mexico's refusal to address the relationship between trade and migration issues, continuing tension between NAFTA's free trade goals and the United States restrictionist immigration policies eventually might result in the relaxation of restraints on migration from Mexico. This is especially true if economic development in Mexico curtails the potential for a mass migration to the United States, thereby relieving domestic resistance to freer labor mobility.

I. ON SEPARATE TRACKS: POLITICAL DISCOURSE ON IMMIGRATION AND NAFTA IN THE UNITED STATES

The separate debates about immigration and NAFTA in the United States raised resoundingly similar themes. This section will describe the parameters of the political discourse on these issues.

A. *The "Illegal Immigration" Problem*

Immigration developed into a highly charged issue in the United States and a number of other nations in 1993.¹⁸ A relatively depressed economy facilitated the growth of anti-immigrant sentiment, particularly in states with relatively large noncitizen populations.¹⁹ This restrictionist fervor, which I have termed

¹⁸ Germany immediately comes to mind in this regard. See, e.g., Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 YALE J. INT'L L. 155 (1993) (analyzing debate in Germany over asylum, immigration, and citizenship laws colored by resurgence of xenophobia); Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 511-16 (analyzing friction in Germany concerning treatment of non-German asylum-seekers). Canada's ailing economy rendered that nation susceptible to the same anti-immigrant sentiments pervasive in the United States. See, e.g., Jean-Claude LeClerc, *Xenophobia: Campbell Groups Foreigners with Smugglers and Criminals*, THE GAZETTE (MONTREAL), July 5, 1993, at B3.

¹⁹ However, immigration, illegal or not, may benefit the U.S. economy. See JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 359 (1989) (reporting that knowledgeable economists can find no economic reason to restrict legal and illegal immigration).

elsewhere as the new nativism,²⁰ is the latest chapter in a long series of anti-immigrant eruptions in the United States.²¹

The latest epoch of nativist sentiment came to full bloom in 1993. Border enforcement became an important theme in a number of political campaigns. The almost exclusive focus was on illegal immigration from Mexico. Though illegal immigration to the United States from Canada exists,²² the average U.S. citizen does not view it as seriously as illegal immigration from Mexico, in no small part because of the perception that illegal immigration from Canada is less significant in terms of numbers than that from Mexico.²³ Democrats as well as Republicans in no uncertain terms demanded efforts to halt illegal immigration from Mexico.²⁴ A few went so far as to suggest that armed forces be deployed to patrol the

²⁰ See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1162-74. Nativism refers to the

intense opposition to an internal minority on the grounds of its foreign (i.e., "un-American") connections. Specific nativistic antagonisms may, and do, vary widely in response to the changing character of minority irritants and the shifting conditions of the day; but through each separate hostility runs the connecting, energizing force of modern nationalism. While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates into a zeal to destroy the enemies of a distinctively American way of life.

JOHN HIGHAM, *STRANGERS IN THE LAND* 4 (2d ed. 1988).

²¹ See generally HIGHAM, *supra* note 20 (noting history of nativism in United States). As succinctly summarized, "[a]t times of national stress, American nativism has often come to the fore, labelling American cultures, American traits different from those of the core Anglo-Saxon culture as 'foreign' or 'un-American.'" Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992); see also Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL'Y REV. 1, 7 (1989) ("During periods of prosperity, we welcome good aliens and do not trouble too much about bad ones. During recessions or other periods of high social anxiety, we blur the distinction and evince hostility toward all of them.").

²² See Richard Simon, *Illegal Residents Not Just from Nearby Nations*, L.A. TIMES, Nov. 26, 1993, at A1 (citing Immigration and Naturalization Service estimates that over 100,000 undocumented Canadians live in United States).

²³ See *infra* notes 114-20 and accompanying text (offering some explanation for different attitudes in United States toward immigration from Canada and Mexico).

²⁴ See Nona Yates, *The Great Divide: Where They Stand*, L.A. TIMES, Nov. 30, 1993, at A20 (outlining immigration positions of President Clinton, California

southern border.²⁵ Numerous restrictionist proposals meandered their way through Congress and state legislatures.²⁶ Restrictionist groups, such as the Federation for American Immigration Reform (FAIR), enjoyed increasing influence, prominence, and apparent legitimacy in the political process.²⁷

As a historical matter, some mainstream liberal interest groups previously joined calls to limit immigration.²⁸ Organized labor, for

Governor Pete Wilson, Senator Dianne Feinstein, Senator Barbara Boxer, California Treasurer Kathleen Brown, and others).

Despite the great concern in the United States with the level of immigration from Mexico,

[c]ompared to the countries of Europe, the scale of Mexican emigration is unremarkable; indeed, it is squarely in the middle range of European experience. Considering Mexico's high rate of population growth and the capital-intensive nature of contemporary technology, the volume of Mexican emigration is impressive more for its smallness than anything else.

Douglas S. Massey, *Economic Development and International Migration in Comparative Perspective*, in DETERMINANTS OF EMIGRATION FROM MEXICO, CENTRAL AMERICA AND THE CARIBBEAN 13, 33 (Sergio Díaz-Briquets & Sidney Weintraub eds., 1991) [hereafter DETERMINANTS OF EMIGRATION].

²⁵ See, e.g., Tracy Wilkinson, *California Elections; U.S. Senate; Candidates Tough on Illegal Immigration*, L.A. TIMES, Oct. 19, 1992, at A3 (reporting position of Democratic Senate candidate Dianne Feinstein).

²⁶ See, e.g., Johnson, *supra* note 20, at 1169-70 n.111, 1172 n.121 (collecting citations to proposals in California legislature and so-called asylum reform proposals in Congress).

²⁷ See Patrick J. McDonnell & Paul Jacobs, *FAIR at Forefront of Push to Reduce Immigration*, L.A. TIMES, Nov. 24, 1993, at A1 ("FAIR has become a well-funded, highly successful pressure group, wielding considerable clout on Capitol Hill, in Sacramento and in the realm of public opinion."). FAIR advocates restricting immigration laws and currently supports a moratorium on immigration. See FEDERATION FOR AMERICAN IMMIGRATION REFORM, IMMIGRATION 2000: THE CENTURY OF THE NEW AMERICAN SWEATSHOP (1992) [hereafter IMMIGRATION 2000] (sampling of literature articulating FAIR's positions); see, e.g., *Cut Off Aid to Immigrants, Group Urges*, L.A. TIMES, Nov. 21, 1991, at A42 (quoting Alan Nelson, former Commissioner of the Immigration and Naturalization Service and FAIR consultant, claiming that excessive immigration has adversely affected employment, increased crime, caused environmental damage, and injured "our basic values"); Dan Stein, *Drowning By Numbers*, RECORDER (San Francisco), Dec. 5, 1991, at 8 (commentary by FAIR's Executive Director articulating similar themes).

²⁸ See LEON F. BOUVIER, PEACEFUL INVASIONS (1992) (proclaiming in acknowledgement section of book "[h]ere I am, a self-proclaimed and proud Liberal advocating reduced levels of immigration!"); Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1, 3 (1991)

example, has voiced restrictionist positions on immigration.²⁹ Although often marginalized as an extremist group, FAIR itself was founded by a group of environmentalists and population control advocates³⁰ and still plays to those concerns.³¹ Indeed, the organization, along with Sierra Club California and some population control groups, joined the California Coalition to Stabilize Population, which advocates that California establish population control policies.³² FAIR's advisory board includes such notable liberals as former Senator and presidential candidate Eugene McCarthy, former

(observing that "some labor union and civil rights liberals as well as environmental activists" have demanded restrictionist immigration policies).

²⁹ See generally 3 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 256-81 (1964) (chronicling restrictionist positions, often racist in nature, of American Federation of Labor); GWENDOLYN MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE, 1875-1920* (1986) (analyzing frequent restrictionist position of organized labor on immigration). For an example, see *Hearing before House Judiciary Comm., Subcomm. on Immigration, Refugees and Int'l Law*, 102d Cong., 1st Sess., March 7, 1991 (statement of Thomas R. Donahue, Secretary-Treasurer for the AFL-CIO) ("[I]t is in no sense anti-immigration, or anti-immigrant, to state that U.S. workers should have a first claim on U.S. jobs, and that U.S. wages and working conditions should not be undermined by workers from other lands.").

Labor even voiced concerns regarding NAFTA's narrow immigration provisions. See LABOR ADVISORY COMMITTEE FOR TRADE, *supra* note 10, at iii ("The NAFTA language on temporary entry mandates the wholesale revision of U.S. immigration law on temporary entry, and will encourage business to respond to shortages of professional and skilled workers by recruiting Canadians and Mexicans, rather than employing U.S. workers."); see also *infra* notes 72-74 and accompanying text (describing narrow changes to immigration laws wrought by NAFTA).

³⁰ See Susan Ferriss, *FAIR: Mounting Campaign to Keep Immigrants Out*, S.F. EXAMINER, Dec. 12, 1993, at A1; McDonnell & Jacobs, *supra* note 27; see also GARRETT HARDIN, *LIVING WITHIN LIMITS* 276-93 (1993) (renowned environmentalist advocating immigration restrictions); Aileen Maria Ugalde, "No Se Habla Español": *English-Only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209, 1216 n.40 (1990) (noting that FAIR's founder, John Tanton, had been president of Zero Population Growth in 1970s as well as chair of U.S. English, a group seeking to make English this nation's "official" language).

³¹ See, e.g., ROBERT W. FOX & IRA H. MEHLMAN, *CROWDING OUT THE FUTURE: WORLD POPULATION GROWTH, U.S. IMMIGRATION, AND PRESSURES ON NATURAL RESOURCES* (1992) (FAIR publication).

³² See Ann Bancroft, *Coalition Seeks State Population Policies*, S.F. CHRON., Feb. 4, 1992, at A14. This position reveals an ambivalence about immigrants and immigration in the environmental movement. Although leaning toward restrictionism, the burgeoning interest in attacking "environmental racism" would indirectly benefit some undocumented Mexicans in the United States

New York City Mayor John Lindsay, and former Colorado Governor Richard Lamm.³³ Besides environmental concerns, FAIR appeals to populist themes and, reminiscent of organized labor's restrictionist positions, advocates the need to protect "American" jobs and the existing wage scale from immigration. FAIR also emphasizes the deleterious impact of immigration on the poor and minorities.³⁴ In short, FAIR has some mainstream liberal roots.³⁵ At the same time, critics have challenged FAIR as racist. They point to the fact that FAIR accepted contributions from a group claiming that African Americans and Latinos are inherently inferior to whites and Asians,³⁶ and that the group's founder wrote an anti-Latino memorandum.³⁷

There may be legitimate policy reasons for limiting the levels of immigration. Nevertheless, there often is a racist core to the restrictionist demand. The seeds of today's nativism probably were sown by the elimination in 1965 of national origin quotas from the U.S. immigration laws, which had institutionalized discrimination in immigrant admissions.³⁸ A more diverse group of immigrants from all over the world began coming to the United States, particularly

living in minority communities. See, e.g., Luke W. Cole, *Remedies for Environmental Racism: A View From the Field*, 90 MICH. L. REV. 1991 (1992).

³³ See McDonnell & Jacobs, *supra* note 27; see also Ferriss, *supra* note 30 (quoting Eugene McCarthy discussing reasons for joining FAIR and stating that "[t]he U.S. has become a colony to the world . . . we don't control our language or our culture").

³⁴ See McDonnell & Jacobs, *supra* note 27; see, e.g., IMMIGRATION 2000, *supra* note 27 (collecting writings on immigration's impact on minorities and U.S. workers, including some written by traditional liberals). It is debatable whether immigrants adversely affect the job market for citizens. See GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRATION ON THE U.S. ECONOMY* 19 (1990) (finding that immigrants "have small impact on earnings and opportunities of natives").

³⁵ See Rita J. Simon, *Old Minorities, New Immigrants: Aspirations, Hopes, and Fears*, 530 ANNALS 61, 68 (1993) (describing "contemporary anti-immigration . . . alliance made up of groups [including FAIR] with strong organized labor, environmental, and zero-population-growth support, along with support from traditional conservatives").

³⁶ Ferriss, *supra* note 30; McDonnell & Jacobs, *supra* note 27.

³⁷ Ferriss, *supra* note 30; see also Perea, *supra* note 21, at 345-46 (explaining circumstances surrounding memorandum and quoting it extensively).

³⁸ See T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 52-57 (2d ed. 1991) (describing national origin quota system and its elimination from U.S. immigration laws in 1965).

more people of color from developing nations.³⁹ The current negative reaction toward illegal (and often legal) immigration is fueled at least in part by the increasing number of immigrants of color coming to the United States from developing nations.⁴⁰

Besides shaping immigration law and policy, anti-immigrant sentiment has had more subtle consequences. Evidence suggests that it indirectly encourages border violence against Mexicans attempting to enter the United States.⁴¹ Restrictionist sentiment at times has had an impact on minority citizens as well. For example, enforcement efforts to curtail illegal immigration have resulted in abuses against Latino⁴² and Asian-American citizens.⁴³ Put bluntly,

³⁹ See *infra* note 109 (citing statistics concerning demographics of recent immigrants).

⁴⁰ See Dianne Klein, *Curbs on Illegal Immigration are 'Social Sin,' Mahoney Says*, L.A. TIMES, Dec. 11, 1993, at B5 (quoting Cardinal Roger Mahoney of Los Angeles stating that immigrant backlash "has a lot to do with the color of the immigrants and the language that they speak. There is a lot of discrimination against Asians and Hispanics.").

⁴¹ See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, SEALING OUR BORDERS: THE HUMAN TOLL (1992) (reporting shootings, use of lethal force, physical abuse, and racially discriminatory conduct by U.S. Border Patrol); AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG U.S. BORDER WITH MEXICO (1992) (same).

⁴² See, e.g., *Murrillo v. Musegades*, 809 F. Supp. 487, 490-97 (W.D. Tex. 1992) (enjoining verbal harassment and physical abuse by Border Patrol of Chicano high school students and employees, all citizens, because of skin color and appearance); AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 41, at 4, 35 (showing that 17.7% of those in study subject to abuse by U.S. Border Patrol were U.S. citizens); JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (analyzing concerted governmental effort to deport undocumented Mexicans in 1950s that resulted in deportation of some U.S. citizens); ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION (1974) (analyzing deportation of undocumented Mexicans and Mexican-American citizens by U.S. government during Depression); Suzanne Espinosa, *Snafu Underscores Civil Rights Issues*, S.F. CHRON., Oct. 22, 1993, at A1 (reporting that Border Patrol arrested Chicano citizen while he was repairing roof of parents' home and deported him as "illegal alien" later that day); Lee Romney, *The Suspicion is Mutual*, L.A. TIMES, Feb. 3, 1994, at J8 (reporting claims by Latinos lawfully in country of harassment by U.S. Border Patrol allegedly fueled by anti-immigrant backlash); see also ARTURO GÁNDARA, THE CHICANO/ILLEGAL-ALIEN CIVIL LIBERTIES INTERFACE 15 (1977) (concluding, after analyzing developments in search and seizure and employment discrimination law, that "illegal Mexican migration to the United States has resulted in judicial and statutory responses that have constrained the constitutional and civil rights of Chicanos").

the anti-immigrant fervor indirectly heightens pre-existing racial tensions.⁴⁴

An occurrence at the conference on which this Symposium is based highlights the fact that the anti-immigrant backlash has an impact on citizens. A question from the audience was posed to Roberto Martinez, who (in English) had discussed human rights abuses by the Border Patrol along the United States southern border with Mexico. The questioner asked why Martinez did not go back to Mexico to try to improve economic conditions there. The logic behind the question apparently was that, if the Mexican economy was improved, fewer of its citizens would try to migrate to the United States, and thus fewer would suffer abuses when attempting to cross the border. Based on his surname, as well as his complex-

⁴³ See U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 22-48 (1992) (documenting hate crimes against Asian American citizens as well as immigrants from Asian nations); see also Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993) (analyzing the phenomenon).

⁴⁴ Another example occurred within blocks of my home. In California's capital, fire bombings directed at a state antidiscrimination agency and African-American, Jewish-American, and Japanese-American targets were attributed in part by one prominent Japanese-American congressman to the scapegoating of "illegal aliens" for California's problems by liberal and conservative politicians. See *California Anti-Bias Department Firebombed in New Hate Attack*, N.Y. TIMES, Oct. 15, 1993, at A24; *Immigrants Taking Bum Rap from Both Parties, Rep. Matsui Says*, S.F. CHRON., Oct. 30, 1993, at A7; Stephen Magagnini, *Matsui: Rhetoric Fosters Hate Crimes*, SACRAMENTO BEE, Oct. 30, 1993, at B1.

A different, though related, phenomenon is the interethnic conflict that some argue is a side effect of changing immigration demographics. Tensions between Korean Americans, many of whom recently immigrated to this nation, and African Americans, many of whom have been in this country for an extended period, are perceptively analyzed in Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993) and Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 601 (1993). I have argued that this sort of conflict, while not insignificant, should not be overemphasized. Kevin R. Johnson, *Telling the Untold Stories: Changing the Images of the Immigrant in Political Discourse*, Presentation to American Association of Law Schools Annual Conference (Jan. 9, 1993) (unpublished manuscript on file with author). For arguments that immigrants and their diversity have contributed substantially to the stability of the U.S. political order rather than being the cause of destabilizing conflict, see JOHN C. HARLES, *POLITICS IN THE LIFEBOAT: IMMIGRANTS AND THE AMERICAN DEMOCRATIC ORDER* (1993).

ion, the questioner apparently assumed that Martinez was an immigrant. Martinez replied that he was a fifth-generation U.S. citizen.⁴⁵

The cure for the negative side effects of the anti-immigrant fervor does not lie with the judiciary.⁴⁶ For example, the U.S. Supreme Court in recent years has consistently deferred to the executive branch in immigration matters.⁴⁷ The Court allowed to continue unimpeded an unprecedented interdiction and repatriation program directed at persons of color fleeing a repressive Haitian government engaging in mass political persecution.⁴⁸ In addition, for a number of reasons, including the limited political power of noncitizens, the political process often cannot be expected to be effective.⁴⁹ Even those who desire to restrict immigration levels for legitimate reasons should be concerned about how to limit the unfortunate side effects of the anti-immigrant sentiment. Such concern, however, most definitely is not a part of the dominant political discourse about immigration in the United States.

B. *The NAFTA Debate*

The second half of 1993 was marked by a free-wheeling, often divisive debate over whether Congress should approve NAFTA. The left of the U.S. political spectrum, including organized labor and environmentalists, voiced the most strenuous objections to the trade pact. These groups, at least historically, also have tended to support restrictionist immigration positions.⁵⁰ Organized labor,

⁴⁵ For a discussion of Martinez's background, and a description of some threats on his life made because of his activities on behalf of immigrants, see WILLIAM LANGEWIESCHE, CUTTING FOR SIGN 56-70 (1993).

⁴⁶ See generally Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (analyzing judicial deference to political branches of government characteristic of classical immigration law).

⁴⁷ See Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993) (analyzing series of Supreme Court decisions favoring executive branch at expense of noncitizen).

⁴⁸ *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993). See generally Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993) (arguing that domestic and foreign policy pressures, as well as acquiescence by judiciary, caused executive branch's extreme policy choice of Haitian interdiction and repatriation).

⁴⁹ See Johnson, *supra* note 20, at 1149-81 (analyzing political dynamic resulting in frequently anti-immigrant laws and policies).

⁵⁰ This might well be expected. As observed by the market-oriented Reagan Administration, "[a]rguments supporting the restriction of

which feared the loss of jobs to Mexico and its substantially lower wage scale, was perhaps the harshest critic.⁵¹ From a trade perspective, organized labor historically has been protectionist in nature.⁵² Environmental groups also expressed concern with NAFTA because of the allegedly lax environmental standards in Mexico.⁵³ Labor and environmental side agreements alleviated some objections to NAFTA, particularly those of some environmental groups.⁵⁴ Nonetheless, the fear of the migration of jobs from the United States to Mexico continued to be the most strongly made objection to NAFTA. This fear undoubtedly was exacerbated by the same poor domestic economy influencing the restrictionist forces in the immigration realm.

Similar to the restrictionist immigration position, there was a darker side to the NAFTA opposition typified by Ross Perot, who pandered to nationalistic and nativist sentiments. His "giant sucking sound" metaphor, describing the predicted impact of NAFTA, tapped into the deep economic insecurity of many Americans.⁵⁵ His suggestion that most Mexicans work for less than human wages⁵⁶ and live in substandard conditions played into deeply held stereotypes about the Mexican people. The claim that Mexican citizens would work for "inhuman" wages places their very humanity in

immigration to protect American jobs are similar to those favoring protectionism" ECONOMIC REPORT OF THE PRESIDENT 222 (1986) [hereafter 1986 ECONOMIC REPORT].

⁵¹ See *supra* note 10 and accompanying text.

⁵² See DANIEL J.B. MITCHELL, *ESSAYS ON LABOR AND INTERNATIONAL TRADE* 47-68 (1970) (analyzing organized labor's position on tariffs).

⁵³ See *supra* note 11 and accompanying text.

⁵⁴ See North American Agreement on Labor Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 (1993); North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993); see also *NAFTA: Is Environmental Rhetoric a Sign of Deeper Divisions?*, GREENWIRE, Oct. 14, 1993, available in LEXIS, News Library, Curnws File (describing deep disagreements among environmental groups, such as the National Wildlife Federation (pro-NAFTA) and the Sierra Club (anti-NAFTA)).

⁵⁵ See ROSS PEROT WITH PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED — NOW!* 41 (1993) (title of chapter 4: "A Giant Sucking Sound"). The appeal of Perot's message ultimately caused the Clinton administration to take the extraordinary, and ultimately successful, step of attempting to defuse these concerns by agreeing to a nationally televised debate between the Vice President and Perot. David E. Rosenbaum, *The Free Trade Accord: The Overview, Gore and Perot Duel on TV Over the Trade Pact*, N.Y. TIMES, Nov. 10, 1993, at A1.

⁵⁶ See PEROT, *supra* note 55, at 27.

question and accentuates the perceived differences between “us” and “them.” Similarly, the focus on weak environmental controls in Mexico enforced by corrupt government officials plays on popular stereotypes of the corrupt, dirty Mexican.⁵⁷ With respect to these types of challenges to NAFTA, subtle racism and ethnocentrism unmistakably colored the opposition.⁵⁸

As this discussion suggests, just as the debate on illegal immigration centered on Mexico, anti-NAFTA arguments almost exclusively focused on characteristics of Mexico and its citizens.⁵⁹ In contrast, concerns about the negative impact of the trade accord because of the third trading partner, Canada, were noticeably absent from the debate. The focus on the United States southern neighbor might be explained in part by the fact that Mexico is a developing nation while Canada is not. In terms of its level of economic development as well as its class structure, historical pedigree, and demographics,

⁵⁷ See *Hispanic Leader Warns NAFTA Debate Drifting Into “Evil Mixture of Prejudice and Ignorance,”* PR NEWSWIRE, May 30, 1993, available in LEXIS, News Library, Curnws File (offering examples of “‘almost subliminal . . . references to Mexican and Latin stereotypes and caricatures [and] innuendo’” used by NAFTA opponents); Steven D. Stark, *Nativism on Film: A World of Bandits and Crooks*, L.A. TIMES, Nov. 14, 1993, at M2 (contending that NAFTA debate was affected by “stereotyped images of bandits, drunks, corrupt government officials and enticing servile maidens”); Raul Yzaguirre, *Parting Shots on NAFTA*, L.A. TIMES, Nov. 16, 1993, at B7 (“[M]uch of anti-NAFTA rhetoric is implicitly or explicitly racist — the image of the ‘dirty Mexican’ is as prevalent today in the NAFTA debate as it was . . . in South Texas in the 1950s.”); see also Richard Delgado & Jean Stefanic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ill?*, 77 CORNELL L. REV. 1258, 1273-75 (1992) (discussing Mexican-American stereotypes in popular culture at various times in U.S. history and failure of members of society to understand its racist content at that time).

⁵⁸ See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing often unconscious nature of racism).

NAFTA supporters also may have been guilty of appealing to racist sympathies. See Paul R. Krugman, *NAFTA: An Empty Victory?*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 30 (reporting that President Clinton urged support for NAFTA because, if not approved, Japan would conclude trade agreement with Mexico); see also *Clinton Sales Tactic Leaves Japan Miffed*, USA TODAY, Nov. 8, 1993, at 6A (reporting negative reaction of Japanese officials to Clinton sales device).

⁵⁹ For an excellent analysis of how cultural differences between the United States and Mexico influenced negotiation and debate about “nontrade” issues, such as environmental controls and labor rights, see Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL’Y IN INT’L BUS. 391, 434-55 (1993).

Canada is viewed by most in this nation as more similar to the United States than is Mexico.⁶⁰ Such similarities made the likely loss of "American jobs" to Canada appear minimal.

As politics would have it, it became increasingly difficult to ignore the relationship between free trade with Mexico and illegal immigration from Mexico to the United States. Indeed, because immigration has been a frequent pressure point in relations between the United States and Mexico,⁶¹ it is strange that the issue of immigration could have been avoided for so long in the NAFTA debate.

⁶⁰ See *infra* notes 114-20 and accompanying text (articulating reasons for difference in attitude in United States about immigration from Canada and Mexico).

⁶¹ See ARTURO GÁNDARA, AN ASSESSMENT OF CARTER ADMINISTRATION RELATIONS WITH MEXICO 2-3 (1980) (discussing strained U.S.-Mexico relations during Carter Administration due in part to issue of undocumented Mexican immigrants); see, e.g., International Developments, *Mexico's Refugee Policies: The 1993 Chinese Refugee Incident as a Case Study*, 7 GEO. IMMIGR. L.J. 640 (1993) (describing assistance by Mexico, after much diplomatic haggling, in United States' successful efforts to halt vessel with Chinese citizens headed for United States); David Clark Scott, *Mexico Unhappy With U.S. Border Policy*, CHRISTIAN SCIENCE MON., Mar. 15, 1994, at 6 (describing "tense" discussions between U.S. and Mexican officials concerning U.S. border enforcement measures). In recent years, Mexico has taken steps to limit migration through its territory to the United States. See *Testimony of Doris M. Meissner, Commissioner Immigration and Naturalization Service before House Subcomm. on Int'l Law, Immigration and Refugees Concerning North American Free Trade Agreement (NAFTA)*, 103d Cong., 2d Sess. (Nov. 3, 1993) [hereafter Meissner Testimony] (on file with author) (crediting Mexican authorities with returning 120,000 people annually from 1990-1992 transiting through Mexico with corresponding reduction of migration pressures on United States); Tracy Wilkinson, *Dreams Die on Mexico's 2d Border*, L.A. TIMES, Jan. 1, 1994, at A1 (describing Mexico's renewed immigration enforcement and deportation of Central Americans entering Mexico seeking to come to United States, and Mexico's acceptance of U.S. money to assist in deportation of illegal migrants); see also Neuman, *supra* note 18, at 504 (observing that "United States has been engaged in a program of cooperation, whose details are not publicized, under which the Mexican government apprehends and deports Central Americans attempting to transit through Mexico to the United States") (footnote omitted); Arthur C. Helton, *Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 26 CORNELL INT'L L.J. 737, 738 (1993) (to same effect). For a study of Mexico's efforts, with U.S. assistance, to reduce Central American migration to the United States through Mexico, see U.S. COMM. FOR REFUGEES, *RUNNING THE GAUNTLET: THE CENTRAL AMERICAN JOURNEY THROUGH MEXICO* (1991).

C. *The Interface*

Although international trade agreements rarely treat migration issues,⁶² to fail to do so in NAFTA is curious considering the relationship between the United States and Mexico and the fact that the parties addressed such “nontrade” issues as the environment and labor rights.⁶³ The potential relationship between migration and trade issues is acute in NAFTA because of the economic disparities between Mexico, a developing nation, and the United States and Canada,⁶⁴ and the long history of migration of Mexican citizens to the United States. Economic disparities at least in part contributed to the pre-existing migration from Mexico to the United States. Many policymakers believed immigration had reached crisis proportions when the time came for congressional approval of

⁶² See Zamora, *supra* note 59, at 396 & n.14 (stating that “non-trade” issues raised in debate over NAFTA, such as environmental quality and workers’ rights, are “not traditionally . . . raised in the negotiation of international trade agreements” and offering example of General Agreement on Tariffs and Trade); see also Robert A. Pastor, *NAFTA as the Center of an Integration Process: The Nontrade Issues*, in NORTH AMERICAN FREE TRADE: ASSESSING THE IMPACT 176 (1992) (Nora Lustig et al. eds., 1992) (analyzing NAFTA negotiations on so-called nontrade issues).

⁶³ With respect to the core trade issues, it is interesting to note that Mexico’s pre-NAFTA arguments against foreign investment in that country and the United States’ arguments against illegal immigration from Mexico are remarkably similar. See DAVID RONFELDT & MONICA ORTIZ DE OPPERMAN, *MEXICAN IMMIGRATION, U.S. INVESTMENT, AND U.S.-MEXICAN RELATIONS* (1990) (highlighting similarities in argumentation and concluding that both nations should moderate positions so as to allow increased economic and social integration). In essence,

[t]he same types of fears that lurk beneath Mexican policies on foreign investment and trade can be found beneath U.S. policy on immigration. . . . Mexican immigration is an economic and social benefit to the United States, and a similar case can be made with regard to foreign investment’s contribution to technology, jobs, and capital in Mexico. *The fears, however, have little to do with a rational calculation of costs and benefits; rather, they are fears of losing control, of being overwhelmed by one’s neighbors or losing one’s national identity.*

PASTOR & CASTAÑEDA, *supra* note 16, at 363 (emphasis added).

⁶⁴ See Philip L. Martin & J. Edward Taylor, *The North American Free Trade Agreement and Rural Mexican Migration to the United States*, in NORTH AMERICAN FREE TRADE AGREEMENT: IMPLICATIONS FOR CALIFORNIA AGRICULTURE 63-64 (1992) (“Never before have countries whose per capita [gross national products] differ by as much as 10 to 1 entered into serious negotiations to free trade and investment barriers between them.”).

NAFTA.⁶⁵ Immigration already was a central issue of discussion between the United States and Mexico, and NAFTA did nothing to allay any concerns about illegal immigration.

The debates over immigration and NAFTA in 1993 were in an important sense contradictory. The parties to NAFTA hoped that, by breaking down barriers to trade among the three nations, the trade agreement would increase trade and the exchange of capital to the benefit of all.⁶⁶ A position on migration consistent with NAFTA's goal might call for a breaking down of immigration barriers among the member nations, thereby facilitating a freer flow of labor.⁶⁷

As we have seen, the current debate in the United States about immigration has a radically different flavor. The restrictionist emphasis, focusing on illegal Mexican immigration, clearly opposes the eradication of barriers to migration; it instead seeks to fortify those barriers.⁶⁸ Border fortification, taking place even while Congress was pondering NAFTA, was designed to halt the flow of "illegal aliens" from Mexico to the United States.⁶⁹ Although sealing the border might be an impossible task,⁷⁰ the popular consensus on

⁶⁵ See *supra* notes 18-49 and accompanying text.

⁶⁶ See NAFTA, *supra* note 7, at art. 102, 32 I.L.M. at 297 (defining parties' objectives).

⁶⁷ See Roberto L. Martinez, *NAFTA's Effect on Human Rights at the Border*, 27 U.C. DAVIS L. REV. 979 (1994) (noting contradiction between free trade and closed borders); see also MICHAEL WALZER, SPHERES OF JUSTICE 37 (1983) (noting that 19th century free trade proponents supported unrestricted immigration).

⁶⁸ See *supra* notes 18-49 and accompanying text. These advocated barriers were not always figurative. See, e.g., Major Garrett, *Bush Campaign May Find Free Trade is a Hard Sell*, WASH. TIMES, Aug. 13, 1992, at A11 (reporting that Republican party platform in 1992 called for construction of "structure" between United States and Mexico to halt illegal immigration).

⁶⁹ See, e.g., Tim Golden, *U.S. Blockade of Workers Enrages Mexican Town*, N.Y. TIMES, Oct. 1, 1993, at A3 (reporting new Border Patrol policy of deploying hundreds of officers along border at El Paso, Texas).

⁷⁰ Illegal immigration from Mexico is a highly complicated phenomenon. The conventional wisdom has it that Mexicans come here for economic opportunity. See ALEINIKOFF & MARTIN, *supra* note 38, at 268-69 (summarizing various theories on why Mexican citizens illegally enter United States). However, family and employment ties between people in Mexico and the United States have developed for over a century, creating an extended social network. Because this network apparently plays a substantial role in encouraging immigration, it limits the prospects for effective governmental intervention. See WAYNE A. CORNELIUS, MEXICAN MIGRATION TO THE UNITED STATES: THE LIMITS OF GOVERNMENT INTERVENTION 2-4 (1981). Indeed, the

how to deal with the "immigration problem" in the United States undisputedly endorsed this goal in 1993.

Some traditional liberal politicians asserted consistent positions on NAFTA and immigration: limit trade and immigration from Mexico.⁷¹ However, the pro-NAFTA forces generally endorsed increased border enforcement. The inconsistency between free trade and closed borders, for the most part, failed to be acknowledged.

II. NAFTA AND FREE TRADE VERSUS IMMIGRATION AND CLOSED BORDERS

NAFTA's terms have a relatively limited direct impact on U.S. immigration laws. The Agreement primarily eases immigration restrictions for narrowly defined business-related and trade-related purposes.⁷² The signatories unquestionably did not intend the trade agreement to provide a complete solution to the outstanding labor migration questions among the United States, Mexico, and Canada.⁷³ As Alan Nelson, former Commissioner of the Immigration and Naturalization Service (INS), mentioned in a conversation with me a few years ago, the "I" word was mysteriously absent from any discussion of NAFTA. The discontinuity and isolation of the

existence of a transnational network may constrain any reduction on migration pressures even if NAFTA results in sustained economic expansion in Mexico. See *infra* notes 90-98 and accompanying text (discussing arguments about whether NAFTA would reduce illegal immigration from Mexico).

⁷¹ For example, Democratic Senators Feinstein and Boxer of California opposed NAFTA and supported increased immigration enforcement. See Carolyn Lochhead, *1,010 More Agents for Border Patrols*, S.F. CHRON., Feb. 4, 1994, at A1; Marc Sandalow, *Feinstein Comes Out Against NAFTA*, S.F. CHRON., Nov. 18, 1993, at A4.

⁷² Chapter 16 of NAFTA deals narrowly with migration issues between the member nations. See NAFTA, *supra* note 7, ch. 16, 32 I.L.M. at 664-70. For a description of the provisions regarding business visitors, treaty traders and investors, intracompany transfers, and professionals engaged in business activities, see *More on Immigration Under NAFTA*, 69 INTERPRETER RELEASES 1128 (1992); see also UNITED STATES EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 15, at 109-11 (summarizing NAFTA's relatively minor changes to U.S. immigration laws and mentioning that United States and Mexico agreed to annual numerical limit of 5,500 Mexicans entering United States).

⁷³ On a narrower migration question, the United States and Canada have been negotiating an agreement for the return of asylum-seekers who have passed through one of the countries before reaching the other. See Neuman, *supra* note 18, at 504; Helton, *supra* note 61.

debates about NAFTA and immigration became readily apparent as both emerged as volatile domestic issues.

A. *The Exclusion of Immigration from NAFTA*

NAFTA expressly recognizes each country's sovereign right to protect its domestic labor force and pursue its own immigration policies, thereby allowing each nation to take measures designed "to ensure border security."⁷⁴ The reason for the exclusion of immigration from NAFTA is not altogether clear, although concern was expressed in the United States about the economic and social consequences of increased immigration from Mexico.⁷⁵ The Bush Administration might have recognized the explosive potential of any public debate in the United States about immigration from Mexico.⁷⁶ The Administration might have concluded that any far-reaching treatment of migration issues in NAFTA may have decreased the possibility of congressional approval or, at best, increased the chances for lengthy debate and delay. The negotiations culminating in NAFTA commenced in the wake of the long and tumultuous debate over the Immigration Reform and Control Act of 1986,⁷⁷ which spanned much of the 1980s.⁷⁸ This fact could not have been lost on the United States.

⁷⁴ See NAFTA, *supra* note 7, art. 1601, 32 I.L.M. at 664 ("[T]his Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating *temporary* entry on a reciprocal basis and of establishing transparent criteria and procedures for *temporary* entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.") (emphasis added).

⁷⁵ See EXCHANGE OF LETTERS, *supra* note 15, at 96 (letter from Congressman Richard A. Gephardt to President Bush dated March 27, 1991, discussing NAFTA and expressing "concern about the prospect of substantial numbers of Mexican workers entering the U.S. labor market, even if only on a temporary basis"); Cyrille Rogacki, *An Interview with Ambassador Julius Katz*, 26 COLUM. J. WORLD BUS. 39 (1991) (Deputy U.S. Trade Representative under President Bush stating that labor migration between United States and Mexico is not a subject of negotiations because "[w]hen we get into broad scale immigration, you're not dealing with trade or even wholly economic issues, you're dealing with social issues. And there's a whole panoply of other policies involved, and we've agreed that will not be a part of this negotiation.").

⁷⁶ See *supra* notes 18-49 and accompanying text.

⁷⁷ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁷⁸ See Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 STUD. AM. POL. DEV. 37 (1992) (analyzing circumstances surrounding passage of Immigration Reform and Control Act and Immigration Act of 1990); see also Deborah E. Anker & Michael H. Posner, *The*

To complicate matters, the national interests of the United States and Mexico tugged in diametrically opposed directions on immigration.⁷⁹ In essence, political exigencies in the United States demanded provisions limiting illegal immigration from Mexico. Mexico, however, indirectly benefits from the migration of some of its poorest citizens. In short, the parties simply might have recognized that, if immigration was a topic of the negotiations, agreement on a trade treaty was highly unlikely.

To further complicate matters, the Mexican government had expressed concern with human rights abuses of its citizens along the border by U.S. authorities.⁸⁰ Some in Mexico advocated the addition of provisions to NAFTA to protect expatriate Mexican workers and halt "the arbitrary, unilateral and discriminatory measures that the government of the United States is adopting along [the] border."⁸¹ Because provisions of that type necessarily would entail some limitations on U.S. border enforcement policies, they might well be expected to raise the hackles of the United States. This United States/Mexico conflict further militated against extensive migration-related provisions in NAFTA.

When NAFTA negotiations were ongoing, immigration, though constantly in the background, simply was not as pressing a public issue in the United States as it later became. Mexico, with emigration of its citizens serving as a safety valve alleviating the threat of political instability, was satisfied with the status quo, although it was concerned with abuses of its citizens by the U.S. Border Patrol. The United States also could live with the status quo, which allowed it to bolster border enforcement efforts. It therefore was possible to exclude migration questions from the negotiations among the

Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 SAN DIEGO L. REV. 9 (1981) (thoroughly describing decade-long debate culminating in Refugee Act of 1980).

⁷⁹ See *supra* note 16 and accompanying text.

⁸⁰ See MEXICAN NAT'L HUMAN RIGHTS COMM'N, REPORT ON HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRATORY WORKERS ON ROUTE TO THE NORTHERN BORDER AND UPON ENTERING THE SOUTHERN UNITED STATES BORDER STRIP (1991); see also Patrick J. McDonnell, *America From Abroad*, L.A. TIMES, Nov. 9, 1993, at A1 (reporting that Mexico's President Salinas received loud applause at speech on state of nation upon reiterating support for protection of human rights of Mexican citizens in United States).

⁸¹ McDonnell, *supra* note 80; see also James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEXICO L.J. 85, 106-07 (1993) (suggesting formation of trinational commission to resolve disputes over human rights violations).

three nations with little domestic fallout. That, of course, changed as time neared for Congress to vote on NAFTA.

B. Convergence

When it came time to seriously consider ratifying NAFTA, some politicians, most of them opponents of the treaty, linked it with immigration in two distinct though related ways. First, they claimed that the agreement should include express provisions restricting illegal immigration from Mexico. Second, they debated the indirect consequences of NAFTA on illegal immigration from Mexico. Detractors claimed that NAFTA would increase legal and illegal immigration to the United States. In stark contrast, supporters contended that NAFTA was the only long-term solution to illegal immigration from Mexico.

1. NAFTA's Lack of Immigration Provisions

As immigration emerged as a front-burner issue in 1993, some politicians⁸² and interest groups⁸³ claimed that an immigration side

⁸² See Vlac Kershner, *Wilson Asks Mexico to Help Seal Border*, S.F. CHRON., Sept. 1, 1993, at A4 (reporting that Governor Wilson sent letter to Mexican President Carlos Salinas de Gotari suggesting that, in order to secure NAFTA's approval, Mexico should take steps to halt illegal immigration to United States); Carolyn Lochhead, *Feinstein, Wilson Plan for NAFTA Assailed*, S.F. CHRON., Sept. 9, 1993, at A7 (reporting that California Senator Dianne Feinstein advocated agreement by Mexico to help control border as precondition to approval of NAFTA); Roberto Suro, *House Hearing in Los Angeles Focuses on Illegal Immigrants*, WASH. POST, Sept. 1, 1993, at A2 (reporting that California gubernatorial candidate Kathleen Brown testified before Congress that approval of NAFTA should be linked to Mexico's agreement on illegal immigration issues); see also Alan C. Nelson, *A Governor's Brave Stand on Illegal Aliens*, N.Y. TIMES, Aug. 23, 1993, at A15 (endorsing California Governor Wilson's proposal that approval of NAFTA should be tied to Mexico's cooperation in stopping illegal immigration).

⁸³ See, e.g., *NAFTA Not the Solution to Illegal Immigration, FAIR Says*, PR NEWswire, Jan. 15, 1993, available in LEXIS, Nexis Library, Currnt File (reporting that Federation for American Immigration Reform called for President Clinton to negotiate side agreement with Mexico aimed at limiting illegal immigration from Mexico to the United States).

There was a muted call for allowing freer labor migration between NAFTA's member nations, which was largely ignored. See *Testimony of Maria Jimenez, Director, Immigration Law Enforcement Project Before House Judiciary Comm., Subcomm. on Int'l Law, Immigration and Refugees, NAFTA and Related Issues*, 103d Cong., 2d Sess (Nov. 2, 1993), available in LEXIS, News library, Curnws file; see also LATINO SUMMIT ON NAFTA, LATINO CONSENSUS POSITION ON NAFTA 20 (Mar. 12-13, 1993) (recommending that trinational commission be established

agreement to NAFTA should be a condition of congressional ratification. Similar to those dealing with environmental and labor issues,⁸⁴ the proposed side agreement would strive to limit illegal immigration between the United States and Mexico. Because Mexico very much wanted NAFTA, the United States arguably could have exercised leverage to obtain concessions on immigration.⁸⁵ The Mexican government, however, registered strong objections to any suggestion that it attempt to halt illegal immigration to the United States. To do so, the Mexican government argued, would violate the Mexican Constitution by infringing the freedom of its citizens to travel.⁸⁶ U.S. officials pressing for NAFTA's approval stated that it was too late to add provisions on immigration controls.⁸⁷ The time factor possibly influenced Mexico's response as well.

It is difficult to speculate whether Mexican resistance would have been so strong if the issue of restricting illegal immigration to the United States in NAFTA had been raised earlier. Although desirous of a safety valve during poor economic times, the Mexican government might have been willing to take modest steps, such as agreeing not to affirmatively encourage illegal immigration and to negotiate with the United States on the subject in the future. Such limited Mexican concessions might have tipped the political bal-

under NAFTA to investigate migration issues); Francis Lee Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 467-68 (1992) (quoting prominent Mexican politician Cuauhtémoc Cárdenas as advocating negotiation on labor migration between United States and Mexico on NAFTA).

⁸⁴ See North American Agreement on Labor Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 (1993); North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993).

⁸⁵ See Nelson, *supra* note 14, at 988; *FAIR Says No NAFTA Without Effective Immigration Controls*, PR NEWSWIRE, Sept. 14, 1993, available in LEXIS, News Library, Curnws File.

⁸⁶ See Patrick J. McDonnell, *Mexico Rebukes Wilson Over Immigrant Plan*, L.A. TIMES, Sept. 11, 1993, at A1 (reporting comments of Mexican Foreign Relations Secretary to this effect and California Governor Wilson's curt reply: "[t]he idea that it is against their constitution I frankly reject"). Recall that the United States harshly criticized the former Soviet Union for refusing to allow Jews to leave the country. See, e.g., Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2101-2487 (1988)) (linking U.S.-U.S.S.R. trade with improvement in emigration opportunities for Soviet Jews).

⁸⁷ See Lochhead, *supra* note 82.

ance in the United States more toward NAFTA. Such a tack, however, might have proven politically embarrassing for a Mexican government that had presented NAFTA to a Mexican citizenry deeply sensitive to the United States efforts to keep "them" out.

In a final, all-out effort to obtain approval of NAFTA, the Clinton Administration eagerly considered virtually every complaint and demand from members of Congress for their votes.⁸⁸ Immigration, however, stood on different footing. For example, Congressman Robert Matsui, a key NAFTA supporter in the House of Representatives, aggressively rebuffed efforts to link approval of NAFTA to an immigration side agreement. Matsui argued that the only long-term solution to illegal immigration was economic development in Mexico, a goal of NAFTA.⁸⁹

2. NAFTA's Impact on Illegal Immigration

Although it seems fair to say that a proposed immigration side agreement was given short shrift, there was considerable debate on the impact of NAFTA on illegal immigration from Mexico to the United States.⁹⁰ Some, including former President Gerald Ford,⁹¹ who along with former Presidents Carter and Bush endorsed NAFTA, claimed that, because illegal immigrants come to this country for economic opportunity, the agreement would reduce illegal immigration to the United States in the long run by fostering economic growth in Mexico.⁹² Others questioned that assertion,

⁸⁸ See David S. Cloud, *Administration Pressed to Deal to Win NAFTA Converts*, 51 CONG. Q. 2620 (Oct. 2, 1993); David S. Cloud, *Clinton Turns Up Volume on NAFTA Sales Pitch*, 51 CONG. Q. 2863 (Oct. 23, 1993); see, e.g., David Lauter & Ronald J. Ostrow, *Mexico Prison Deal is Linked to NAFTA Votes*, L.A. TIMES, Nov. 12, 1993, at A1 (reporting that, in order to gain votes in favor of NAFTA, Clinton Administration was attempting to strike deal with Mexico allowing deportation of Mexican nationals serving prison terms). Such concessions did not require that the other nations agree to any changes in the trade accord.

⁸⁹ See John Matthews, *Matsui Critical of Lawmakers' Stances*, SACRAMENTO BEE, Oct. 30, 1993, at A1. Matsui admitted that NAFTA might in the short term increase immigration from Mexico. *Id.*; see also *infra* notes 95-98 and accompanying text (discussing consensus in this regard).

⁹⁰ See *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3 (arguments for and against NAFTA based on alleged impact on immigration).

⁹¹ See Gwen Ifill, *Clinton Recruits 3 Presidents to Promote Trade Pact*, N.Y. TIMES, Sept. 15, 1993, at B12.

⁹² This was the Clinton Administration's party line. See *California Town Hall Meeting with: President Clinton*, FED. NEWS SERV., Oct. 3, 1993, available in LEXIS, Nexis Library, Currnt File (President Clinton); *Hearing of the Senate Finance Comm., North American Free Trade Agreement*, FED. NEWS SERV., Sept. 15,

particularly with respect to the time frame in which the United States might experience a decrease in illegal immigration.⁹³ Some postulated that NAFTA might have a more subtle and speculative positive effect on immigration. By improving relations between the United States and Mexico, future cooperation on restricting illegal immigration might be easier.⁹⁴

1993, available in LEXIS, Nexis Library, Currnt File (Secretary of State Warren Christopher); Sebastian Rotella, *Reno Weighs Border Options*, L.A. TIMES, Oct. 8, 1993, at A3 (Attorney General Janet Reno); Marcus Stern, *INS Nominee Eyes "Balance" on Blockades*, SAN DIEGO UNION-TRIB., Oct. 1, 1993, at A1 (Doris Meissner, nominee for Commissioner of INS); see also *Congress Debates NAFTA as House Panel Considers Immigration Implications*, 70 INTERPRETER RELEASES 1472 (1993) (stating that, as congressional vote on NAFTA neared, Clinton Administration officials testified before Congress that NAFTA represented best hope for reducing illegal immigration from Mexico). Others agreed with this view as well. See, e.g., Daniel B. Wood, *Confronting California's Immigration Issue*, CHRISTIAN SCI. MONITOR, Oct. 4, 1993, at 12 (stating position of California Governor Pete Wilson and Mexican President Carlos Salinas).

⁹³ See PEROT, *supra* note 55, at 72, 92 (arguing initially that NAFTA has potential to increase illegal immigration and later stating that "[w]hile no one was watching, U.S. NAFTA negotiators radically revised the nation's immigration laws"); Jorge Castañeda, *Can NAFTA Change Mexico?*, FOREIGN AFF. 66 (Fall 1993) ("Most immigration scholars in [U.S. and Mexico] expect NAFTA and the economic policies it will encourage in Mexico to stimulate migratory flows in the short run, as displaced peasants and laid-off employees take advantage of large wage differentials and head north."); Christopher Farrell, *Shut Out Immigrants and Trade May Suffer*, BUS. WK., July 5, 1993, at 82 (suggesting that NAFTA will increase legal and illegal immigration to United States from Mexico).

One contributor to this Symposium characterizes the potential illegal immigration consequences of NAFTA as a "criminal justice" issue. See Laurie L. Levenson, *NAFTA: A Criminal Justice Impact Report*, 27 U.C. DAVIS L. REV. 843, 855-56 (1994). Illegal immigration, however, primarily raises civil, not criminal, issues revolving around deportation and potential relief from deportation. Such issues appear to have little direct relation to the criminal justice system. This is not to contend that undocumented persons never commit crimes in this country. That criminal justice issue, however, is not discussed by Professor Levenson. Assuming that NAFTA does increase illegal immigration in the short term and may raise general questions about law enforcement, it remains uncertain how that alone creates a criminal justice problem of any sort. See *infra* notes 95-98 and accompanying text.

⁹⁴ See *Media Availability with Attorney General Janet Reno*, FED. NEWS SERV., Nov. 1, 1993, available in LEXIS, Nexis Library, Currnt File (comments of Attorney General Reno and Michael S. Teitelbaum, Vice-Chair, U.S. Commission on Immigration Reform); see also Zamora, *supra* note 59, at 392-93 (referring to NAFTA negotiations and emphasizing that "the United States and Mexico are involved in negotiating a *relationship*" and that "NAFTA

A consensus emerged that, even if NAFTA might decrease migration pressures in Mexico in the long run, increased migration pressures would exist to some degree in the short term.⁹⁵ For example, Doris Meissner, later to become Commissioner of the INS, opined that NAFTA might not decrease short-term pressures on illegal immigration from Mexico.⁹⁶ An increase in illegal immigration in the near future was a possibility because of the potential displacement of small farmers in Mexico as a consequence of the elimination of crop subsidies under NAFTA.⁹⁷ Others responded that the possible short-run migration pressures were overstated and, in any

negotiations have much more to do with U.S.-Mexican relations than with international trade") (emphasis in original).

⁹⁵ See, e.g., GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 26 (rev. ed. 1993) (reconciling various estimates about NAFTA's impact on immigration and concluding that "in the short run, NAFTA may marginally increase the gross number of illegal immigrants" while "in the longer run, NAFTA should help create the level of Mexican prosperity that will substantially reduce the gross level of illegal immigration"). Pressures for Mexican immigration, however, in the near term may increase with or without NAFTA. See *id.* One knowledgeable researcher concludes that, "[b]etween 1994 and 2010, there will be less Mexico-to-U.S. migration with NAFTA than without NAFTA." PHILIP L. MARTIN, *TRADE AND MIGRATION: NAFTA AND AGRICULTURE* 135 (1993).

⁹⁶ See Doris Meissner, *Managing Migrations*, 86 *FOREIGN POL'Y* 66, 82 (1992) (arguing that improved wages and living standards in Mexico through trade agreement is way to decrease migration from Mexico to United States but, to do so, improvements must be felt throughout Mexican society). As INS Commissioner, Meissner again emphasized that, despite short term migration pressures that might increase to an even greater degree without NAFTA, "a strong economy to our South — the promise of NAFTA — is the only real and sustainable way to reduce migration pressures." Meissner Testimony, *supra* note 61, at 13.

⁹⁷ See SHERMAN ROBINSON ET AL., *AGRICULTURAL POLICIES AND MIGRATION IN A U.S.-MEXICO FREE TRADE AREA: A COMPUTABLE GENERAL EQUILIBRIUM ANALYSIS* 31 (1991) (concluding that "undue haste" in introducing free trade in agriculture would increase rural out-migration in Mexico and immigration to United States). Concern regarding NAFTA's impact on the indigenous population in Mexico, particularly the economic impact on corn farmers, may have contributed to the discontent resulting in the rebellion in Chiapas, Mexico, that commenced on January 1, 1994, the day that NAFTA went into effect. See Tod Robberson, *How Mexico Brewed a Rebellion*, *WASH. POST*, Jan. 9, 1994, at A31; see also Tim Golden, *Mexican Troops Battling Rebels; Toll at Least 57*, *N.Y. TIMES*, Jan. 2, 1994, at A1 (quoting guerrilla leader as stating that NAFTA "is a death certificate for the Indian peoples of Mexico").

event, the trade agreement remained the only durable solution to illegal immigration from Mexico.⁹⁸

NAFTA opponents and proponents agree that the trade agreement will have *some*, even if somewhat uncertain, immigration consequences. The proper question thus appears to be what those consequences might be.

3. Summary

Though it is silent on migration issues among its member nations, NAFTA and immigration undeniably are related. At least in theory, a trade agreement addressing migration between Canada, Mexico, and the United States might well make the most sense. As a practical matter, domestic politics in the United States and Mexico made such an agreement impossible.

III. THE FALSE DICHOTOMY: SEPARATION OF THE FLOW OF TRADE FROM THE FLOW OF PEOPLE IN NAFTA

In the formulation of NAFTA, the flow of capital between the member nations was discussed in isolation of the flow of people between the member nations. It is not entirely clear why the separation is appropriate. True believers in the free market presumably would prefer the free flow of both labor and trade.⁹⁹ Historically, however, protectionists have opposed the free flow of both for parochial economic reasons.¹⁰⁰

This section first will explore the trade/migration dichotomy in light of U.S.-Mexico relations. It then will compare NAFTA's treatment of labor migration issues with that of the European Union and the development of immigration practices among European Union nations. Finally, it will consider how NAFTA might have addressed questions of migration between the three nations and speculate how the trade agreement indirectly might affect the future of migration to the United States from Mexico.

⁹⁸ See WAYNE A. CORNELIUS & PHILIP L. MARTIN, *THE UNCERTAIN CONNECTION: FREE TRADE AND MEXICO-U.S. MIGRATION* (1993) (concluding that claim that NAFTA would increase migration from Mexico was overstated).

⁹⁹ See, e.g., Malcolm S. Forbes, Jr., *Fact and Comment*, FORBES, Sept. 13, 1993, at 25; Michael Ruby, *And Now, The Bill of Lading*, U.S. NEWS & WORLD REP., Sept. 13, 1993, at 83.

¹⁰⁰ See *supra* notes 10, 50-52, 71 and accompanying text (noting organized labor's positions on trade and immigration).

A. *The False Dichotomy*

Labor migration and capital flow are related to international trade.¹⁰¹ Labor and capital obviously are necessary ingredients to economic development. At the microeconomic level, individual decisions to migrate often are influenced by economic considerations.¹⁰² All of these propositions are especially true when discussing the United States and Mexico.¹⁰³ As two observers noted,

[I]n the absence of protectionism, trade among countries with different factor endowments is a substitute for migration. In other words, if countries with an abundance of labor can specialize in the production of labor-intensive goods, there need not be labor migration to more developed countries. . . . [U]nrestricted trade and international labor migration are substitutes. . . . It follows that, by eliminating protectionism in North America and by increasing

¹⁰¹ See 1986 ECONOMIC REPORT, *supra* note 50, at 213 (“The movement of people between countries links national economies. Like international trade . . . , international migration connects domestic and international markets. The free flow of resources in response to market signals promotes efficiency and produces economic gains for both producers and consumers. The migration of labor, both domestically and internationally, represents such a flow of productive resources.”); see also Martin & Taylor, *supra* note 64, at 69-70 (noting economic relationship between migration and trade flows in relations between United States and Mexico); cf. VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST 225-55 (1992) (arguing that United States should synchronize immigration policy with nation’s economic circumstances). As then-Secretary of Labor Ray Marshall remarked,

[O]ften people . . . don’t look at the symmetry between international trade problems and international immigration. They are part and parcel of the same process and if you don’t look at them in context, then you’re likely to make the same mistakes a lot of people make when they only [think] about domestic affairs and try to isolate domestic concerns from international concerns.

NAT’L COMM’N FOR MANPOWER POL’Y, TRADE AND EMPLOYMENT 326 (1978) (remarks of Secretary of Labor Ray Marshall).

¹⁰² See Everett S. Lee, *A Theory of Migration*, 3 DEMOGRAPHY 47, 49-56 (1966) (analyzing factors contributing to individual migration decisions).

¹⁰³ See Raúl Hinojosa-Ojeda & Sherman Robinson, *Labor Issues in a North American Free Trade Area*, in NORTH AMERICAN FREE TRADE: ASSESSING THE IMPACT, *supra* note 62, at 69, 70 (“Mexican-U.S. interdependence includes the largest trade relation and the largest debtor-creditor relation between any two developed and developing countries, the largest foreign investment flows, the largest in-bond coproduction relations (*maquiladoras*), and the longest contiguous border with the highest levels of border crossings and border commerce, both legal and illegal.”); see also THE CALIFORNIA-MEXICO CONNECTION (Abraham F. Lowenthal & Katrina Burgess eds., 1993) (analyzing many interrelationships between California and Mexico).

foreign investment in Mexico, Mexico's structural adjustment program and NAFTA will help reduce Mexican migration to the United States.¹⁰⁴

Not surprisingly, in light of the interrelationship among labor, trade, and economic development, some have advocated an integrated approach to stemming illegal immigration to the United States from Mexico. The approach would involve trade development, foreign assistance, investment, and multilateral cooperation.¹⁰⁵ The fact that NAFTA failed to treat migration issues between the nations in any sort of comprehensive way suggests that,

¹⁰⁴ Dolores Acevedo & Thomas J. Espenshade, *Implications of a North American Free Trade Agreement for Mexican Migration into the United States*, 18 *POPULATION & DEV. REV.* 729, 730-31 (1992) (emphasis added); see also UNITED STATES COMM'N FOR THE STUDY OF INT'L MIGRATION AND COOPERATIVE ECON. DEV., *UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE* xvi (1990) [hereafter *UNAUTHORIZED MIGRATION*] (report of bipartisan commission created by Congress under the Immigration Reform and Control Act of 1986) ("The issue for many countries is stark; they either export goods and services to create jobs at home, or they export people.").

The relationship between trade and migration with respect to the United States and its neighbors to the south has been encapsulated as follows:

[T]here is an emerging awareness of the mutual interdependence between the United States and countries below our southern border. Increasingly, what happens in Mexico, Central America, and the rest of Latin America is acknowledged to have economic, social, and political consequences for the United States. International economic relations that were once largely limited to flows of goods and services now involve significant international labor migration flows as well. As a consequence, the self-interest of the United States lies in accepting more responsibility for economic development in the Caribbean Basin.

THOMAS J. ESPENSHADE, *PROJECTED IMBALANCES BETWEEN LABOR SUPPLY AND LABOR DEMAND IN THE CARIBBEAN BASIN: IMPLICATIONS FOR FUTURE MIGRATION TO THE UNITED STATES* 55-57 (1988).

For a cogent description of the linkages between trade and migration, see Philip L. Martin, *Migration and Trade: Challenges for the 1990s* 13-16 (Feb. 1994) (paper prepared for World Bank seminar, on file with author); see also MARTIN, *supra* note 95 at 11-12 (summarizing relationship between trade theory and migration consequences).

¹⁰⁵ See *UNAUTHORIZED MIGRATION*, *supra* note 104; see also *DETERMINANTS OF EMIGRATION*, *supra* note 24, at xvi (stating that "most important" research conclusion of series of studies was "that no viable alternative to economic development seems to exist that would significantly reduce undocumented immigration into the United States").

despite the interdependence, the political reality is that capital and labor flows are viewed in distinctly different lights.¹⁰⁶

It seems readily apparent that a majority of the U.S. citizenry is more uncomfortable with open borders with Mexico than it is with free trade with Mexico.¹⁰⁷ A proposal for open immigration borders, for example, would not be taken seriously in the political process. More open trade borders—as NAFTA's ultimate success illustrates—would be. In other words, in today's political climate, the freer flow of trade is in the realm of political possibility in the United States, while freer immigration is not.

Economists, sociologists, anthropologists, political scientists, and the like would feast on any attempt to explain the willingness to allow free trade and the concomitant resistance to free immigration. It undoubtedly tells us something about ethnocentrism, racism, and classism in the United States. It further suggests that persons may fear difference and change brought by new and different people joining the community. It also suggests that factors other than grand economic theory influence political stands.

In concrete terms, why is it that in the United States "open trade" borders are more politically palatable than "open people" borders? Consider briefly a few possibilities. The migration of people into

¹⁰⁶ This is not to suggest that the infusion of capital into a nation is never without objection. Citizens of this nation have at various times registered objections about foreign investment. For example, complaints were made about Arab investment in the United States in the 1970s. See Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091, 1092-93 (1983) (summarizing concern in United States with increasing foreign investment, primarily from Arab nations). Japanese capital in the 1980s also raised public concern. See John Schwartz, *Japan Goes Hollywood*, NEWSWEEK, Oct. 9, 1989, at 62-67. See generally KENNETH C. CROWE, *AMERICA FOR SALE* (1978); EARL H. FRY, *FINANCIAL INVASION OF THE U.S.A.: A THREAT TO AMERICAN SOCIETY?* (1980). Those objections may arise from a desire for power and control over "our" economy. It in a sense mirrors the nativist concern with excessive immigration. See *supra* notes 18-49, *infra* 114-20 and accompanying text; see also *supra* note 63 (discussing Mexico's concern with foreign investment and how it mirrors U.S. concerns with illegal immigration from Mexico).

¹⁰⁷ See generally RITA J. SIMON & SUSAN H. ALEXANDER, *THE AMBIVALENT WELCOME: PRINT MEDIA, PUBLIC OPINION AND IMMIGRATION* (1993) (analyzing fairly consistent negative public opinion about immigration and immigrants). The theoretical debate about open borders therefore is likely to remain precisely that — theoretical. See *OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES* (Mark Gibney ed., 1988); *Symposium on Duties Beyond Borders*, 98 ETHICS 647 (1988).

the United States may raise a number of different concerns than the flow of trade or alienable capital. First, the migration of people may be more permanent than the flow of trade. As the immigration enforcement problems suggest, immigrants, illegal or not, often remain in the United States indefinitely and have a lasting impact on the nation.¹⁰⁸ While the flow of products and capital may be prominent, trade may raise less enduring concerns.

Second, and perhaps more important, foreign capital, though implicating issues of power and control, is less visible to the average citizen than the presence of different types of people. Many of the new immigrants to this nation, legal or not, are viewed—literally and figuratively—as different in terms of race, class, and ethnicity by the majority.¹⁰⁹ Many are from different cultures and speak different languages.¹¹⁰ Citizens may feel uncomfortable with changes, even if only perceived ones, wrought by the new immigrants.¹¹¹

¹⁰⁸ For example, generally speaking, any person born on U.S. soil is a citizen, even if the child of undocumented parents. *See* U.S. CONST. amend. XIV, § 1 (“[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”); *see, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (interpreting language in expansive manner). Thus, U.S.-born children of illegal immigrants are citizens entitled to the same rights, privileges, and obligations as any other citizen.

¹⁰⁹ *See* IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP’T OF JUSTICE, 1991 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 20 (1992) [hereafter INS STATISTICS] (presenting data of immigrants granted lawful permanent residence in the United States in fiscal year 1991: 14 of top 15 nations that sent 77.5% of new immigrants (with nearly 52% from Mexico) to United States were developing nations populated by people of color); *see also* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 865-66 (1993) (summarizing data of changing racial demographics in United States, in large part fueled by recent immigration).

¹¹⁰ For a thoughtful analysis of the enforcement of conformity to the national ideal through language, *see* Perea, *supra* note 21, at 328-50. As Professor Perea observed, “[m]any commentators agree that the cause of the official English movement is the large, and largely unwelcome, immigration of many Hispanics and Southeast Asians during recent decades.” *Id.* at 343-44 (footnote omitted).

¹¹¹ *See, e.g.*, Nathan Glazer, *The Integration of American Immigrants*, 21 LAW & CONTEMP. PROBS. 256, 265-69 (1956); Schuck, *supra* note 28, at 23. Despite the discomfort, the diversity of the new immigrants may bring economic and other advantages to the nation. *See, e.g.*, Hing, *supra* note 109, at 883 (“Since Asia and industrializing nations of Latin America are new areas of economic power and significance, bicultural and multicultural U.S. residents will prove

Nation-states' aversion to labor migration may result from the fear that it will change the "national identity."¹¹² Fear of change brought by different people may be more visible than that brought by the infusion of more fungible capital or products. Even the changes contemplated by NAFTA triggered popular concern in the United States.¹¹³ Still, trade does not raise issues of class, race, and ethnicity as directly and deeply as immigration.

At the risk of oversimplification, consider the differing attitudes of dominant American society toward immigration from Mexico and Canada.¹¹⁴ Immigration from Mexico often is viewed as problematic because of the differences between the dominant culture in the United States and the Mexican peoples. First, many undocumented immigrants from Mexico are poor with limited education. Second, they tend to be of a different color. Finally, their culture is different with a different dominant religion and they speak a language other than English.¹¹⁵ The fact that a significant Mexican-

invaluable as American companies develop private trade agreements and cooperative business ventures with the nations and corporations of those regions.").

¹¹² See, e.g., Kanstroom, *supra* note 18 (analyzing this phenomenon with respect to immigration, asylum, and citizenship law and policy in Germany); see also Schuck, *supra* note 21, at 4 (observing that "[m]ost citizens and elected leaders" share a different view of immigration than economists and that "[t]o the layperson's mind, immigration is not just a welfare-enhancing transfer of resources; it is also an enormous social gamble.").

¹¹³ See Rosenbaum, *supra* note 9 (quoting Senator Bradley, a NAFTA supporter: "Nafta [sic] has become a symbol for other things, . . . a lightning rod for peoples' anxieties about changes in their lives they have no control over."); see also Levenson, *supra* note 93, at 853 (quoting former U.S. Customs Commissioner referring to NAFTA as the "North American Drug Trade Agreement").

¹¹⁴ Unable and unwilling to resist the call of narrative, I must relay a story that highlights this point. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (analyzing use and function of narrative in efforts at racial reform). My father-in-law, a Mexican American citizen whose family has lived in the United States for several generations, and I were watching a television news account criticizing the fact that children born in the United States to undocumented parents are deemed to be citizens. See *supra* note 108 (describing law on citizenship). The focus of the account was entirely on the children of undocumented Mexican citizens. He asked me if I wanted to know what troubled him about news coverage of the "immigration problem." After I answered affirmatively, he said that it always focused on illegal immigration "from the south."

¹¹⁵ See Zamora, *supra* note 59, at 434-55 (analyzing differences between Mexican communitarian, political, and economic cultures with those of the United States); see also LEO R. CHAVEZ, *SHADOWED LIVES* 18-19 (1992)

American population exists in the United States¹¹⁶ seemingly would tend to ameliorate the concern of mainstream United States society with illegal immigration from Mexico. The concern, however, prevails.¹¹⁷ Although previous immigrant generations faced difficulties due to, among other things, class, ethnicity, and language, they eventually assimilated to some extent into dominant society.¹¹⁸ This is not so simple for immigrants of color from nations such as Mexico. Racism in the United States has proven to enjoy a longer half-life than ethnocentrism or discrimination on the basis of social class.¹¹⁹

Immigration from Canada does not raise the same concerns in dominant U.S. society. Canada, as a nation, is closer economically and class-wise to the United States. The popular perception is that Canadians seeking to come to the United States are not poor and uneducated. Most Canadians derive from the same European stock as many Americans. The dominant cultures of the United States and Canada are viewed as more similar. Resistance to Canadian immigration thus is weaker than that to Mexican immigration. Consequently, open borders between the United States and Canada

(referring to categorization of undocumented Mexicans as the "others" of U.S. society with mythic qualities that justify social order).

¹¹⁶ See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 7 (113th ed. 1993) (showing table of population of persons of Hispanic origin in United States approaching 10%).

¹¹⁷ See WAYNE A. CORNELIUS, AMERICA IN THE ERA OF LIMITS: NATIVIST REACTIONS TO THE 'NEW' IMMIGRATION 15 (1982) (discussing public opinion poll showing that Mexican immigration was viewed as having more negative impact on United States than Canadian and Western European immigration). Some data suggests that Latinos share the restrictionist sentiments of the majority of the U.S. population. See RODOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN & CUBAN PERSPECTIVES ON AMERICAN POLITICS 87-89 (1992) (reporting polling results in response to statement whether "there are too many immigrants": 75.2% of Mexicans, 79.4% of Puerto Ricans, and 65.5% of Cubans compared to 73.8% of Anglos strongly agreed or agreed with the statement). However, as a group, less than 1% of Latinos agreed that immigration was the "principal national problem." *Id.* at 100-01.

¹¹⁸ See generally NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT (2d ed. 1970).

¹¹⁹ See generally DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (arguing that racism is permanent part of U.S. society). For works focusing on racism against Chicanos in the United States, see MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST (1979) and RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972).

presumably would be less problematic to the U.S. citizenry than open borders between the United States and Mexico.¹²⁰

As the old saying goes, necessity is the mother of invention. Political exigencies made it necessary to avoid treating immigration on a grand scale in NAFTA. The European Union's experience sheds light on what might have been, and perhaps what might well be.

B. A Brief Comparison: Migration Issues and the European Union

NAFTA and the European Union dealt with migration between the parties to the respective treaties in entirely different ways. The Treaty Establishing the European Economic Community (EEC Treaty)¹²¹ envisioned "the abolition, *as between member states*, of obstacles of freedom to movement for persons, services and capital."¹²² The overall purpose of the EEC Treaty was to "establish[]

¹²⁰ See Martinez, *supra* note 67, at 985 (contrasting increasing militarization of U.S.-Mexico border with "demilitarized, noncoercive" atmosphere of U.S.-Canada border).

¹²¹ Treaty Establishing the European Economic Community (EEC Treaty), as modified by the Single European Act, 1987 O.J. (L169) 1. See generally J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (analyzing development of European Economic Community). The twelve members of the European Union are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom.

¹²² EEC Treaty, *supra* note 121, at art. 3c (emphasis added); see Ricou Heaton, Note, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND J. TRANS. L. 643 (1992) (describing free movement provisions of EEC Treaty); see also Martin & Taylor, *supra* note 64, at 67 ("Economic integration within the [EEC] is based on the idea that national borders should be irrelevant in economic transactions, including the economic decision about where to work or find employees."); Bernd Baron Von Maydell, *The Impact of the EEC on Labor Law*, 68 CHI-KENT L. REV. 1401, 1404 (1993) ("The treaty establishing the European Communities does not only contain economic principles; it also lays down the principle of freedom of movement.").

Because the free movement provisions apply only to citizens of member states, problems of migration by nationals of nonmember states, including the availability of asylum to such persons, have provoked considerable discussion. See Kay Hailbronner & Jörg Polakiewicz, *Non-EC Nationals in the European Community: The Need for a Coordinated Approach*, 3 DUKE J. COMP. & INT'L L. 49 (1992); *On the Borderline*, ECONOMIST, Nov. 23, 1993, at 58. The Schengen Agreement and Convention abolishes internal border checks of citizens of European Union nations while promising to limit illegal immigration from nonmember nations. See Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, Agreement June 14, 1985, Convention June 19, 1990, 30 I.L.M.

the internal market . . . [that] shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this treaty."¹²³ Freedom of movement is designed to further "a harmonious development of economic activities."¹²⁴ The EEC Treaty thus afforded freedom of movement to European Union "nationals as economic actors, not as citizens per se."¹²⁵

Any hopes of strictly limiting migration within the European Union to "economic actors" proved to be easier said than done. The European Court of Justice, as well as European Union directives and regulations, significantly expanded the class of persons to whom the free movement rules apply.¹²⁶ The European Union's evolution has resulted in the further opening of the borders between member nations.¹²⁷ Nonetheless, those who predicted

68, at tit. I, arts. 17, 32; see also T.C. HARTLEY, *EEC IMMIGRATION LAW* (1978) (summarizing EEC immigration law before Schengen Agreement). There has been growing pressure in the European Union generally to limit migration from nonmember nations. See International Developments, *Is the Boat Too Full For a Few More? Refugees' Dreams Deferred as Germany Reforms an Exploited Asylum Opportunity*, 7 GEO. IMMIGR. L.J. 633 (1993) (describing Germany's new restrictions on asylum and desire of some European Union nations to limit immigration from non-European Union nations); Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the 'Euro-solution' to the German Immigration Dilemma*, 16 B.C. INT'L & COMP. L. REV. 201, 209-12 (1993) (same).

Serious concerns not addressed here would be raised if NAFTA's signatories pursued the European Union's practice of returning asylum applicants who have passed through the territory of treaty partners. See Neuman, *supra* note 18, at 505; Helton, *supra* note 61; see also James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719 (1993) (expressing concern that "impending termination of immigration controls at intra-Community borders [have resulted in] demand[s for] enhanced security at the Community's external frontiers" with negative impact on member nations' commitment to refugee protection). The United States and Canada are discussing a treaty that would adopt a practice similar to that of the European Union in this regard.

¹²³ EEC Treaty, *supra* note 121, at art. 8A.

¹²⁴ *Id.* at art. 2.

¹²⁵ Kanstroom, *supra* note 122, at 204 (citation omitted).

¹²⁶ See *id.* at 204-09 (summarizing development of law, including findings by European Court of Justice that "worker" need not be employed full time and may include university student working part time, or person hoping to work or wishing or intending to work).

¹²⁷ See *id.* at 203 (referring to "consistent evolution of the concept of free movement from a primarily instrumentalist, economic idea to a much more expansive general right").

that its free movement provisions would result in large-scale emigration from member countries with floundering economies were proven wrong.¹²⁸ This is true despite the existence of unemployment and wage disparities among the European Union's member nations.¹²⁹

NAFTA fails to include any free movement provision even remotely comparable to that of the EEC Treaty.¹³⁰ Its provisions therefore are not as likely to foster easy migration between member states similar to that in the European Union. Indeed, the EEC Treaty's goal to create an integrated community of nations differed very much from NAFTA's underlying philosophy of free trade between individual nation states. Even so, NAFTA, by loosening trade restrictions and fostering the flow of commerce, may result in the pressure to open the door a crack to an increased flow of labor between the United States, Mexico, and Canada.¹³¹ As the Euro-

¹²⁸ See CORNELIUS & MARTIN, *supra* note 98, at 27-29. This may in part be the result of provisions of the EEC Treaty, which allow member states to limit migration on the grounds of "public policy, public security or public health." EEC Treaty, *supra* note 121, at art. 48(3). This has been interpreted to allow states to exclude citizens of member states who lack health insurance and are unable to establish that they have sufficient resources to avoid burdening the state's social services system. See Kanstroom, *supra* note 122, at 208-09.

¹²⁹ See Martin & Taylor, *supra* note 64, at 68 (recognizing this fact and stating that European Union "experience suggests that a NAFTA that stimulates job growth in Mexico and causes wages to rise faster in Mexico than in the United States can drastically reduce migration for employment long before job opportunities and wages are equalized").

¹³⁰ See *supra* notes 72-74 and accompanying text (analyzing NAFTA's provisions regarding immigration); see also Elizabeth F. Kraus, Note, *The Systemic Effects of Economic Trade Zones on Labor Migration: The North American Free Trade Agreement and the Lessons of the European Community*, 7 GEO. IMMIGR. L.J. 3, 323 (1993) (comparing NAFTA and EEC Treaty on treatment of labor migration and related issues).

¹³¹ See Hathaway, *supra* note 122, at 734 (concluding that one lesson from European Union experience is "that increasing levels of economic integration lead logically towards a policy of generalized freedom of movement within the economic zone"); see also Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 919 (1992) (discussing weak central regional institutions created by NAFTA compared to those of European Union and speculating that NAFTA "should, and perhaps will inevitably, evolve toward the [European Union] structure as the inadequacies of the more limited structures now envisioned become apparent."); MARTIN, *supra* note 95, at 32 (observing uncertainty whether NAFTA will result in comparable migration consequences as European experience). Cf. JOHN HIGHAM, SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA 30 (1975) ("Any restrictive

pean Union experience suggests, such a development would not necessarily result in a mass migration from Mexico to the United States.

Any lessons drawn from the European Union experience, the nuances of which I have not adequately covered here, should be viewed cautiously. Further study of the European Union's free movement provisions is warranted. Attention might be directed usefully at the treatment of migration issues in other trade accords, particularly those involving neighboring nations, and the indirect effects of other trade agreements on migration patterns, exercises well beyond the scope of this Article.

C. *NAFTA Revisited*

The Clinton Administration, after cautiously embracing a free trade agreement negotiated by the Bush Administration, unequivocally enjoyed a significant political victory when the U.S. Congress approved NAFTA. Still, let me make two distinct observations on the costs of omitting comprehensive migration provisions from NAFTA. First, if only superficial attempts had been made to address the perceived problem with illegal immigration to the United States, NAFTA might have suffered less resistance in the political arena. Second, the advantages of expressly planning a full economic future for the United States, Canada, and Mexico by dealing with migration issues were lost as a result of political exigencies.¹³²

1. Political Viability

Although ultimately ratified by Congress, NAFTA's passage might have been eased if illegal immigration from Mexico had been addressed to some degree. For example, if the Mexican government at least agreed not to encourage migration by its citizens to the United States, this might have satisfied some restrictionist groups, which tend to be more politically conservative and thus

[immigration] policy . . . inevitably entails discriminations; and a system of discrimination that does not offend the democratic conscience has proved as yet unattainable.”).

¹³² See Meissner, *supra* note 96, at 82 (“For the United States and Mexico to treat migration separately from a free trade regime is to miss a historic opportunity. Illegal Mexican migration is a problem for both countries that can ultimately be solved only by improved wages and living standards in Mexico. A free-trade agreement should be designed to produce that result over time.”).

more inclined to support a free trade treaty. Although it seems highly unlikely, organized labor might have been less resistant to, even if not supportive of, the trade pact because of its interest in immigration's perceived effects on the labor supply (and thus on wages).

In light of the bipartisan nature of the call for immigration reform,¹³³ more far-reaching restrictionist measures might have garnered further congressional support for NAFTA. Of course, consideration need be given to the fact that more extreme enforcement measures likely would lessen the likelihood for Mexican approval.¹³⁴ In any event, at least appearances of restricting immigration might have improved the political viability of NAFTA and, in light of the restrictionist fervor in 1993, probably would have made the fight for congressional ratification easier than it proved to be.

In a completely different vein, the Clinton Administration might have packaged NAFTA in a way that would have appealed to restrictionists. By carving out the power of member nations to pursue their respective border security policies,¹³⁵ NAFTA effectively sanctioned U.S. authority to pursue restrictionist policies, as it has done increasingly in recent years. The United States, if it decides to play to domestic restrictionist themes, remains entirely free under NAFTA to pursue stringent enforcement measures to the detriment of poor Mexican citizens seeking to join family or work in the United States, if not both. This, of course, gives some credence to the claims that NAFTA primarily benefited economic elites in Mexico.¹³⁶ Reservation of the enforcement power by the United States in NAFTA might have been emphasized in the political debate.

This political tack certainly is not one that I advocate or endorse. It would play on restrictionist fears that hardly are commendable. The Clinton administration therefore took the high road by emphasizing the long-term potential for NAFTA to reduce illegal immigration from Mexico.¹³⁷

Nonetheless, let us not ignore the fact that a NAFTA failing to treat migration issues may have a long-run impact on immigration

¹³³ See *supra* notes 18-49 and accompanying text.

¹³⁴ See *supra* notes 79-81 and accompanying text.

¹³⁵ See *supra* note 74 and accompanying text.

¹³⁶ For an example of criticism of this tenor, see Chuahtémoc Cárdenas, *Free Trade, the Environment, and the Need for a Social Charter*, 15 *LOV. L.A. INT'L & COMP. L.J.* 71 (1992).

¹³⁷ See *supra* note 92 (citing authorities).

politics in the United States. It indirectly reinforced, confirmed, and legitimated the popular conception that easing restrictions on immigration from Mexico is unacceptable and indeed unspeakable.¹³⁸ “Those Mexicans,” along with bringing assorted economic and social ills, simply are too poor, too uneducated, and too “foreign” to be allowed to come here.¹³⁹ If “we” do not watch out, they will overrun “us.” Indeed, the ignorance of migration as an issue in NAFTA is entirely consistent with the view that Mexican citizens, for reasons of race, class, ethnicity, and perhaps sheer numbers, are unworthy of joining the United States community.

2. Regional Economic Development

This Article does not join the restrictionist view that NAFTA should have included provisions limiting migration between the member nations, or that the powers-that-be should have emphasized the fact that NAFTA ensures the sovereign prerogative to enforce border security. Rather, the point that I hope to emphasize is that, at least with respect to the United States and Mexico, trade/capital issues are tied to migration issues. Such issues therefore logically would be expected to be addressed in a comprehensive trade accord between those nations. As history teaches, political realities have not always permitted the United States to adopt the most sensible immigration and trade policies.¹⁴⁰ The current debate about NAFTA and immigration appears to be simply the latest example.

Free market principles suggest that a restrictionist NAFTA allowing member states to make every effort to curtail illegal immigration into their respective territories may not represent sound economic policy. As the European Union recognized, free movement of persons, services, and capital as factors of production further economic aims. It surely is anomalous to avoid discussing labor migration in a trade agreement when pre-existing labor migration between the nations has been so substantial for so long a period of time, when the issue has been such a source of diplomatic tension among the nations, when the migration results from eco-

¹³⁸ Moreover, the status quo—migration of undocumented workers with little bargaining power—may benefit U.S. business interests. See generally Alejandro Alvarez Béjar, *Industrial Restructuring and the Role of Mexican Labor in NAFTA*, 27 U.C. DAVIS L. REV. 897 (1994).

¹³⁹ See *supra* notes 114-20 and accompanying text.

¹⁴⁰ See, e.g., ALEINIKOFF & MARTIN, *supra* note 38, at 1-5 (discussing Chinese Exclusion Acts in late 1800s); *supra* note 8 (citing authority referring to acrimonious debate about Smoot-Hawley trade legislation).

conomic disparities between the nations, and when the migration has unquestionable economic consequences for both nations. Moreover, as the European Union example suggests, the treatment of labor migration issues in a trade agreement may simply be a concession to the inevitable relaxation of immigration barriers between member nations, *at least when the trade partners are contiguous nations*. At some point, freer immigration from Mexico to the United States may result from similar pressures. Freer trade, particularly in the short term, seems most likely to encourage migration as the market readjusts.

When dealing with three neighboring nations, a free flow of labor between them might well make the most economic sense. From an economic perspective, there is little difference between barriers to labor migration and trade barriers. As we have seen, however, migration and trade between the United States and Mexico are viewed in distinctly different lights because people are viewed differently than goods and capital. United States policymakers currently are unwilling to confront the reality that it may not be possible to make the southern border impermeable in order to keep all "outsiders" (i.e., Mexicans) out.¹⁴¹ The large undocumented population in this country suggests that this may well be the case.¹⁴²

Freer labor migration among the three parties to NAFTA may well represent sounder policy. In any event, to the alarm of immigration restrictionists, a side effect of NAFTA could be a weakening of the migration barriers between the nations. Tensions between free trade and closed borders may cause pressures for freer immigration into the United States from Mexico. Any such development, however, will be moderated by the fact that the trade agreement implicitly conceded that Mexicans are not welcome in the United States, a proposition that has become deeply embedded in the American psyche.

CONCLUSION

In recent years, the focal point of diplomatic tension between the United States and Mexico often has been illegal immigration from Mexico to the United States. However, NAFTA, the most signifi-

¹⁴¹ See CORNELIUS, *supra* note 117 (analyzing limited ability of United States to limit illegal immigration from Mexico).

¹⁴² See INS STATISTICS, *supra* note 109, at 169 (estimating that, in 1987, between four and five million "illegal aliens" resided in United States).

cant agreement between the two nations in decades, studiously avoided this most difficult question. Political realities, domestic in nature, simply made it impossible to take advantage of the historic opportunity to address migration issues that had troubled the nations for much of the twentieth century. From the U.S. perspective, any agreement on the subject would have a restrictionist flavor necessary to placate domestic pressures. These concessions probably would have been unacceptable to Mexico in light of its countervailing domestic pressures.

One may only speculate about what the post-NAFTA future holds with respect to migration between the United States and Mexico. If the experience of the European Union provides any guidance, NAFTA may have the unintended effect of breaking down the barriers to migration between the nations without any mass migrations. This seems unlikely, however, unless there is significant economic growth in Mexico.

As President Clinton learned and history teaches, it may be difficult to convince a domestic audience that changes should be made for the long-run common good, even though some may suffer in the short term. This was a difficult task with respect to obtaining approval for a NAFTA dealing almost singularly with core trade issues. Deeply ingrained cultural and other values in the American populace made domestic acceptance of a freer flow of people from Mexico much more problematic.

In conclusion, the United States and Mexico missed an important window of opportunity to address an issue that has troubled relations between them for many years. Rather than deal directly with migration questions in hopes of making a coherent plan for the future, the nations buried their heads in the proverbial sand and hoped that matters will improve. Only time will tell whether this was the correct tack to take.