

OPEN BORDERS?

Kevin R. Johnson^{*}

U.S. immigration law is premised on the fundamental idea that it is permissible, desirable, and necessary to restrict immigration into the United States and to treat borders as a barrier to entry rather than a port of entry. In this Article, Kevin Johnson seeks to add to the scholarly dialogue on immigration law by considering the possible reimagination of the meaning and significance of the international border. Specifically, Professor Johnson attempts to articulate arguments for eliminating the border as a legal construct that impedes the movement of people into the United States. In making a case for the consideration of more open borders, this Article calls for the study of a potentially radical change in immigration law. The argument obviously runs counter to the historical restriction of immigration, as well as the wave of border fortification that marked the 1990s and increased dramatically in the wake of the tragic events of September 11, 2001. To this point, politicians, activists, and scholars have not seriously considered opening the borders to all comers; few theorists question the underlying premise that a nation-state has the sovereign power to enact immigration restrictions or that it might exercise that power to admit all persons who seek entry into the country. Similarly, legal scholarship generally treats closed borders as the assumed state of immigration law, with the law facilitating the efficient, fair, and rational administration of a comprehensive system of immigration controls; put differently, legal scholarship ordinarily offers ideas on improving this system, rather than on questioning its foundational premises. Part I of this Article contrasts the

^{*} Associate Dean for Academic Affairs, University of California at Davis, Professor of Law and Chicana/o Studies; Director, Chicana/o Studies Program (2000–2001); A.B., University of California, Berkeley; J.D., Harvard University. This Article was prepared for the *UCLA Law Review's* Symposium "Law and the Border: Examining the Frontier Between the United States and Mexico" in January 2003. Thanks to Aimée Gross and Jennifer Walwyn for organizing the symposium and inviting me to participate. Richard Delgado, Steve Legomsky, Thomas Wuil Joo, Miroslava Chavez-Garcia, Joel C. Dobris, Victor C. Roméro, Rob Correales, Jack Ayer, Rachel F. Moran, Peter Margulies, Holly Doremus, Diane Amann, and Michael Scaperlanda offered critical, yet helpful, comments on a draft of this Article. The comments of Alex Aleinikoff, Chris Cameron, George Martínez, Rachel F. Moran, and Mary Romero at the live symposium helped my thinking about the issues discussed in the Article. Conversations with George Martínez at the outset of this project helped me to frame my arguments. The general subject of open borders was one of the issues discussed in a roundtable discussion at the Immigration Law Teachers Workshop in May 2002 at Loyola-New Orleans School of Law; although circumstances prevented me from attending the workshop, my thinking on this Article benefited from the written submissions of the roundtable participants (David Abraham, Daniel Kanstroom, David A. Martin, and Leti Volpp) distributed before the conference. Thanks to John D. Ayer, who suggested the topic of this Article to me years ago, and Joel C. Dobris, who for years has sent me copies of immigration articles from a plethora of eclectic sources. Thanks also to Dean Rex Perschbacher for his support of my scholarship and other professional endeavors. Cerissa Salazar Parreñas provided valuable research and editorial assistance.

views of political theorists on open borders. Part II studies the moral, economic, and policy arguments for open borders, revealing the difficulty in squaring immigration restrictions with the commitment of liberal theory to individual rights. This section further suggests the possible move toward more open borders, with regional integration and more open labor migration akin to that which has evolved in the European Union possibly serving as a step toward broader change.

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INTRODUCTION

From racial classifications in affirmative action programs¹ to the distinction between sales and leases in commercial transactions,² and the public/private distinction central to constitutional law,³ law experiences great difficulty in attempting to demarcate and enforce clear boundaries between legal categories. Border theorists maintain that such uncertainty demonstrates the inherent inability to establish hard-and-fast lines between socially constructed categories.⁴ Although the reliance on geography makes the task of constructing borders between nations easier in certain respects, the meaning attached to borders remains in flux and under stress, given the globalization of the world economy, technological change, and changing conceptions of nation-states at the dawn of the new millennium. Although frequently overlooked, "[b]orders are not inherently significant, they are significant because we attach meaning to them. We can change the significance of borders without changing their location by changing what they signify—what comes along with them."⁵

Throughout world history, international borders have been subject to interpretation, debate, and transformation for reasons as varied as love and war, and feast and famine. Defined by law, borders between nations unquestionably are legal and social constructs.⁶ The same holds true for other sorts of political

1. See, e.g., Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (analyzing the impacts of the "one drop" rule of racial identity for African Americans); see also Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (considering the racial ambiguity of Latina/os of mixed ancestry). See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994) (articulating a theory of the social construction of "races" in the United States); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (analyzing the social and legal construction of race). For a current analysis of issues of the social construction of race, gender, and disability, see Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 159 (Francisco Valdes et al. eds., 2002).

2. See John D. Ayer, *On the Vacuity of the Sale/Lease Distinction*, 68 IOWA L. REV. 667 (1983); see also Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP. PROB. & TR. J. 255 (1997) (discussing the distinction between principal and income in investment theory).

3. See generally Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (collecting articles analyzing the distinction and its significance).

4. See GLORIA ANZALDUA, *BORDERLANDS: LA FRONTERA: THE NEW MESTIZA* (1987); RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1989); *BORDER THEORY: THE LIMITS OF CULTURAL POLITICS* (Scott Michaelsen & David E. Johnson eds., 1997).

5. Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1194 (1996).

6. See Barry A. Feinstein & Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 4–15 (2000) (exploring the formation of borders between nations).

boundaries within the United States, such as those defining states, municipalities, and congressional districts.⁷ For purposes of immigration law, international borders must necessarily be defined in order to determine what imaginary line must be crossed to constitute immigration into a nation-state.⁸

U.S. immigration law is founded on the idea that it is permissible, desirable, and necessary to restrict immigration into the United States and to treat a border as a barrier to entry rather than as a port of entry. Seeking to reimagine the meaning and significance of the international border, this Article attempts to articulate arguments for eliminating the border as a legal construct that impedes the movement of people into this country. In making a case for open borders, this Article calls for consideration of no less than a revolutionary change in immigration law. This argument runs counter to the wave of border fortification that marked the 1990s and increased dramatically with the antiterrorism measures taken in the wake of the tragic events of September 11, 2001.⁹

Any serious mention of the taboo subject of "open borders" long has been the political kiss of death for serious immigration reformers.¹⁰ Politicians do not consider open borders a viable policy option, presumably because of the public's seemingly natural predisposition, particularly in times of social stress, toward restrictionist measures. Immigration law scholars ordinarily avoid discussing open borders without much of an explanation; alternatively, they brush off the possibility as hopelessly impractical.¹¹ Needless to say, arguments for opening the borders to all migrants would face stubborn, probably vociferous, resistance. Legitimate fears of the various possible adverse social, economic, and political impacts on U.S. society would be invoked. In addition, nativism and racism, a strong undercurrent to this country's immigration history, likely would infect the debate as well.

7. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

8. See Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 205 (2002) ("When we think of borders as barriers to immigration, we picture the imaginary lines separating the United States from Canada and Mexico. Perhaps we think of physical signs such as fences or border patrol check-points."); see also Lucie E. White, *The Power Beyond Borders*, 70 MISS. L.J. 865 (2001) (comparing the use of force by the U.S. government to enforce borders to other "borders" between people created by U.S. law).

9. See *infra* text accompanying notes 46–48.

10. See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 571 (1996). I recognize that the use of the phrase "open borders" tends to end the debate over the minimization of border controls and that a change in rhetoric could help persuade others. Cf. Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11 (2000) (arguing for a new conception of "nature" for consideration in environmental protection). Nonetheless, its rhetorical force leads me to employ the phrase in this Article.

11. See *infra* text accompanying notes 20–23.

At the same time, however, policymakers readily accept without serious question the idea that the United States can restrict immigration and assume that it is the unfettered right of every nation-state; policymakers often support immigration controls without consideration of whether the enforcement of immigration restrictions is in fact possible.¹² Immigration law scholars, generally speaking, fail to question whether restrictions on immigration are socially desirable or to consider whether increased border enforcement can effectively reduce undocumented immigration. These underexamined assumptions are simply accepted as the starting point of analysis for any system of immigration law and policy.

Classical immigration law provides a ready ally to immigration controls. The plenary power doctrine, the current vitality of which is under debate,¹³ unquestionably has been a longtime fixture of immigration law. It historically has immunized from judicial review Congress's judgments about which noncitizens to admit and which to exclude from the shores of the United States.¹⁴ Founded on notions of the raw sovereignty of the nation-state, plenary power as a statement that Congress has virtually unfettered discretion to exclude immigrants effectively represents the flipside of open borders.¹⁵

12. See *infra* text accompanying notes 20–23.

13. Compare Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (contending that the latest Supreme Court decision requires revisiting the plenary power doctrine), and Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (pointing to signs of the plenary power doctrine's demise), and Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (questioning the existence of the plenary power doctrine), with Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) [hereinafter Chin, *Segregation's Last Stronghold*] (advocating for the elimination of the plenary power doctrine), and Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (disputing the contention of the plenary power doctrine's demise).

14. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (refusing to disturb gender preferences in immigration admission criteria, and noting that "[t]his Court has repeatedly held that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of immigrants") (citations and internal quotation marks omitted); *Mathews v. Diaz*, 426 U.S. 67, 80–81 (1976) (refusing to invalidate Congress's decision to deny federal benefits to noncitizens); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (rejecting a constitutional challenge to racial discrimination in the immigration laws); see also *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding gender discrimination in a provision of the immigration laws); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding that courts lacked authority to review claims of selective enforcement of the immigration laws against Arab and Muslim noncitizens); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (finding that the President's policy of interdicting Haitians fleeing political violence on the high seas and returning them to Haiti, without hearing asylum and other claims, did not violate domestic or international law).

15. See Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. (forthcoming 2004).

Under a strict plenary power regime, the U.S. government may act as if it is in a state of nature without legal constraints in a modern "survival of the fittest" world.¹⁶

Although plenary power criticisms are many,¹⁷ open border justifications in immigration scholarship are relatively few.¹⁸ Indeed, most plenary power critics fervently deny the claim that they advocate opening the country's borders.¹⁹ Rather, they generally only advocate extending basic constitutional principles to the admission criteria—a sensible conclusion assuming the continued existence of migration controls.

Consider a few examples of the shunning of open borders. In criticizing the plenary power doctrine, Louis Henkin hastened to add that "[d]oubtless, . . . our society [is] not necessarily open to all comers at all times."²⁰ Although advocating legal protection of the rights of immigrants in the United States, Owen Fiss emphasized that he does not "question[] the validity of laws regulating the admission of immigrants to this country My point is not to subvert the admission process or otherwise open the borders"²¹ Frederick Whelan observed that the

16. See George A. Martínez, Immigration and the "State of Nature" (Mar. 2002) (unpublished manuscript, on file with author). As is the case in immigration law, the U.S. Supreme Court has afforded the federal government "plenary power" over the rights of native people and U.S. territories. See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP* (2002) (analyzing the Supreme Court's finding that the federal government has "plenary power" over immigration, Indian tribes, and territories); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (same); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002) (same).

17. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

18. See *infra* Part I.

19. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1475 & 1475 n.277 (1997) ("[O]ne would expect liberals to support the principle of open borders . . . and yet they shy from the proposition.") (footnote citing, *inter alia*, JOHN RAWLS, *POLITICAL LIBERALISM* 12 (1993)); see also Bosniak, *supra* note 10, at 559 (stating that "most progressives . . . regard[] the national community as the predominant community of normative concern and presume[] the legitimacy, and perhaps the necessity, of maintaining boundaries around it").

20. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 33 (1985) (emphasis added); see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987) (criticizing the plenary power doctrine and its foundational case, *The Chinese Exclusion Case*); see also R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1266 n.11 (1994) (citing authorities that suggest that open borders are not a viable policy option).

21. Owen Fiss, *The Immigrant as Pariah*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* 3, 16 (Joshua Cohen & Joel Rogers eds., 1999) (emphasis added);

idea of open borders "is contrary to common opinion, and startling in its radicalness. Nearly everyone rejects it, preferring instead to stand on the established principles of state sovereignty"²² Endorsing abrogation of the plenary power doctrine, Frank Wu condemned open borders:

[I]t would be naive verging on utopian to argue for open borders and against the existence of nations. In a world with severe socioeconomic differences among nations, and for a country that has an extensive welfare system, it would be impossible to adopt a policy of allowing entry to every potential immigrant. . . . National sovereignty must be accepted.²³

As these fervent denials suggest, more open migration policies often have been dismissed without serious consideration and analysis. Such policies deserve fuller analysis. Looking beyond borders in considering the treatment of immigrants,²⁴ this Article offers an alternative vision of how the U.S. borders might be reconfigured.

Serious discussion of open borders, the counterpart to the current U.S. emphasis on immigration restriction and tough immigration enforcement, is long overdue. With increasing frequency, observers outside the law have voiced support for the liberal admission of immigrants,²⁵ or at least a regime with fewer immigration restrictions.²⁶ Hoping to extend that discussion more deeply into legal scholarship, this Article sketches the arguments for open borders. Even if unsuccessful in convincing the United States to welcome immigrants, this analysis may allow for a more honest consideration of immigration restrictions and require lawmakers and policymakers to offer explanations for the need for and the practicality of border controls.

see also Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1028 (arguing for more open membership criteria for immigrants while denying "advocat[ing] a constitutionally-based open border/open membership philosophy"). In interpreting the immigration laws, the Supreme Court arguably has behaved as a "gatekeeper" to limit the number of noncitizens entering the country, which is consistent with the view that limits must be imposed on the admission of noncitizens. See Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113 (2002).

22. Frederick G. Whelan, *Citizenship and Freedom of Movement: An Open Admission Policy?*, in OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES 3, 14 (Mark Gibney ed., 1988).

23. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 39 (1996) (emphasis added) (footnote omitted). Many assumptions are built into Professor Wu's observations, including the suggestion that the United States has an "extensive welfare system," which arguably is not the case when its welfare system is compared to those of other Western democracies (especially after welfare reform in 1996, see *infra* text accompanying note 100).

24. See Bosniak, *supra* note 10, at 596–617.

25. This Article employs the terms immigrants and migrants interchangeably.

26. See NIGEL HARRIS, THINKING THE UNTHINKABLE: THE IMMIGRATION MYTH EXPOSED (2002); TERESA HAYTER, OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS (2000); Gene Epstein, *New Melting Pot: How Immigration Helps Keep the U.S. Competitive and Financially Strong*, BARRON'S, Sept. 2, 2002, at 17; *Let the Huddled Masses In*, ECONOMIST, Mar. 31, 2001, at 15; see *infra* text accompanying note 236 (mentioning the *Wall Street Journal's* advocacy of open borders).

Political theorists have found it extremely difficult to justify efforts to close national borders, especially in light of the emphasis on individual rights in liberal theory.²⁷ Closed borders also implicate serious moral concerns regarding the human impacts of border enforcement, such as violence and death, racial discrimination, and the creation of an exploitable labor force, all of which flow from the system of immigration restrictions and enforcement in the modern United States.²⁸

Moreover, closed borders create a foundation for overzealous and publicly condemned enforcement measures, such as the United States' refusal to accept Jewish refugees fleeing the Holocaust during World War II in the name of border enforcement and compliance with immigration laws.²⁹ The suppression of the rights of *noncitizens* also can lead to harsh policies directed toward certain groups of U.S. *citizens*, as demonstrated by the internment of persons of Japanese ancestry, citizens and noncitizens alike, during World War II,³⁰ and by the holding of U.S. citizens without criminal charges or access to an attorney after the horrible events of September 11, 2001.³¹

Economic arguments also militate in favor of free migration between nations.³² International trade principles suggest that labor migration is a net benefit to the national welfare.³³ In an era of globalization, why not allow labor to cross national borders, considering that capital and goods are permitted and encouraged to do so? The nations that comprise the European Union came to this conclusion in allowing labor migration between and among its member nations.³⁴ The North American Free Trade Agreement (NAFTA), however, stopped short of this step, although permitting free trade of goods and services between the United States, Canada, and Mexico.³⁵

Finally, freeing up migration through an open borders policy would recognize that the enforcement of closed borders cannot stifle the strong, perhaps irresistible, economic, social, and political pressures that fuel international

27. See *infra* Part I.

28. See *infra* Part II.A.

29. See *infra* text accompanying notes 183–184.

30. See *Korematsu v. United States*, 323 U.S. 214 (1944). See generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 (1998) (analyzing *Korematsu* and its impacts from many different perspectives).

31. See *Hamdi v. United States*, 316 F.3d 450 (4th Cir. 2002) (addressing the claims of a U.S. citizen labeled an “enemy combatant,” detained indefinitely without charges, and denied access to counsel); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (finding unconstitutional the U.S. government’s denial of access to an attorney for a U.S. citizen who was labeled an “enemy combatant” and held without being charged with a crime).

32. See *infra* Part II.B.

33. See *infra* Part II.B.1.

34. See *infra* Part II.B.3.

35. See *infra* text accompanying notes 285–298.

migration. Consequently, border controls cannot end unlawful migration. As with the United States' failed prohibition of the alcohol trade in the early twentieth century, enforcement of the immigration laws to halt undocumented immigration has proven virtually impossible. To make matters worse, border enforcement shares many of Prohibition's negative side effects: promoting criminal activity, leading to abusive law enforcement practices, contributing to a caseload crisis in the courts, and undermining the legitimacy and moral force of the law.³⁶ Elimination of border controls would offer other policy benefits as well, such as reducing racial discrimination and minimizing international tensions growing out of disputes over border enforcement.³⁷

Two possible objections to open borders deserve immediate attention. Fears abound that the elimination of border controls will open the "floodgates," and that millions of immigrants from around the world will overwhelm the United States.³⁸ Related to this concern is the perception that open borders would mean a loss of national sovereignty.³⁹ Such conceptions betray an attitude of U.S. superiority: that noncitizens the world over could not resist coming to the best of all countries if the opportunity existed. True, free migration might well result in initial population readjustments between nations. However, as one commentator observed:

Most people have no inclination to leave their native soil, no matter how onerous conditions become. Would-be emigrants must fight off the ties of family, the comfort of familiar surroundings, the rootedness in one's culture, the security of being among "one's own," and the power of plain inertia. Conversely, being uprooted carries daunting prospects: adjusting to alien ways, learning a new language, the absence of kith and kin, the sheer uncertainty of it all.⁴⁰

36. See *infra* text accompanying notes 316–358.

37. See *infra* Part II.B.2–5.

38. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 89–90 (1984); Wright, *supra* note 20, at 1273–81.

39. Cf. Peter H. Schuck, *The Message of 187: Facing up to Illegal Immigration*, AM. PROSPECT, Spring 1995, at 85 (stating that the passage of an anti-immigrant initiative in California was "an expression of public frustration with a government and civil society that seem out of touch and out of control") (emphasis added).

40. ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 223 (1987); see MICHAEL WALZER, SPHERES OF JUSTICE 38 (1983); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 270 (1987). But see JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 373–74 (2d ed. 1999) (declining to advocate open admissions because of, among other reasons, the lack of data allowing for an accurate estimate on the resulting flow of immigrants to the United States). Because it is difficult to estimate the migration impacts of a move to open borders in modern times, there unquestionably is a risk in moving to a system of open entry. A transitional program might ease the adjustment and minimize the risks of public disorder. However, past experience with virtually open borders in this country suggests that mass migrations will not necessarily follow. See *infra* text accompanying notes 103–109.

Consistent with this view, free movement *within* the United States generally has not led to mass migrations, although significant economic, political, and social disparities exist between the various states.⁴¹ Despite human inertia as well as the general affinity for family and homeland, any debate about immigration—from relatively minor reform efforts to broader ones—almost invariably must confront the fear that the country risks being overwhelmed by hordes of immigrants of different races, cultures, and creeds.

An offshoot of the floodgates argument is that, with large numbers of minority immigrants coming to the United States, racism and cultural conflict will increase.⁴² The social cohesion concern assumes that large numbers of migrants will come who are not already migrating, which is not necessarily the case.⁴³ Taken literally, this argument would more generally place into question the enforcement of the antidiscrimination laws and the Equal Protection Clause of the Fourteenth Amendment because of potential threats to social cohesion, an argument rejected in the nation's decision to move forward in desegregating the Jim Crow South.⁴⁴ In any event, if, as Nathan Glazer says, "we are all multiculturalists now,"⁴⁵ we should make our immigration laws consistent with that view. If not, we should say so.

The United States' current preoccupation with terrorism arguably makes it an inopportune time to raise the possibility of eliminating immigration controls. The horrific events of September 11, 2001 understandably have raised legitimate public concerns about national security.⁴⁶ In the name of public safety, the highest levels of the federal government have engaged in massive efforts since then to close, not open, the borders; the public generally has supported these efforts and has been much more restrictionist in mood than in the days before the World Trade Center in New York City crumbled to the ground.⁴⁷

41. See Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 219–20 (1971). Consider, for example, the reluctance of a refugee family to leave war-torn Ethiopia as described in MAWI ASGEDOM, *OF BEETLES AND ANGELS: A TRUE STORY OF THE AMERICAN DREAM* (2001).

42. See *infra* text accompanying notes 397–399 (discussing a cultural conflict argument against more open borders).

43. See *infra* text accompanying notes 103–109.

44. See *infra* text accompanying notes 397–399.

45. NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1997).

46. See Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401–06 (2002) (offering a description from a high-level Justice Department official of the U.S. government's conduct in the war on terrorism); *The Aftermath of September 11: A Chronology*, 79 INTERPRETER RELEASES 1359 app. i, (2002) (providing a chronology of the Bush Administration's legal responses to the events of September 11, 2001).

47. See Margaret Graham Tebo, *The Closing Door: U.S. Policies Leave Immigrants Separate and Unequal*, ABA J., Sept. 2002, at 43; see also Michele R. Pistone, *A Times Sensitive Response to Professor Aleinikoff's Detaining Plenary Power*, 16 GEO. IMMIGR. L.J. 391, 399–400 (2002) (observing that, after September 11, the nation moved from contemplating more open borders to considering policy options

Other constructive immigration reform efforts have fallen by the wayside. For example, serious discussions of a bilateral agreement regularizing migration between the United States and Mexico ended abruptly on September 11.⁴⁸

Open borders are entirely consistent with efforts to prevent terrorism. More liberal migration would allow for full attention to be paid to the true dangers to public safety and national security. U.S. immigration authorities could focus on terrorists, dangerous criminals, and drugs and other contraband, rather than trying to keep most noncitizens out of the country. Enforcement efforts could move beyond the morass of exclusion grounds, per country caps, ceilings on immigrant visas, and the many complexities of the Immigration and Nationality Act (INA)⁴⁹ that have made its enforcement unwieldy.⁵⁰

Historically, U.S. immigration laws have been overbroad in attacking the perceived evil of the day, whether it be racial minorities, the poor, political

and controls that would enhance security). For criticism of the various measures, see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002); Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. (forthcoming 2003); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Neal L. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Victor C. Romero, *Decoupling "Terrorist" From "Immigrant": An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER, RACE, & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

For a sensationalistic argument on the need to close the borders in the "war on terrorism," see MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002); see also Jan C. Ting, *Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002) (questioning, in a more balanced manner, whether the United States had done enough in the "war on terrorism").

48. See Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37 (2002); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003).

49. Pub. L. No. 82-414, 66 Stat. 166 (1952) (as amended and codified in scattered sections of 8 U.S.C.); see STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1 (3d ed. 2002) ("The [INA], passed in 1952 and amended many times since, is a hideous creature. Its hundreds of pages contain excruciatingly technical provisions that are often hopelessly intertwined.").

50. To make matters worse, the Immigration and Naturalization Service (INS), which until the Spring of 2003 had primary responsibility for enforcing the INA, has been criticized as inefficient, if not downright inept. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 251 (4th ed. 1998). Criticism of the competence of the INS when it mailed visa renewals to two suspected September 11 hijackers months after their deaths, led to a reorganization of the immigration bureaucracy in the Executive Branch. See *Sensenbrenner Leading the Charge for Immediate INS Overhaul: Belated Visa Approval Notification for Sept. 11 Terrorists Has Congress Clamoring for Control of the Immigration Agency*, 60 CONG. Q. WEEKLY, Mar. 16, 2002, at 705.

dissidents, or others.⁵¹ To be effective, the “war on terrorism” should attempt to exclude from admission true dangers to national security, rather than simply trying to seal the borders, which has proven to be virtually impossible.⁵² As seen in other areas of law enforcement, more calculated immigration law enforcement has a greater likelihood of rooting out unlawful conduct than scattershot efforts that infringe on the civil rights of many people.⁵³ Importantly, evasion of the law by hundreds of thousands of undocumented immigrants has created networks that pose true risks to the national security.⁵⁴

In any event, terrorism concerns will diminish with time. The country’s jitters will fade and we will return to consideration of immigration reform, particularly that between the United States and Mexico. When the appropriate time comes, this Article hopefully will assist in analyzing the important issues implicated by opening the borders.

Part I of this Article contrasts the views of political theorists on open borders.⁵⁵ Rather scant legal attention has been paid to this possibility. “While many people dispute either the wisdom or the justice of particular provisions of the immigration laws, relatively few have questioned the underlying premise that a nation-state has the moral power to enact restrictions.”⁵⁶ Much legal scholarship treats closed borders as the assumed state of immigration law, with the law facilitating the efficient, fair, and rational administration of a comprehensive system of immigration controls; scholarship generally offers ideas on improving this system, rather than on questioning its foundational premises.⁵⁷ Part II studies the moral, economic, and policy justifications for open borders. This part further outlines the possible move toward that state of affairs, with regional integration and open labor migration akin to that which has evolved in the European Union possibly serving as a precursor to broader change.⁵⁸

As has been observed, “there is an important difference between appreciating the feasibility and moral logic of a legal rule of free entry, and being psychologically ‘ready’ to collectively implement such a rule in practice.”⁵⁹ The psychological barrier may be the most formidable one to open borders,

51. See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* (3d ed. 1994) (documenting the history of nativist outbursts in the United States, including the creation of the discriminatory national origins quota system in 1924).

52. See *infra* text accompanying notes 411–429.

53. See *infra* text accompanying notes 420–421.

54. See *infra* text accompanying notes 411–429.

55. See *infra* Part I.

56. LEGOMSKY, *supra* note 49, at 242.

57. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 528–35.

58. See *infra* text accompanying notes 103–429.

59. Wright, *supra* note 20, at 1298 (footnotes omitted).

especially because closed borders are viewed as the natural order of things. Times change, however, and the American public may come to see the inevitability of open entry.

I. POLITICAL THEORISTS ON OPEN BORDERS

A growing body of literature scrutinizes open borders and, more specifically, the border restrictions maintained by most western nations.⁶⁰ One clear lesson emerges from the scholarship. Liberal theory, with its commitment to the protection of individual rights,⁶¹ finds it difficult to reconcile the rights of noncitizens with closed borders marked by numerous restrictions on entry.

"[I]n a truly liberal polity, it would be difficult to justify a restrictive immigration law or perhaps any immigration law at all."⁶² In that vein, Mark Tushnet has proclaimed that "[a]s a matter of principle, liberals ought to be committed to relatively unrestricted immigration policies."⁶³ He states unequivocally that "what's best about the United States would be preserved by a policy of open borders and naturalization available to anyone who agreed with the fundamental principles that animate our polity."⁶⁴

Embracing rights-based views similar to those valued by liberal theorists, religious leaders also have urged a more generous immigration policy. Such arguments are based on the moral imperative that immigrants should be treated in a humanitarian way.⁶⁵ Relying on religious teachings, churches and

60. See, e.g., PHILLIP COLE, *PHILOSOPHIES OF EXCLUSION: LIBERAL POLITICAL THEORY AND IMMIGRATION* (2000); STANLEY HOFFMAN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* (1981); David Miller, *The Ethical Significance of Nationality*, 98 *ETHICS* 647 (1988); Timothy King, *Immigration From Developing Countries: Some Philosophical Issues*, 93 *ETHICS* 525 (1983); Whelan, *supra* note 22.

61. Consistent with liberal theory, the commitment of international law to fundamental individual rights, which has a lengthy historical pedigree, grew substantially after World War II. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *IND. L.J.* 809, 823–25 (2000).

62. Schuck, *supra* note 38, at 85.

63. Mark Tushnet, *Immigration Policy in Liberal Political Theory*, in *JUSTICE IN IMMIGRATION* 147, 155 (Warren F. Schwartz ed., 1995).

64. Mark Tushnet, *Open Borders*, in *A COMMUNITY OF EQUALS*, *supra* note 21, at 69, 73.

65. See Father Brian Jordan, *My Ideal Immigration Policy*, in *BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY* 43 (Richard D. Lamm & Alan Simpson eds., 2001); Terry Coonan, *There Are No Strangers Among Us: Catholic Social Teachings and U.S. Immigration Law*, 40 *CATH. LAW.* 105 (2000); Michael Scaperlanda, *Who Is My Neighbor? An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 *CONN. L. REV.* 1587 (1997); see also Kristina M. Oven, Student Article, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 499, 533–40 (1999) (discussing the Catholic Church's response to immigrants and the implications of Catholicism for U.S. immigration policy).

religious leaders periodically challenge modern immigration policies and the treatment of immigrants.⁶⁶

Despite the nation's stated commitment to liberal ideals, U.S. immigration law has permitted ideological discrimination, suspect classifications in admission policies, and discrimination against noncitizens after admission, and continues to do so despite the liberal principles that govern modern U.S. constitutional law.⁶⁷ To fully appreciate the conundrums that immigration controls pose to liberal theory, consider a few groups of noncitizens excluded under the U.S. immigration laws. Most generally, the modern immigration laws, despite technically complying with the color-blindness demanded by the U.S. Supreme Court, have racially disparate impacts in their operation,⁶⁸ which are in tension with the nation's stated commitment to equality under the law.⁶⁹ Similarly, the bar on the admission of noncitizens "likely at any time to become public charges"⁷⁰—the most frequently invoked substantive ground for exclud-

66. See, e.g., ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988) (analyzing the Sanctuary movement in the 1980s in which religious workers and others sought to provide sanctuary to Central American refugees); IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985) (offering a religious justification for the Sanctuary movement); *Nation's Catholic Bishops Share Views on Criminal Justice System*, DALLAS MORNING NEWS, Nov. 16, 2000, at 4A (reporting that the National Conference of Catholic Bishops criticized the negative impact of the 1996 immigration reform laws on undocumented immigrants).

67. See Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105 (1997).

68. See, e.g., Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1119-47 (1998); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 (1993); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755 (2000); Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995).

69. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications, including those in a state program to increase government contracting with minority businesses, are subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (to the same effect); see also Victor C. Roméro, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997) (contending that courts should apply strict scrutiny to immigration laws that affect fundamental rights). The Court's color blind analysis has been criticized. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

70. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). In 1996, Congress amended this ground to make it tougher for noncitizens to satisfy the income and other restrictions to avoid exclusion as possible public charges. See Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens From Becoming Public Charges*, 31 CREIGHTON L. REV. 741 (1998) (describing the impacts of the amendments). This amendment complemented the denial of federal welfare benefits to legal immigrants. See *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2260 (1996). For a critical analysis of the impact of welfare reform on immigrants, see Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 45-50 (1997); Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal*

ing noncitizens⁷¹—conflicts with the anti-caste ideal of U.S. law.⁷² In addition, disabled persons protected in the United States by the Americans with Disabilities Act,⁷³ including persons with Human Immunodeficiency Virus (HIV), can be denied admission into the country.⁷⁴ Congress acted to exclude them even though the U.S. Public Health Service concluded that HIV positive noncitizens do not pose a significant health risk to the general population.⁷⁵

As these examples suggest, liberalism struggles to accommodate individual rights in a society deeply committed to limits on immigration.⁷⁶ Besides the

Fixes: An International Human Rights Critique of Immigration and Welfare "Reform," 71 SO. CAL. L. REV. 547 (1998); Scaperlanda, *supra* note 65; Connie Chang, Comment, *Immigrants Under the New Welfare Law: A Call for Uniformity, a Call for Justice*, 45 UCLA L. REV. 205 (1997).

71. See LEGOMSKY, *supra* note 49, at 409 ("Over the years, the public charge provision has become the single most common affirmative substantive basis for denials of immigrant visas and one of the most common for nonimmigrants . . .") (footnotes omitted). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519–28 (1995) (analyzing the history of the exclusion of the poor under the U.S. immigration laws). In contrast, efforts by states to prevent the poor living in other states from migrating into their jurisdictions have been found to be unconstitutional infringements on the right to travel. See *Saenz v. Roe*, 526 U.S. 489 (1999) (invalidating a California law providing lower welfare benefits to new residents as an undue interference with the right to travel). The right to travel between states is well recognized. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.38, at 985–1002 (6th ed. 2000) (summarizing Supreme Court cases). States are, however, permitted to limit this right to protect public safety, such as through laws requiring the registration of sex offenders. Such registration requirements have been criticized as violating the right to travel. See Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89 (1996); Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated With the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788 (1996). Constitutional limits also exist on the federal government's power to regulate U.S. citizens' travel to foreign nations. See NOWAK & ROTUNDA, *supra*, at § 14.37, at 980–85 (summarizing Supreme Court cases).

72. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (identifying the anticaste principle as a touchstone for equal protection analysis).

73. Pub. L. No. 101-336, 104 Stat. 327 (1990).

74. See INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i) (2000).

75. See LEGOMSKY, *supra* note 49, at 413–14; Juan P. Osuna, *The Exclusion From the United States of Aliens Infected With the AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUS. J. INT'L L. 1 (1993); Lynn Acker Starr, *The Ineffectiveness and Impact of the Human Immunodeficiency Virus (HIV) Exclusion in U.S. Immigration Law*, 3 GEO. IMMIGR. L.J. 87 (1989); Peter A. Barta, Note, *Lambskin Borders: An Argument for the Abolition of the United States' Exclusion of HIV-Positive Immigrants*, 12 GEO. IMMIGR. L.J. 323, 324–31, 335–39 (1998); Lia Macko, Note, *Acquiring a Better Global Vision: An Argument Against the United States' Current Exclusion of HIV-Infected Immigrants*, 9 GEO. IMMIGR. L.J. 545, 547–52 (1995); see also Peter Margulies, *Asylum, Intersectionality, and AIDS: Women With HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521 (1994) (contending that women with HIV should be eligible for asylum). Along these lines, the U.S. immigration laws historically have regulated sexuality by denying the entry of gays and lesbians into the country. See generally EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* (2002) (analyzing the history of U.S. immigration law's exclusion of "sexual deviants").

76. See Schuck, *supra* note 38, at 85–90.

political vulnerability of the noncitizens most directly affected, a strong conception of national sovereignty exacerbates the conflict between immigration exclusions and liberal theory.⁷⁷ To summarize the dynamic at work:

[The] conflict between the concepts of national sovereignty and the inalienable human right of free movement is rarely noticed, testifying in part to the unquestioned status of national sovereignty. Also contributing to the absence of controversy is that, unlike the police measures that would be required to deport large numbers of illegal aliens already within U.S. territory, legislation barring aliens outside its boundaries from legal entrance inconveniences few U.S. citizens. Such exclusion is thus carried out with little debate and relative political impunity.⁷⁸

A. Liberal and Communitarian Theory on Immigration Restrictions

In an influential article, political theorist Joseph Carens outlined the case for free migration by demonstrating how radically different contemporary approaches to political theory all generally militate in favor of open borders.⁷⁹ His analysis begins by questioning the justification for the use of force against Haitian boat people and Salvadoran and Guatemalan asylum seekers to prevent their entry into the United States:

What justifies the use of force against such people? Perhaps borders and guards can be justified as a way of keeping out criminals, subversives, and armed invaders. But most of those trying to get in are not like that. They are ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families. On what moral grounds can these sorts of people be kept out? What gives anyone the right to point guns at *them*?⁸⁰

Liberal theory, as well as other political theories, militates in favor of a system of open entry with narrow exceptions. To that end, Carens's open border system would allow for narrow restrictions that are consistent with liberal theories of rights. Recognizing the need for restrictions to take steps against a clear "threat to the public order,"⁸¹ Carens would bar mass migration

77. See Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in *GLOBAL GOVERNANCE AND INTERNATIONAL LEGAL THEORY* (Ige F. Dekker & Wouter G. Werner eds., forthcoming 2003) (analyzing the social construction of national sovereignty).

78. Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 *IND. J. GLOBAL. LEG. STUDS.* 143, 148–49 (1994). See generally Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 *BYU L. REV.* 1139 (analyzing the weakness of immigrants in the political process).

79. See Carens, *supra* note 40, at 251.

80. *Id.* (emphasis in original).

81. See *id.* at 259. For this proposition, Carens relies on JOHN RAWLS, *A THEORY OF JUSTICE* 212–13 (1971); see also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 95 (1980).

that would threaten chaos and the end of liberal society. He cautioned, however, that "[a] need for *some* restrictions would not justify *any* level of restrictions."⁸² Thus, in order to take the rights of noncitizens seriously, a public order exclusion would need to be narrowly tailored to achieve the desired end.⁸³

In making the case for open borders, Carens addressed the communitarian rationale for border controls proposed by Michael Walzer.⁸⁴ Walzer contended that the community should be able to adopt criteria that limit the admission of outsiders in order both to preserve community self-definition and to allow the community to make decisions that reflect shared community values.⁸⁵ As Linda Bosniak has summarized, "[t]he heart of Walzer's argument is that admissions decisions are the legitimate and essential prerogative of the current members of any particular national community."⁸⁶ Carens found Walzer's justification for broader admissions restrictions unpersuasive. As Carens observed, because such restrictions are inconsistent with rights to free movement, we do not allow local communities to limit entry into their jurisdiction to foster community self-determination, even though we recognize self-determination as appropriate to a certain degree.⁸⁷

Walzer has suggested that certain moral limits exist on the admissions criteria adopted by the community, with racial restrictions being invidious and impermissible.⁸⁸ Once the concession is made that *some* limits are necessary, however, the question becomes where the limits on community self-determination end and the rights of the individual, or other moral limits on immigration

("The *only* reason for restricting immigration is to protect the ongoing process of liberal conversation itself.") (emphasis in original).

82. See Carens, *supra* note 40, at 259 (emphasis added).

83. See *id.* at 264; see also *infra* text accompanying notes 411–429 (articulating a narrow exception to open borders for protecting national security).

84. See WALZER, *supra* note 40, at 35–42, 61–63; see also David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 193–208 (1983) (analyzing various types of community membership held by different types of immigrants). The Supreme Court has applied a communitarian rationale to uphold citizenship requirements for certain state jobs. See *Foley v. Connelie*, 435 U.S. 291, 296 (1978); see also NOWAK & ROTUNDA, *supra* note 71, at § 14.12, at 797–801 (reviewing Supreme Court decisions in this area).

85. See WALZER, *supra* note 40, at 35–42, 61–63; see also WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 125 (1995) (stating the belief that immigration controls may be justified by a liberal state's goal of protecting cultural membership); PETER C. MEILAENDER, *TOWARD A THEORY OF IMMIGRATION* (2001) (challenging Carens's call for open borders on the ground that a nation should be able to regulate immigration in order to preserve a national identity); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1069–73 (1994) (analyzing Walzer's views).

86. Bosniak, *supra* note 85, at 1072.

87. See Carens, *supra* note 40, at 266–67.

88. See WALZER, *supra* note 40, at 40; Carens, *supra* note 40, at 266.

restrictions, begin. One senses a hint of liberal rights influencing communitarian sensibilities with respect to the immigration controls in Walzer's analysis.

In this way, liberal and communitarian theories converge with respect to immigration restrictions. Walzer, however, leaves open whether other restrictions in the immigration laws can be justified by community self-determination. Could a community decide to exclude the poor, the disabled, short people, or blondes in the name of community self-definition? Although such arbitrary classifications may be permissible in personal decisions in the private sphere, they ordinarily are not the type that the U.S. Constitution allows governments or communities to make.⁸⁹

To avoid taking communitarian theory to its logical extreme, Walzer and other like-minded theorists must rely on certain liberal principles to demarcate the limits on a community's self-definition through immigration restrictions. Absent such limits, communitarian theory could support invidious racial restrictions for admission into a nation, as well as other invidious limitations on entry. Ultimately, the logic of the communitarian rationale would allow closing the borders without any meaningful limits.

B. Liberal Theory Versus the Plenary Power Doctrine

A legal sleight of hand in the realm of immigration law seriously undercuts liberal theory's devotion to individual rights. Through reliance on the sovereign power to exclude noncitizens from entry without legal constraint, the Supreme Court has justified plenary power of the federal government over immigration.⁹⁰ In the United States, plenary power to regulate immigration generally has meant the fervent rejection of *any* limits on the sovereign's power to impose immigration restrictions. In *The Chinese Exclusion Case*,⁹¹ for example, the Court upheld an infamous nineteenth century law prohibiting immigration from China and emphasized that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as part of [its] sovereign powers delegated by the Constitution."⁹² As put bluntly by Justice Frankfurter at the onset of the dark days of the

89. I do not mean here to enter the debate over the efficacy of the public/private distinction, which implicates the extension of personal rights in constitutional law. See *supra* note 3 (citing authority).

90. See Scaperlanda, *supra* note 21, at 972–1002; Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 63–83 (1989); Wu, *supra* note 23, at 39.

91. 130 U.S. 581 (1889).

92. *Id.* at 609; see *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

McCarthy era, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."⁹³

Volumes of scholarship contend that ordinary constitutional constraints should limit national sovereignty in the U.S. government's immigration admissions criteria.⁹⁴ Importantly, while advocating open borders, one need not denigrate the sovereign power of the nation-state to restrict immigration. For example, although contending that no moral basis justifies closed borders and that the nation would benefit from more open borders, R. George Wright studiously avoided challenging the power of the sovereign to restrict immigration because a nation-state could affirmatively choose open borders in its exercise of sovereign power.⁹⁵

Efforts have been made in recent years to read international law as circumscribing national sovereignty over immigration. Modern international law imposes certain limits on the ability of nation-states to restrict immigration.⁹⁶ Well-established international law, for example, requires nation-states to provide safe haven to political refugees and to those who have been tortured in their native lands.⁹⁷

93. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

94. See sources cited *supra* note 13.

95. See Wright, *supra* note 20, at 1271–72.

96. See Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1113–29 (1996); James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983); Scaperlanda, *supra* note 21; see also Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGRATION REV. 737 (1991) (discussing the limited protections for undocumented workers under international law); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999) (analyzing national sovereignty as an impediment to implementing international human rights norms); Saito, *supra* note 16, at 469–71 (identifying areas in which U.S. immigration law violates international law); Spiro, *supra* note 13, at 354–55 (discussing international law's constraints on immigration matters). For skepticism about whether the U.S. immigration laws conform to international law norms, see Kevin R. Johnson, *The Moral High Ground? The Relevance of International Law to Racial Discrimination in the U.S. Immigration Laws*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 285 (Berta Esperanza Hernández-Truyol ed., 2002).

Interestingly, international law imposes more stringent obligations on nations to permit emigration, rather than requiring states to permit immigration into their jurisdictions. See Thomas Kleven, *Why International Law Favors Emigration Over Immigration*, 33 U. MIAMI INTER-AM. L. REV. 69 (2002). This suggests the predominance of national sovereignty over international law; requiring a nation to allow people to leave the country is less of an intrusion on national sovereignty than compelling a nation to admit noncitizens from other nations.

97. See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (1951); United Nations Protocol Relating to the Status of Refugees, Jan. 3, 1967, 606 U.N.T.S. 267 (1967); Convention Against Torture and Other Cruel, Inhuman or Degrading

One's views on plenary power deeply affect how one views immigration. Endorsement of the plenary power doctrine allows virtually any restrictions on immigration, broad or narrow, with Congress determining which are appropriate. The nation-state has complete power over this realm. In contrast, liberal theory favors free immigration—absent a strong showing of the need for restrictions—in order to protect liberal dialogue.⁹⁸ These stark differences reflect different commitments to the individual rights of noncitizens; liberal theorists strive to recognize those rights while plenary power advocates see the sovereign as having complete authority to define the rights of noncitizens. In terms of immigration, liberal theory is more consistent with U.S. constitutional traditions as well as the trajectory of international law.

In the face of growing challenges to sovereign power to restrict immigration, the U.S. government has proceeded in a direction consistent with the view that it possesses near complete sovereign power over immigration controls. Border controls in U.S. law expanded steadily in the 1990s. Increasing admission restrictions and new grounds for removal hit a high watermark in 1996, with the passage of two harsh immigration reform laws,⁹⁹ as well as welfare reform that eliminated immigrant eligibility for benefits.¹⁰⁰ To top it off, Congress shortly after September 11, 2001 passed the USA PATRIOT Act, which again expanded the grounds upon which noncitizens could be removed from the country.¹⁰¹

Treatment or Punishment, *opened for signature* Dec. 10, 1984, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc A/39/51 (1984).

98. See *supra* text accompanying notes 79–89.

99. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); see also *infra* text accompanying notes 176–178 (analyzing the aggressive positions taken by the INS under 1996 immigration reform legislation). Professor Peter Schuck describes the 1996 immigration reforms as “the most radical reform of immigration law in decades—or perhaps ever.” PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 143 (1998).

100. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2260 (1996).

101. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 350–52; see also Cole, *supra* note 47, at 974–77 (criticizing the USA PATRIOT Act and other measures that are part of the “war on terrorism”); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (same); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002) (contending that the new law will have a detrimental impact on asylum-seekers); Johnson, *supra* note 48, at 856–57 (criticizing the immigration provisions of the USA PATRIOT Act).

C. Conclusion

Liberal theory has never provided a satisfactory rationale for closed borders, especially of the type enforced with rigor by the United States at the end of the twentieth century. Substantive exclusions that go beyond those necessary to protect public safety find little support in a system committed to individual rights. Communitarian arguments for restriction based on national self-determination acknowledge *some* limits on substantive immigration controls, such as racial restrictions, but fail to demarcate the line between permissible and impermissible criteria. In this way, communitarian theory is consistent with the thrust of the plenary power doctrine and the notion of the unrestrained sovereign power of nation-states over immigration. Ultimately, liberal theory, which animates U.S. constitutional law and international law, justifies more open borders than currently exist in the United States.

A system very different from the current U.S. immigration laws is most consistent with a theory of liberal rights.¹⁰² The current default rule is that a noncitizen is presumed to be inadmissible unless he or she establishes eligibility to enter the country. One could envision a system in which that presumption is reversed—that a noncitizen is presumed admissible unless the government establishes that he or she is a threat to the public order. This would represent a move from presumptively closed borders to presumptively open borders.

II. THE CASE FOR OPEN BORDERS

Part I of this Article outlined the theoretical difficulties in justifying the restriction of migration into a territory, as well as the inherent difficulty of both liberal and communitarian approaches to justify immigration controls of the kind enforced today. Offering the affirmative case for free migration between states, this part of the Article contends that moral, economic, and policy reasons favor open borders.

Free migration into the United States would not be without precedent. Gerald Neuman's influential article on state regulation of immigration during the nation's first century placed in question the conventional wisdom that the United States embraced wholly open borders during its first hundred years.¹⁰³ Indeed, the infamous Alien and Sedition Acts of the 1790s excluded

102. See *supra* text accompanying notes 79–89.

103. See Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

political radicals and provided for their deportation.¹⁰⁴ As Neuman documents, many of the states attempted to regulate migration from outside their jurisdiction.¹⁰⁵

That being said, the comprehensive federal immigration scheme that prevails in the United States today simply did not exist during the nation's first century. Open borders and easy admission of immigrants generally were the rule, with the general presumption favoring admission.

The United States has moved from relatively open to relatively closed borders. It is possible to return to the more open variety. The deregulation of various industries near the end of the twentieth century demonstrates the potential for moving from a highly regulated body of public law to a much less regulated system.¹⁰⁶

Even with the "deregulation" of immigration, certain types of narrow restrictions on open borders might well be justified. This Article does not thoroughly formulate the immigration restrictions necessary to protect public safety and national security in an open border regime. Such protections would be justified by the concept of self-defense and protection of the public order.¹⁰⁷

The law should presume that all immigrants are admissible unless a strong justification for exclusion is documented and narrowly tailored to protect public safety. Narrow tailoring of the exclusion would prevent overbroad enforcement, which arguably is one of the flaws of modern immigration practice.¹⁰⁸ In sum, this change would reverse the current legal presumption in which the law strongly presumes that noncitizens are not admissible.¹⁰⁹

104. See JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951)*; JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956)*.

105. See Neuman, *supra* note 103, at 1842–1901.

106. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA 1–2 (1992)*. The method of the deregulation of industry in the United States has been criticized, however. See generally ALFRED E. KAHN, *WHOM THE GODS WOULD DESTROY, OR HOW NOT TO DEREGULATE (2001)* (criticizing deregulation in the United States); ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 225–80 (1997)* (summarizing the history of regulation and deregulation of industry).

107. See *supra* text accompanying notes 81–83.

108. See *infra* text accompanying notes 110–230.

109. See LEGOMSKY, *supra* note 49, at 123 (describing the process of admitting immigrants into the United States). Currently, a noncitizen seeking to enter the United States as an immigrant bears the burden of proving that he or she satisfies all of the requirements for an immigrant visa. See INA § 291, 8 U.S.C. § 1361 (2000). Similarly, the presumption is that any noncitizen seeking a temporary (nonimmigrant) visa, such as a business, tourist, or student visa, is in fact an immigrant and must satisfy the more rigorous requirements for an immigrant visa. See INA § 214(b), 8 U.S.C. § 1184(b). In total, the immigration laws presume that a noncitizen is inadmissible into the United States absent an affirmative showing to the contrary.

A. Moral Justifications

As discussed, political theorists have debated the propriety of border controls.¹¹⁰ It is difficult to reconcile individual rights with the many blanket exclusions in U.S. immigration laws.¹¹¹ This, however, only tends to show that restrictions are difficult to justify morally: The inherent deficiency in justification does not necessarily point to any affirmative obligation to allow for the easy admission of immigrants into the United States. This part attempts to set forth the affirmative case for open borders.

At a fundamental level, “[a]n open entry policy is a broad attack on the problem of morally arbitrary suffering and inequality.”¹¹² Although arbitrary constructs, borders contribute to suffering and inequality that is difficult to justify. The accident of place of birth effectively may create a life of relative opportunity or deprivation. One question is whether law and policy will allow migration and increase access to opportunity, or reinforce the inequalities attributable to the luck of the draw.

1. Eliminating Racial Discrimination

Racial discrimination and segregation constitute serious moral problems the world over.¹¹³ Consistent with the almost universally accepted moral prohibition, international law prohibits racial discrimination.¹¹⁴ The international community in recent years has increased efforts to enforce the nondiscrimination norm. For example, the United Nations convened the 2001 World

110. See *supra* text accompanying notes 60–102.

111. See *supra* text accompanying notes 60–102.

112. Wright, *supra* note 20, at 1294.

113. See WALZER, *supra* note 40, at 40; see also K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) (analyzing the morality of considering race in political dialogue); John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423 (2002) (analyzing the morality of the antidiscrimination norm under U.S. law).

114. See United Nations International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force on Jan. 4, 1969); see also Chin, *Segregation's Last Stronghold*, *supra* note 13, at 60–61 (contending that various sources of international law, including the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, prohibit racial discrimination in immigration laws and undercut the plenary power doctrine); Berta Esperanza Hernandez-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 *COLUM. HUM. RTS. L. REV.* 521, 555–56 (2000) (contending that the U.S. government's efforts to deport Muslim immigrants violated the United Nations International Convention on the Elimination of All Forms of Racial Discrimination).

Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa to discuss the issue.¹¹⁵

The U.S. immigration laws historically have discriminated against persons from developing countries populated predominantly by people of color.¹¹⁶ Modern immigration laws continue to have racially disparate impacts;¹¹⁷ nonetheless, most immigrants to the United States are people of color from developing nations.¹¹⁸ Consequently, punitive immigration laws necessarily—and adversely—affect large numbers of noncitizens of color. The U.S. emphasis on border enforcement, for example, has contributed to racial Oseekers, with people of color most directly affected.¹¹⁹ Under current conditions, immigration controls contribute to racism and discrimination in the United States. This can be seen most starkly with the post–September 11 heightened scrutiny of noncitizens,¹²⁰ which was accompanied by a precipitous rise in racial discrimination and hate crimes against Arabs and Muslims generally.¹²¹

Although not without flaws, the efforts to eradicate racial discrimination in domestic law are exemplified by the watershed Supreme Court decision of *Brown v. Board of Education*.¹²² An open entry system would be consistent with the prevailing antidiscrimination norm. It would avoid some of the adverse consequences of border enforcement in the United States and remove a powerful contributor to racial discrimination in American social life. Open borders would avoid some of the social costs of closed borders, including but not limited to promoting discrimination against a racially stratified labor force in the United States.¹²³ Although immigrants at some level “choose” to

115. See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, at <http://www.un.org/WCAR>; Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235, 1236–37 (2002) (summarizing the themes of the conference). For insights on the conference, see Celina Romany & Katherine Culliton, *The UN World Conference Against Racism: A Race-Ethnic and Gender Perspective*, HUM. RTS. BRIEF, Winter 2002, at 14; Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER FORUM FOREIGN AFF., Winter/Spring 2002, at 31; Gay McDougall, *The World Conference Against Racism: Through a Wider Lens*, 26 FLETCHER FORUM FOREIGN AFF. Summer/Fall 2002, at 135.

116. See *supra* text accompanying notes 29–31.

117. See *supra* text accompanying notes 29–31.

118. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It? Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1485, 1505 (2002).

119. See *infra* text accompanying notes 134–230.

120. See *supra* text accompanying notes 46–48.

121. See, e.g., HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY”: HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11 (2002).

122. 347 U.S. 483 (1954).

123. See *infra* text accompanying notes 188–212. Border controls have been characterized as a form of employment discrimination against noncitizens. See Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291 (2003).

migrate under those conditions, the U.S. government has greatly magnified the potential harms through its policies.¹²⁴

The civil rights harms resulting from the enforcement of the U.S. immigration laws are not limited to noncitizens at the border, but extend to legal immigrants and U.S. citizens of certain national origin ancestries in the interior of the country. Monumental efforts to prevent certain groups of outsiders from entering the country stigmatize those here who share common ancestry with those excluded.¹²⁵ Put concretely, the U.S. government's zealous efforts to seal the southern border to keep Mexican migrants out of the country effectively tells Mexican American citizens that they are unwanted.¹²⁶ The same is true with respect to the impact of the "war on terror" on the Arab and Muslim communities.

Stigmatizing impacts similar to those attributable to the notorious national origins quota system, which barred immigration of inferior races from eastern and southern Europe and served as the bedrock of the U.S. immigration laws from 1924 to 1965, flow from border enforcement efforts aimed at particular groups of immigrants in the modern era.¹²⁷ As plain-talking President Harry Truman put it when he unsuccessfully vetoed the Immigration and Nationality Act of 1952, the quota system was premised on the view

that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept . . . violates the great political doctrine of the Declaration of Independence that "all men are created equal."¹²⁸

The repeal of the quota system in 1965 allowed immigration to become more open and fairer than in the past. Immigration from Asia increased dramatically.¹²⁹ More immigrants of African ancestry came to the United States as well.¹³⁰

124. See *infra* text accompanying notes 158–175.

125. See Johnson, *supra* note 68, at 1148–54.

126. See *id.* at 1136–40.

127. See Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327; Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1947 (1996) (book review).

128. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 1952–1953, at 443 (1966).

129. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

130. See, e.g., Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999); Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women*, 50 ME. L. REV. 309 (1998); Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539

Open borders would send an expressivist message that people from other nations, including people of color from the developing world, have equal dignity with all people.¹³¹ Rather than classified as undesirable and dehumanized “aliens” subject to exclusion and brutal border enforcement,¹³² citizens of all other nations would be welcomed as persons worthy of membership in U.S. society. Such important messages would do much to minimize the nativism and racism that often has infected public discourse over immigration, and shaped the treatment of immigrants and certain groups of citizens in the United States.

In sum, racial discrimination in border enforcement injures citizens and noncitizens presumed to be immigrants because of the color of their skin. Border enforcement promotes animosity directed at certain minority groups and renders certain groups of U.S. citizens as holding limited citizenship—second-class citizenship—rights.¹³³ This result runs contrary to the general thrust of U.S. law to remedy racial discrimination.

Moral considerations arising from the practical consequences of enforcement in the United States militate in favor of removing immigration controls. Put simply, border enforcement falls disproportionately on poor people of color and arguably is immoral and unjust.

a. Ending the Discriminatory Enforcement of Border Controls

Border controls in the United States historically have tended to be race- and class-based,¹³⁴ which ought to trouble communitarian theorists as well as their liberal counterparts.¹³⁵ The Chinese exclusion laws constitute a painful

(2003). Although often neglected in the study of U.S. immigration history, forced migrants from Africa constituted one of the earliest and largest immigrant groups to come to the United States. See Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996).

131. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

132. For an analysis of the dehumanizing impacts of the terminology of “alien” used in the U.S. immigration laws, see Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996–1997).

133. See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 711–16, 722–25 (2000). See generally KENNETH L. KARST, *BELONGING TO AMERICA* (1989) (analyzing the efforts of various groups to secure full membership in U.S. society).

134. See Johnson, *supra* note 68, at 1119–47 (analyzing the use of immigration laws to adversely affect racial minorities); Johnson, *supra* note 71, at 1519–28 (same for poor and working people).

135. See *supra* text accompanying notes 88–89.

and jarring example.¹³⁶ These laws effectively prohibited Chinese immigration to the United States, resulted in the mass detention of Chinese immigrants, and created and maintained in the United States a large Chinese male population unable to marry (because Chinese women could not immigrate and because Chinese men were legally prohibited from marrying white women).¹³⁷ Moreover, under the racial restrictions on naturalization that remained fully intact in U.S. law until 1952,¹³⁸ Asian immigrants, classified by the courts as not “white,” were ineligible for naturalization and thus were unable to become U.S. citizens.¹³⁹

Fortunately, express discriminatory restrictions have been removed from U.S. immigration laws. However, the laws’ racial impacts, often hidden by the opaque technicalities of the immigration laws, stand in tension with modern notions of equality.¹⁴⁰ Racial profiling in immigration enforcement, for example, harms the dignity of persons stopped by the Border Patrol, stigmatizes U.S. citizens subject to immigration stops because they fit the “undocumented immigrant profile,” and imposes costs on hundreds of thousands of U.S. citizens and lawful immigrants.¹⁴¹ Such injuries, which are difficult to justify even if the measures in fact are effective at reducing undocumented immigration, are next to impossible to rationalize when they have not been shown to be successful. This appears to be the case in the United States.¹⁴²

Other facially neutral provisions of the immigration laws have plainly racial impacts. The per country ceilings (annual limits on immigration from any one country) make immigrants from certain high immigrant-sending nations, such as Mexico, India, and the Philippines, wait to come to the United States years longer than prospective immigrants from other nations;

136. See generally LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (analyzing laws and their legacy).

137. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990*, at 23–24 (1993). See generally RONALD T. TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (rev. ed. 1998) (analyzing the history of excluding Asian immigrants from the United States).

138. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW* (1996) (reviewing judicial decisions defining “white” for the purposes of naturalization laws in effect from 1790 to 1952).

139. See *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).

140. See *supra* text accompanying notes 122–124.

141. See *Johnson*, *supra* note 133; see, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding that a Mexican appearance was one relevant factor in, but alone not enough to justify, finding reasonable suspicion to conduct a stop to investigate whether the occupants of a car are illegal immigrants). But see *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc) (disregarding the language in *Brignoni-Ponce* and holding that the Border Patrol cannot lawfully consider Hispanic appearance in deciding to make an immigration stop).

142. See *infra* text accompanying notes 342–345 (offering data showing that millions of undocumented immigrants live in the United States).

consequently, similarly situated applicants are treated differently solely because of their national origins, which, of course, closely correlate to race.¹⁴³ Similarly, the so-called diversity visa system favors white immigrants by preferring noncitizens from "low-immigrant countries" in the allocation of visas.¹⁴⁴ In one recent year, just as many diversity visas went to Europeans as to Africans and Asians combined, even though immigration demand from Asia and Africa greatly exceeds that from Europe.¹⁴⁵

Although priorities have changed to a certain extent since September 11, 2001,¹⁴⁶ U.S. border enforcement has long centered on undocumented migration from Mexico. Border fortification in the 1990s was aimed almost exclusively at the nation's southern border.¹⁴⁷ Other efforts to limit undocumented migration, such as workplace enforcement in the interior of the country, have been comparatively minimal in large part because of the resistance of employers.¹⁴⁸ Tough immigration reforms enacted by Congress in 1996 fall disproportionately on the Mexican immigrant community,¹⁴⁹ resulting in record levels of deportations of "criminal aliens," with by far the largest number from Mexico. In fiscal year 1999, for example, nearly 80 percent of the immigrants formally removed on criminal grounds were natives of Mexico.¹⁵⁰ In fiscal year 1998, over 80 percent of all noncitizens ordered deported from the United States were from Mexico.¹⁵¹ Removals increased from 42,469 in fiscal year 1993 (with about 64 percent, from Mexico)¹⁵² to over 170,000 in fiscal year 1998 (with over 80 percent from Mexico).¹⁵³ This does not include

143. See Johnson, *supra* note 68, at 1133; Legomsky, *supra* note 68, at 333; Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713.

144. See Johnson, *supra* note 68, at 1135; Legomsky, *supra* note 68, at 321, 329–30; Ting, *supra* note 68, at 309.

145. See U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 44, 45 tbl.8 (2002) [hereinafter 1999 INS STATISTICAL YEARBOOK].

146. See sources cited *supra* note 47. In the long run, the immigration responses to the events of September 11 have, and will, adversely impact the Mexican immigrant community in the United States. See Johnson, *supra* note 48.

147. See *infra* text accompanying notes 157–175.

148. See LEGOMSKY, *supra* note 49, at 1121–35 (summarizing INS enforcement of employer sanctions).

149. See *infra* text accompanying notes 157–175.

150. See Press Release, U.S. Immigration & Naturalization Service, INS Sets New Removals Record; Fiscal Year 1999 Removals Reach 176,990 (Nov. 12, 1999); see also Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1042 (2002) (stating that 1996 immigration reform legislation and increases in INS budget "resulted in a marked increase in the removal of criminal aliens from the country"); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1134–38 (2002) (same).

151. See U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 215–17 tbl.65 (2000) [hereinafter 1998 INS STATISTICAL YEARBOOK].

152. See *id.* at 218–25 tbl.66.

153. See *id.* at 215–17 tbl.65.

hundreds of thousands of voluntary departures annually by Mexican citizens who do not exhaust the legal procedures for challenging their deportation from the country.¹⁵⁴

The skewed national origin and racial impacts of U.S. immigration enforcement cannot be ignored as an aberration.¹⁵⁵ The disparate racial impacts under current immigration law enforcement undercut the ostensible bar on racial restrictions, given that their effects are well known, entirely predictable, and perhaps intentionally discriminatory.¹⁵⁶

b. Halting "Death at the Border"¹⁵⁷

Heightened immigration enforcement in the 1990s has taken a terrible human toll. The measures have racially disparate impacts. Military forces are massed almost exclusively on the southern border with Mexico, with the most likely casualties being Mexican citizens. The fact that it is Mexican, not white, persons being killed has tended to dampen any public outcry over the thousands of deaths.

Military-style operations on the Southwest border have channeled immigrants into remote, desolate locations where thousands have died agonizing deaths from heat, cold, and thirst.¹⁵⁸ A week rarely goes by without press reports of undocumented Mexican immigrants who have died on the long, treacherous journey to the United States.¹⁵⁹ The title of one November 2002 *New York Times* article tells it all: "Skeletons Tell Tale of Gamble by Immigrants."¹⁶⁰ Despite the growing death toll, the U.S. government continues to pursue enforcement operations with vigor. The California Rural

154. See 1999 INS STATISTICAL YEARBOOK, *supra* note 145, at 215–16 tbl.60 & tbl.61.

155. See *supra* text accompanying notes 113–133.

156. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing the legal significance of unconscious racism in U.S. social life).

157. Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999) (analyzing the impacts of increased border enforcement strategies in the 1990s).

158. See generally TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICAN BORDER, 1978–1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (1996); JOSEPH NEVINS, *OPERATION GATEKEEPER* (2002); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration in the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001).

159. See Hing, *supra* note 158, at 123; see, e.g., Simon Romero & David Barboza, *Trapped in Heat in Texas Truck, 18 People Die*, N.Y. TIMES, May 15, 2003, at A1.

160. John W. Fountain with Jim Yardley, *Skeletons Tell Tale of Gamble by Immigrants*, N.Y. TIMES, Oct. 16, 2002, at A1.

Legal Assistance Foundation attributes over 2000 deaths in the last decade to one southern California operation known as Operation Gatekeeper.¹⁶¹

Operation Gatekeeper demonstrates the U.S. government's indifference to the human suffering caused by its aggressive border enforcement policy. In the words of one informed commentator, "[t]he real tragedy of [Operation] Gatekeeper, however, is the direct link . . . to the staggering rise in the number of deaths among border crossers. INS has forced these crossers to attempt entry in areas plagued by extreme weather conditions and rugged terrain that *INS knows to present mortal danger*."¹⁶² In planning Operation Gatekeeper, the INS knew of the risk of deaths but proceeded nonetheless; the government rationalized the deaths of migrants as necessary casualties of the "war" on illegal immigration.¹⁶³ As another observer concludes, "Operation Gatekeeper, as an enforcement immigration policy financed and politically supported by the U.S. government, flagrantly violates international human rights *because this policy was deliberately formulated to maximize the physical risks of Mexican migrant workers, thereby ensuring that hundreds of them would die*."¹⁶⁴

Long before the 1990s, the Border Patrol had a reputation for committing human rights abuses against immigrants and U.S. citizens of Mexican ancestry.¹⁶⁵ Reports of brutality, shootings, beatings, and killings historically have plagued the Border Patrol.¹⁶⁶ In recent years, Amnesty International, American Friends Service Committee, and Human Rights Watch have issued reports documenting human rights abuses by the Border Patrol.¹⁶⁷

Criminals also frequently prey upon unlawful entrants seeking to evade border inspection. Robberies, beatings, murders, and rapes of immigrants are often reported in the border region.¹⁶⁸ In the name of enforcing the law, vigilante groups now patrol the borders and threaten violence to undocumented immigrants.¹⁶⁹ Along with Border Patrol abuses, such criminal activity

161. See <http://www.stopgatekeeper.org> (last visited May 29, 2003).

162. Hing, *supra* note 158, at 135 (emphasis added) (footnote omitted).

163. See *id.* at 156–59.

164. Vargas, *supra* note 158, at 69 (emphasis added).

165. See *id.* at 42–64.

166. See generally JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (analyzing the mass removal campaign that the Border Patrol referred to as "Operation Wetback"); ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (documenting a history of human rights abuses by the INS).

167. See, e.g., AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO (1998); AMERICAN FRIENDS SERVICE COMM., HUMAN AND CIVIL RIGHTS VIOLATIONS ON THE U.S. MEXICO BORDER 1995–97 (1998); Human Rights Watch, *Crossing the Line: Human Rights Abuses Along the U.S. Border With Mexico Persist Amid Climate of Impunity* (1995), at <http://www.hrw.org/reports/1995/Us1.htm>.

168. See sources cited *supra* note 167.

169. See Robert F. Castro, *Exorcising Tombstone's Evil Spirits: Eradicating Vigilante Ranch Enterprises Through Public Interest Litigation*, 20 L. & INEQ. 203, 205–18 (2002); Nick Madigan, *Police*

directed at migrants should make one ponder the moral consequences of U.S. border enforcement.

Heightened immigration restrictions and bolstered immigration enforcement have caused a rapid increase in the fees charged by smugglers providing migrants passage to the United States. It now is much more expensive to come to the United States than before the new border operations went into effect in the 1990s; fees increased from hundreds to thousands of dollars.¹⁷⁰ Smuggling debts paid off through indentured servitude are not uncommon, thereby taking the exploitation of undocumented workers who enter into such arrangements to new levels. Criminal syndicates have grown and thrive in human trafficking.¹⁷¹

One surprising, counterintuitive consequence of increased U.S. border enforcement demonstrates its self-defeating nature. Migrants who come to the United States appear more likely to remain permanently in the country than in the past; undocumented immigrants simply do not want to risk running the gauntlet of border controls—and literally risking their lives—for a second time.¹⁷² As a result, the undocumented immigrant population in the country has increased since the various border operations were put into place in the 1990s.¹⁷³

The border buildup has failed as a matter of policy *and* has had serious moral costs. Years of bona fide reform efforts, such as training, civilian oversight boards, and legal actions, have failed to ameliorate the human costs of border enforcement. This Article does not recapitulate the many reform efforts pursued in recent years or the proposals for incremental strategies to improve the enforcement of the immigration laws, including those made by governmentally sponsored groups, such as the U.S. Commission on Immigration

Investigate Killings of Illegal Immigrants in Arizona Desert, N.Y. TIMES, Oct. 23, 2002, at A13; Jerry Seper, *Arizona Militia Set to Patrol Border for Illegal Aliens*, WASH. TIMES, Dec. 9, 2002, at A5; see also Michael J. Nuñez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573 (1992) (analyzing hate crimes directed at undocumented immigrants along the southern border with Mexico).

170. See Hing, *supra* note 158, at 153–54; Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 667–68 (2001); David Spener, *Smuggling Migrants Through South Texas: Challenges Posed by Operation Rio Grande*, in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 129 (David Kyle & Rey Koslowski eds., 2001).

171. See *infra* text accompanying notes 196–203. Such consequences resemble those resulting from the federal government's efforts in the early twentieth century to ban commerce in alcohol. See *infra* text accompanying notes 312–358.

172. See Cornelius, *supra* note 170, at 668–69.

173. See *infra* text accompanying notes 312–358.

Reform and the Select Commission on Immigration and Refugee Policy.¹⁷⁴ Despite prolonged efforts, the immigration laws and their enforcement have not improved in any meaningful way and, in fact, arguably have become less fair and effective in recent years.¹⁷⁵

c. Minimizing Other Human Costs of Immigration Enforcement

The comprehensive immigration restrictions in U.S. law obviously require enforcement. Responding to political pressures over time, the Immigration and Naturalization Service (INS) developed an enforcement mentality that contributes to a pattern of aggressive policy choices of dubious morality. Consider examples from the last few years. In implementing the 1996 immigration reform legislation, the INS indefinitely detained noncitizens who could not be removed from the country, a policy that a conservative Supreme Court found unlawful.¹⁷⁶ Similarly, until the Court intervened, the INS enthusiastically defended the provisions of the 1996 laws that it read as barring any judicial review of many deportation decisions¹⁷⁷ and vigorously applied the new deportation grounds in the immigration reforms to criminal convictions entered before the passage of the law.¹⁷⁸ The aggressive positions taken by the INS all fell disproportionately on noncitizens of color and had significant impacts on many other noncitizens as well before the Supreme Court rejected the government's positions.

The enforcement mentality also has adversely affected the implementation of immigration policies designed to be humanitarian in nature. Political theorists generally agree that nations have a moral obligation to offer asylum to

174. See, e.g., U.S. COMM'N ON IMMIGRATION REFORM, LEGAL IMMIGRATION SETTING PRIORITIES (1995); SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981).

175. See *supra* text accompanying note 134–174.

176. See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

177. See *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Judicial review is important to noncitizens, especially because the courts regularly reverse a relatively high percentage of the decisions of the immigration bureaucracy. See Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 STAN. L. REV. 115 (1992) (providing data from an empirical study of the judicial review of immigration decisions).

178. See *St. Cyr*, 533 U.S. at 326; Daniel Kanstroom, *St. Cyr. or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 418–23 (2002); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); see also Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Activity Analysis*, 69 U. CIN. L. REV. 453 (2001) (analyzing the Supreme Court's retroactivity analysis, including in the case of 1996 immigration reforms); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (analyzing the harsh impacts of 1996 immigration reforms on criminal aliens that the INS vigorously enforced).

refugees fleeing persecution.¹⁷⁹ The "moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation."¹⁸⁰ Unfortunately, however, countries committed to strong, unyielding border controls, such as the United States, find it especially difficult to satisfy the moral and legal obligations owed to refugees.¹⁸¹

The repeated failures to respect the legal rights of refugees flow logically from the presumption that borders, as a general matter, remain closed to immigrants. International law, which imposes obligations on nation-states to afford temporary refuge to noncitizens who have fled political, religious, national origin, racial, and related forms of persecution,¹⁸² has sought to prevent conduct like the U.S. government's refusal to accept Jewish refugees during the Holocaust because the relevant immigration quotas in the U.S. immigration laws were filled.¹⁸³ This episode in U.S. history rightly evokes universal condemnation as immoral conduct fueled by anti-Semitism.¹⁸⁴ In the 1980s, the U.S. government arrested and detained thousands of asylum seekers who fled politically motivated violence in El Salvador and Guatemala and unlawfully pressured them to accept "voluntary" deportation without availing themselves of potential legal rights and remedies to pursue asylum in this country.¹⁸⁵ More recently, the United States engaged in the interdiction and repatriation

179. See WALZER, *supra* note 40, at 48–50; Michael Walzer, *The Distribution of Membership*, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1, 20 (Peter G. Brown & Henry Shue eds., 1981); Frederick G. Whelan, *Immigrants in American Law: Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 449 (1983); see also Andrew E. Shacknove, *American Duties to Refugees: Their Scope and Limits*, in OPEN BORDERS?, *supra* note 22, at 130, 136–45 (outlining U.S. duties to refugees); Detlev F. Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466, 471–72 (1997) ("Neutrals have a right and at least a moral obligation to provide shelter for those attempting to flee war, persecution and their attendant cruelties.").

180. Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 898 (1986); see *supra* text accompanying note & note 97 (discussing international law with respect to the admission of refugees).

181. Germany also has implemented increased measures to limit the number of asylum seekers from outside the European Union eligible for relief, see Maryellen Fullerton, *Failing the Test: Germany Leads Europe in Dismantling Refugee Protection*, 36 TEX. INT'L L.J. 231 (2001), which is consistent with the "Fortress Europe" that has accompanied the formation of the European Union, see *infra* text accompanying notes 281–284.

182. See sources cited *supra* note 97.

183. See Johnson, *supra* note 68, at 1129–30 & n.109.

184. See generally HENRY L. FEINGOLD, *THE POLITICS OF RESCUE* (1970); SAUL S. FRIEDMAN, *NO HAVEN FOR THE OPPRESSED* (1973); GORDON THOMAS & MAX MORGAN WITTS, *VOYAGE OF THE DAMNED* (1974).

185. See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990); see also *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (settling a class action in which the U.S. government was accused of bias against the asylum claims of Salvadorans); sources cited *supra* note 66 (noting authorities on the Sanctuary Movement in the 1980s in which religious and other U.S. citizens provided safe haven to Central American refugees).

of desperate Haitians who were fleeing the political turmoil and persecution in that country.¹⁸⁶ The U.S. government maintained that the asylum seekers were economic migrants not entitled to enter the country, rather than political refugees deserving of relief. This classification almost inevitably flows from the view that all immigrants are presumptively economic migrants who should be barred from entry.¹⁸⁷

In sum, border enforcement contributes to an enforcement mentality in the immigration bureaucracy and to zealous policy measures designed to deter unlawful entry. The U.S. emphasis on militarizing the border and limiting immigration almost invariably contributes to the harsh treatment of refugees and to the failure to abide by moral and legal obligations to immigrants. It is readily apparent that, as a practical matter, nation-states that devote resources to closed borders find it difficult to shift gears and allow for admission and humanitarian treatment of refugees.

d. Preventing the Creation of an Exploitable Labor Force

Immigrant labor is unquestionably important to the national economy. A 2002 study found that immigrants comprised over half of the growth of the entire civilian labor force in the United States in the 1990s, a time of tremendous economic growth, with an estimated nine million undocumented immigrants in the country.¹⁸⁸ Rather than reward valued labor that benefits the national economy, border restrictions have contributed to the maintenance of a large and easily exploited undocumented immigrant workforce in the United States. The threat of deportation—and consequently the fear of loss of liberty

186. See *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993); see also Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993) (analyzing parallels between the treatment of Haitian and Holocaust refugees). At various times in the last decade, the U.S. government has treated Chinese, see Ting, *supra* note 68, at 310–11, and Cuban migrants in similar ways, see Richard A. Boswell, *Throwing Away the Key: Limits on Plenary Power?*, 18 MICH. J. INT'L L. 689, 705–08 (1997) (book review); Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in the Latino Communities*, 78 DEN. U. L. REV. 633, 650–51 (2001). However, claims long have been, and continue to be, made that the U.S. government has been more generous toward Cuban migrants than Haitian migrants for racial and foreign policy reasons. See 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, 26–27 (1993); Dana Canedy, *Renewed Calls for Revising Policy on Haitians*, N.Y. TIMES, Oct. 31, 2002, at A24.

187. See *supra* text accompanying notes 70–72 (discussing public charge exclusion grounds).

188. See ANDREW SUM ET AL., IMMIGRANT WORKERS AND THE GREAT AMERICAN JOB MACHINE: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO NATIONAL AND REGIONAL LABOR FORCE GROWTH IN THE 1990S, at 38, 41–42 (National Business Roundtable, 2002); see also AMERICAN IMMIGRATION LAW FOUNDATION, MEXICAN IMMIGRANT WORKERS AND THE U.S. ECONOMY: AN INCREASINGLY VITAL ROLE (2002) (analyzing the importance of immigrant workers from Mexico to the U.S. economy).

and of separation from friends, family, job, and community¹⁸⁹—rests heavily on undocumented workers, possibly chilling them from exercising any rights under the law.¹⁹⁰

Undocumented immigrants work long hours for low wages with few benefits; this cheap labor benefits both employers and consumers. Understanding that undocumented immigrants enjoy little in the way of legal protections, and deeply fear deportation, few employers resist the temptation to exploit them. The law facilitates that exploitation. In 2002, the Supreme Court ruled that the National Labor Relations Board could not order employers to provide backpay to undocumented workers who had been unlawfully discharged for union-organizing activities because to do so “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”¹⁹¹ Employers can thus violate the rights of undocumented workers under the federal labor laws with little fear of substantial punishment.

The Supreme Court previously has held that Title VII of the Civil Rights Act of 1964 does not bar discrimination based on immigration status.¹⁹² This law represents the major legal protection against employment discrimination in the United States. Although a provision of the immigration laws prohibits discrimination against noncitizens legally authorized to work,¹⁹³ evidence exists that employers continue to discriminate against Latina/o and Asian American citizens and lawful immigrants.¹⁹⁴

189. See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss ‘of all that makes life worth living.’”) (citations omitted).

190. Despite their uncertain immigration status, undocumented immigrants have been involved in organizing activities. See HÉCTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* (1993); Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999).

191. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). For criticism of the decision in *Hoffman*, see Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert Correales, *Does Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003).

192. See *Espinoza v. Farah Mfg.*, 414 U.S. 86 (1973); see also Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (contending that Congress should amend Title VII of the Civil Rights Act of 1964 to bar discrimination against immigrants authorized for employment under the law).

193. See INA § 274A, 8 U.S.C. § 1324a (2000).

194. See U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 52 (1994) (referring to “studies of discriminatory practices against foreign-sounding and foreign-looking applicants for employment” due to employer sanctions in 1986 immigration reform); see, e.g., U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3–8 (1990); Cecelia M. Espenosa, *The Illusory Provisions of*

Some laws ostensibly protect undocumented workers in the workplace. However, minimum wage and basic working condition laws often are not enforced with respect to the undocumented workforce. Undocumented workers effectively form part of the secondary labor market employed outside of legal and regulatory constraints.¹⁹⁵ The immigration laws, by declaring a non-citizen to be in the country unlawfully, offer employers in the secondary labor market powerful leverage over undocumented workers in terms of wages and conditions. Undocumented workers often face a "take it or leave it" decision with respect to the terms and conditions of their employment.

Removing the lever of uncertain legal status imposed by the immigration laws, along with meaningful workplace enforcement of wage, condition, and discrimination laws, would do much to improve the working lives of undocumented workers. No principled justification exists for employers' failure to comply with the laws protecting the wages and working conditions of all workers. Employers, however, gain much from the current lack of enforcement of the laws protecting undocumented workers.

Highly publicized instances of unscrupulous persons holding noncitizens in horrible conditions represent the tip of the iceberg of the serious problem of undocumented worker abuse.¹⁹⁶ For example, in southern California, Thai immigrants were smuggled into the United States and forced to work for low wages in a garment factory surrounded by high walls, razor wire, and guards to prevent their escape.¹⁹⁷ In another case, hearing-impaired and mute Mexican immigrants were smuggled into the country and forced to sell trinkets and beg on the streets of New York, and were beaten if their earnings were deemed insufficient.¹⁹⁸ Human trafficking has become a major business for international criminal networks.¹⁹⁹

Sanctions: The Immigration Reform and Control Act of 1986, 8 GEO. IMMIGR. L.J. 343, 347-48, 364-69, 381-83 (1994).

195. See Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1574-75 (1999); see also PETER B. DOERINGER & MICHAEL J. PIRE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 167-69 (2d ed. 1985) (describing an economic theory of dual labor markets).

196. See, e.g., Cleo J. Kung, Comment, *Supporting the Snakeheads: Human Smuggling From China and the 1996 Amendment to the U.S. Statutory Definition of "Refugee,"* 90 J. CRIM. L. & CRIMINOLOGY 1271 (2000). See generally PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* (1997) (documenting the history of undocumented migration from China, including modern smuggling operations that exploit Chinese laborers).

197. See Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 41 (2001); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER, RACE, & JUST. 405 (1998).

198. See Hyland, *supra* note 197, at 40-41.

199. See Moisés Naim, *Five Wars of Globalization*, 18 AM. U. INT'L L. REV. 1, 9-11 (2002).

Women often are the most exploited of all immigrants in the labor market.²⁰⁰ Abuse runs rampant in the domestic service industry, with women the primary subjects of abuse in these jobs.²⁰¹ Domestic service is necessary for many middle class and professional families in the United States but is compensated poorly; callous, harsh treatment of workers is common.²⁰² Forced prostitution of immigrant women is a serious, and growing, social problem.²⁰³

Emerging international law obligations to undocumented workers suggest concerns with the morality of the immigrant labor exploitation occurring in the United States.²⁰⁴ For example, the Universal Declaration of Human Rights,²⁰⁵ the International Convention for the Protection of Migrants,²⁰⁶ and the International Covenant on Civil and Political Rights,²⁰⁷ all offer legal protections to immigrants.²⁰⁸ That immigrants suffer mistreatment in the United States in violation of international law suggests the illegitimacy of border controls.

Not coincidentally, the disposable labor force that immigration law helps to create in the United States is primarily composed of immigrants of color from the developing world.²⁰⁹ Immigration law thus contributes to racial stratification in the U.S. labor market as well. In this way, the labor exploitation

200. See Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-1994); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1.

201. See Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809 (2003).

202. See Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 U. MIAMI L. REV. 1045 (1999). See generally MARY ROMERO, *MAID IN THE U.S.A.* (1992); RHACEL SALAZAR PARREÑAS, *SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK* (2001).

203. See Hyland, *supra* note 197, at 41-42; Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides,"* 70 GEO. WASH. L. REV. 475 (2002); Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161 (2002); Symposium on Sexual Slavery: *The Trafficking of Women and Girls Into the United States for Sexual Exploitation*, 13 HASTINGS WOMEN'S L.J. 1 (2002).

204. See Bosniak, *supra* note 96; see also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 395-404 (2001) (questioning the morality of punishing undocumented workers for their unlawful status).

205. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

206. 30 I.L.M. 1517 (1991).

207. 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

208. See William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 26-29 (1995) (outlining how these international instruments might be used by civil rights activists); see also RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 41-48 (1984) (discussing the rights of noncitizens under international law). For an analysis of the protections of migrants under the United Nations International Convention for the Protection of Migrants, see CARMEN TIBURCIO, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* 150-51, 268 (2001); Bosniak, *supra* note 96; Tamayo, *supra*, at 27.

209. See Johnson, *supra* note 118, at 1496-99, 1505-06.

issue overlaps considerably with concerns about racial discrimination promoted by the U.S. immigration laws.²¹⁰

Put simply, immigration controls have helped to create a large undocumented labor force subject to economic exploitation.²¹¹ Open borders would help to minimize the potential for such a labor system.²¹²

2. Special Moral Obligations to Mexican Immigrants

The argument to this point suggests that the United States owes moral obligations to immigrants generally. However, the nation arguably owes a greater moral obligation to citizens of Mexico, in part because of the symbiotic relationship that has existed for many decades between the two nations.²¹³

For most of U.S. history, there has been no real effort to discourage undocumented migration from Mexico to the United States.²¹⁴ Generally speaking, there has been little real concern with labor migration from Mexico. The U.S. government historically has enforced the immigration laws in ways that provide employers with a ready supply of low-wage labor that can be terminated at the will of the employer.²¹⁵

At various times, the U.S. government has facilitated the entry of Mexican workers into the country when low-wage labor was in high demand. Wage disparities contribute to the migration; Mexican workers look for higher wages in the United States than they can earn in Mexico while U.S. employers look for cheaper labor than they ordinarily can obtain in this country. Employers gain economically from cheap labor; U.S. consumers benefit from lower prices for goods and services due to cheaper labor costs.

210. See *supra* text accompanying notes 134–156.

211. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994); Nessel, *supra* note 204; Ontiveros, *supra* note 200.

212. Proposed guest worker programs also may subject workers to exploitation. See Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement With Mexico: Lessons From the Bracero Program*, 79 TEX. L. REV. 895 (2001). This certainly was the case with the last large-scale temporary worker program, the Bracero Program, in the United States; temporary workers enjoyed few of the protections that the law guaranteed them and employer abuses were rampant. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 29, 45–46, 64–66, 70–71 (1992). For that reason, such programs are at most a second-best option to open migration. See Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465 (2002).

213. See Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

214. See generally DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2002) (summarizing the history of Mexican immigration to the United States, and U.S. immigration controls).

215. See, e.g., CALAVITA, *supra* note 212.

Institutionalizing the arrangement for a time, the Bracero Program brought temporary workers to this country from the 1940s to the 1960s.²¹⁶ By so doing, it helped create the extensive family ties and social networks that fuel Mexican migration today.²¹⁷ At the same time, the U.S. government has deported undocumented workers when their labor was no longer needed through mass deportation campaigns like "Operation Wetback" in 1954, and the "repatriation" campaign of the Great Depression.²¹⁸

Mexico sends more immigrants to the United States than any other nation. From 1988 to 1998, hundreds of thousands of lawful permanent residents from Mexico entered the United States annually.²¹⁹ A large undocumented Mexican population has lived and worked for decades in this country. The INS estimated that in 1996, about 2.7 million undocumented immigrants from Mexico, comprising about 54 percent of the total undocumented population, lived in the United States.²²⁰

As a result of the long history of migration from Mexico to the United States, which has been tacitly or expressly supported by the U.S. government, many Mexican immigrants in this country have developed deep community ties in, and allegiances to, both countries.²²¹ Such transnational identities result in back-and-forth movement between the two nations, in cultural and other affinities to both countries, and in legal and other obligations to the two governments. These transnational identities have become formally recognized under both U.S. and Mexican law.²²²

216. See *id.* (analyzing the Bracero Program and its impacts).

217. See ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 230–34 (1990); WAYNE A. CORNELIUS, MEXICAN MIGRATION TO THE UNITED STATES: THE LIMITS OF GOVERNMENT INTERVENTION 2–4 (Working Papers in U.S. Mexican Studies No. 5, 1981); Douglas S. Massey, *The Social and Economic Origins of Immigration* 510 ANNALS 60, 68–70 (1990).

218. See GARCÍA, *supra* note 166 (discussing the 1954 mass removal campaign of Mexican immigrants); FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (analyzing the history of the "repatriation" of persons of Mexican ancestry during the Great Depression); CAMILLE GUERIN-GONZALES, MEXICAN WORKERS AND AMERICAN DREAMS: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900–1939 (1994) (same).

219. See 1999 INS STATISTICAL YEARBOOK, *supra* note 145, at 27 tbl.3.

220. See *id.* at 240 tbl.1.

221. See Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 13–24 (1995); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057, 1062–70 (2000); Roger Rouse, *Mexican Migration and the Social Space of Postmodernism*, 1 DIASPORA 8 (1991); Enid Trucios-Haynes, *The Role of Transnational Identity and Migration*, 28 U. MIAMI INTER-AM. L. REV. 293 (1996–97).

222. In the past decade, both governments have been willing to allow its citizens to assume dual nationality. See T. ALEXANDER ALEINIKOFF, BETWEEN PRINCIPLES AND POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY 30–36 (1998); Jorge A. Vargas, *Dual Nationality for Mexicans*, 35 SAN DIEGO L. REV. 823 (1998). See generally Spiro, *supra* note 19 (analyzing the impacts of dual nationality in modern times).

Besides condoning and encouraging migration to this country, the United States arguably owes a special obligation to Mexican nationals because its policies have contributed to great wealth disparities between the two countries, disparities that create significant migration pressures.²²³ In the face of a strong argument that this nation owes moral obligations to Mexican citizens, the U.S. government acts as if it owes them virtually no obligations—moral or otherwise. On the contrary, border enforcement efforts over the last two decades have almost myopically centered on Mexican migrants. The U.S. government has aggressively pursued strategies to deter and punish Mexican migration to the United States,²²⁴ policies that have had serious human consequences.²²⁵ Consequently, any recognition of a moral obligation to Mexican immigrants in the United States would require an entire about-face in U.S. immigration policy.

Even if one wholly rejects open borders, U.S. obligations to Mexico and its citizens militate in favor of more open migration between the two countries. Mexican President Vicente Fox has advocated open borders between the United States and Mexico.²²⁶ Free migration in the North American trade bloc could resemble the system that has evolved in the European Union.²²⁷ Time will tell whether the U.S. government will institutionalize formal changes in the migration relationship between this country and Mexico.

3. Conclusion

The current immigration law and enforcement system in place in the United States has immoral consequences. It creates serious inequities due to national origin and racial discrimination in the legal immigration system and facilitates the death of desperate undocumented immigrants, who against all

223. See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1465 n.13 (1983); see also Lucy A. Williams, *Property, Wealth and Inequality Through the Lens of Globalization: Lessons From the United States and Mexico*, 34 IND. L. REV. 1243 (2001) (analyzing the economic impacts of globalization on the United States, Mexico, and workers in both countries); *supra* text accompanying notes 179–181 (noting the moral obligations of nation-states to refugees). Similar arguments could be made with respect to other developing nations where the United States is responsible for poverty or other conditions, such as war and violence, which contribute to pressures for the emigration of people looking for safety and economic security in another nation.

224. See *supra* text accompanying notes 157–175. This has changed somewhat since the events of September 11 as enforcement measures have been expanded. See *supra* note 47 (citing authorities on the U.S. government's response to the threat of terrorism).

225. See *supra* text accompanying notes 157–175.

226. See Frank del Olmo, *Keeping People out Also Keeps Them In*, L.A. TIMES, July 8, 2001, at M5; Ginger Thompson, *Mexico Leader Presses U.S. to Resolve Migrants' Issues*, N.Y. TIMES, Nov. 27, 2002, at A12; see also *infra* text accompanying notes 288–290 (discussing the impact of September 11 on discussions between U.S. and Mexican governments on the issue of migration).

227. See *infra* text accompanying notes 275–298.

odds, risk their lives in search of jobs and family reunification. To make matters worse, the law facilitates the exploitation of immigrant workers—predominantly persons of color—by increasing their vulnerability once they enter the United States. This is especially true with respect to immigrants from Mexico, who through U.S. government policies have effectively served as an inexpensive, easily exploitable labor force that benefits both American employers and consumers. Moral obligations to Mexican migrants grow out of such exploitation but have yet to be fully recognized by the U.S. government.

Open borders would help ameliorate the discrimination that the immigration laws aid and abet.²²⁸ The consequences of such a system need not generate fear. Open borders might ultimately have consequences similar to those of the increased migration of African Americans from the rural South to the urban North in the twentieth century, interstate migration that provided economic and other opportunities in the era of Jim Crow.²²⁹ Movement of workers from the developing world would occur and economic opportunities would be created. The same generally was the case in the first century of this country's existence.²³⁰

B. Economic Justifications: A Utilitarian Rationale

Conservative and liberal economists alike embrace free trade as beneficial for the United States.²³¹ Similarly, both micro- and macroeconomic arguments have long been made in support of liberal immigration policies.²³² At the macroeconomic level, a strong argument can be made that more open, less restrictive immigration laws and policies that promote labor mobility would confer economic benefits on U.S. society.

In a regime of closed borders, both undocumented and legal immigration arguably provide concrete economic benefits. As one economist put it:

It is not easy to fashion a convincing economic argument against an open door toward temporary workers with employer sponsorship, and thus illegal immigration may be in large part the result of economically unsound U.S. policies. Furthermore, because illegal aliens participate only minimally in entitlement programs, do not vote, and usually pay taxes like other workers, it is by no means clear that their presence

228. Cf. Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1529–30 (2000) (reviewing authority allowing for affirmative action in higher education to remedy past discrimination); Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (analyzing exclusionary policies directed at immigration from Africa and advocating corrective action).

229. See Nett, *supra* note 41, at 224.

230. See *supra* text accompanying notes 103–109.

231. See *infra* text accompanying notes 232–240.

232. See Wright, *supra* note 20, at 1281–89 (finding that the utilitarian economic argument complements the open border argument based on political theory).

should be viewed as a "problem." Without an appropriate policy regarding the admission of temporary workers, illegal immigration may be a "second-best" response to the resulting economic inefficiencies.²³³

Immigrants often see great economic benefits in the form of wages when they move to the United States. Economic opportunity is an important reason—often one of the primary motivations—for migrating.²³⁴ Many immigrants, particularly undocumented immigrants, come to this country for jobs that are higher paying than those available in their homeland, even if the wages for particular types of employment are low by U.S. standards.

Employers and capital often support more open immigration policies because of the economic benefits.²³⁵ An unabashed supporter of free labor migration, the *Wall Street Journal* proclaimed in 1984 that "[i]f Washington still wants to 'do something' about immigration, we propose a five-word amendment: There shall be open borders."²³⁶ Employers gain in the ready availability of relatively inexpensive labor, which is particularly useful in the agriculture and service industries. For these reasons, business interests at various times in U.S. history have supported less restrictive immigration laws.²³⁷

Despite the benefits of an open entry system, U.S. workers historically have feared labor competition, with its downward pressure on wages, from immigrant labor. Wealth inequality may grow with easy migration, the argument goes. A related fear is that, in a welfare state, open borders will bankrupt the nation with immigrants overconsuming public benefits.²³⁸ As explained below, such fears are exaggerated and lack support in the empirical evidence.²³⁹

Needless to say, even in an era of globalization, the United States continues to embrace comprehensive immigration restrictions as it opens its borders to trade and services. As Kitty Calavita has observed, "the irony is that in this period of globalization marked by its free movement of capital and goods, the movement of labor is subject to greater restrictions than at the dawn of the

233. Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey With an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION, *supra* note 63, at 158, 159.

234. See *supra* text accompanying notes 188–227.

235. See *supra* text accompanying notes 188–212.

236. *In Praise of Huddled Masses*, WALL ST. J., July 3, 1984, at 24; see *The Simpson Curtain*, WALL ST. J., Feb. 1, 1990, at A8 ("Our view is, borders should be open.").

237. See KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820–1924, at 151–57 (1984) (analyzing business efforts to loosen immigration restrictions in the 1920s); JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 33–57 (1971) (contending that the Border Patrol's enforcement efforts were closely related to the needs of growers); Johnson, *supra* note 78, at 1155–56 & n.60 (analyzing the role of employers in political debates over immigration); John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 836 (1982) (recognizing business goals to ease restrictive immigration policies).

238. See *infra* Part II.B.2.

239. See *infra* Part II.B.2.

Industrial Revolution.”²⁴⁰ A serious question exists as to whether these restrictions make economic sense.

In the short run, the tension between free trade and closed borders perhaps can be justified by political exigencies. In the long haul, however, economic pressures for migration in an age of easy transportation and improved information flows with the Internet, will not be as simple to forestall with border controls.

1. The Analogy to International Trade: Benefits to the National Economy

The economic arguments in favor of more open immigration policies resemble the arguments that are employed by international trade advocates. The proliferation of trade agreements, including regional arrangements such as the European Union and NAFTA, and global ones such as the World Trade Organization, shows the current popularity of free trade based on the belief that nations in the aggregate benefit economically by reducing barriers to the free flow of capital, goods, and services.²⁴¹ Relying on such economic arguments, Howard Chang has argued that liberalizing immigration policies likely would increase national and global economic welfare because of more efficient use of the untapped source of relatively low-wage labor in countries across the world.²⁴² One influential econometric study found that “[a]lthough highly speculative, the calculations reported here clearly suggest large potential worldwide efficiency gains from moving toward a worldwide labour market free of immigration controls.”²⁴³

Historically, the alleged costs of immigration to the nation have been at the center of the immigration debate in the United States. Although some observers contend that the economic costs of immigration are overstated,²⁴⁴

240. See Calavita, *supra* note 78, at 152.

241. See *infra* Part II.B.3.

242. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997); Howard F. Chang, *Migration as International Trade: The Economic Gains From the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371 (1999) [hereinafter Chang, *Migration as International Trade*]; see also Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL’Y 163 (2002) (analyzing the adverse economic impact of current U.S. immigration law). But see SIMON, *supra* note 40, at 365–66 (disputing that international trade and immigration are equivalent economically).

243. Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, 14 J. DEV. ECON. 61, 74 (1984).

244. See, e.g., SIMON, *supra* note 40; see also Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters*, 2000 U. ILL. L. REV. 613, 632–35 (reviewing studies on the economic costs and benefits of immigration).

others contend that the costs outweigh any benefits.²⁴⁵ Comprehensive empirical studies, however, demonstrate that any economic impacts of immigration are relatively minor in the larger scheme of things.²⁴⁶

Even assuming that the current U.S. immigration system imposes more costs than benefits, opening the borders might still offer net welfare gains like those seen with increased international trade. In contrast to the current immigration laws' emphasis on family-based immigration,²⁴⁷ greatly enhanced labor mobility likely would increase employment-based migration, a strategy advocated by many economists seeking to increase immigration's economic benefits to the nation.²⁴⁸ Consequently, the economic upside of open borders might well be higher than appears at first glance.

An open U.S. immigration policy could encourage the migration of the best and the brightest to this country and benefit the national economy. A potential "brain drain" might have negative effects on other nations,²⁴⁹ but it economically would benefit the United States as well as offer opportunity to skilled immigrants the world over.

2. The Wealth Distribution Consequences of Open Borders

According to some observers, globalization has led to increased economic inequality, with capital benefiting and labor suffering.²⁵⁰ Opposition to free

245. See, e.g., ROY BECK, *THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS* (1996); GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* (1999); PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 137-77 (2d ed. 1996).

246. See NATIONAL RESEARCH COUNCIL, *THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* (1998); see also BILL ONG HING, *TO BE AN AMERICAN* 76-106 (1997) (analyzing various studies on the economic consequences of immigration); LEGOMSKY, *supra* note 49, at 112 (summarizing economic studies); Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1981-87 (1996) (book review) (analyzing various economic studies on immigration, and concluding that any adverse economic impacts were small compared to the overall size of the U.S. economy).

247. See LEGOMSKY, *supra* note 49, at 147 ("Since [1952], one central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.") (footnote omitted).

248. See BORJAS, *supra* note 245; SIMON, *supra* note 40; Sykes, *supra* note 233.

249. See Richard Delgado & Jean Stefancic, *Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice*, 27 CONN. L. REV. 773, 786 (1995).

250. See, e.g., Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353 (2001); Timothy A. Canova, *Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities*, 33 U.C. DAVIS L. REV. 1547 (2000); Gil Gott, *Critical Race Globalism? Global Political Economy, and the Intersections of Race, Nation, and Class*, 33 U.C. DAVIS L. REV. 1503 (2000); Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000); Sylvia R. Lazos Vargas, *Globalization or Global Subordination? How LatCrit Links the*

trade, as exemplified by the violent protests against the World Trade Organization, has been on the rise, with particular concern for the growing economic inequality resulting from globalization.²⁵¹ Like global economic integration, proposals to allow free migration can expect opposition. The benefits of an open entry system arguably would accrue to employers while the costs would be imposed on workers. Along these lines, the claim has most forcefully been made that minority workers in low-wage jobs are adversely affected by immigrant labor.²⁵² Immigration's impact on low-wage workers, especially African American workers, has been of considerable concern.²⁵³ Some observers forcefully contend that immigration has adversely affected African Americans.²⁵⁴ The empirical data, however, does not offer strong support for this claim.²⁵⁵

Organized labor in the United States traditionally feared downward pressures on the wage scale arising from an influx of immigrant workers.²⁵⁶ Consequently, labor unions historically supported restrictionist measures.²⁵⁷ In recent years, however, unions in the United States have begun to change their position on immigration and are now exploring ways of organizing immigrant labor,²⁵⁸ and unionizing across national boundaries.²⁵⁹ These policy changes

Local to Global and the Global to the Local, 33 U.C. DAVIS L. REV. 1429, 1436–50 (2000); Williams, *supra* note 223.

251. See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000).

252. See, e.g., VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST 211–215 (1992); MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 181–216 (1996).

253. See *infra* text accompanying notes 254–255.

254. See, e.g., BRIGGS, *supra* note 252, at 213–15; LIND, *supra* note 252, 139–216; ROGER WALDINGER, *STILL THE PROMISED CITY? AFRICAN-AMERICANS AND NEW IMMIGRANTS IN POST INDUSTRIAL NEW YORK* (1996); see also Lawrence H. Fuchs, *The Reactions of Black Americans to Immigration*, in *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS* 293 (Virginia Yans-McLaughlin ed., 1990) (analyzing public opinion polls showing that African Americans historically have supported immigration restrictions); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1826–27 (noting the conflict between African American and Latina/o immigrant workers).

255. See Chang, *Migration as International Trade*, *supra* note 242, at 408–09 (citing and summarizing studies).

256. See, e.g., BRIGGS, *supra* note 252 (contending that immigration adversely affects workers and unionization).

257. See 3 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 256–81 (1964) (describing the traditionally restrictionist positions of the American Federation of Labor).

258. See Crain & Matheny, *supra* note 254, at 1828–30; Johnson, *supra* note 118, at 1501–02.

259. See Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 922 (1996–97). See generally DALE HATHAWAY, *ALLIES ACROSS THE BORDER: MEXICO'S "AUTHENTIC LABOR FRONT" AND GLOBAL SOLIDARITY* (2000) (analyzing efforts by Mexican labor unions to organize workers across borders and to pursue other strategies).

result from the realization that border controls have not prevented immigrant labor from entering the country, and are unlikely to do so in the foreseeable future. Given that reality, the most promising strategy for organized labor lies in unionizing all workers, not just U.S. citizen workers.²⁶⁰

Even assuming that adverse distributional consequences may result from open immigration policies, wealth redistribution policies, not immigration restriction, would seem in order.²⁶¹ In this way, economic benefits can be reaped, and costs paid out of the gain. The politics of public benefit programs, however, make wealth redistribution difficult as a practical matter. Stigmatized as "welfare," such policies often are considered to be handouts to the undeserving poor.²⁶² The beneficiaries of open entry, primarily businesses and employers but also to a certain extent consumers,²⁶³ would no doubt resist redistribution proposals to reduce the wealth inequalities generated by open entry. Economically speaking, such transfer payments would make necessary adjustments to the unequal distribution of the benefits of easy labor migration. Despite the thorny political issues raised, such policy options deserve serious consideration.

Related concerns stem from the fear that poor and working noncitizens who come to the United States may end up overconsuming public benefits.²⁶⁴ Few issues touch off the firestorm of controversy that is usually generated by immigrants receiving public benefits. Restrictionists historically have prevailed in limiting immigration of the poor because of the widespread fear that poor immigrants threaten to drain the public coffers.²⁶⁵ California's Proposition 187 exemplifies the heated public reaction to the mistaken belief that undocumented immigrants are excessively using public benefits.²⁶⁶

In considering immigrant benefit consumption, it is important to note that immigrants are not eligible for many of the large, most costly public benefits programs. Welfare reform in 1996 made both lawful and undocumented immigrants ineligible for most benefit programs, such as Temporary

260. See *supra* text accompanying notes 256–259.

261. See Chang, *Migration as International Trade*, *supra* note 242, at 409–10.

262. See generally MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1990) (analyzing the politics of welfare).

263. See *supra* text accompanying notes 241–249.

264. See generally Johnson, *supra* note 71.

265. See generally *id.* (reviewing this history).

266. See generally *id.* (analyzing the impacts of Proposition 187 in light of the history of concern with immigrant public benefit consumption); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (analyzing the anti-Mexican sentiment at the core of the initiative campaign); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (same). A federal court invalidated the bulk of Proposition 187. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

Assistance to Needy Families, the major federal welfare program.²⁶⁷ Although many have criticized welfare reform,²⁶⁸ it nonetheless remains clear that immigrants who are ineligible for most benefits cannot bankrupt the public benefit system. Even if this were to change, public benefit consumption by noncitizens still might not be a problem. Relatively easy access to benefits for immigrants in Europe, for example, has not caused unduly negative fiscal impacts.²⁶⁹

Moreover, despite certain stereotypes, not all immigrants are poor and uneducated and likely to attempt to access public benefit programs. A 2002 study shows that the education levels of Latina/o immigrants have increased in recent years.²⁷⁰ About one-half of all immigrants from Mexico reportedly have a high school diploma or college degree.²⁷¹ This should not come as a surprise; educated citizens of Mexico, in some ways, have the most to gain economically from migrating, especially if they can secure jobs in the United States commensurate with their education. They are often willing to invest in their future and have the resources necessary to secure entry to the United States through smuggling operations or otherwise.²⁷²

It is true that immigration may have fiscal impacts on states that receive high numbers of immigrants. The state and local governments in those jurisdictions must bear more costs, such as those incurred in providing access to public schools and emergency services, while the federal government receives much of the tax revenue contributed by immigrants.²⁷³ However, it is better for states to raise these fiscal concerns with the federal government than for them to continue efforts to punish immigrants or restrict immigration. In the 1990s, the federal government provided funds to several states experiencing high rates of immigration in order to offset these added costs.²⁷⁴

In sum, free labor migration is the logical extension of the globalizing economy. Political controversies will likely arise because of the perceived wealth distribution consequences of open borders. Although immigrant consumption of public benefits is a concern that must be addressed, it should

267. See *supra* note 70. Congress later restored certain benefits to immigrants. See Noncitizen Benefit Clarification and Other Technical Amendments of 1998, Pub. L. No. 105-306, 112 Stat. 2926 (1998).

268. See sources cited *supra* note 70.

269. See Johnson, *supra* note 71, at 1523 n.50.

270. See B. LINDSAY LOWELL & ROBERTO SURO, THE IMPROVING EDUCATIONAL PROFILE OF LATINO IMMIGRANTS (Pew Hispanic Center Report, 2002).

271. See Mark Fineman, *Mexico Redraws Faces of Migrants*, L.A. TIMES, July 11, 2001, at A3 (reporting the findings of a report of the Mexican National Population Council).

272. See *supra* text accompanying notes 170–171.

273. See Johnson, *supra* note 71, at 1539–41; Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1470–74 (1995).

274. See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1366–68 (1999); Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 937–39 (1997).

not determine whether open borders make economic sense. Rather, policy-makers should consider wealth redistribution policies that may ameliorate any negative impacts on U.S. workers associated with open entry.

3. A Regional Migration Arrangement as the Second Best Alternative

Because of perceived economic benefits, regional common markets emerged at the tail end of the twentieth century. In some instances, labor migration agreements evolved out of increased trade. Regional migration arrangements between nations in a particular region of the world, such as those that exist in much of Europe, hold promise as an alternative to open borders.²⁷⁵ Labor migration within the region would be permitted. National sovereignty would be recognized, because regional arrangements only develop with the consent of sovereign nation-states.

Regional arrangements have been advocated as a politically viable alternative to the current system for admitting refugees to the United States.²⁷⁶ Under those systems, nations would prefer the admission of refugees facing persecution in nearby, not faraway, nations. Greater racial and cultural homogeneity among populations in a region, as opposed to all those in the world, would tend to minimize opposition to a regional proposal. Regional migration also ameliorates the fear of opening the "floodgates" to immigrants the world over that is posed by a system of wholly open entry.²⁷⁷ A regional arrangement suggests more control over the numbers of migrants, which has been important to the public debates concerning the formulation of immigration policy.²⁷⁸

The members of the European Union have concluded that the economic benefits of free labor migration within the member states would benefit the member states. Free labor migration generally is permitted within the European Union, and the elimination of border controls has proven to be relatively painless. Indeed, the great success of the European Union has contributed its potential growth and its expansion to include possibly ten new members in the near future.²⁷⁹ Nor is the European Union alone. Several regions of northern

275. See Nett, *supra* note 41, at 227.

276. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990).

277. See *supra* text accompanying notes 103–109.

278. See *supra* text accompanying notes 103–109.

279. See Keith B. Richburg, *The EU and the Power of the People*, WASH. POST, Nov. 8, 2002, at A27.

Europe, South America, and Africa have allowed, or are considering allowing, relatively easy migration between member states.²⁸⁰

There are costs to regional regimes that are inherent in any system of border controls. Efforts to limit migration into the European Union hastened the creation of the so-called Fortress Europe; with internal controls eased, border controls were erected around the European Union's perimeter.²⁸¹ As a condition of EU membership, for example, Spain created its first comprehensive immigration law and limited migration from North Africa.²⁸² Similar to the events occurring along the southern border of the United States, migrants have died while seeking to evade the border fortifications, and migrants from North Africa have encountered increased discrimination.²⁸³

The emergence of Fortress Europe demonstrates why regional arrangements are second-best alternatives to open borders. As a political matter, it is easier to build political support for such arrangements than for an immediate move to open borders. The costs of closed borders do not completely disappear, however; rather, they are shifted to prospective immigrants outside the boundaries of the regional arrangement, just like when nation-states erect border controls. The human and other costs of EU border enforcement are similar to those seen in the United States, with the aggressive enforcement of the southern border with Mexico and harsh treatment of asylum seekers.²⁸⁴

Despite its shortcomings, a regional migration pact may be the most likely alternative to open borders in the near future for the United States. Although the U.S. government was unwilling to consider immigration in the formation of NAFTA, the tripartite trading relationship holds the potential for evolving into an European Union-like labor migration relationship between its member states (the United States, Canada, and Mexico).²⁸⁵ Over the course of the twentieth century, the United States and Mexico have developed an increasingly closer economic and political relationship. This development creates the potential for future cooperation on migration issues beyond that of fighting

280. See LEGOMSKY, *supra* note 49, at 250; Larry Rohter, *South American Trading Bloc Frees Movement of Its People*, N.Y. TIMES, Nov. 24, 2002, at § 1, p. 6.

281. See Kevin R. Johnson, *Regional Integration in North America and Europe: Lessons About Civil Rights and Equal Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 33, 40-43 (2000-2001).

282. See Kitty Calavita, *Immigration, Law, and Marginalization in a Global Economy: Notes From Spain*, 32 LAW & SOC'Y REV. 529, 542-48 (1998).

283. See Johnson, *supra* note 281, at 42-43.

284. See *supra* text accompanying notes 157-187.

285. See T. Alexander Aleinikoff, *Legal Immigration Reform: Toward Rationality and Equity*, in BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY, *supra* note 65, at 5, 5-6; Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994); John A. Scanlan, *A View From the United States—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 IND. J. GLOBAL LEGAL STUD. 79, 123-25 (1994).

crime in the border region.²⁸⁶ Such an arrangement would be consistent with the moral obligations that the United States arguably owes Mexican workers.²⁸⁷

In recent years, the U.S. and Mexican governments have discussed migration between the two states—a turnaround from the early 1990s, when NAFTA's approval hinged on *not* addressing immigration.²⁸⁸ Only days before September 11, 2001, the regularization of migration between the United States and Mexico appeared to be on the horizon. Immediately before that fateful day, the highest levels of the U.S. and Mexican governments had been engaged in serious discussions toward a lasting migration pact. Since then, U.S. border enforcement and national security concerns in the war on terrorism have put those efforts on hold.²⁸⁹ Mexico's President Vicente Fox, however, continues to press for a bilateral migration arrangement.²⁹⁰

The interests of the two states converge in important ways; Mexico and the United States both have much at stake in continued migration between the two nations. The Mexican economy receives billions of dollars in remittances annually from Mexican workers in the United States.²⁹¹ The U.S. economy benefits heavily from immigrant labor, particularly in service, agricultural, and other labor-intensive industries.²⁹² Mexico thus has much to gain by ensuring that its citizens have access to jobs, reducing the risk of labor exploitation, and securing a durable immigration status, while the United States needs and desires low-wage labor.²⁹³

286. See Alan D. Bersin, *El Tercer Pais: Reinventing the U.S./Mexico Border*, 48 STAN. L. REV. 1413 (1996).

287. See *supra* Part II.A.2.

288. See *supra* text accompanying notes 285–287.

289. See Johnson, *supra* note 48, at 866–67.

290. See Richard Boudreaux, *Frustration Marks Fox, Bush Talks*, L.A. TIMES, Oct. 27, 2002, at 3. The inability to secure a migration accord with the United States ultimately contributed to the resignation of Mexico's prominent foreign minister, Jorge Castañeda, in January 2003. See Tim Weiner, *Foreign Minister in Mexico Will Quit, Frustrated by the U.S.*, N.Y. TIMES, Jan. 9, 2003, at A5.

291. See Vargas, *supra* note 158, at 80 (mentioning the importance of billions of dollars of remittances to Mexico from immigrants in the United States); see also Alexander C. O'Neill, Note, *Emigrant Remittances: Policies to Increase Inflows and Maximize Benefits*, 9 IND. J. GLOBAL LEGAL STUD. 345 (2001) (analyzing the importance of remittances from migrants to developing countries in terms of economic development).

292. See *supra* Part II.A.1.d.

293. The Mexican government's interest in protecting migrant labor in the United States is not solely humanitarian; increasing wages and benefits for Mexican migrants also increases remittances to Mexico. See Richard Griswold del Castillo, *Mexican Intellectuals' Perception of Mexican Americans and Chicanos, 1920–Present*, 27 AZTLÁN 33, 49 (2002); see also Kenneth Juan Figueroa, Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection From Private Discrimination*, 102 COLUM. L. REV. 408 (2002) (contending that the Mexican government should have standing to vindicate the rights of its citizens working in the United States).

Although economic growth in Mexico may be a key ingredient in the long run for the reduction of migration,²⁹⁴ pressures fueling migration from Mexico to the United States are likely to remain for the foreseeable future. To the extent that free migration can offer economic benefits to Mexico, the demand for future migration will decrease.

In some ways, free migration among the NAFTA nations would acknowledge existing realities. Currently, labor integration between the United States and Mexico is occurring from the bottom up, with U.S. employers and Mexican workers moving in this direction. Efforts to bar the employment of undocumented workers have been largely ineffective, with employer sanctions not vigorously enforced.²⁹⁵ Certain jobs in the United States, such as in agriculture, construction, and many service industries, cannot be exported to other countries for completion by low-wage labor and thus will remain in this country.

Impediments to a regional arrangement may still exist. Racial, socioeconomic, and cultural differences between the populations of the NAFTA partners arguably exceed those of the original EU members. In addition, anti-Mexican sentiment has a long history in the United States.²⁹⁶ Fear of a mass migration of poor, culturally and racially different people will likely generate considerable controversy.²⁹⁷ At the same time, however, such migration may well be inevitable.

In sum, increased trade under NAFTA may further improve the relationship between the United States and Mexico, thus making a bilateral or multilateral migration agreement more likely in the future. An European Union-like labor migration arrangement in North America is one possibility. Such an alternative may be more politically viable than the immediate adoption of open entry to migrants. A labor migration agreement would provide economic benefits to the nations involved, and would recognize the United States' special relationship with Mexico and the moral obligation to Mexican workers.²⁹⁸ One significant downside of such an arrangement, however, is that a strict border control regime at the perimeter of the region, like that in Europe, would likely emerge.

294. See U.S. COMM'N FOR THE STUDY OF INT'L MIGRATION AND COOPERATIVE ECON. DEV., UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE (1990); Philip L. Martin, *Economic Integration and Migration: The Case of NAFTA*, 3 UCLA J. INT'L L. & FOREIGN AFF. 419 (1998).

295. See sources cited *supra* notes 194.

296. See *supra* Part II.A.2.

297. See *supra* text accompanying notes 38–45.

298. See *supra* Part II.A.2.

C. Policy Justifications

Globalization, technological advances, and changing conceptions of the nation-state require serious study of new approaches to immigration controls.²⁹⁹ Besides limiting the abuses and injuries that enforcement of the current immigration laws cause immigrants and U.S. citizens,³⁰⁰ the benefits of open entry to the United States are many. Importantly, allowing free labor migration would permit the U.S. government to focus enforcement efforts on protecting national security, a high priority after September 11.³⁰¹

History teaches that the cyclical fear of a flood of immigrants of different races destroying U.S. society has never been justified. Time and time again, the United States has taken extreme action in the name of self-preservation, which history records with regret, embarrassment, and disbelief. U.S. society once considered the German and Irish as unassimilable peoples who diluted Anglo-Saxon racial purity.³⁰² Although Chinese and Japanese immigrants were despised groups generating a plethora of immigration restrictions in the late nineteenth and early twentieth centuries,³⁰³ by today's economic standards people of Chinese and Japanese descent have higher average incomes than whites.³⁰⁴ Southern and Eastern Europeans, whose immigration led to the creation of the national origins quota system in 1924, now are viewed as part of the mainstream, not as people of different, inferior races.³⁰⁵

Despite popular perceptions, most Latina/o immigrants, the largest component of the current immigration cohort, assimilate to a large degree into the United States; as a group, they learn English, participate in the workforce, and embrace traditional American values.³⁰⁶ By economic and political measures,

299. See Saskia Sassen, *Regulating Immigration in a Global Age: A New Policy Landscape*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 65 (2000).

300. See *supra* Part II.A-B.

301. See *infra* text accompanying notes 46-48.

302. See HIGHAM, *supra* note 51, at 29, 196-200. For an analysis of the integration of German immigrants into U.S. society in the early twentieth century, see Allan C. Carlson, *The Peculiar Legacy of German-Americans*, SOCIETY, Jan.-Feb. 2003, at 77.

303. See Johnson, *supra* note 68, at 1120-27.

304. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853, 869-71 (1995) (reviewing economic data). Because this information can be taken out of context, it must be used carefully. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1258-65 (1993). I in no way mean to suggest here that racism against Asian Americans, including persons of Chinese and Japanese ancestry, is not a social problem in the United States. See generally ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999) (analyzing the uncertain status of Asian Americans in the United States); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002) (same).

305. See Johnson, *supra* note 68, at 1127-31.

306. See Johnson, *supra* note 1, at 1281. See generally LINDA CHÁVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991) (analyzing the assimilation of

for example, Cuban Americans on average are better off than other U.S. citizens.³⁰⁷

Latina/o assimilation is exemplified by the increasing efforts of politicians across the political spectrum who seek to attract Latina/o voters, and avoid taking positions on immigration and related issues that would tend to alienate this growing segment of the electorate.³⁰⁸ Not surprisingly, Latina/os have greatly increased their representation in elected offices in recent years.³⁰⁹

Some observers have complained that current levels of immigration have made assimilation difficult.³¹⁰ However, the waves of immigration of the early twentieth century were, as a percentage of the U.S. population, larger than the current levels of immigration.³¹¹ Over the course of the twentieth century, the nation has slowly but surely adjusted. This past success, which is part of a long history of successful immigrant integration into U.S. society, suggests the possibility that the United States could fully integrate immigrants in a legal regime without borders. Moreover, given the influence of U.S. culture throughout the world in this high-tech, information age, we might well expect immigrants today to be much more familiar with the United States, to be prepared for faster assimilation, and to be more capable of making an informed judgment about immigration, than immigrants of previous generations.

1. The Impossibility of Enforcing Broad Immigration Restrictions

A move to open borders would recognize the inherent difficulty, if not impossibility, of immigration enforcement consistent with liberal values.³¹²

Latina/os in U.S. society); PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* (1997) (offering a romanticized view of immigrant assimilation in U.S. history).

307. See Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 383–93 (1994); see also Alice G. Abreu, *Lessons From LatCrit: Insiders and Outsiders, All at the Same Time*, 53 U. MIAMI L. REV. 787 (1999) (reflecting on the identity of Cuban Americans and how that identity relates to that of other Latina/os).

308. See Ricardo Alonso-Zaldivar, *Latinos Give Bush High Job Approval Rating, Poll Shows*, L.A. TIMES, Aug. 21, 2002, at A10; Matea Gold, *Rivals Go After Davis' Latino Support*, L.A. TIMES, July 13, 2002, at B12. The backlash against California Governor Pete Wilson's support for Proposition 187 taught Republican politicians the potential downside of taking positions viewed as anti-Latina/o. See Matea Gold, *Simon Takes Chance With Pete Wilson Endorsement*, L.A. TIMES, Oct. 24, 2002, at B1; James Sterngold, *Hoping to Run California, and Recast the Republicans*, N.Y. TIMES, Jan. 28, 2002, at A8.

309. See Steve Scott, *Competing for the New Majority Vote*, 31 CAL. J. 16, 18 (2000) (discussing the rapid increase in Latina/o elected officials in California).

310. See generally BRIMELOW, *supra* note 245 (advocating a moratorium on immigration because of, among other things, difficulties in the assimilation of immigrants).

311. See Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1, 3 (2001) ("The percentage of the U.S. population that is foreign-born is steadily rising and now approximates 10%, which is still well below the 14% share reached in the first decade of the 20th century.").

312. See *supra* Part I.

The move would recognize that the United States simply will not adopt the types of policies represented by the Berlin Wall that once separated East and West Germany. Despite ever increasing enforcement efforts, social, economic, and political pressures result in a continuous flow of migrants to the United States. Draconian enforcement measures that result in the loss of human life, but not the desired outcome, simply cannot be justified as a policy matter. Millions of undocumented immigrants have evaded strict immigration controls to live and work in the United States.³¹³

In 1982, the Supreme Court recognized that “[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”³¹⁴ Rather than deterring undocumented immigration and reducing the undocumented immigrant population, the aggressive border enforcement strategies adopted in the 1990s appear to have increased the permanent settlement of undocumented immigrants in the United States.³¹⁵

Although the analogy is far from perfect, migration controls resemble in significant ways the United States’ efforts to enforce the bar on the alcohol trade during Prohibition,³¹⁶ which not coincidentally emerged at a time like today when nativism had hit a fever pitch.³¹⁷ The enforcement of Prohibition fell most heavily on poor and working class southern and eastern European immigrants—popularly considered to be racially different—and on African Americans.³¹⁸ Federal enforcement of Prohibition proved to be extremely difficult; in essence, “the federal government was unable to enforce Prohibition

313. See *infra* text accompanying notes 219–220.

314. *Plyler v. Doe*, 457 U.S. 202, 218 (1982). See generally LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* (2d ed. 1998) (studying the lives of undocumented immigrants in the United States).

315. See *infra* text accompanying notes 342–349.

316. See Charles H. Whitebread, *Freeing Ourselves From the Prohibition Idea in the Twenty-First Century*, 33 *SUFFOLK U.L. REV.* 235, 237–40 (2000). See generally HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* (1950) (describing the emergence of Prohibition in the United States). A similar analogy has been made with respect to Prohibition and the modern war on drugs. See, e.g., David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 *SUFFOLK U.L. REV.* 241 (2001); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 *DEPAUL L. REV.* 483 (1997); Charles H. Whitebread, “Us” and “Them” and the Nature of Moral Regulation, 74 *S. CAL. L. REV.* 361 (2000) [hereinafter Whitebread, *Moral Regulation*].

317. See HIGHAM, *supra* note 51, at 267–68; Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 *N.C. L. REV.* 303, 314–15 (1986).

318. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 574–75 (2001); William J. Stuntz, *The Legal Construction of Norms: Self-Defeating Crimes*, 86 *VA. L. REV.* 1871, 1877–78 (2000).

in communities that had accepted—and even expected—hard drink.”³¹⁹ In the end, “[P]rohibition’s failure was due to a lack of popular support for enforcement.”³²⁰

Moreover, enforcement resulted in fatalities due to excessive use of force by federal officials who zealously—perhaps desperately—sought to suppress the alcohol trade.³²¹ Many otherwise law-abiding citizens did not consider alcohol trafficking to be a legitimate crime and knowingly violated the law.³²² Organized crime flourished in the bootlegging industry.³²³ Increased criminalization of alcohol trafficking offenses followed, causing a caseload crisis in the federal courts.³²⁴ To nullify the enforcement of a law lacking popular support, juries refused to convict defendants for violation of alcohol-related laws.³²⁵ This, of course, placed the legitimacy of the law in question.

The efficacy of immigration controls bears striking resemblances to the effectiveness of enforced sobriety during Prohibition. Increasing at times of high levels of nativist sentiment,³²⁶ border enforcement tends to focus on poor and working class noncitizens who attempt to evade border controls.³²⁷ It does nothing about the large percentage of undocumented immigrants who originally had the ability and resources to enter the country legally on a temporary

319. Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 162 (1991).

320. W.J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 293 (1996); see Spaeth, *supra* note 319, at 162 (“This great national experiment [of Prohibition] failed utterly.”).

321. See LAURENCE F. SCHMECKEBIER, *THE BUREAU OF PROHIBITION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 53 (1929) (“A too free use of firearms has been one of the criticisms directed against prohibition agents, and alleged cases of unjustifiable use of weapons have been reported.”). One observer discusses the killing of a wrongly accused bootlegger by U.S. Customs officers, which resulted in a congressional inquiry. He states that this death “was only one of many shooting deaths which the government justified by its goal of banning liquor. [The outrage at the killing] best exemplified the nation’s outrage at often violent Prohibition enforcement.” Spaeth, *supra* note 319, at 161–62 (footnotes omitted).

322. See Whitebread, *Moral Regulation*, *supra* note 316, at 364–65.

323. See Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613 (1994); see also Benito Gaguine, *The Federal Alcohol Administration*, 7 GEO. WASH. L. REV. 844, 845 (1939) (discussing organized crime and the enforcement difficulties of Prohibition).

324. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1068 (1995); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf”?*, 50 SYRACUSE L. REV. 1317, 1324–25 (2000).

325. See Edwin R. Keedy, *Administration of the Criminal Law*, 31 YALE L.J. 240, 240 (1922). Juries have been willing to act in a similar way by refusing to convict in certain instances despite strong evidence that a drug crime had been committed. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

326. See *supra* text accompanying notes 299–311.

327. See Johnson, *supra* note 71.

visa but later violated its terms by overstaying.³²⁸ Like the enforcement of the alcohol laws, the racial impacts of immigration controls are unmistakable.³²⁹

Serious enforcement difficulties have led to the increasing criminalization of immigration law violations.³³⁰ As during Prohibition, the criminalization of immigration offenses has created a caseload crisis in the federal courts. In recent years, criminal prosecutions for deported noncitizens' unlawful re-entry into the country³³¹ have increased dramatically.³³² The great rise in such prosecutions has resulted in a steep increase in workload in courts along the U.S.-Mexican border, which has led to the addition of federal judges in that region.³³³

As was the case for alcohol consumption during Prohibition, the ordinary law-abiding citizen does not view the employment of undocumented workers as truly criminal conduct. Many U.S. citizens, including two otherwise upstanding nominees for U.S. Attorney General—the nation's chief law enforcement officer—knowingly hired undocumented immigrants, apparently not considering it to be a crime equivalent to others.³³⁴ Large employers, such as Tyson Foods, the nation's largest meat producer and processor, have employed vast numbers of undocumented workers.³³⁵ Indeed, some informed observers contend that the entire U.S. food and agriculture industry depends on undocumented immigrant labor.³³⁶

328. It is estimated that 40 percent of all undocumented immigrants are visa overstays. See 1999 INS STATISTICAL YEARBOOK, *supra* note 145, at 242.

329. See *supra* text accompanying notes 299–325.

330. See generally Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

331. See 8 U.S.C. § 1326(a) (1998).

332. See, e.g., *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); see also Pamela A. MacLean, *Study Suggests Hispanic Men Face Excessive Prosecution*, DAILY RECORDER (Sacramento), Oct. 11, 2001, at 1 (reporting that Latina/os were subject to high rates of criminal prosecution under the illegal entry law).

333. See Sen. Dianne Feinstein, *Senate Approves Five New Urgently Needed Federal Judgeships for San Diego*, CONG. PRESS RELEASES, Dec. 21, 2001; Pamela Manson, *Congress OKs Two New Federal Judgeships for Texas*, 16 TEX. LAW. 8 (2001); Diane Jennings, *Border Court Overwhelms Judges: Officials Say Drug, Immigration Hearings Strain System*, DALLAS MORNING NEWS, June 17, 2001, at 41A.

334. See Linda Kelly, *The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 CONN. L. REV. 1045, 1069 (1999) (discussing the cases of Zoe Baird and Kimba Wood, both of whom withdrew from consideration for Attorney General after their nominations because of controversies involving their employment of undocumented domestic service workers); Romero, *supra* note 202, at 1057–62 (same). Wood was a federal district court judge and Baird was general counsel of a major corporation.

335. See David Barboza, *Tyson Foods Indicted in Plan to Smuggle Illegal Workers*, N.Y. TIMES, Dec. 20, 2001, at A1. Tyson Foods was indicted by the federal government for this alleged practice, and was subsequently acquitted. See Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. TIMES, Mar. 27, 2003, at A14.

336. See David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26.

To the extent that violation of the immigration laws is viewed as criminal, unlawful immigration and the employment of undocumented immigrants are generally considered to be “victimless” crimes.³³⁷ As Isabel Medina has observed:

Congress criminalized the employment of undocumented aliens in 1986 to deter unauthorized entry in the hope of removing the aliens’ goal—employment. Criminalization of the employment relationship, however, has not deterred illegal entry. Most examinations of this failure focus on the inadequacy of enforcement efforts, and the complexity of the problem posed by unauthorized immigration. The principal reason that criminalization of employment of undocumented aliens has failed to deter unauthorized immigration, however, is that the criminalized behavior, employment, is highly valued by American society and does not possess the characteristics that modern American society relies upon to support the imposition of criminal sanctions. To the contrary, employing illegal aliens carries a forceful moral imperative: it is conduct which in certain contexts is required by an individual’s values or morals. The moral tension surrounding the employment prohibition makes prosecutors reluctant to devote scarce financial resources to prosecute those who engage in such behaviors, judges reluctant to impose serious sanctions, and society reluctant to support strong enforcement efforts.³³⁸

Similarly, undocumented immigrants generally are not viewed—except by ardent restrictionists—as the equivalent of common criminals, but rather as people who come to the United States looking for work and a better life.³³⁹ This attitude is demonstrated by the fact that employers voluntarily hire undocumented workers; many citizens are comfortable with hiring undocumented workers to work in their homes,³⁴⁰ and often know of undocumented immigrants in their communities but do not report them to the authorities. There simply is not the palpable fear of undocumented immigrants that there is of common criminals. At times, moral convictions may serve as the basis for assisting undocumented immigrants. In the 1980s, religious activists helped

337. See Medina, *supra* note 330, at 717–29 (analyzing the lack of any concrete harm to undocumented immigration and the employment of undocumented immigrants); see also *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) (referring to immigration violations as “victimless” crimes” (quoting *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997))); Robert W. McGee, Essay, *Some Thoughts on the Relationship Between Property Rights and Immigration Policy*, 42 CLEV. ST. L. REV. 495, 504 (1994) (same).

338. Medina, *supra* note 330, at 671–72 (footnotes omitted).

339. See, e.g., HING, *supra* note 246, at 32–43 (relating the story of Rodolfo Martinez Padilla, an immigrant from Mexico); Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989) (recounting the story of Maria Elena, an undocumented immigrant working on the economic fringes of U.S. society).

340. See *supra* text accompanying notes 200–202.

Central Americans enter the country and flee the violence of their homelands even though this conduct violated the law.³⁴¹

The end of Prohibition effectively admitted that enforcement of the alcohol laws had been ineffective. Similarly, the end of closed borders would acknowledge the failure of the current immigration enforcement regime. Despite the record levels of expenditures to seal the U.S.-Mexican border, undocumented immigration continues largely unabated.³⁴² According to the latest INS estimate, five million undocumented immigrants lived in the United States in 1996, with roughly 300,000 coming each year.³⁴³ Other estimates are considerably higher.³⁴⁴ One thorough report concluded that "[t]here is no evidence that the border enforcement build-up . . . has substantially reduced unauthorized border crossings" and that "[d]espite large increases in spending and Border Patrol resources over the past nine years, the number of unauthorized immigrants increased to levels higher than those [before 1986]."³⁴⁵ The collateral, yet no less real, effects of greater border enforcement include increased migrant deaths, unauthorized migrants staying longer than in the past,³⁴⁶ large numbers of noncitizens imprisoned for immigration crimes,³⁴⁷ and the expansion of "the very profitable human smuggling industry."³⁴⁸ Trafficking of immigrants and compelled labor in the sex and other industries resulted in Congress enacting the Victims of Trafficking and Violence Protection Act of 2000.³⁴⁹

The failure of border enforcement is in large part due to the strong family, social, and economic factors that contribute to migration. Migration to the United States from Mexico has established deep family connections and enduring social ties between Mexican citizens and this country over the last century.³⁵⁰ Besides a large flow of immigrants from Mexico to the United

341. See *supra* text accompanying note 66.

342. See U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED* (Dec. 1997). See generally PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000) (analyzing the lack of effectiveness of border enforcement); MASSEY ET AL., *supra* note 214, at 163 (characterizing current U.S. border enforcement as "smoke and mirrors"); Scanlan, *supra* note 237 (analyzing the implications of the U.S. government's "illusory" efforts to limit the number of immigrants entering the country).

343. See U.S. DEP'T OF JUSTICE, *THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION* 39 (2002).

344. See *supra* text accompanying notes 219-220 and notes 219-220 (discussing INS estimates of the undocumented immigrant population in the United States).

345. BELINDA I. REYES ET AL., *HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION*, at viii, xii (Public Policy Institute of California, 2002) (emphasis added).

346. See *supra* text accompanying notes 172-173.

347. See *supra* text accompanying notes 330-333.

348. REYES ET AL., *supra* note 345, at xiii; see *supra* text accompanying notes 170-171.

349. Pub. L. No. 106-386, 114 Stat. 1464 (2000); see Cooper, *supra* note 150; *supra* text accompanying notes 196-203.

350. See *supra* text accompanying notes 221-222.

States, a large population of persons of Mexican ancestry live in this country, a fact that both attracts more immigration from Mexico, and influences the immigration debate in the United States. Economic circumstances in Mexico also have contributed to the continued migration.³⁵¹ Little evidence suggests that, at least in the short run, the social and economic pressures fueling migration will change in any meaningful way.³⁵²

Recent events confirm the inherent limitations of border controls. The massive security measures put in place after the tragedy of September 11 reportedly reduced undocumented immigration from Mexico for a short time. Government statistics, however, show that a little more than a year after September 11, rates of unlawful entry along the southern border with Mexico returned to their previous levels.³⁵³ Few events could better create the incentive and political support to aggressively enforce the borders than the terrorist acts of September 11. Nonetheless, undocumented migration now continues at the same levels as it did previously. It is difficult to envision any event that could prompt sustained efforts to close the borders that would in fact achieve that goal.

Besides the lessons of history, recent developments make enforcement of the immigration laws more difficult as a practical matter than it has been in the past. About ten percent of the families with children in the United States have mixed immigration status families, "famil[ies] in which one or more parents is a noncitizen and one or more children is a citizen."³⁵⁴ Consequently, any effort to remove noncitizens unlawfully in the United States will adversely impact the families of many U.S. citizens. This phenomenon likely will make more rigorous enforcement more controversial than it already is, reducing political support for strong enforcement measures. Finally, as a practical matter, it is more difficult to deport immigrant parents when U.S. citizen children also will be deported.³⁵⁵

Reform strategies have largely failed to this point. For example, a blue-ribbon Commission on Immigration Reform offered a multivolume report

351. See *supra* Part II.A.2.

352. See *supra* Part II.A.2.

353. See Jim Yardley, *Mexicans' Bids to Enter U.S. Rebound to Pre-9/11 Levels*, N.Y. TIMES, Nov. 24, 2002, at 24 (analyzing INS data); see also Hugh Dellios, *Visiting Home Is Gift Enough*, CHI. TRIB., Dec. 26, 2002, at 1 (reporting that Mexican immigrants were once again returning to Mexico for the Christmas holidays to visit family and friends). It recently came to light that an undocumented immigrant from Mexico had worked on the White House grounds for a couple of years. See *NBC Nightly News: How Illegal Immigrant Gained Access to White House* (NBC television broadcast, Jan. 4, 2003).

354. Michael E. Fix & Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform* 1 (Oct. 1999), <http://www.urban.org/url.cfm?ID=409100> (last visited Sept. 16, 2003).

355. See Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

with recommendations that have had no real impact.³⁵⁶ Efforts to reform the Border Patrol have been ongoing for years.³⁵⁷ Nonetheless, there is no indication that the immigration controls and their enforcement, as currently fashioned, can be reformed incrementally in a manner that would reduce undocumented immigration.³⁵⁸

In sum, strict immigration controls that run counter to migration pressures simply cannot be enforced. As Prohibition has shown, law cannot be effectively enforced when it faces social and economic resistance and the governed do not view as criminal what the law criminalizes. Moreover, rampant violation of the immigration laws undermines their very legitimacy.

2. Reducing Racial Discrimination and Prohibiting the Exploitation of All Workers

As discussed previously, racial discrimination in U.S. immigration laws raises serious moral concerns.³⁵⁹ It also constitutes bad policy that is inconsistent with efforts in other areas of U.S. law to eradicate racial discrimination in the public schools, the workplace, and American social life generally.³⁶⁰ The legitimacy of the struggle to eliminate discrimination is seriously undermined by the discrimination inherent in the immigration laws.³⁶¹

Some commentators might contend that large scale immigration would reduce social cohesion and possibly increase racism against immigrants of color.³⁶² The national commitment to multiculturalism, however, suggests that we should strive to welcome and accept people of different cultures and backgrounds and races, not keep them out because some segments of our society might act in discriminatory ways. Because of the fear of public opposition, desegregation of the public schools proceeded with "all deliberate speed,"³⁶³ a decision that since then has been roundly criticized.³⁶⁴ Fears of public opposition to immigrants could indefinitely justify strict immigration controls.

356. See, e.g., U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY (1994); *supra* note 174 (citing reports calling for immigration reform).

357. See, e.g., Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757 (1995).

358. See *infra* Part II.C.2-5.

359. See *supra* Part II.A.1.

360. See *supra* text accompanying notes 122-123.

361. See *supra* text accompanying notes 122-123.

362. At the Symposium at which this Article was initially presented, Professors Alex Aleinikoff and Rachel Moran suggested variations of this argument.

363. See *Brown v. Bd. of Education*, 349 U.S. 294, 301 (1955).

364. See Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 436-44 (1999); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1750-57 (1993).

Importantly, the social cohesion argument assumes a drastic increase in immigration with open borders, which is far from evident.³⁶⁵ The number of noncitizens apprehended by the immigration authorities, which may include noncitizens apprehended on numerous occasions, ranged between one and 1.9 million annually during the 1990s.³⁶⁶ Although perhaps high to some observers, the apprehension numbers hardly suggests that a “flood” of noncitizens will come to America in an open borders system. If numbers prove to be a problem, however, a phased-in approach to ensure the public order could be implemented.

Moreover, beyond its dubious morality, the use of law to assist in the creation of a disposable, racially stratified labor force is poor labor policy.³⁶⁷ The dual labor market, with immigrant labor in one low-wage market and citizens in a higher-wage one, may injure U.S. citizen workers as well as immigrant workers. Failure to enforce labor standards for immigrant labor makes it difficult for domestic labor to maintain wages and working conditions.³⁶⁸ If possible, employers will look to the more inexpensive immigrant labor market.³⁶⁹ By enforcing labor protections for immigrant workers, all workers stand to benefit.³⁷⁰ This suggests that the answer to the claim that immigrants undercut domestic workers is not to restrict immigration, which historically has been the preferred approach of organized labor,³⁷¹ but rather, to ensure employer compliance with wage and conditions laws and regulations for all workers. So long as a dual labor market exists, in which a lawless regime governs one market, and in which low-wage labor is subject to easy exploitation, one can expect employers to opt for immigrant labor over domestic workers.

Only by eliminating the dual labor market with undocumented labor will it be possible to begin to take the necessary steps to enforce uniform wage and condition laws that benefit all workers. With a new system of open entry, resources could be shifted from border controls to enforcement of the labor laws. By helping to end the exploitation of workers on account of immigration status, open borders would further national labor policy.

365. See *supra* text accompanying notes 38–54.

366. See U.S. DEPT OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 237 tbl.58 (2002).

367. See *supra* Part II.A.1.d.

368. See *supra* text accompanying notes 256–260.

369. See *supra* Part II.A.1.d.

370. See Cameron, *supra* note 190 (contending that the future of the American labor movement rests on the organization of Latina/o workers, including immigrant workers).

371. See *supra* text accompanying notes 256–260.

3. Promoting the Integration of Immigrants Into U.S. Society

At various times in U.S. history, immigration restrictionists have claimed that immigrants have not assimilated into the mainstream. Some might claim that open borders could make the problem worse, rather than better. However, a properly designed open entry policy could promote the integration of immigrants into U.S. society.³⁷²

Even if they disagree on the proper strategies to achieve the goal of integrating immigrants into the economic, political, and social fabric of the United States, commentators from different political persuasions agree that integration is a laudable goal.³⁷³ Communitarians—who seek to ensure full membership for immigrants admitted into a community—as well as liberals, would support this view.³⁷⁴

The integration of Mexican immigrants into American social life has proven difficult. As aptly summarized by Bernard Trujillo:

The patterns of Mexican migration we observe are partially attributable to the vibrant and ongoing relationships between Mexicans in Mexico and Mexicans (along with persons of Mexican descent) in the United States. A Mexican national fixes her eyes on the U.S. with a mixture of hope and resentment: hope because she knows her labor will be welcomed by the economy and she will be welcomed by networks of Mexicans who have come weeks and generations before; resentment because she believes the border is fundamentally false.³⁷⁵

Mexican immigrants also resent the racial discrimination that they suffer in the United States. Discrimination against persons of Mexican ancestry, particularly in the Southwest where border enforcement contributes to racial tensions, is a central part of the history of the Mexican people in this country.³⁷⁶ Border enforcement often focuses on persons of a different race.³⁷⁷ U.S. citizens of Mexican ancestry suffer from discrimination in jobs, education,

372. See Jagdish Bhagwati, *Borders Beyond Control*, FOREIGN AFF., Jan.–Feb. 2003, at 98, 103–04.

373. See U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION & IMMIGRANT POLICY 25–58 (1997) (offering policy initiatives to facilitate the integration of immigrants into U.S. society). Compare BRIMELOW, *supra* note 245, at 211–16 (contending that immigrants are failing to assimilate into U.S. society), with Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 888–98 (2002) (offering proposals that would promote the integration of immigrants into U.S. society).

374. See WALZER, *supra* note 40; Bosniak, *supra* note 85, at 1068–87.

375. Trujillo, *supra* note 143, at 721 (emphasis added).

376. See generally RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); CAREY MCWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES (1949).

377. See *supra* Part II.A.1.

and public accommodations.³⁷⁸ Racial difference makes it difficult for immigrants and citizens of Mexican ancestry to assimilate into mainstream U.S. society.³⁷⁹

By eliminating the importance of immigration distinctions between people in the United States, an open admissions system would end the institutionalized stigmatization of domestic minorities who share ancestries with disfavored immigrants.³⁸⁰ In so doing, the law would help promote the integration of noncitizens and certain groups of citizens into U.S. society. Legal distinctions between immigrants and citizens, which are currently central to the immigration laws,³⁸¹ serve to create in-groups and out-groups, promote inter-ethnic tension, and breed discrimination against perceived outsiders. Open admissions policies would tend to render irrelevant such distinctions and assist in promoting full community membership for all people living and working in U.S. society.

Reducing the significance of people's immigration status would be consistent with the U.S. government's policy of encouraging naturalization, thereby transforming immigrants into citizens. In the 1990s, the federal government facilitated the naturalization of immigrants through the Citizenship USA program.³⁸² Naturalization rates, particularly of Mexican immigrants,

378. See Delgado & Stefancic, *supra* note 228; Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994); see, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977); *Hernandez v. Texas*, 347 U.S. 475 (1954).

379. See Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998); George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (2000).

380. See *supra* text accompanying notes 127–133.

381. See *supra* note 132 and accompanying text.

382. See Doris Meissner, *Putting the "N" Back Into INS: Comments on the Immigration and Naturalization Service*, 35 VA. J. INT'L L. 1 (1994). The law also promotes immigrant assimilation—and avoids a potential caste system—by bestowing U.S. citizenship on children of undocumented persons born in the United States. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). This rule is based on an interpretation of the Fourteenth Amendment that has been challenged. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENS WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). But see David S. Schwartz, *The Amoralism of Consent*, 74 CAL. L. REV. 2143 (1986) (book review) (questioning the morality of Schuck and Smith's suggestion that the Fourteenth Amendment need not bestow citizenship on children of undocumented immigrants born in the United States). Proposals have been made to end the long legal tradition of bestowing citizenship on children born in the United States of undocumented parents. See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997) (defending the birthright citizenship rule in the face of challenges to the rule); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994) (contending that changing birthright citizenship in the United States would threaten equality).

An issue worthy of further discussion, but beyond the scope of this Article, is whether an open borders regime would diminish the value of citizenship in the United States, which arguably already has occurred with the greater recognition of immigrant rights toward the end of the twentieth century. See

rose dramatically.³⁸³ Although the program came under heated attack for allegedly being motivated by partisan political ends,³⁸⁴ the federal government continues to encourage naturalization.³⁸⁵

Integration of immigrants into U.S. social life offers a policy-based rationale for the Supreme Court's decision in *Plyler v. Doe*,³⁸⁶ which held that the states could not constitutionally bar undocumented immigrants from the public schools. An education allows immigrant children a chance at full access to U.S. society.³⁸⁷ To guarantee an education recognizes the inherent unfairness, as well as injury to the country, of denying undocumented children a public education when in fact they live in this country and will in all likelihood be part of the nation's future labor force.³⁸⁸ For similar reasons, efforts have been made in recent years to ensure undocumented immigrants access to higher education³⁸⁹ and eligibility for drivers' licenses.³⁹⁰

If one is concerned with the integration of immigrants, policies that promote assimilation, not restrictionist measures, are the answer. Although it

Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989). My hope here is to fully recognize the humanity and membership rights of noncitizens as well as citizens, not to diminish the worth or value of citizenship.

383. See 1998 INS STATISTICAL YEARBOOK, *supra* note 151, at 170. Changes in Mexican law permitting dual nationality also contributed to the increase in the naturalization of Mexican immigrants. See ALENIKOFF *supra* note 222, at 30–36. The backlash of anti-immigrant sentiment also contributed to this increase. See *supra* text accompanying notes 125–133.

384. See, e.g., Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1, 44–50 (1997) (contending that the abuse of the naturalization process was one of many grounds justifying the impeachment of President Clinton). The Justice Department's Office of the Inspector General found that the Clinton Administration had not acted for political ends in its Citizenship USA program, although some naturalization petitions were erroneously approved because of hasty processing. See IG Report Finds INS's "Citizenship USA" Program Was Flawed, but Not for Political Reasons, 77 INTERPRETER RELEASES 1198 (2000). To remedy errors in naturalization, the INS promulgated a series of regulations, creating for the first time in U.S. history a procedure to allow the agency—without the oversight of the courts—to revoke the citizenship of naturalized citizens. See Catherine Yonsoo Kim, Note, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448 (2001).

385. See U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 373, at 46–58.

386. 457 U.S. 202 (1982).

387. This was one of the justifications for *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

388. See *Plyler*, 457 U.S. at 237–38, 241 (Powell, J., concurring); *id.* at 242 (Burger, C.J., dissenting). One influential constitutional law scholar has commented that some "will quite properly wish that the Court's head had proven equal to its heart and that a sturdier analytic foundation had been provided for the result reached." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-23, at 1553 (2d ed. 1988).

389. See Victor C. Rom  ro, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2002); Michael A. Olivas, *Storytelling out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

390. See Johnson, *supra* note 118, at 1504–05.

is important to avoid the coerced assimilation endorsed by the U.S. government in the past,³⁹¹ policies such as ensuring access to English-as-a-second-language courses, naturalization workshops, community education programs, and related measures generally would be welcomed by the immigrant community. Such policies could help promote the economic and political integration of immigrants into U.S. society. They would represent an improvement over the failed efforts at immigration restrictions, which in some ways constitute the worst of both worlds: Immigrants continue to enter the country, and no policies exist to facilitate their integration into U.S. society.

At the same time, Mexican immigrants have been blamed for promoting social disintegration and exacerbating racial divisiveness by “refusing” to assimilate: living in separate ethnic enclaves, maintaining the Spanish language, and embracing rather than abandoning their culture.³⁹² Some commentators deeply fear the racial and cultural impacts of current levels of immigration; presumably, they would have great reservations about open borders. This view might command the support of a vocal segment of the public. The evidence, however, shows that immigrants in fact assimilate by learning English and adopting American family and work values.³⁹³

The most extreme version of this perspective, at least in relatively polite discussion, is that the United States is a white nation and should remain that way. As journalist Peter Brimelow has stated bluntly, “the American nation has always had a specific ethnic core. And that core has been white.”³⁹⁴ However, closed borders can only delay—not halt—the United States’ inevitable racial and cultural transformation. As Census 2000 demonstrated, the nation’s racial demographics have changed dramatically over the last few decades,

391. See HING, *supra* note 246, at 19–20.

392. See, e.g., PATRICK J. BUCHANAN, *THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* 97–149 (2002); JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC* (1998); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (rev. ed. 1998).

393. This is true for Latina/o immigrants who often are charged with refusing to assimilate. See generally PEW HISPANIC CENTER/KAISER FAMILY FOUNDATION, *2002 NATIONAL SURVEY OF LATINOS* (2002) (summarizing a comprehensive survey of Latina/os in the United States and showing that they tend to assimilate). At the same time, the presence of Mexican immigrants in the United States has affected the culture and community in certain locales of this country. See Adelaida R. Del Castillo, *Illegal Status and Social Citizenship: Thoughts on Mexican Immigrants in a Postnational World*, 27 *AZTLAN* 11 (2002); see also *infra* text accompanying notes 397–398 (discussing cultural changes brought by immigrants).

394. See BRIMELOW, *supra* note 245, at 10; see also BUCHANAN, *supra* note 392, at 97–149 (embracing similar views); CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* 84–108 (2002) (summarizing white nationalist objections to current levels of immigration, and fear of demographic changes to U.S. society).

despite extensive border controls.³⁹⁵ Reversal of this trend appears highly unlikely, absent a return to the discredited national origin quota scheme buttressed by draconian immigration enforcement measures that cannot be reconciled with liberal notions of individual rights.³⁹⁶

Nor can the perceived need to preserve "our culture" justify immigration controls. Cultures evolve over time due both to external pressures and internal fissures.³⁹⁷ The "culture" of this nation (to the extent it can be defined) has changed and will continue to do so over time. As is the case with respect to racial change, cultural change to a large extent is inevitable, especially as demographic changes continue. Technological and travel improvements, which are largely beyond our control, may well accelerate this transformation. Cultural changes simply cannot be forestalled by immigration controls.³⁹⁸

Change understandably may be discomfoting, and, by facilitating change, immigration probably has contributed to social tensions.³⁹⁹ However, fears of racial and cultural transformation cannot justify closed borders, just as they cannot justify segregated schools, workplaces, and neighborhoods. In any event, in light of technological and transportation improvements combined with migration pressures, growing pains from the demographic change in the United States are in some ways inevitable. The sensible approach is to adopt laws and policies that facilitate these changes, rather than to seek to prevent the inevitable.

4. Reducing International Tension

Immigration sporadically has produced tensions between nation-states. A move toward open entry would serve to reduce international tensions.⁴⁰⁰ Specifically, a move to open borders could well improve international relations between the governments of the United States and other countries.

395. See Johnson, *supra* note 118, at 1482 & n.1.

396. See *supra* text accompanying notes 60–102.

397. See Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1589 (1996) ("Culture is not some monolithic, fixed, and static essence.") (footnote omitted). See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (analyzing the legal implications of the dynamic nature of culture).

398. See Wright, *supra* note 20.

399. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999); 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 CAL. L. REV. 863 (1993); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995).

400. For an analysis of the measures necessary to improve U.S./Mexico relations, see Hale E. Sheppard, *Salvaging Trade, Economic and Political Relations With Mexico in the Aftermath of the Terrorist Attacks: A Call for a Reevaluation of U.S. Law and Policy*, 20 B.U. INT'L L.J. 33 (2002).

Abuses of Mexican nationals in the United States have resulted in rifts between the two nations' governments.⁴⁰¹ Border enforcement strategies and U.S. authorities' harsh treatment of Mexican nationals have contributed to the conflict. The U.S. government, for example, changed the name of one of the first new border enforcement operations of the 1990s in El Paso, Texas from "Operation Blockade" to "Operation Hold-the-Line," in response to the strong protests of the Mexican government.⁴⁰² Similarly, Mexican officials protested the anti-Mexican sentiment underlying the campaign in California for Proposition 187, a voter-approved initiative that would have barred undocumented immigrants from receiving public benefits,⁴⁰³ including a public education.

Migration is not an issue of tension limited to the United States and Mexico. Tighter border controls on the northern U.S. border after September 11 elicited the Canadian government's concern over the treatment of its citizens by the U.S. government.⁴⁰⁴ Moreover, the proposed elimination of a visa waiver program for citizens of certain nations, designed to improve U.S. security, may have foreign relations repercussions. According to the U.S. General Accounting Office, "[t]he decision to eliminate the program could negatively affect U.S. relations with participating countries, could discourage some business and tourism in the United States, and would increase the need for State Department resources."⁴⁰⁵

American law generally seeks to limit the potential for negative foreign policy consequences that arise from conflicts between U.S. and foreign citizens. For example, the jurisdiction of the federal courts to hear disputes in cases involving noncitizens and foreign states provides a degree of assurance that foreigners will receive fair treatment in lawsuits with U.S. citizens.⁴⁰⁶ Federal

401. See Mary Beth Sheridan, *U.S. Sting Angers Mexican Officials*, CHI. SUN TIMES, May 31, 1998, at 27; Mark Fineman, *New U.S. Law on Migrants Has Mexico up in Arms*, L.A. TIMES, Apr. 3, 1997, at A17; Eric Malnic et al., *U.S. Will Review Case of Clubbed Immigrants*, RECORD (Hackensack), Apr. 3, 1996, at A17.

402. See Tim Golden, *U.S. Blockade of Workers Enrages Mexican Town*, N.Y. TIMES, Oct. 1, 1993, at A3.

403. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 158, 165-66 (1994); see also sources cited *supra* note 266 (analyzing Proposition 187).

404. See Glenn Kessler, *Powell Aims to Reassure Canadians*, WASH. POST, Nov. 15, 2002, at A30; Tonda MacCharles, *We're Both at Risk, Powell Tells Canada*, TORONTO STAR, Nov. 15, 2002, at A7; see also Jim Rankin, *Canadian in Passport Fiasco*, TORONTO STAR, Feb. 14, 2003, at A1 (reporting that the INS accused a Canadian citizen of using a forged Canadian passport and subjected her to expedited removal to India).

405. U.S. GEN. ACCOUNTING OFFICE, *BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM* 3-4 (2002).

406. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 10-16 (1996); see, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (2003) (codified as amended); Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 97 (1992) (codified as amended); Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended).

preemption of state regulation of immigration was largely premised on the potential for immigration enforcement to have foreign relations consequences.⁴⁰⁷ An important rationale for the plenary power doctrine has been the foreign policy implications of immigration decisions, although the doctrine has served to protect immigration laws that have negative foreign policy consequences from judicial review.⁴⁰⁸

In sum, liberal admission would generally seem to further U.S. foreign policy interests.⁴⁰⁹ The potential foreign policy benefits are not limited to U.S.-Mexican relations. Open borders could relieve tensions between the United States and other nations as well. Importantly, multilateralism will be essential to fighting terrorism in the future.⁴¹⁰

5. Protecting the Nation From True Dangers to Public Safety and National Security

As previously discussed, no political theory would justify endangering public safety with immigration.⁴¹¹ Even in a system of open entry, a certain level of border enforcement would be necessary to allow for the exclusion of noncitizens who endanger the public safety.⁴¹² Such limits on entry could be justified morally on self-defense grounds.⁴¹³ The focus on controls in an open borders system, however, would be much narrower than the current restrictionist regime. In terms of justifiably narrow restrictions, we should closely limit ourselves to controls consistent with a liberal commitment to open borders.⁴¹⁴

407. See Spiro, *supra* note 403, at 135–49; see, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

408. See *INS v. Abudu*, 485 U.S. 94, 110 (1988); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976); *supra* text accompanying notes 90–101 (discussing the contours of the plenary power doctrine).

409. See *supra* text accompanying notes 400–408. At times, U.S. immigration decisions have too readily been influenced by foreign policy concerns, particularly when the result was to deny entry to, or remove from the country, noncitizens. See Kevin R. Johnson, A “Hard Look” at the Executive Branch’s Asylum Decisions, 1991 UTAH L. REV. 279; see also Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3 (2000) (contending that the State Department makes hasty judgments based on foreign policy in asylum and refugee cases).

410. See John W. Head, Essay, *What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL’Y 1 (2002).

411. See *supra* text accompanying notes 81–83.

412. None of this discussion should be read as endorsing the overbroad definition of “terrorist activity” and “terrorist” in the current U.S. immigration laws. See Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322–27 (2000); Nadine Strossen, *Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL’Y 531 (1997); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2871–74 (2001).

413. See *supra* text accompanying notes 81–83.

414. See *supra* text accompanying notes 79–89.

To this end, controls designed to prevent terrorist activity in the United States would be fully justified.⁴¹⁵ Such controls would be consistent with the rights of the individual while also allowing the nation to protect its national security as permitted by international law.⁴¹⁶ The exclusion, however, would need to be narrow. One possibility would be to limit the exclusion in a manner consistent with the incitement test under the First Amendment, which allows speech to be abridged if it is directed to inciting or producing imminent lawless action, and is likely to produce such conduct.⁴¹⁷ In sum, noncitizens who pose such an imminent threat could justifiably be denied entry into the United States. If NAFTA developed into an European Union-style arrangement permitting labor migration between Canada, Mexico, and the United States, one possibility would be to enhance security along the outer borders of the member nations, akin to developing the "Fortress Europe"⁴¹⁸ in the name of national security.⁴¹⁹

Particularized immigration controls might result in more effective enforcement of terrorism and related exclusions. This has proven to be the case on a smaller scale with respect to the U.S. Customs Service. In response to claims of racial profiling in customs searches at ports of entry, the agency promulgated standards and procedures governing intrusive searches; implementation of the new rules improved efficiency in finding contraband while resulting in fewer searches.⁴²⁰ Similarly, to eradicate racial profiling in law enforcement, several state and local jurisdictions in the United States have required policies, procedures, and standards to govern traffic stops.⁴²¹ In short, narrowly tailored immigration enforcement might better protect public safety than the current system.

Overbroad efforts to protect national security appear to offer few concrete benefits, and have resulted in widespread civil rights deprivations.⁴²²

415. See Carens, *supra* note 40, at 260.

416. See Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001) (discussing the right of self-defense against terrorism); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002) (same).

417. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that the First Amendment barred the regulation of speech "except where . . . advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action") (footnote omitted).

418. See *supra* text accompanying notes 281–284.

419. See James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 419, 457–59 (2002) (advocating this sort of "perimeter security strategy" with the cooperation of Canada, Mexico, and the United States).

420. See Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 912–15 (2002) (reviewing studies showing that Custom Service searches at the border became more effective after the imposition of limits on officer discretion).

421. See *id.* at 918–19.

422. See *supra* Part II.A.1.

Efforts to regulate the political ideology of immigrants is a glaring example.⁴²³ The overbroad definition of "terrorist" and "terrorist activity" in the current immigration laws⁴²⁴ failed to stop the September 11 hijackers from entering the United States. The indiscriminate dragnet of Arabs and Muslims after September 11 produced little in the way of concrete information about those events.⁴²⁵

This Article will save for another day a detailed definition of the few exclusions necessary to protect public safety in an open borders regime. Rather, for now, my hope is to reverse the current presumption that exists in the U.S. immigration laws that a noncitizen should be denied entry into the United States. Under the proposed open borders regime, noncitizens would be admitted absent an affirmative showing that they would endanger the public safety.⁴²⁶

Although border controls narrowly tailored to protect public safety are necessary and appropriate,⁴²⁷ the risk is that Congress, in creating exceptions to the general rule of free entry, would allow the exceptions to overtake the rule by accretion. Efforts to appear "tough on immigration" offer short-run political benefits to politicians, whatever the harms to the immigrant community, and whether or not the policy actually achieves its stated goals.⁴²⁸ Consequently, any open borders regime would likely be subject to minor incursions that, over time, would pose substantial risks to undermining the overall system. Put simply, exceptions could increase and ultimately swallow the general rule. As a result, any open migration system always would occupy a precarious place in U.S. law.

Given the lessons of history, fears of a flood of migrants from the developing world, who are different racially, culturally, and socioeconomically, will lead to pressures to close the borders, particularly in times of national crisis.⁴²⁹ Consequently, constant monitoring will be necessary to address any growing public backlash against open borders. In essence, the general tilt of public opinion to oppose open borders probably will always threaten the very existence of such a system.

423. See generally Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 841-69 (1997) (analyzing the history of political restrictions in U.S. immigration laws); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988) (criticizing ideological regulation in immigration laws).

424. See sources cited *supra* note 412.

425. See Akram & Johnson, *supra* note 47, at 327-55.

426. See *supra* text accompanying notes 81-83.

427. See *supra* text accompanying notes 81-83.

428. See Johnson, *supra* note 78, at 1158-61.

429. See *supra* text accompanying notes 38-54.

6. Conclusion

Strong policy arguments can be made for free migration between states. Besides concrete benefits to the United States, open borders would eliminate both the civil rights deprivations that result from the current enforcement of border controls and the ripple effects on U.S. citizens and lawful immigrants of particular national origin ancestries. Abolition of border controls would reduce enforcement abuses, reduce racial discrimination, and promote racial justice. Moreover, the United States stands to reap foreign policy benefits and to reduce tensions between itself and many other states, particularly Mexico. At the same time, public safety can be protected, perhaps better than it is under the current immigration system.

CONCLUSION

It is perhaps cliché to say that the globalizing economy, as well as technological improvements in communication and transportation, have made the world a smaller place. Nonetheless, increased trade, movement, and intercourse between nations are much more common in 2000 than they were in 1900. Citizens of a world marked by global diasporas today have ties to their native countries as well as to their countries of destination.⁴³⁰

To this point, the law has responded in rather limited ways to the phenomenon of globalization. In the United States, for example, the rights of immigrants have tended to expand over time.⁴³¹ After years of consideration, the federal government took the cautious step of recognizing dual nationality, which quickly grew in popularity among Mexican nationals in the United States.⁴³²

This Article has outlined the arguments for a far-reaching immigration response to the changing world. Open borders would mark a true revolution in current U.S. immigration law, and would create an admissions system in which migration effectively approximated demand. The fundamental premise of the U.S. immigration laws is that exclusion of immigrants is the norm and

430. See Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1006 (2001); see Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 621–25 (1999); cf. MANUEL CASTELLS, *THE END OF THE MILLENNIUM* 168–211 (2d ed. 2000) (discussing criminal elements engaging in crime crossing borders); Amann, *supra* note 61, at 810 (discussing the emergence of an international criminal procedure in part due to the globalization of crime); Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1, 4 (2000) ("Today, in a world characterized by the acceleration of human interaction, vital problems have also become global. Problems such as economic crises, epidemics, transborder pollution, nuclear radiation, ozone depletion, global warming, computer viruses, and computer piracy no longer respect the sanctity of national borders.").

431. See generally Schuck, *supra* note 38 (documenting pressures for a change to classical immigration law).

432. See *supra* note 222 and accompanying text.

admission of noncitizens is the exception to the rule. This need not be. This Article hopes to shift the debate over immigration to consider the possibility of making the United States' borders more permeable to people, as well as to goods, services, and capital.

No coherent intellectual justification for immigration restrictions like those enforced by the United States has emerged. More importantly, the U.S. elimination of border controls would offer many benefits. Elimination of border controls would end the brutality inherent in enforcement of the current immigration controls, which result in physical abuse, promote racial discrimination, and relegate certain groups of U.S. citizens and lawful immigrants to second-class status. Rampant civil rights deprivations have resulted. Such consequences render U.S. immigration enforcement immoral.

Moreover, the nation stands to reap economic benefits from free labor migration in a globalizing world economy. As a matter of economic theory, international trade with Mexico and much of the world, which the United States has eagerly embraced, differs little from labor migration. A utilitarian argument would allow for labor migration and add the benefits of a low-wage labor force to the national economy.

Last but not least, strong policy arguments exist for the abolition of border controls. Experience demonstrates that, at least within modern sensibilities, border controls cannot be enforced. Undocumented immigration is not viewed as criminal by most law-abiding Americans, nor is the employment of undocumented immigrants. Abolition of border controls would recognize the economic and social reality of immigration, including the fact that millions of undocumented immigrants make valuable contributions to the U.S. economy but are forced to live on the margins of society and, subject to exploitation because of their uncertain immigration status, work in poor conditions for substandard wages. Foreign policy benefits also would accrue from a system in which the nationals of other societies were in fact welcomed rather than labeled a public menace, barred from entry, and treated as pariahs in our midst.

It may well be that "[d]espite the rapid globalization of the world economy, the countries of terra firma are unlikely to abandon the concept of individual, sovereign nations in favor of a world of free borders and unrestricted migration."⁴³³ Times change, however. And the time hopefully will come when the United States will realize that closed borders are far from inevitable and, in fact, do not serve the national interests. Closed borders result in immoral consequences that, in the annals of history, have and will make us

433. Victor C. Roméro, *Expanding the Circle of Membership by Reconstruction of the "Alien": Lessons From Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REF. 1, 5 (1998) (footnote omitted); see *supra* text accompanying notes 17–23 (discussing similar treatment of open borders in legal scholarship).

ashamed. The replica of the Berlin Wall that the government is in the process of erecting between the United States and Mexico is not consistent with American values and dreams. Rather, an "Open Republic" is more consistent with the values for which this nation proudly stands.⁴³⁴

434. See Jost Delbrück, *Global Migration-Immigration-Multiethnicity: Challenges to the Concept of the Nation-State*, 2 IND. J. GLOBAL LEG. STUDS. 45, 48 (1994) (offering the idea of an "Open Republic" as an alternative to the conventional wisdom of nation-states).
