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# A View from the United States - Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century

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# **A View from the United States— Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century**

JOHN A. SCANLAN\*

*In this article, Professor Scanlan argues that in spite of recent trends toward globalism, traditionally composed nation-states, especially the United States, will continue to exercise localized control over immigration and receiving nations may pursue increasingly restrictive policies. The author begins with a history of recent U.S. and European Union (EU) immigration policies, positing that State self-interest has always played a central role. Next, he traces the post-World War II development of the "international refugee regime" as well as the development of the European Union's "open" labor market. Professor Scanlan predicts that international agencies will become less efficacious for several reasons, including the loss of their galvanizing force, the fight against communism. Next he argues that though labor moves relatively freely throughout EU Member States, the EU's stance on immigration from non-EU States has become more and more restrictionist. Further, to the extent the labor market is open, the situation developed out of circumstances peculiar to post-War Europe, and therefore the EU example provides little hope that North America will become similarly unified. The author concludes with a prediction that with the possible exception of concerted responses to emergencies, the nation-states of the developed world will continue to pursue self-interested immigration policies, including the vigorous guarding of their borders.*

## I. INTRODUCTION

"Immigration policy" and "immigration law," as those terms are used today in the United States—and, I believe, in most of the developed world—are part of the traditional vocabulary of national self-interest and

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*realpolitik*. Their customary use takes a number of important things for granted: a unitary State existing in a world made up almost entirely of similar sovereign entities; a body of legislation focusing particularly and precisely on which aliens should be permitted to enter the State and under what conditions; a sophisticated bureaucracy entrusted with the responsibility of policing the border and removing “undesirables”; and a set of elaborate procedural guidelines regulating the activities of that bureaucracy. Although hardly necessary for immigration control, the contemporary western tradition also assumes a set of “democratic” processes that generate the legislation and that control entrances that make the legislators accountable to the people who elected them.

In a profound sense, then, immigration law and immigration policies are integrally related to our modern conception of the “State.” They relate most obviously in the sense that they are *products* of political and bureaucratic arrangements that have achieved their fullest development since the Enlightenment. Less obviously, they relate because of the *purpose* they frequently serve—the preservation of the political and social *status quo*, or the promotion of particular interests—and because of the politically constitutive role they *always* perform. In a recent article, Timothy Mitchell described how immigration “practices” have helped bring our conception of the State into being and have endowed the State with the appearance of independence, permanence, and power:

The larger presence of the state in several ways takes the form of a framework that *appears* to stand apart from the social world and provide an external structure. One characteristic of the modern state, for example, is the frontier. By establishing a territorial boundary and exercising absolute control over movement across it, state practices define and help constitute a national entity. Setting up and policing a frontier involves a variety of fairly modern social practices—continuous barbed-wire fencing, passports, immigration laws, inspections, currency control, and so on. These mundane arrangements, most of them unknown two hundred or even one hundred years ago, help manufacture an almost transcendental entity, the nation state.<sup>1</sup>

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1. Timothy Mitchell, *The Limits of the State: Beyond Statist Approaches and Their Critics*, 85 AM. POL. SCI. REV. 77, 94 (1991) (emphasis added).

State practices involving migration and the establishment of frontiers have been enmeshed in global processes of change from the beginning. As Aristide Zolberg and John Guy have both observed (albeit from very different vantage points), the very notion of the independent nation-state is rooted in the desire, political will, and administrative ability to distinguish an identifiable, national "us" from the rest of the world's population—a large universe of "thems," frequently caricatured and categorized as distorted and maligned versions of ourselves.<sup>2</sup> Transnational events, although not exclusively responsible for the process, clearly played a major role in promoting and enabling the notion. Guy, for example, argues that the modern concept of the English State emerged during the Tudor era and was motivated in large measure by the propaganda value of distinguishing a godly, Protestant, and *English* people from its ungodly, Catholic, and *foreign* competitors and opponents—most notably, Spain and France. Dynastic, religious, and economic struggles involving more than one realm helped forge national identities and shared senses of on-going national interests.<sup>3</sup>

The issue confronting us today is whether a number of transnational processes, apparently quite different from those that characterized earlier eras, will lead to new political formations that will radically transform governmental practices as they affect or attempt to influence migration. If the "modern State" (which is probably several hundred years older than Mitchell credits) owes some or all of its existence to barbed wire, passport controls, and immigration laws—or to similar but older, and arguably more "primitive" physical and legal impediments to movement—might we not argue that the State—or at least, its border-regulating function—is on the verge of disappearing, that technology, capitalism, and bureaucratic centralism are about to accomplish what Marxist historical determinism could not? The argument seems fairly simple: advances in technology enable information, goods, economic capital, and people to move about the globe in ever-increasing amounts, at an ever-increasing speed; the internationalization of businesses provides additional incentives to speed those flows, even as it deprives *national* governments of the effective means to regulate them; the economic advantages of "free trade" extend beyond the movement of goods and capital and include more "open" immigration; and

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2. See JOHN GUY, *TUDOR ENGLAND* 1-29 (1988); Aristide R. Zolberg, *The Formation of New States as a Refugee-Generating Process*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (1983).

3. GUY, *supra* note 2.

the movement to “harmonize” trade inevitably leads to more wide-reaching agreements and the creation of new bureaucracies that may or may not result in the obliteration of political boundaries, but which certainly facilitate the movement of people, preempting or replacing restrictive national immigration laws.

The argument I have just made is, of course, a parody. It is also incomplete since it ignores an important set of facts that clearly are related to “globalization,” “progress,” and migration—namely, population statistics and other demographic data. The argument also implicitly characterizes all migration as economically motivated, ignoring evidence that fear of persecution and the desire for family reunification motivate many emigrants,<sup>4</sup> and that the States which admit these emigrants are frequently seeking political or diplomatic, rather than economic, advantage. Yet even in the abbreviated and simplified form in which I have presented the argument, it deserves respectful attention. Thus, I have no doubt whatsoever that there are significant economic, political, and institutional forces at work that threaten the stability of restrictive immigration regimes and also portend the transfer of at least some decision-making and administrative power over migration to intergovernmental organizations. I will note some of these forces and their probable effects in the next section of this paper. I will then explain why, in my view, globalization phenomena are likely to have only *marginal* and *limited* effects on U.S. immigration policy and law in the

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4. Refugee admissions are governed by a unique set of legislative provisions in the United States. Thus, the Immigration and Naturalization Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42)(A) (1988 & Supp. V 1993) [hereinafter INA], provides a definition of “refugee”; INA § 207, 8 U.S.C. § 1157 (1988 & Supp. V 1993), provides a mechanism for admitting an annually-designated number of “refugees” to the United States from countries of “first asylum” or countries of origin; and INA § 208, 8 U.S.C. § 1158 (1988), provides a mechanism for granting “asylum” to individuals who have reached U.S. territory and then claim that they meet the refugee definition. See also INA § 243(h), 8 U.S.C. § 1253(h) (1988 & Supp. V 1993), which provides for the grant of “withholding of deportation or exclusion” to those who can demonstrate that their “life or freedom would be threatened,” a requirement that has been restrictively interpreted so that the applicant must demonstrate that the likelihood of death or physical harm is “more likely than not.” See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). U.S. refugee admissions policy is discussed in detail below. See *infra* part II.B.

The separate allocation system governing ordinary immigrant admissions distinguishes between “family reunification” and “employment-related” visas. See INA § 203 (a)-(b), 8 U.S.C. § 1153(a)-(b) (1988 & Supp. V 1993). I deal extensively with the latter category below, but ignore the former almost entirely. My justification for doing so rests on the fact that “family reunification” allocations are all derivative, since they depend on the immigration status of another person. Virtually all “anchor” migrants petitioning on behalf of another family member have either entered the country as job-seekers or as refugees.

coming decades. Finally, I will suggest that these limited effects are the predictable consequences of a world system which, at least where migration is concerned, continues to recognize local interests and the priority of the nation-state, and affords only a limited scope for the "internationalization" or "globalization" of immigration policy.

## II. U.S. IMMIGRATION POLICY AND LAW IN A CHANGING WORLD

Jeffrey Passel has conveniently divided all of immigration policy and law—like ancient Gaul—into "three fundamentally different sets of rules. . . those that govern legal immigration (i.e., mainly sponsored admission for family and work); those that govern humanitarian admissions (refugees and asylees); and those that govern illegal entry."<sup>5</sup> I am not sure the separate parts are as distinct as Passel believes; nor would I necessarily employ the same labels he adopts. Nevertheless, I will use his trisection to map global changes and the probable future of U.S. immigration policy and law.

### A. *Legal Migrants*

In the domain of "legal immigration," U.S. policy and law are going to be affected by the continuation and possible acceleration of the shift of manufacturing to places with abundant supplies of cheap labor and lax environmental laws. The demand for an unskilled or semi-skilled domestic manufacturing labor force is likely to decline, and Congress is likely to stay on the path it entered on in 1990 and further reduce the *legal* immigration opportunities for people with such limited skills. On the other hand, immigration "quotas" will almost certainly increase for the favored few: highly-educated professionals and those with demonstrated executive or managerial skills.<sup>6</sup> Both developments can be tied to changes in the global

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5. Jeffrey S. Passel & Michael Fix, *U.S. Immigration in a Global Context: Past, Present, and Future*, 2 *IND. J. GLOBAL LEGAL STUD.* 5, 9 (1994).

6. This pattern is not peculiar to the United States. Demetrios Papademetriou, looking at the transnational labor market, has "identified two new groups of 'international citizens': one with very high skills, the other with very low skills. Immigration policy treats only the first group as desirable, thus, compelling the second group to immigrate illegally." Paul Burkhead, *Stirring the Pot: Immigrant and Refugee Challenges to the United States and the World*, 47 *J. INT'L AFF.* 579, 583 (1994).

economy. Neither, however, suggests that global factors are likely to bring about any sea change in the U.S. approach to labor migration.

Recruitment of migrants from abroad to fulfill specific perceived labor needs has been a hallmark of U.S. policy since the early colonial days. The conquest of the continent by Europeans led inexorably to the cultivation of vast tracts of land, the introduction of sophisticated industries, and the development of a complex transportation web. Immigrants were needed to farm, participate in manufacturing, and provide a myriad of services. Although individual colonies—and later, individual States<sup>7</sup>—attempted to limit immigration, physical proximity, porous borders, a conscious effort to promote “interstate commerce,” coordinated economic development, and (particularly after the Civil War) greater political unity almost totally undercut their efforts. Bowing to public pressure, the federal government began restricting the importation of Chinese “Coolies” in the 1860s,<sup>8</sup> enacted the first Chinese Exclusion law in 1882,<sup>9</sup> and began to bar the admission of “contract laborers” from any country in the 1880s. Although anti-Asian measures were remarkably effective,<sup>10</sup> the contract labor laws

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7. No systematic account of colonial immigration policy and law has been published in this century. I am currently writing a book on the subject. For a comprehensive account of attempts by individual states to limit immigration, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

8. See 29 U.S. Rev. Stat. § 2158 (2d ed. 1878) (repealed 1974).

9. Act of May 6, 1882, ch. 126, 22 Stat. 58. Subsequent provisions dealing with the exclusion and deportation of the Chinese were enacted in 1884, 1888, 1892, 1893, 1898, 1900, 1901, 1902, 1904, and 1912. As late as June 14, 1940, Congress “conferred upon the Attorney General the authority, power and jurisdiction by virtue of any law relating to the exclusion from and residence within the United States . . . of Chinese and persons of Chinese descent . . . .” 8 U.S.C.A. § 261 (1940) (repealed 1943), summarizing 1940 Reorg. Plan No. V., eff. June 14, 1940, 5 F.R. 2423, 54 Stat. 1238.

10. Asian immigration began after the California Gold Rush and continued until almost completely eliminated by a series of restrictive measures enacted between 1882 and 1924. The immigrants included “approximately 430,000 Chinese, 380,000 Japanese, and 150,000 Filipinos, [as well as] about 8,000 Koreans and a similar number of Asian Indians.” RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 65 (1989). Takaki has summarized the relevant law:

Unlike European immigrants, Asians were . . . victimized by the institutionalized racial discrimination of public policies. The Chinese Exclusion Act of 1882 singled out the Chinese on a racial basis, and the National Origins Act of 1924 totally prohibited Japanese immigration . . . . Furthermore, the 1924 law . . . allow[ed] European-immigrant men to return to their homelands and bring wives back to the United States. Their wives were accorded nonquota status, that is, there were no limits to the number of European women who could come here as wives. The law had the very opposite effect on Asian-immigrant communities. Seeking to prevent the development of Asian families here, it barred the entry of women from China, Japan, Korea, and India. Even U.S. citizens could not bring Asian wives into the country . . . .

had little practical effect until 1924 and were repealed in 1952.<sup>11</sup> Even when they were most stringently enforced, their effects were limited by the passage of contradictory legislation creating “special” programs to bring tens of thousands of Mexican and Caribbean agricultural workers “temporarily” to the United States.<sup>12</sup>

The influx of foreign workers waxed and waned considerably (flourishing, for example, in the period from 1846 to 1856 and in the last decades of the nineteenth century, diminishing rapidly in the late 1850s and early 1860s, and almost totally coming to a halt during the Great Depression), sometimes responding to “nativist” and “protectionist” lobbies who counselled the abolition of *all* migration to protect U.S. jobs. Yet it was probably clear to most policymakers prior to 1965 that the United States was part of a global economy, and that such an economy included the transnational exchange not only of goods and capital, but also of labor. The Immigration Amendments of 1965<sup>13</sup> underlined that understanding by establishing permanent annual “preferences” for a limited number of skilled and unskilled immigrants coming to the United States to perform jobs for which no U.S. workers were readily available. (That act and subsequent legislation also institutionalized the granting of employment-related *non-immigrant* visas to especially well-qualified aliens.)<sup>14</sup>

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*Id.* at 14. Some provisions of the 1924 act were clearly redundant since the Chinese Exclusion Act, as modified and strengthened by Congress, remained in effect until 1943. *Id.* at 378. Furthermore, the so-called “Gentlemen’s Agreement” between the U.S. and Japanese governments in 1908 had, with a few exceptions, ended Japanese immigration to the United States.

11. T. Alexander Aleinikoff and David Martin provide a good account of the legislative history of the transformation of the “contract labor” provision into the modern requirement that (some) immigrants obtain “labor certification.” See THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 154-55 (1985).

12. See generally KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. (1992); JULIAN SAMORA, OPERATION WETBACK (1971); PRESIDENT’S COMM’N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE (1951).

13. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

14. See, e.g., INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988 & Supp. V 1993). Among the most important are INA § 101(a)(15)(B) (business visitors); § 101(a)(15)(H) (temporary workers of “distinguished merit and ability”); § 1101(a)(15)(H)(ii)(a) (seasonal agricultural laborers and other persons “coming temporarily to the United States to perform agricultural labor or services”; and intracompany transferees “in a capacity that is managerial, executive, or involves specialized knowledge.”). *Id.* Other categories include “treaty traders” and “treaty investors”; registered nurses; aliens of “extraordinary ability in the sciences, arts, education, business, or athletics”; foreign entertainers; cultural exchange program participants; and representatives of foreign religious organizations. INA §§ 101(a)(15)(E)(i)-(ii), (H)(i)(a), (O), (P), (Q), (R).

Qualifications for these visas vary considerably. Some are limited in number. Generally, better-educated aliens and those doing highly-skilled “professional” work find it much easier to obtain



Since 1965, the internationalization of business and of the labor market has accelerated. The recent conclusion of negotiations on the General Agreement on Tariffs and Trade (GATT) has produced the most comprehensive multilateral trade agreement ever. In Europe, the Common Market has become the "European Union" (EU). Within the Union—which has social, cultural, and environmental dimensions, as well as strictly economic ones—goods, money, and labor circulate freely. On this continent, the recently-concluded North American Free Trade Agreement (NAFTA)<sup>15</sup> is a considerably more modest undertaking; as its title indicates, it is principally a "free trade agreement" among the United States, Mexico, and Canada, adopted to promote "the agreed objectives of a vigorous economic relationship, maintaining sustained growth, and expanding trade and investment [among] the [three] countries."<sup>16</sup> Although Congress has characterized NAFTA as "the most comprehensive trade agreement ever negotiated [which] creates the world's largest integrated market for goods and services,"<sup>17</sup> NAFTA's drafters consciously chose to avoid creating an integrated continental labor market.<sup>18</sup> The only provision

nonimmigrant employment-related visas than do unskilled and poorly-educated laborers.

15. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296-456, 612-799 (1993), 33 I.L.M. 649-57, 663-64, 671-80 (1994).

16. H.R. REP. NO. 361 (I), 103d Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2555.

17. *Id.* at 8, *reprinted in* 1993 U.S.C.C.A.N. at 2558.

18. See Kevin R. Johnson, *Free Trade and Closed Borders*, 27 U.C. DAVIS L. REV. 937, 978 (1994):

The signatories unquestionably did not intend the trade agreement to provide a complete solution to the outstanding labor migration questions among the United States, Mexico, and Canada. As Alan Nelson, former Commissioner of the Immigration and Naturalization Service (INS), mentioned in a conversation . . . the "I" word was mysteriously absent from any discussion of NAFTA. . . .

NAFTA expressly recognizes each country's sovereign right to protect its domestic labor force and pursue its own immigration policies, thereby allowing each nation to take measures designed "to ensure border security."

*Id.* at 956-57 (citations omitted) (*quoting* North American Free Trade Agreement, Dec. 17, 1992, art. 1601, 32 I.L.M. 664 (1993); and a private conversation with Alan Nelson).

Johnson also quotes Ambassador Julius Katz, Deputy U.S. Trade Representative under President Bush:

[L]abor migration between [the] United States and Mexico is not a subject of negotiation because "[w]hen we get into broad scale immigration, you're not dealing with trade or even wholly economic issues, you're dealing with social issues. And there's a whole panoply of other policies involved, and we've agreed that it will not be part of this negotiation."

*Id.* at 957 n.75 (*quoting* from Cyrille Rogacki, *An Interview with Ambassador Julius Katz*, 26 COLUM. J. WORLD BUS. 39 (1991)).

that directly affects immigration modifies existing law only slightly and is likely to benefit a fairly small number of Mexicans and Canadians actively involved in trading and investing in the United States.<sup>19</sup>

However, internationalization over the last several decades has not been limited to the sort of “free trade” in goods, services, and capital promoted directly by treaty. U.S. firms, like their counterparts in other advanced capitalist countries, have learned that costs can be lowered substantially by shifting production to countries where labor costs, taxes, and regulatory burdens are low. Technological developments—particularly in the areas of electronic data processing and communication—have also enabled firms to shift many service jobs outside the nation’s borders.

Yet, the exportation of manufacturing and service jobs is not the only component of the restructured international marketplace of the late twentieth century. The transformation of the United States into a service-oriented economy has contributed to the loss of millions of manufacturing jobs; however, it has also contributed to the creation of millions of both high- and low-skilled service jobs. The demand for service providers—particularly those whose jobs cannot be “farmed out” to other countries and those involved in the management of multinational corporations and the operation of financial markets—will almost certainly increase in the decades to come. Nevertheless, it is by no means clear that much of the new demand in the lower ranges of the service sector cannot be met by U.S. workers displaced from manufacturing. For reasons that I will touch on below, the demand in this sector that cannot be met domestically will probably be met by *illegal*, rather than *legal* immigration. In the post-industrial economy, we can also expect more natives to be trained to provide highly-skilled services, particularly if the jobs pay well and provide decent social status. In this sector, the shortfall of available domestic labor is likely to increase and immigration law is probably going to be liberalized further. Thus, the increased concentration of managerial and bureaucratic functions in the United States, which appears to be a predictable consequence of the

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19. See 19 U.S.C. § 3401 (Supp. V 1993):

Upon a basis of reciprocity secured by the Agreement [NAFTA], an alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien, may, if otherwise eligible for a visa and if otherwise admissible into the United States under the Immigration and Nationality Act . . . be considered as classifiable as a nonimmigrant under section 101(a)(15)(E) of such Act if entering solely for a purpose specified in Section B of Annex 1603 of the Agreement . . . .

internationalization of business, is likely to promote additional immigration “preferences” for well-educated, white collar workers, thus continuing a trend that began at least twenty years ago. I foresee no significant changes in agricultural worker policies, although regional “free trade” agreements may expedite the procedures under which temporary agricultural labor is permitted to enter the United States. Finally, family reunification policies will probably not be affected at all.

### *B. Refugees and Asylees*

Persecution has created refugees for centuries. Since the early decades of this century, massive displacements of people driven from their homelands by warfare and persecution have occurred with regularity. Millions of people fled Russia and the Balkans prior to World War II, and hundreds of thousands of others fled Germany and Austria, prompting the League of Nations to treat the matter as one deserving international attention.<sup>20</sup> However, it is only in the last fifty years that refugee flow has been recognized as a “global” phenomenon in the full sense of the word: involving large-scale, recurrent, involuntary emigration from many countries in Europe, Asia, Africa, and the Americas into a broad range of “asylum” countries, ranging from the poorest (e.g., Zaire and Burundi) to those barely able to keep their heads above water (e.g., Pakistan) to those in the throes of “development” (e.g., Thailand, Malaysia, and Mexico) to the established first-world powers (including the United States); and requiring coordinated international action to provide short- and long-term relief, physical and legal protection, and the eventual permanent repatriation or resettlement of those who have fled.

Bureaucrats and scholars lack the ability to distinguish clearly between those fleeing *from* “persecution” (i.e., the congeries of practices employed by nation-states to specially disadvantage or harm particular classes of nationals) and those migrating *to* greener economic pastures. (In many instances, the distinction is empty since talented people may face the systematic denial of civil and political rights at home, yet still offer marketable skills in the receiving country. Jewish scientists fleeing Europe in the late 1930s and 1940s who were immediately recruited into the U.S.

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20. The history of early 20th century international efforts to deal with large-scale refugee problems is treated below in notes 24-26, and in the accompanying text.

nuclear development program provide a good example, as do many of the Hungarian “freedom fighters” who quickly found jobs in U.S. industry.<sup>21</sup>) Nevertheless, many refugee flows occur suddenly<sup>22</sup> and generate substantial numbers of clearly involuntary migrants—people moving across national borders with few resources and little planning. Even if they have been successful in their countries of origin, their skills are frequently not needed or not readily exploited in their countries of refuge. Often disoriented, usually at a linguistic and cultural disadvantage, they are likely to impose significant costs on the receiving nation before they are assimilated, resettled, or sent home. The international regime for dealing with refugee problems, which emerged in the 1940s and 1950s and continued to develop during the 1960s, 1970s, and 1980s,<sup>23</sup> has provided a mechanism for dealing with refugee situations swiftly while shifting some of their costs to countries with a greater capacity to pay. It has promoted third-country resettlement, most notably with respect to the hundreds of thousands of refugees who left Indochina in the late 1970s and early 1980s. It has also

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21. See GIL LOESCHER & JOHN SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945-PRESENT*, at 59-60 (1986) (noting that “[b]y the end of 1957, fully 65.7 percent of the Hungarian refugees were gainfully employed, compared with 40.7 percent for the U.S. population as a whole.”).

22. The speed—and suddenness—of refugee migrations has been exemplified in 1994 by two migrations: that of “boat people” fleeing Haiti; and the land migration of Rwandans into Zaire. The exodus from Haiti that overwhelmed U.S. diplomacy in June and July of 1994 is addressed below, in notes 43-44 and accompanying text.

The migration from Rwanda, which is occurring as I write, is so massive and sudden that it defies accurate estimation. See, e.g., *Rwandans Flee in Panic to Zaire*, N.Y. TIMES, July 14, 1994, at A3 (“Starting late this afternoon, refugees crossed the border at the rate of 10,000 an hour along a small road just north of Goma, a Red Cross official estimated,” and that “[b]ehind those first Rwandan refugees, one aid worker said, there was ‘a wall of people’ on the 25-mile road . . . .”); Raymond Bonner, *Rwandan Refugees Flood Zaire as Rebel Forces Gain: Relief Agencies Overwhelmed by Influx*, N.Y. TIMES, July 15, 1994, at A10 (“More than half a million Rwandans have fled into Zaire in the last 24 hours, the International Committee of the Red Cross in the Zairian border town of Goma said late this afternoon.”); *Refugees Pour into Zaire as Rebels Gain*, N.Y. TIMES, July 15, 1994, at A10 (“Aid agencies say they are expecting between 500,000 and a million refugees. Goma has a population of about 150,000 people.”); Paul Lewis, *U.N. Issues New Appeal for Rwandan Cease Fire*, N.Y. TIMES, July 15, 1994, at A10 (“Even if the rebels halt their advance, diplomats and refugee officials said, the United Nations expects 100,000 to 200,000 new refugees to reach the Zairian town of Goma alone,” and that “[t]he United Nations estimates that the total population of northwestern Rwanda has swollen to some 1.7 million, or nearly twice its normal level, with the influx of up to a million refugees. Reports from the region indicate that Rwandans are now crossing the border into Zaire around the town of Goma at a rate at least 2,000 an hour, with some estimates ranging to 10,000 an hour”); and *The Exodus of a Nation: 200,000 Flee Rwanda Rebels in Only 1 Day*, CHI. TRIB., July 18, 1994, at 1 (estimating “[t]he number of refugees crowding Goma . . . at nearly a million” as of July 17, 1994).

23. See *infra* parts III.B-C. for a discussion of the “international refugee regime.”

exerted significant influence on a number of countries—including the United States—to reform their asylum practices and afford greater opportunities to those with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>24</sup>

I believe that governments have more thoroughly recognized the global dimensions of the refugee problem than any other area of immigration policy. I also believe that governments have gone further in seeking multilateral solutions. Nevertheless, as refugees continue to proliferate and the Cold War becomes a distant memory, the limits of international organizations and nations attempting to subordinate their particular interests to more general humanitarian goals become ever more apparent. In my view, “humanitarian admissions” are likely to remain at or slightly below the levels achieved over the last fifteen or twenty years; measured as a percentage of existing U.S. population, they are likely to decrease. Particularly where asylum-seekers are concerned, the procedures employed by the government to determine eligibility are likely to be “fairer,” that is, more “principled” and less overtly “political.” Yet, the probable consequence of such fairness is that only a tiny percentage of millions of asylum-seekers are going to receive permission to enter or remain in the United States.<sup>25</sup> As the effective burden of proof for each applicant rises,

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24. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating 1951 Convention definition). INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1981), is modeled on this definition.

25. See, for example, the following recent comment:

I used to think that simply creating a speedy but fair asylum adjudication procedure would be the single key for mastering the issue of political asylum, this most unruly element of immigration policy. But with the worsening political climate, I am no longer convinced that it will be enough, even if we could assure final and enforceable orders, positive or negative, within, say, twelve months of filing. Experience seems to have shown that even those countries now operating streamlined adjudication systems with greatly augmented resources continue to have difficulty in getting ahead of the political curve.

David Martin, *Interdiction, Intervention, and the New Frontiers of Refugee Law and Policy*, 33 VA. J. INT'L L. 473, 477-81 (1993). According to Dennis Gallagher,

Third-country resettlement is likely to decline in the post-Cold War era. The United States, the principal country of resettlement, has given preference to refugees of 'special humanitarian concern.' Proposals to interpret this as people who have especially compelling needs have fallen on deaf ears. . . . Even though the number of refugees worldwide has grown to over 18 million, the U.S. resettlement program will probably shrink over the next few years on the grounds that fewer refugees are of special concern to the United States. It is unlikely that any reduction in U.S. refugee resettlement will be compensated by increases

new attempts will be made to regularize and “internationalize” the expulsion of the ineligible. Existing international organizations, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), will assume an expanded role. However, that role will shift (in large measure, though not totally) from protection to repatriation.<sup>26</sup> The number of people seeking refuge worldwide will almost certainly increase, perhaps dramatically. That increase, at least in the United States and Europe, is likely to promote more restrictionism rather than greater generosity.

### C. *Illegal Migrants*

Global factors are likely to “push” more undocumented aliens in the direction of the U.S. border and encourage others with temporary visas to “overstay” and remain indefinitely in an illegal status. A significant percentage of those illegally entering or overstaying will continue to be those fleeing violence and political upheaval in their homelands—although most will not qualify for the limited number of refugee visas made available each year or be able to prove the probable personal persecution necessary to obtain “political asylum” or “withholding of deportation.” With the exception of very young and very old migrants coming to join relatives in the United States, most of these quasi-refugees will attempt to enter the U.S. work force. They will be joined by millions of other undocumented aliens whose principal motives for migration will be economic. The number of such illegals will probably rise, although there is no way of predicting with any certainty whether the rate of increase will exceed or remain below historical levels.

I expect the increase in illegal immigration to be fairly moderate, but quite uneven. Quasi-refugees and those coming solely to seek work will probably face both more rigorous enforcement of existing immigration laws and new economic disincentives to migrate. Loopholes, however, will

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in the resettlement programs of other governments, such as Canada and Australia.

Dennis Gallagher, *Durable Solutions in a New Political Era*, 47 J. INT'L AFF. 429, 444 (1994).

26. *Interview: The Evolution of the UNHCR—Mrs. Sadako Ogata, U.N. High Commissioner for Refugees*, 47 J. INT'L AFF. 419 (1994) [hereinafter *The Evolution of the UNHCR*]. “Refugee work in the 1990s should focus on the countries of origin to promote prevention. Prevention and solutions. Prevention means looking into the countries of origin and solutions involve returning people [to their home countries].” *Id.* at 419. During the same interview, Ogata accepted without demurrer this characterization of her earlier remarks: “You indicated earlier that the focus in the 1990s is on refugee repatriation.” *Id.* at 425.

probably grow. On the other hand, traditional willingness to exploit the labor of illegal aliens and to reap the benefits of the underground economy to which they contribute is likely to slow—although not halt—the drive for more effective control.

Illegal immigration results when people seeking entry find themselves ineligible for immigrant or nonimmigrant visas, yet still manage to cross the U.S. border. It also occurs when individuals legally in the United States as nonimmigrants “overstay” their visas and evade detection or deportation. Both sorts of behavior are as old as the immigration laws prohibiting them. Despite the prohibition, there is probably as much or more incentive today as there ever has been for aliens to enter or remain in the United States illegally. That incentive is not likely to diminish in the foreseeable future.

For refugees, the principal incentive is fear and lack of available alternatives. Censuses of refugees are notoriously difficult to generate since people crossing national borders in a panic do not often register with those patrolling those borders—and it is never clear whether all those who *are* counted meet the legal definitions that governments employ to distinguish “genuine refugees” or “asylees” from “displaced persons” or “economic migrants.” Nevertheless, it seems certain that the worldwide refugee population, although constantly fluctuating, has remained above 10 million for at least a decade, is now approaching or has surpassed 20 million, and is almost certain to rise.<sup>27</sup> Political and ethnic turmoil in much of Africa, the Balkans and the former Soviet Union, and the Middle East gives no sign of diminishing. Closer to home, instability in Haiti generated boat people at an unprecedented rate,<sup>28</sup> a new boatlift from Cuba seems highly likely, and Mexican politics have taken a new and dangerous turn.<sup>29</sup>

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27. The most authoritative recent estimate of current refugee population—which is already badly outdated—is the figure of 19 million offered by the UNHCR. See *infra* note 60 and accompanying text.

28. See *supra* note 22, and *infra* notes 43-44, and accompanying text.

29. See, e.g., Andrew Reding, *Chiapas is Mexico*, 11 *WORLD POL'Y J.* 11, 11-25 (1994). According to Reding, the 1993 “Zapatista” uprising in Chiapas province was not an isolated event, but a sign of deep political trouble in Mexico. He argues that “[r]epression or the threat of repression is a fact of life throughout rural Mexico” and that incipient revolution has emerged often, only to be crushed brutally.

In 1968, after students began marching to demand a greater measure of democracy, the army attacked a gathering in Mexico City’s Tlateloco Square with tanks and automatic weapons. Hundreds were killed, hundreds more imprisoned. In the ensuing years, the armies *brigadas blancas* kidnapped suspected dissidents, hundreds of whom were never heard from again. And in the early 1970s, the army forces crushed a peasant rebellion in the state of Guerrero with a scorched-earth policy that made little distinction between combatants and civilians.

The continuation (and probable expansion) of the refugee crisis is certain to create more immigration pressure. With increasing frequency, refugees from almost every region have sought safety in the West. According to one source, "despite deterrent measures, the number of asylum applications in Europe, North America, and Australia rose more than sevenfold from an estimated 100,000 in 1983 to about 715,900 in 1991 . . . . Indeed, between 1983 and mid-1992, over 3 million people sought asylum in the industrialized states."<sup>30</sup> At least 409,000 of these applicants—nearly one-seventh of the total—sought admission to the United States.<sup>31</sup> Given new restrictionist pressures in Europe and Canada, the percentage is likely to hold steady or rise in the future.

The pool of potential labor migrants is many times larger than the pool of putative refugees—and is likely to grow at an even more rapid rate, with predictable consequences along the border. According to Francisco Alba:

In a world that is becoming smaller due to closer relations among countries, the pool of available labor is becoming larger.

. . . . .  
One indicator of an increasingly competitive labor situation worldwide is the population that is of working age. The future size

Hundreds were killed, hundreds more imprisoned. In the ensuing years, the armies *brigadas blancas* kidnapped suspected dissidents, hundreds of whom were never heard from again. And in the early 1970s, the army forces crushed a peasant rebellion in the state of Guerrero with a scorched-earth policy that made little distinction between combatants and civilians. There is therefore nothing out of the ordinary in the army's response to the uprising in Chiapas. As in other cases of 'subversion,' it has bombed and strafed villages, executed captives, and detained and tortured civilian dissidents.

That the army has not had to rely on these methods more regularly is a testament to the success of a second method of constraining democracy: electoral fraud.

*Id.* at 18, 19.

What is arguably different today is an intensified demand by the electorate for truly representative elections, tremendous cynicism about the goals and economic program of the ruling political party, the PRI, and widespread political restiveness, which may have been exemplified by the assassination of the PRI's candidate for the presidency in the national elections slated for August 1994.

Thus, Reding, in a recent Op-Ed piece, argued that "Mexico is headed for a political crisis" and asserted that "[a] clean election is essential to the success of the North American Free Trade Agreement and the stability of our populous neighbor. If Mexican democracy falters, we may have to prepare for a flood of refugees across our southern border." Andrew Reding, *Mexico on the Edge*, N.Y. TIMES, July 5, 1994, at A15.

30. GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 97-99* (1993).

31. See *id.* at 98. According to this table, which includes the years 1983 through 1991, 409,900 of these applicants sought asylum in the United States, 212,000 in Canada, and 2,192,400 in the IGC countries (i.e., industrialized countries of northern Europe). *Id.* at 98.



of the working-age population—those between 15 and 65 years of age—can be precisely estimated. United Nations data reveal that in 1960 there were 1.146 billion working-age individuals in the less-developed countries. This population had nearly doubled (to 2.155 billion) by 1985 and will reach approximately 3.010 billion by the year 2000.

In developed countries, the working-age populations tend to be smaller and increase at slower rates. This group will only expand by 50 percent between 1960 and 2000, from 595 to 842 million individuals. The contrast between the developed and less-developed countries is even more noteworthy if we compare the patterns anticipated to occur over the next fifteen years. In the developed countries, the working-age population will increase by 60 million between 1985 and 2000, while the less-developed countries will add 855 million persons to their working-age populations over the same fifteen-year span.<sup>32</sup>

The huge disparity revealed by these statistics does not mean that most of the newcomers to the world labor market will migrate from their country of origin to seek work. Nor does it mean that all those who do will be unwelcome: particularly in times of prosperity, industrialized countries with low birth rates have frequently depended on foreign laborers to take jobs that would otherwise go begging.

Nevertheless, the number of foreign workers ready, willing, and able to migrate to the United States and other developed countries is growing rapidly, and is likely to increase in the future. In many underdeveloped and developing countries, there is a substantial "labor surplus" that shows no signs of diminishing. Clearly, such a surplus exists in a number of countries that have long histories of sending laborers to the United States, including Haiti, the Dominican Republic, Jamaica, and the Republic of Ireland. However, the paradigmatic case remains Mexico. Trejo Reyes, writing in the late 1980s and using official Mexican and Banco de Mexico labor force documents, has estimated that under every likely economic projection, Mexico will run a substantial "employment deficit" for the foreseeable future:

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32. Francisco Alba, *Migrant Labor Supply and Demand in Mexico and the United States: A Global Perspective*, in U.S.-MEXICO RELATIONS: LABOR MARKET INTERDEPENDENCE 243, 250 (Jorge A. Bustamante et al. ed., 1992).

The size of the employment deficit in 2000 under the observed tendencies is rather large. In the most pessimistic case . . . the deficit would grow from 2.3 million jobs in 1985 to 12.5 million jobs in 2000. That is, only 1.4 million jobs would be created during the whole period, compared to 800,000, the number needed every year simply to keep the employment deficit constant in absolute terms. Even in the most optimistic case . . . during the fifteen-year period only 7 million jobs would be created—that is, about 467,000 new jobs annually, or slightly more than half of the new jobs required simply to keep the employment deficit at its current absolute level. The resulting employment deficit in the three cases would be 12.2, 10.6, and 8.4 million jobs in the year 2000.<sup>33</sup>

Although many commentators believe that the North American Free Trade Agreement will eventually raise productivity and wages in Mexico, thus reducing long-term emigration pressures, virtually no one has argued that the projected turn-around will come quickly. Instead, many of the *proponents* of NAFTA have suggested that one of the short-term effects of the agreement will be *increased* labor migration<sup>34</sup>—or, at least, an increasing

33. Saul Trejo Reyes, *Mexican-American Employment Relations: The Mexican Context*, in U.S.-MEXICO RELATIONS: LABOR MARKET INTERDEPENDENCE 257, 266 (Jorge A. Bustamante et al. ed., 1992).

34. Frequently, the problem is presented as a short-term one that will particularly affect a few industries. See, e.g., Kathleen Rees et al., *The Potential Effects of NAFTA on the Textile and Apparel Industry in the United States*, in NORTH AMERICAN FREE TRADE AGREEMENT: OPPORTUNITIES AND CHALLENGES 239, 242 (Khoshrow Fatemi ed., 1993). "In the short run, domestic industry may suffer a structural transfer of labor resulting from lower wages in Mexico and preferential access of apparel imports to the United States under NAFTA."

Sometimes, it is presented as a much longer-term problem. Sydney Weintraub, for example, explains:

[W]hile [labor provisions were] not explicitly included, many Americans support NAFTA because they are convinced that economic development is the only sure way to slow down undocumented immigration from Mexico. Is this a vain hope? It probably is, for the short term; but it may not be for the long term . . . . It is hard to define the long term. It could take more than 100 years for per capita incomes in the two countries to equalize, but this may not be necessary to reduce the incentive to emigrate. If income and employment in Mexico were on a steady upward path, coupled with more equal distribution of the benefits than in the past, this sense of hope for the future may be sufficient to staunch emigration pressures.

Sydney Weintraub, *The Coming Debate on NAFTA*, in NORTH AMERICAN FREE TRADE AGREEMENT: OPPORTUNITIES AND CHALLENGES 18, 29 (Khoshrow Fatemi ed., 1993).

An even more pessimistic view is asserted by R. Hinosa Ojeda and Robert McCleery, *U.S.-Mexico Interdependence, Social Pacts, and Policy Perspectives: A Computable General Equilibrium Approach*, in U.S.-MEXICO RELATIONS: LABOR MARKET INTERDEPENDENCE 113, 134 (Jorge A. Bustamante et al. ed., 1992).

The neo-liberal alternative, which is modeled on current policy directions in the United States and Mexico, implies a free trade agreement, continued debt servicing, and restrictive

number of attempts to cross the U.S. border in the face of a more rigorous enforcement effort.

Although global phenomena largely explain the departure of most “illegals,” their reception in the United States is now—and is likely to remain—a local phenomenon, driven largely by considerations of costs, benefits, and political impact. That reception has both formal and informal aspects. With several very important exceptions—including the *bracero* program that flourished in the 1950s and early 1960s, the so-called “Texas proviso” to the Immigration and Nationality Act that used to protect the U.S. employers of illegal aliens, and the “amnesty” and Replacement Agricultural Worker provisions of the Immigration Reform and Control Act of 1986 (IRCA)<sup>35</sup>—the formal response to future refugees and work-seeking migrants has been restrictive. Thus, as a general matter, the only migrants welcome are those who are brought from abroad as “refugees” under geographically and numerically limited annual “allocations,” or who survive the rigorous screening imposed on asylum (and withholding of deportation) applicants, or who qualify for the limited number of employment-related immigration visas, or who meet the very demanding requirements established for those seeking permission to work as non-immigrants in the United States. The law requires that everyone else be sent home.

The informal response has always been more generous—although only selectively so. Since Michael Piore argued in 1979 that a “de facto” immigration “system” exists side-by-side with the de jure system,<sup>36</sup> it has

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immigration (at least in intent) à la IRCA [Immigration Reform and Control Act of 1986]. We show that changes in trade policies, as opposed to capital and labor policies, generally have smaller impacts on production and welfare. A [free trade agreement] by itself is not capable of reducing migration as some have claimed. Migration, in fact, will increase substantially in the absence of significant capital inflows to increase employment and wages in Mexico.

*Id.*

See, e.g., Johnson, *supra* note 18, at 963. Johnson cites GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 26 (rev. ed. 1993), which is probably the most frequently cited study in the NAFTA literature. He also notes that Doris Meissner, now Commissioner of the INS, expressed a similar view in 1992. See Doris Meissner, *Managing Migrations*, 86 *FOREIGN POL'Y* 66, 82 (1992).

35. Immigration Reform and Control Act of 1986, Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359.

36. See generally MICHAEL PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979). As Piore notes, de facto policy is made at the administrative level by the INS and other enforcement agencies. *Id.* at 172-78. It is responsive to “citizens’ complaints and . . . [to] the pattern of political pressure as it is revealed in the history of immigration policy and in . . . day-to-day relationships with elected officials.” *Id.* at 176. It reveals a “sensitivity to workers in competition with natives” and “to employers’ needs,” and frequently bends the law in favor of vocal constituencies. *Id.*

been commonplace in U.S. immigration scholarship to highlight the discrepancy between “book law” and the real-world practices of the INS and other enforcement agencies. Particularly among commentators focusing on the labor market and espousing a Marxist or neo-Marxist perspective, the “contradictions” between stated legislative purpose and real-world policy implementation have assumed a fundamental importance, with some arguing that the discrepancy exists to promote the economic interests of employers and to permit the “superexploitation” of their employees.<sup>37</sup> Implicit in this

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Piore sees the two systems as separate but overlapping. Thus, he notes that “the de jure immigration system has not been nearly as divorced from the prevailing de facto system as the term ‘illegal’ suggests and has actually provided a variety of channels through which those who become permanent settlers and have children can regularize their status.” *Id.* at 177-78.

37. Kitty Calavita has consistently argued the first position. She has chronicled the key role played by industrialists and politicians, first, in shaping early U.S. immigration policy, and second, in blocking later attempts to minimize foreign recruitment via de jure restrictions on the employment of “contract labor.” See generally KITTY CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924* (1984). In a later work, she distinguishes between the merely “rhetorical” and real consequences of the contract labor laws. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 4-5 (1992). Yet, in her analysis of the bracero program, she finds:

a “state” that is fragmented across institutional lines, at least in the short term and close up; that faces contradictions not just from without but from within as well; and that sets policies less according to some grand plan to rescue the political economy than in response to immediate institutional needs. . . .

While it is true that INS policies usually advanced the interests of growers, close attention to the archival record reveals that this was neither because the agency was coopted by agricultural interests, as instrumentalists would have it, nor because of a direct “objective relation” between the state and capital, as structuralists would maintain. Rather, the Immigration Service pursued growers’ interest in a generous bracero system at least in part to realize its own.

*Id.* at 9.

For an example of the second, more radical perspective, see Marlene Dixon et al., *Reindustrialization and the Transnational Labor Force in the United States Today*, in *THE NEW NOMADS: FROM IMMIGRANT LABOR TO TRANSNATIONAL WORKING CLASS* 101-115 (Marlene Dixon & Suzanne Jonas eds., 1982):

Both in regard to the U.S. and the capitalist world more generally, we are focusing on a phase in the world-historic process of capital accumulation. The obverse side of this process is what Braverman describes as the incessant “transformation of working humanity into a ‘labor force,’ a ‘factor of production,’ an instrument of capital.” . . . We view this ‘accumulation of misery’ as occurring on two levels.

1. The creation of a relative surplus population, “a population of greater extent than suffices for the average needs of the self-expansion of capital.” The existence of a reserve army of labor (i.e., a variable proportion of the labor force which may be employed when capital has a need for labor, and unemployed when the need declines) is not only a product, but indeed a condition or necessity, for capitalist expansion and capital accumulation; and its existence is a condition for the devaluation and degradation of the employed sector or waged labor.

argument is the belief that the INS will overlook illegal immigration when it suits the interests of employers—and enforce the law when it does not.<sup>38</sup> A more moderate reading of the history—which I personally favor—suggests that not all employers have the same interests, that the interests they do have are subject to change, and that to the extent they present a unified front, they are but one interest group among many. Yet it appears indisputable that most employers favor relatively “open” immigration most of the time and that, historically, they have had considerable influence in either moderating restrictive legislation or persuading the government to ease up on enforcement efforts. There is no reason to doubt that employers will pursue similar objectives in the future, sometimes with success.

Interest-group analyses of refugee policy, including my own co-authored book, also reveal distinctions between *de jure* and *de facto* policy and suggest that powerful lobbies inside and outside government can influence decision-making.<sup>39</sup> Facially neutral laws can and have been administered

2. Even *within* the employed population, and therefore independently of capitalist crisis, the secular product of capital accumulation is the devaluation and degradation of waged labor. Taylorization has meant not only a change in the labor process itself (deskilling, intensification, etc.), but also an actual cheapening of labor power, as highly skilled work has been reduced to unskilled, and highly paid workers have been replaced by cheap, unskilled labor. These tendencies can be seen statistically in the fact that skilled, highly-paid workers are being *unemployed*, while the participation of lower-paid women and immigrants is increasing; overall, then, for the working population as a whole, wage levels are being lowered rather than raised.

Further, we would argue, the tendency of this process is to subject an ever larger sector of the U.S. labor force to *superexploitation*, that is, to a reduction of wages below the level necessary for the production and reproduction of labor power.

*Id.* at 101.

38. See, e.g., PIORE, *supra* note 36.

As several scholars have now pointed out, our policy toward Mexican immigrants has varied in blatant fashion with U.S. business cycles and the requirements of particular U.S. industries. Thus, immigration was ignored in the twenties and during World War II and the postwar boom. But the policy was reversed, often in a brutal and repressive fashion, in the 1930s and in the post-Korean recession. The reversal involved the repatriation of more than one million Mexicans but was accompanied by the introduction of the *bracero* program, which was designed to cushion the impact upon agricultural businesses.

*Id.* at 177.

This “business cycle” argument poses no difficulties if we assume—as Piore does—that the short-term interests of business are changeable and that the immigration process also takes into account the interests of non-business groups, such as displaced U.S. workers. It would be highly problematic were we to assume that the deep logic of capitalism requires employers to foster *unlimited* competition for jobs in order to lower wages and promote “superexploitation.”

39. LOESCHER & SCANLAN, *supra* note 21 *passim*; see also L. GERSON, *THE HYPHENATE IN*

with considerable partiality to favor some groups. Although ideology accounts for some of the difference, well-organized ethnic interests have also played a role. Soviet Jews and Cubans, for example, both benefitted from prevailing anti-communist sentiments within the government, but also from effective lobbying on their behalf. Usually, interest-group pressures have resulted in special legislation,<sup>40</sup> promulgation of favorable administrative guidelines,<sup>41</sup> discretionary implementation of those guidelines on behalf of a particular group, or favorable exercise of administrative discretion in the absence of explicit guidelines.<sup>42</sup> Occasionally, they have led enforcement agencies to ignore widespread violations of the underlying statute and permit the arrival and continued residence of undocumented aliens. Since 1980, for example, virtually every Cuban arriving on U.S. shores has been granted political asylum or shielded from deportation. The only significant exceptions are those with prior criminal records in Cuba or those involved in criminal activity after arrival here. As long as Cuban-Americans play a decisive role in Florida electoral politics, we can expect such favorable treatment to continue.<sup>43</sup>

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RECENT AMERICAN POLITICS AND DIPLOMACY (1964) (although not focused on the issue of refugee admissions, nor even exclusively on immigration, Gerson's work provides probably the best example of an interest-based study of U.S. immigration policy); ROBERT DIVINE, AMERICAN IMMIGRATION POLICY (1957) (employing a more eclectic methodology, Divine also does a good job of taking interests into account).

40. See, e.g., Act of November 2, 1966, 80 Stat. 1161 (1966), which granted "conditional permanent resident" status to Cubans otherwise ineligible for naturalization.

41. For example, after strenuous lobbying and considerable pressure from the State Department, guidelines were adopted in 1980 for processing Indochinese refugees, dropping a requirement favored by the INS whereby each potential refugee admissible under INA § 207 would have been required personally to demonstrate a "well-founded fear of persecution." See LOESCHER & SCANLAN, *supra* note 21, at 198-201.

42. See, e.g., LOESCHER & SCANLAN, *supra* note 21 (in particular, chapters 3, 4, 6, 7, and 8 note that the best example of such generosity was probably the use of executive "parole" to bring more than a million Hungarians, Cubans, and Indochinese to the United States from 1956 through 1980).

43. Haitians, who began arriving by boat in significant numbers only in 1980, have nowhere near the same political or economic power in Florida. In addition, they come to the United States with a number of immediate disadvantages: they are poor, black, frequently illiterate, and usually speak neither English nor Spanish. They also have been identified as a group peculiarly susceptible to AIDS. It is therefore not surprising that the U.S. government treats them totally differently from their Cuban counterparts. See, e.g., Terry Atlas, *Haiti Boat People To Be Put In Camps*, CHI. TRIB., July 6, 1994, at 1 (quoting William Gray III, President Clinton's adviser on Haiti: "Those who take to the boats will not have resettlement possibilities in the United States."); Michael R. Gordon, *In Policy Shift, U.S. Will Admit No Haitians at Seas*, N.Y. TIMES, July 6, 1994, at A1. For an account of the early history of differential treatment of Cubans and Haitians, see LOESCHER & SCANLAN, *supra* note 21; NORMAN L. ZUCKER, *THE GUARDED GATE* (1987).

Yet, even migration patterns established over the course of time are not immune to domestic challenge. Large labor surpluses or substantial refugee problems in traditional “sending countries” and uncertain economic prospects in traditional “receiving countries” can create a volatile situation. The substantial migration of Mexican laborers to the United States is a “hot” political issue that is likely to become even hotter in the decades to come. The mass migration of thousands of Haitian and Cuban “boat people” in 1980 created substantial anti-refugee backlash in the early 1980s; the recent outpouring of thousands of new Haitian “boat people” over a three-week period induced the Clinton administration to refuse admission to anyone leaving that island by sea.<sup>44</sup>

Of course, change can also lead in the direction of more generosity. Thus, a fairly general amnesty could be declared again for illegal aliens already present in the United States and those “amnestied” could be granted the opportunity to obtain U.S. permanent residence;<sup>45</sup> the INS could relax its enforcement effort generally or along particular segments of the border; particular groups of asylum seekers could be offered conditional permanent residence,<sup>46</sup> temporary “safe haven”<sup>47</sup> or more limited de facto relief from

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44. The decision to refuse to permit Haitian “boat people” to seek political asylum is a reversion to the policy adopted during the Bush administration and pursued during the first year of the Clinton administration. It does feature “liberal” elements not available earlier, including expanded opportunities for Haitians to apply for political asylum at the U.S. embassy in Port-au-Prince and new resettlement opportunities in Panama and other regional States. It was prompted by a sudden mass exodus. See *supra* note 22.

According to the *Chicago Tribune*, “More than 13,000 Haitians—nearly 5,000 [in a two-day period]—have taken to sea in desperate attempts to flee their impoverished nation in the three weeks since the U.S. halted its policy of automatically returning those intercepted at sea.” Atlas, *supra* note 43, at 1.

45. According to Stephen Legomsky, “[a]pproximately 1.8 million aliens applied for temporary resident alien status under the general legalization program” established by the Immigration Reform and Control Act of 1986 (IRCA). Nearly 98% of these applications were approved. STEPHEN LEGOMSKY, IMMIGRATION LAW AND POLICY 549 (1992). Another 1.3 million aliens otherwise ineligible for visas applied for legalization under IRCA’s special agricultural provisions. *Id.* at 552.

46. This status was available for a limited number of applicants (never exceeding 17,400) each year between 1965 and 1980 under the former “seventh preference,” which was codified at 8 U.S.C. § 1153(a)(7) (1965) (repealed 1980).

47. Immigration Act of 1990, Pub. L. 101-649, § 302, 104 Stat. 4978, 5030 (codified as amended at 8 U.S.C. § 1254(a) (1988 & Supp. IV 1992)) created a new temporary status for individuals fleeing ongoing armed conflict, environmental disasters, and other “extraordinary and temporary conditions” that prevent safe return. This provision, which must be invoked by the Attorney General on behalf of a particular group, provides “temporary protected status” for a period of 6 to 18 months. It has been employed on behalf of Salvadorans (after considerable lobbying and special Congressional legislation), Kuwaitis, Liberians, and Lebanese. See LEGOMSKY, *supra* note 45, at 974-77.

deportation;<sup>48</sup> and the practice of granting special “diversity” visas could be continued and expanded.<sup>49</sup> It would be presumptuous to argue that none of these things will occur in the next several decades; there is no way of predicting every future migration pressure or all of the vagaries of U.S. response to such pressure.

However, I believe that the general trend will be toward tighter rather than looser borders, with more effort put into the apprehension of illegal aliens at the border and their detection and deportation after arrival. As has almost always been the case, the enforcement commitment will be expressed more unequivocally in writing than in the actions of the bureaucrats charged with implementing policy. Nonetheless, I think the gap between *de jure* law and *de facto* practice is likely to narrow significantly. I base this prediction on a number of facts and assumptions (many of which I have already set out) about global demography, the global economy, and social, political, and economic trends in the United States.

### 1. *Demographic Considerations*

The developing and underdeveloped worlds are continuing to generate vast numbers of surplus workers and refugees. Although some ongoing immigration is probably necessary to balance declining nativity rates in the West (including the United States), there is clearly a worldwide oversupply of laborers that is likely to get worse. The refugee population is also growing rapidly. Developments in transportation and communication (including new versions of informal peonage and the elaboration of smuggling networks to bring undocumented people across national borders) enable an increasing number of people from almost everywhere in the world to reach the United States and other developed nations.

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48. Legomsky has chronicled the “inventive” non-statutory remedy, and “extended voluntary departure,” which the U.S. government employed on at least 16 occasions between 1960 and 1981. LEGOMSKY, *supra* note 45, at 972-74. This remedy frequently overlapped with the grant of executive “parole,” a discretionary remedy originally authorized by § 212(d)(5) of the INA of 1952, but extended beyond recognition as an admissions device for refugees during the period beginning with the Hungarian uprising in 1956 and nominally ending with the passage of the Refugee Act of 1980. *See generally* LOESCHER & SCANLAN, *supra* note 21.

49. Immigration Act of 1990, Pub. L. 101-649, § 131, 104 Stat. 4978, 4997 (codified as amended at 8 U.S.C. § 1153(c) (1988 & Supp. IV 1992)) created 55,000 annual “diversity visas” to be distributed among applicants from “low-admission” regions of the world and “low-admission” countries within these regions.



## 2. *Social and Political Considerations*

In recent years, immigrants have tended to concentrate in California, Texas, Florida, and the New York-New Jersey area. Such concentration may be a predictable result of the restructuring of the U.S. economy. It may help revitalize some urban areas,<sup>50</sup> and may even produce long-term national and regional benefits; yet it clearly imposes heavy short-term local costs by burdening health care and educational systems and forcing municipalities and state governments to pay for social benefits that are not directly recoverable in taxes or reimbursements from the federal government. The heavy concentration of immigrants in a few locations probably magnifies concerns about immigration in those locations while permitting it to remain a background, low-priority political issue in most of the nation. Thus, California, Texas, and Florida are likely to continue to argue for a more restrictionist policy and aggressively pursue reimbursement for their costs,<sup>51</sup> while the subject is likely to be a matter of relative indifference in

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50. See SASKIA SASSEN, *THE GLOBAL CITY* 315 (1991), stating:

[I]mmigration is a factor in the occupation of areas both in New York in the 1970s and in London in the 1960s that would otherwise have had a high proportion of abandoned housing and closed stores. Through the immigrant community, immigrants become agents actively engaged in rehabilitating both spatial and economic sectors of the city. The immigrant community can be seen as representing a small-scale investment of direct labor (through neighborhood upgrading) and of capital (through neighborhood commerce) in a city's economy. Another way of putting it is that the immigrant community is a structure or vehicle that maximizes the benefits of individual investments of direct labor and money for the community, by concentrating such investments spatially, a concentration effected by residential segregation. Thus, home repairs by multiple households become neighborhood upgrading; differences of language and food create a captive market for ethnic shopkeepers.

*Id.*

51. See, e.g., *L.A. TIMES*, July 3, 1994, at A1:

In large U.S. cities, mothers too poor to pay—including undocumented ones—have their babies in hospitals at public expense.

All children in America, citizens or not, may attend public schools. In every town on the Mexican border, without exception, the schools are woefully overcrowded.

A research group in Washington, the Center for Immigration Studies, says illegal aliens cost the nation about \$7 billion a year in medical, educational and other services. This is the main complaint of the various groups formed to curb immigration.

"We're just giving away America," said Glenn Spencer, a spokesman for one such California group called Act Now. "We have too soft a heart."

Florida claims to spend \$1.5 billion a year on social services for about 373,000 illegal immigrants. Its governor argues that this is a federal problem and has sued the government to collect. Texas, with 405,000, and California, with 1.6 million, have filed similar lawsuits.

The cost estimates presented in the story are much higher than those generated by earlier studies, many of which find *net* economic benefits from immigration to the economy as a whole and to the fisc.

Indiana, North Dakota, or Idaho. On balance though, present migration patterns (which almost certainly will continue) probably enhance restrictionist pressures because the states with the highest concentration of immigrants control at least forty percent of the House of Representatives.<sup>52</sup>

### 3. *Economic Considerations*

Fluctuations in the U.S. economy will affect immigration policy and law as they always have. High domestic unemployment will promote more restrictionist sentiment and lessen employer demand for alternative sources of labor; low domestic unemployment will diminish (although not eliminate) restrictionist sentiment and will increase employer demand for alternative sources of labor.

Structural changes in the U.S. economy—which are clearly related to the globalization of markets—are likely to be even more important. The de-industrialization of the West is likely to continue (although it appears that labor-intensive, underground-economy “sweatshop” and light assembly jobs are re-emerging), as will the mechanization of agriculture. The high-end service sector will continue to grow, but its needs are likely to be met through the expansion of relatively narrow *legal* immigration channels; the

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It should be noted that anti-immigrant sentiment in California does not end with suits for compensation. Thus, the same story also notes:

California Republican Gov. Pete Wilson, campaigning for reelection, would amend the Constitution to deny citizenship to native-born children of undocumented mothers.

He also favors an initiative on the November ballot that would deny a public education and all but emergency health care to illegal immigrants.

Sen. Barbara Boxer (D-Calif.) wants to call out the National Guard to seal the Mexican border.

Her Democratic colleague, Sen. Dianne Feinstein, who as mayor of San Francisco was a champion of immigrants, now wants to buy tougher border control with a \$1 toll on every person who crosses. About 56 million a year cross legally at San Diego, the world's busiest port of entry. Illegal crossers, of course, do not stop at toll booths.

*Id.*

52. According to the INS, 973,977 immigrants in 1992 indicated their “statistical area of intended residence.” Of these, more than 34% indicated an intent to settle in one of the nation's ten largest metropolitan areas. More than 13% indicated an intent to settle in Los Angeles and a similar number registered New York City as their choice. *Immigrants Admitted for Top 10 Metropolitan Areas of Intended Residence: 1992*, in *THE WORLD ALMANAC* 370 (Robert Famighetti ed., 1994).

Of the 435 seats in the House of Representatives, California has been apportioned 52; New York, 31; Texas, 30; Florida, 23; Illinois, 20; and New Jersey, 13. These 169 seats from only six states constitute 39% of the total. *Congressional Apportionment*, in *THE WORLD ALMANAC* 360 (Robert Famighetti ed., 1994).

low-end service sector will probably continue to grow, although some low-end jobs (data entry, for example) are being exported overseas. With respect to these low-end jobs: a) a significant percentage will be taken by U.S. workers displaced from industry; b) a significant percentage will be in the underground economy and will recruit part-time and casual labor (including immigrants) in order to minimize the cost of benefits and government regulation; and c) the attractiveness of casual labor will depend, to some extent at least, on new costs that may be legislatively imposed (e.g., national health insurance), and on the ability and willingness of the government to enforce its regulatory and employer-contribution laws. To take one example: any national health insurance scheme requiring universal coverage and employer contribution will probably discourage the employment of undocumented aliens and other casual laborers *if it is widely enforced, and if the penalties for non-compliance are sufficiently severe*; if it is not enforced, or the penalties provide no real deterrent, then, all other things being equal, it will continue to be rational to hire undocumented aliens.

It seems unlikely that the incentives to hire undocumented aliens will disappear in the near future—in fact, they may grow. When combined with the continuing growth of the world's refugee population and its increasing surplus of people seeking employment, continuing illegal immigration at a fairly high level is a virtual certainty. Some of that illegal migration will probably receive a wink and a nod from governmental officials who will be more concerned about the political symbolism of highly-visible enforcement activities along the border and well-publicized (but necessarily selective) enforcement of existing “employer sanctions” laws than about net migration statistics. Nevertheless, existing pressures on the government “to do something about immigration”—a demand that usually ignores motives for departure, the niceties of entry status, and the long-term economic consequences of immigration policy—are not going to go away. In my view, more effective enforcement of a body of law that looks a good deal like the one we have today is highly probable. Fewer undocumented people will slip across the border, and more of those who do will be caught and deported. Where illegal immigration is concerned, the inevitable gap between stated policy and actual implementation is likely to narrow.

## III. THE LIMITS OF INTERNATIONAL COOPERATION

More legal opportunities for highly-skilled and well-educated foreigners to migrate to the United States; a fairer but probably less generous refugee policy; and more effective but far from complete control over illegal immigration, are hardly negligible consequences. However, they do not add up to major revisions in the criteria employed by this country to select its immigrants, the number of immigrants actually welcomed, or the procedures governing their admission, exclusion, or deportation. More importantly, the changes I have described, if they occur, will leave intact several powerful, but somewhat misleading, impressions: first, that immigration *to* the United States is regulated *exclusively* by the United States; second, that immigration policy and its uneven successes are a matter of *national* rather than *international practice*; and third, that the frontier dividing the “American” “us” from the vast “un-American” “them,” however often it has been breached, is an artifact constructed by Congress, the courts, and INS out of domestic policy concerns, a parochial legal tradition, and U.S.-made barbed wire.

I believe that our sense of a national frontier very similar to the one we have had for more than a century will persist into the foreseeable future. I believe that this sense will be largely, but not entirely, justified by this course of events. Thus, the “fairly modern social practices” identified by Mitchell as establishing that frontier—including “continuous barbed wire fencing, passports, immigration laws, inspections, currency control, and so on”<sup>53</sup>—are likely to persist without major change and will help sustain our confidence in the primacy of that “almost transcendental entity, the nation-state.”<sup>54</sup>

Yet, the monopoly of the nation-state over immigration affairs need not—and probably cannot—be quite as absolute as “statist” (or “neo-statist”)<sup>55</sup> models of international affairs tend to assume. Nation-states

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53. Mitchell, *supra* note 1, at 94.

54. *Id.* at 94.

55. Mitchell, *supra* note 1. As his title, *The Limits of the State: Beyond Statist Approaches and Their Choices*, suggests, Mitchell does not reify the State. Instead, he argues that “the State” is an intellectual construction—a “framework”—which is never totally separate from the concrete practices of statesmen, politicians, bureaucrats, and the like. Thus, it only “*appears* to stand apart from the social world and provide an external structure,” and is not *really* a “transcendental entity,”—although appearances obviously count for a great deal. *Id.* at 94 (emphasis added).

probably never established their immigration policies unilaterally, certainly do not do so now, and are not likely to do so in the future. Similar or complementary interests often have promoted a search for common solutions to problems extending across national borders. Over the last half century or so, States have begun to institutionalize various forms of cooperation relating to the transnational movement of refugees and labor migrants. An elaborate “international refugee regime”<sup>56</sup> has emerged, which has helped coordinate the responses of traditional “receiving” countries to the misfortune so common in their more benighted neighbors. In some parts of the world, the degree of cooperation on labor migration—particularly over the last decade—has made significant ideological and institutional inroads on traditional notions of national sovereignty. These developments are meaningful. They give globalists some reason to hope. But particularly if they are looking at U.S. policy, they would be wise not to hope for too much.

#### A. *The Persistence of the State and of Local Interests*

My skepticism derives from my belief that States will continue to exercise sovereign prerogatives as long as they believe it is in their interest to do so. *Global events*,<sup>57</sup> by definition, invite coordinated multilateral

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Nevertheless, appearances can sometimes be deceiving. When Mitchell speaks of a nation “establishing a territorial boundary and exercising *absolute control* over movement across it,” he is not really speaking of State *practice tout court*. Instead, he is speaking of a State’s *aspirations*, coupled with practices that promote the goal of “control,” but inevitably fall short of achieving it completely. *Id.* at 94 (emphasis added).

56. LOESCHER, *supra* note 30. See also CLAUDENA SKRAN, *THE INTERNATIONAL REFUGEE REGIME AND THE REFUGEE PROBLEM IN EUROPE* (forthcoming). See generally Gil Loescher, *The International Refugee Regime*, 47 J. INT’L AFF. 337 (1994).

For a discussion of what the “international refugee regime” is, how it has functioned, and what its prospects are for the future, see *infra* part III.B-F.

57. The term “global events” requires some sort of definition. I will suggest that they are events, standing in some relationship to one another, that occur simultaneously or in close temporal proximity, and that occur either entirely or in significant measure outside the boundaries of any State, or within several States, events that either implicate the interests of many States, or have the clear potential of doing so, and that defy clear unilateral solution.

Examples of “global events” include the pollution of the oceans or the earth’s atmosphere, the AIDS pandemic, the dissemination of information or political propaganda via a worldwide communications web, and the exchange of capital and goods within an international economic framework that permits buyers and sellers, borrowers and lenders from almost every country in the world to participate in the market. With respect to immigration, they include all of the factors that either *permit* or *promote* the international movement of refugees and job-seekers, or *facilitate* that movement.

responses. Indeed, from an Olympian perspective, they may require the subordination of local and immediate interests to some supranational authority for the good of all. Yet people live in nation-states, not on Olympus. If those States are democratically governed, as all of the western industrialized States confronting large-scale immigration are, they cannot ignore the concerns of the electorate. Since they are complex bureaucracies, they cannot ignore the concerns of civil servants or organized pressure groups either. No immigration policy can satisfy everybody. But no State can afford to pursue a policy that does not promise clear benefits to enough of its constituents, if not immediately, then in the near future. Doing good for the world at large—or at least for some of its most desperate and vulnerable people—is a value that has been internalized by a number of societies, the United States included.<sup>58</sup> For that value to prevail, however, doing good must be associated with the probability of the people at home doing well<sup>59</sup>—or at least doing better than otherwise would be likely. Coordinated or collective international policies that meet this test are politically defensible and can achieve considerable stability and even growth, but multilateral or global policies that fly in the face of important local interests will fail.

The current worldwide immigration situation presents problems that cry out for joint action. Yet it also presents the strong possibility that most actions pursued jointly will fall well short of their goals or fail completely. The likelihood of failure, the short-term costs of generosity, and the threat to sovereignty of many “global solutions” almost guarantee that international cooperation will be limited, and that except where strong economic or security concerns dictate otherwise, it will focus more heavily on immigration *restriction* than on additional admission *opportunities*.

Clearly, such international cooperation will begin with the assumption that too many people are on the move. Thus, it will point to massive and

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58. See, e.g., John Scanlan & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example*, in OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES 61-107 (Mark Gibney ed., 1988).

59. See, e.g., Aristide Zolberg, *Commentary on Current Refugee Issues*, in 47 J. INT'L AFF. 341, 343 (1994).

States are not by nature, generous. Nothing happens if you wait for generosity or for the state to exercise moral obligation. But I think liberal states do have an obligation of asylum and a very important one. And I think this is the only ground we can have to have a really strong and generous refugee regime. But this kind of obligation is much more likely to be carried out when it is to your political advantage to do so.

imperfectly controlled migration from numerous countries of origin to virtually every developed country in the world—and also to those less-developed countries that can provide a better prospect of work or personal safety. The overabundance of asylum applicants has already been noted, as has the rapidly expanding number of people from the Third World seeking to enter the international workforce. According to Arthur Helton:

[an] unprecedented number of refugees are fleeing persecution—approximately 19 million, according to the United Nations High Commissioner for Refugees (UNHCR). An additional 24 million people are displaced within their own countries, due to armed conflict or forced relocation. These are only part of the estimated 100 million migrants worldwide who move for a variety of reasons, ranging from poverty and economic insecurity to population growth and environmental degradation.<sup>60</sup>

We can elaborate Helton's list of *causes* (or factors directly contributing to international migration) to include widespread famine, the transformation of economies from an agricultural to an industrial base or from an industrial to a service base, rampant nationalism and ethnic intolerance, and warfare that either involves several nations or has the potential of sending refugees and displaced persons across the borders of several nations. Or, we can list all of the phenomena that *facilitate* such migration, such as the establishment of transnational communication and transportation networks. And we can argue—validly, I think—that the only way to render migration “manageable” (i.e., acceptable to immigrant-receiving nations in terms of both numbers and mode of entry) is to address these “root causes” and related facilitating phenomena. It is likely that any academic attempt to “solve” any of these problems would denude entire forests, generate immense controversy, and, in all likelihood, result in little or no consensus about costs, benefits, implementation, strategy, or probable success. Political consensus, particularly consensus involving a substantial number of nations, is even more unlikely.<sup>61</sup>

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60. Arthur C. Helton, *Displacement and Human Rights: Current Dilemmas in Refugee Protection*, in 47 J. INT'L AFF. 379 (1994) (citing UNHCR, *The State of the World's Refugees* 1 (1993)); UNHCR, media release, Oct. 4, 1993 (quoting Sadako Ogata, United Nations High Commissioner for Refugees); United Nations Population Fund, *The State of World Population* (1993).

61. Theoretical and political consensus probably is possible in very limited areas, particularly where facilitation and not the root causes of migration is at issue. For example, countries desiring to

Thus, the developed world, and the United States in particular, is likely to respond to millions of potential migrants by continuing to distinguish between “us” and “them” at the time that entry decisions are made. Clearly, the creation of a unified labor market in the European Union, the European drive to enunciate a common refugee policy, and the move to deregulate movement within the territory of the European Community (EC) all need to be addressed. At least in Europe, “us” and “them” are relative terms, and frontiers aren’t what they used to be. Nevertheless, as a general principle, individual states will continue to police their own borders and maintain their own immigration policies. They will continue to welcome their own nationals (or “citizens”), temporary visitors from other countries who demonstrate that they are not likely to compete for jobs or overstay their welcome, and a limited number of aliens seeking long-term or permanent residence. Some of the latter will be relatives of those already residing legally within the State’s borders. Most, however, will be especially “desirable” economic migrants or refugees. Everyone else (including the vast majority of the world’s migratory population) will be unwelcome, and will be treated as “illegal aliens” should they attempt to enter or succeed in entering without permission.

Even in Europe, much of the responsibility for border control will rest with national immigration authorities. However, almost everywhere—including the United States and all of the other traditional immigrant-receiving countries—the approach toward those seeking refuge will continue to have a significant international dimension. Intergovernmental cooperation is likely to borrow heavily from practices adopted during the Cold War, but those practices are likely to be recast to discourage the resettlement of refugees and to limit the right of asylum. Assuming that the number of people involuntarily displaced from their native countries continues to grow at anything approaching current rates, it seems certain that virtually all cooperation will be directed at providing

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restrict immigration may believe that some additional control will result if airlines and other carriers are required to screen their passengers better, and are forced to bear the cost of returning undocumented or inadequately documented aliens to their places of origin. This has been the practice in the United States for many years, and has recently become common practice in Europe. See Charles B. Keely and Sharon Staunton Russell, *Responses of Industrial Countries to Asylum-Seekers*, 47 J. INT’L AFF. 399, 403 (1994).

Assuming that such laws are enforced, there is good reason to believe that this practice will deter at least some entrants, since the airlines will turn more people away. However, the net effect of the policy on migration numbers is likely to be fairly small since many aliens have the alternative of entering illegally across land borders or being smuggled in.



emergency aid and the better policing of national borders. Although subject to some important qualifications within the territory of the European Union, the principle of national sovereign control over immigration is likely to be strengthened rather than diminished.

A much better prospect of greater “globalization”—or, at least, of strong regionalization and the partial surrender of sovereignty to a supranational entity—exists in the realm of labor migration. Progress in forging a European Union, although far from complete, suggests that the more highly-developed countries in Europe have committed themselves to a fully-integrated labor market—although not a labor market generally “open” to entrants from outside the EU. However, as the absence of provisions for labor market integration in NAFTA illustrates, even this qualified commitment has not been matched in the United States. The continuing existence of an economic and social “fault line” at the global level, separating the “developed North” from the “undeveloped” or “developing South,” suggests that it is not likely to be matched in the foreseeable future.

#### *B. The Waxing and Waning of the “International Refugee Regime”*

It has been apparent since the end of World War I that refugees pose problems far from the place of original misfortune and long after they have experienced displacement or persecution. The defeat of the Axis powers led to the collapse of the Austro-Hungarian and Ottoman empires, bloody nationalistic struggles in eastern and central Europe and the area then called the “Near East,” and the disorderly migration of millions of Greeks, Turks, Kurds, Bulgarians, and Armenians. The humiliation of the Russian army in 1918 led directly to revolution, nearly a decade of civil war, and the flight of hundreds of thousands of “White Russians” to places as remote as France, the United States, and China. More than twenty years after the war ended, on the eve of another global conflagration, more than 15,000 of these refugees, still stranded in Shanghai, continued to seek permanent resettlement in any country willing to take them.

In the early 1920s, the international community began to address the global refugee problem systematically. The first coordinated steps were tiny, resulting in a small office, loosely connected to the League of Nations, that lobbied on behalf of refugees. Its chief accomplishment was the creation of a standardized document, the so-called “Nansen passport,” which a number of nations agreed to accept in lieu of regular identity papers and

which, on the sufferance of the host countries, served as a temporary ticket of admission. Resurgence of refugee problems in the 1930s, a result of continuing turmoil in the U.S.S.R. and persecution of Jews in Germany and Austria, led to the following: the reconstitution of the refugee office, directed by a "High Commissioner for Refugees under the protection of the League of Nations";<sup>62</sup> the promulgation of two multilateral conventions, intended to accord specified minimal social and political rights to refugees in their countries of asylum, but which received virtually no international support and were accorded very little protection;<sup>63</sup> and intergovernmental attempts to find places of permanent resettlement for European Jews, which failed miserably.<sup>64</sup>

By 1939, it thus was clear that refugees were common, mobile, and very difficult to resettle. It was also clear that their arrival in foreign countries posed significant practical problems and could be politically destabilizing. The early refugee conventions were promulgated during the Great Depression; although they afforded no guarantee that refugees would receive permanent protection, they met with considerable local resistance. The late 1930s, in fact, were marked by numerous incidents of refugees being turned away at a series of national borders or being expelled by several States. The common interest in "doing something" about refugees, which was felt most acutely in western Europe, was overmatched by the selfish interests of governments and their constituencies.<sup>65</sup> Only in a few instances did the

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62. Louise W. Holborn, *The League of Nations and the Refugee Problem*, in 203 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 134 (1939).

63. According to Holborn, the first Convention, presented on October 26, 1933, was intended to apply to all holders of "Nansen passports" and "improved the Nansen certificate system in regard to the period of validity as well as the right to return to the hospitable country, restricted the practice of expulsion, insured the enjoyment of civil rights, and secured most favorable treatment in respect to labor, welfare, relief, and taxation." *Id.* at 132. However, it was only "ratified by eight States with various reservations which in certain cases appreciably restrict its value, especially in regard to the refugee's right to work." *Id.* at 132 n.15.

The second Convention of February 10, 1938 applied to Germans who had not originally been eligible to receive Nansen passports. "This convention gave the German refugees certain privileges of sojourn and residence in signatory states; provided for a travel and identity document; gave a certain amount of protection against forcible return to Germany; and in general repeated the provisions of the 1933 convention with respect to legal status, labor conditions, and social welfare." *Id.* at 133.

Holborn, perhaps because of the time her article appeared, failed to note that France, Belgium, and Germany were the *only* States that ratified the second convention. The terms of both conventions were routinely violated after the advent of World War II.

64. See, e.g., DAVID WYMAN, PAPER WALLS: AMERICA AND THE REFUGEE CRISIS, 1938-1941 (1968) (a classic account of the U.S. role in the failed Evian conference).

65. Adverse economic conditions were probably the greatest motivators of narrow self-interest,

convergence of national interests lead to solutions that permanently removed unfortunate people from harm's way. Although some have characterized the interwar approach to refugees as an "international regime," that characterization seems far too generous. At best, it was a proto-regime, an imperfect and unsuccessful model of how States might coordinate their responses to a difficult global situation.

After World War II, however, a genuine "international refugee regime" emerged, characterized by the following: (1) the common or convergent interests of powerful States; (2) a set of overlapping ideologies—"mythologies" might be the more accurate term—which served to convince receiving or benefactor States that they were likely to "do well by doing good" (confidence in the ability of "liberal" ideas and practices to reform the world were consistently linked with anti-Communism); (3) a broadly accepted legal framework that most non-communist States were willing to use, at least generally, to conform their actions to international standards; (4) permanent or temporary resettlement opportunities provided by a variety of countries that were nearly adequate to accommodate the world's refugee population; (5) marginally adequate funding to deal with "refugee emergencies"; (6) a permanent refugee office within the United Nations with enough funding, administrative competence, and international prestige to provide limited on-site aid and perform important coordinating functions in the provision of legal protection, the solicitation of funding for "refugee emergencies," the administration of long-term on-site aid and third-country resettlement, and (more recently) the repatriation of people deemed no longer in danger to their countries of origin;<sup>66</sup> (7) a corps of diplomats

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although widespread anti-Semitism also played a role. Commenting on the world's refusal to settle more than 250,000 European Jews in the 1933-39 period, Walter Adams noted that the crisis arose "at a time of economic crisis that has almost stopped normal migration." Walter Adams, *Extent and Nature of the World Refugee Problem*, 203 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 32 (1939). Even France, which pursued a much more generous refugee admissions policy than any other western nation, was affected. [F]rom 1924 to 1926 France recruited labor from among the Russian refugees in Eastern Europe and Germany.

Economic distress and political tension in 1935 led to severe restrictions in the employment of aliens and even to some expulsion of refugees; and a period of acute difficulty for the refugees followed . . . .

Walter Adams, *Refugees in Europe*, 203 ANNALS AM. ACAD. POL. SOC. SCI. 38, 41-42 (1939).

66. From an institutional perspective, the "international refugee regime" probably includes a variety of actors and not just the UNHCR. Gil Loescher makes the following point:

Since 1950, an international refugee regime composed of the U.N. High Commissioner for Refugees (UNHCR) and a network of other international agencies, national governments and voluntary or non-governmental organizations (NGOs) have developed response strategies that

competent to discuss refugee affairs with their counterparts from other countries; and (8) an emerging tradition of dealing with virtually every aspect of the global refugee problem through ongoing or ad hoc bilateral or multilateral negotiation.

It is important to note that this regime did not emerge full-grown from the head of Zeus. Gil Loescher, in his excellent outline of the International Refugee Regime's institutional dimensions and development,<sup>67</sup> has demonstrated that it progressed in stages and has been heavily dependent on the active support of the United States and other developed nations. The UNHCR, for example, lacked the funding and prestige to play a major role in refugee relief or resettlement until the United States lent its political and financial support after the 1956 Hungarian uprising.<sup>68</sup> Its expansion into the Third World "during the 20-year period from the late 1950s to the late 1970s" depended heavily on the acquiescence and assistance of former colonizing powers.<sup>69</sup> In every instance, States have sought to coordinate and regularize their responses to refugees out of a strong sense of national self-interest. Thus, as Gil Loescher and I argued in *Calculated Kindness*, U.S. willingness to resettle large numbers of Hungarians, Cubans, Soviet Jews, and Indochinese, and to favor asylum applicants fleeing from communist countries, was driven more by geopolitical and ideological concerns than it was by simple humanitarianism.<sup>70</sup>

Using refugee policy to promote foreign policy objectives (and perhaps help "save the world for democracy" in the process) makes perfectly good sense if the cost of resettlement is relatively low and the dangers posed by doing nothing *are*—or at least *seem*—inordinately high. Because the costs today are so high, and the most tangible benefit associated with the regime during its glory days—the forestalling of communist expansion—is no longer relevant, the development of the regime has been reversed, and it appears to have entered a period of prolonged (and perhaps irreversible) decline.

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permit some refugees to remain in their countries of first asylum, enable others to be resettled in third countries and arrange for still others to be repatriated to their countries of origin.

Loescher, *supra* note 56, at 352 n.3. See also LOESCHER, *supra* note 30 (providing a fuller account of the history, organization, objectives, and accomplishments of the international refugee bureaucracy, and of its complicated relationship with individual governments).

67. Loescher, *supra* note 56.

68. *Id.* at 358-59.

69. *Id.* at 359-60.

70. See generally LOESCHER & SCANLAN, *supra* note 21.

It is tempting to hope that regimes can function independently of their creator-member-patrons; that international organizations such as the UNHCR are capable of taking on a political life of their own; that ideologies of generosity and welcome are self-sustaining; and that international law is a source of international standards sufficiently autonomous and well-regarded that it can stand in the way of local political initiatives. To a limited degree, such hope is probably justified. More than a hundred countries are either signatories to, or have agreed to abide by, the general principles of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to that Convention.<sup>71</sup> They have committed themselves, among other things, to a persecution-based definition of refugee that supposedly makes no ideological distinctions among victims or persecutors and to the principle of *non-refoulement*, that is, to the principle that refugees are entitled not to be returned to places of likely persecution. Such commitments impose at least some constraints on independent action. The international response to refugee emergencies outside of Europe in recent decades, and the willingness of the UNHCR to extend its “good offices” to people who may not meet the refugee definition set forth in the 1967 Protocol, have helped condition the world to believe that poor, uneducated, and frequently politically unsophisticated people from underdeveloped countries have as much to fear and are as deserving of protection as the “political refugees” fleeing communism who were the principal beneficiaries of the 1951 Convention. The expansion of the UNHCR’s budget, relief, and legal protection functions has given the organization a much bigger voice in policymaking than it had twenty years ago.

Nevertheless, there are ample signs that the “community of interest” that helped create the present regime has eroded significantly in recent years and has been reduced to two fundamental points of agreement: first, a shared sense that egregious and well-publicized refugee emergencies, such as the outpouring from Rwanda, ought to receive some sort of immediate response to alleviate suffering and minimize destabilization in the country of first-asylum; second, a shared belief that the industrialized western nations need to find the most effective means to fend off asylum-seekers and secure the quickest return of refugees to their country of origin.

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71. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Part of the problem is simply numerical: there are already far too many victims who already have been pushed out of their countries or are on the verge of departure. According to Aristide Zolberg:

Over the last 20 years, the number of refugees worldwide has increased dramatically—from approximately 5 million, a number with which receiving nations could cope, to nearly 20 million. . . . The total number of displaced persons in the world today is approaching 50 million people, and violence, environmental degradation, rogue regimes and anarchy add to this figure.<sup>72</sup>

The numbers are particularly disconcerting because so many of the world's refugees and victimized people now have the means of reaching the industrialized West. Dennis Gallagher spoke for many when he recently noted:

In the post-Cold War period, many states have collapsed or are unstable; war and human rights abuses are common. Some of these states are nearer to Western states than was previously the case. There is growing awareness of how small the world has become and how easily people can learn of and avail themselves of policies—such as those governing political asylum—that permit them to start life anew in a country that is democratic, respects human rights and provides basic economic opportunities.<sup>73</sup>

With numbers come economic and social costs. Refugees, by definition, are migrating out of desperation; it is hardly surprising that many lack money, education, and vocational and language skills. According to Charles Keely and Sharon Russell, “[a]sylum is expensive. Care for asylum applicants in industrial countries and adjudication of their claims are estimated to cost from \$8 billion to \$10 billion annually.”<sup>74</sup> Particularly in times of recession or economic stagnation, any resources directed toward migrants, however great their needs, can spur resentment and ignite underlying racial and ethnic animosity. This reaction has clearly been the case in Germany and other parts of Europe:

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72. Burkhead, *supra* note 6, at 584.

73. Gallagher, *supra* note 25, at 443.

74. Keely & Russell, *supra* note 61, at 402 (citing John Darnton, *Western Europe is Ending its Welcome to Immigrants*, N.Y. TIMES, Aug. 10, 1993, at A10).

As the numbers continued to increase, asylum, illegal immigration, the remnants of guest worker programs and the fear of even greater asylum demands following the breakup of the Soviet Union all made migration a politically sensitive issue in Europe. Anti-immigrant political parties gained strength. Anti-foreigner incidents increased and provoked controversy. Questions were raised about Europe's capacity to absorb refugees and the wisdom of even trying to incorporate culturally very different people into ethnically based societies. Chancellor Helmut Kohl declared that Germany was not a country of immigration. French Interior Minister Charles Pasqua told Parliament: "France was once a country of immigration, but it no longer wants to be one . . . . [T]he goal we have set is zero immigration."<sup>75</sup>

Overt manifestations of racial or ethnic hatred directed specifically at refugees have been comparatively rare in the United States—although it is difficult to explain our Haitian policy without saying that successive administrations have deemed it politically inexpedient to extend any sort of welcome to the black residents of that beleaguered island. Yet the goal of "zero immigration" appears to have a substantial following in California, and may also be spreading to other parts of the country.

These considerations do not mean that the United States will abandon the existing regime entirely. Receiving countries will almost certainly continue to cooperate in ways that have been common since World War II: for example, by jointly underwriting emergency relief operations and the ongoing work of the UNHCR; meeting regularly to address crisis situations and the ever-worsening problem of asylum claims;<sup>76</sup> and even occasionally reaching agreement to grant temporary "safe haven" to particular victims of human rights abuse (such as Haitian "boat people"). Yet as the difficulty in finding even temporary refuge for the Haitians illustrates, there is nothing on the horizon that suggests the existing "international refugee regime" will act to expand the opportunity for refugees to resettle or find asylum outside their countries of origin. Nor does it appear, except in Europe (and there under very restrictive conditions), that multinational organizations will

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75. *Id.* at 401 (quoting William Drozdiak, *Rolling Up a Worn-Out Welcome Mat*, N.Y. TIMES, Aug. 10, 1993, at A10).

76. According to Keely and Russell, "over 100 meetings among developed countries of Europe and North America addressed [the] issue [of political asylum] in 30 forums in 1991 alone." Keely & Russell, *supra* note 61, at 407.

displace sovereign States either in setting refugee policy or in implementing it.

### C. Coordinated Responses

Coordinated responses began in Europe as a necessary corollary of the movement to abolish internal borders within the EC.<sup>77</sup> The prospect of free movement from nation to nation *after* entry had been achieved invited common policies to regulate admission. Of particular concern was the tendency of asylum-seekers to move from nation to nation, filing multiple applications in the hope that one would offer refuge. To discourage such “shopping” for asylum, and also to reduce the processing load of the EC States and the possibility that rejected applicants might be passed back and forth endlessly among these States,<sup>78</sup> all Members have signed one or both of “[t]wo parallel agreements, the Dublin Convention and the Second Schengen Agreement. . . . Both agreements, with slight variations, contain rules for determining a ‘responsible state’ which agrees to process an applicant for asylum from a country outside the European Communities.”<sup>79</sup>

The idea that a single State can be assigned exclusive responsibility to make an asylum determination does not mean that the “responsible State” must in fact grant asylum. Instead, it may process a claim, reject it, and return the applicant to his or her country of origin, absolving itself *and its co-signatories* of any further legal responsibilities with respect to that particular alien. Alternatively, under its own asylum-processing rules, it can

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77. *See* Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 30 I.L.M. 84 (1991) [hereinafter Second Schengen Agreement].

According to Gerald Neuman, “[t]his integrated territory, which does not yet exist, has been nicknamed ‘Schengenland.’ Schengenland is growing beyond the original five members to include Italy, Portugal, Spain, and even Greece. Denmark, Ireland, and the United Kingdom so far have resisted joining the agreement.” Gerald Neuman, *Buffer Zones against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT’L L. 503, 507 (1993).

78. *See, e.g.*, Neuman, *supra* note 77, at 507 n.23 (quoting Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 30 I.L.M. 427, 428 (1991) [hereinafter Dublin Convention]) (noting that one of the purposes stated in the preamble of the so-called Dublin Convention is “to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum.”).

79. Neuman, *supra* note 77, at 506. *See* Second Schengen Agreement, *supra* note 77; Dublin Convention, *supra* note 78.



refuse to process the claim and return the applicant to the applicant's non-EC country of "first asylum" for refugee processing there.

Although this last alternative is not explicitly provided for in the 1951 Convention, nor in the 1967 Protocol, returning an applicant to a country of "first asylum" that is not likely to persecute the applicant does not appear to conflict with the fundamental refugee instruments. Germany has taken advantage of this fact by designating Poland as a "safe country" and arranging the return of all asylum-seekers who have passed through Polish territory on the way to Germany.<sup>80</sup> However, the expeditious removal of unwanted asylum-seekers, rather than the protection of victims, is the clear purpose of the policy.

Countries in North America have also begun coordinated claim processing. Canada, "consciously borrow[ing] from the European treaties,"<sup>81</sup> "has recently amended its immigration laws to make possible the rejection of asylum applicants who have passed through the United States."<sup>82</sup> The United States and Canada have engaged in negotiations "to establish a reciprocal agreement for the return of asylum applicants who have passed through either of these countries on the way to the other."<sup>83</sup> According to Neuman, "the United States has [also] been engaged in a program of cooperation, whose details are not publicized, under which the Mexican government apprehends and deports Central Americans attempting to transit through Mexico to the United States."<sup>84</sup>

#### D. Erosion of Legal Protection

One of the features of the post-international refugee regime (the period from 1950 to the present) has been its willingness to expand the legal and

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80. See Neuman, *supra* note 77, at 508, 520-21. Although agreements with Poland and the Czech Republic were still pending when the Neuman article was published, the agreement with Poland is now in effect. Keely & Russell, *supra* note 61, at 404 (citing Michael W. Divine, Note, *German Asylum Law Reform and the European Community: Crisis in Europe*, 7 GEO. IMM. L.J. 795, 804-09 (1993)).

81. Neuman, *supra* note 77, at 504.

82. *Id.* at 504. See also LOESCHER, *supra* note 30, at 110.

83. Neuman, *supra* note 77, at 504 (citing *Canadian Government Proposes Major Revisions to Its Immigration Law*, 69 INTERPRETER RELEASES 1396, 1398 (1992); *Canada Tightening Refugee Law*, REFUGEE REP., Sept. 30, 1992, at 1, 6-8).

84. Neuman, *supra* note 77, at 504 (citing Bill Frelick, *Running the Gauntlet: The Central American Journey in Mexico*, 3 INT'L J. REFUGEE L. 208 (1991) and *Congress Clears Funding Bill for INS*, State Department, 69 INTERPRETER RELEASES 1263, 1265 (1992)).

*de facto* definitions of “refugee.” Victims seeking help during this period initially owed their condition to events in Europe prior to 1951. After this temporal refugee condition had been removed, some States—including the United States—extended protection only to those fleeing Communist regimes. The 1967 Protocol universalized the definition of “refugee” to include *all* persons with a “well-founded fear of persecution” on account of race, religion, nationality, and political opinion. Although the United States ratified the 1967 Protocol in 1968, it did not incorporate this broader definition into domestic law until 1980. In contrast, the UNHCR had long before extended its “good offices” to desperate migrants without inquiring too carefully into the origins of their fears. Additionally, individual countries pursuing their own ideological and political ends resettled several million people without making any individual determinations that they met *any* refugee definition. As a consequence, the universe of refugees grew immensely.

Today, “every Western government is having difficulty reconciling the rights of refugees to a fair determination of their claims to asylum with its own need to maintain an effective immigrant control mechanism.”<sup>85</sup> Asylum and refugee resettlement programs in much of Europe and in Canada have become much more restrictive over the last fifteen years. The erosion of legal protection has sometimes involved the substantive right to asylum, but more frequently it has involved the procedures under which asylum or refugee status is sought and adjudicated. To the extent that the substantive and procedural rights of would-be refugees and asylum-seekers are distinguishable under U.S. law, it appears that both are under significant attack in this country as well.

No traditional receiving State has formally repudiated its obligations under the 1951 Convention or 1967 Protocol to observe the principle of *non-refoulement*, yet, many have made it much more difficult to present asylum claims or prove refugee status. In addition to the cooperative agreements just described, “refugee reform” has ranged from measures intended to simplify identification and record-keeping to efforts intended to deny presumptive refugee status to large groups of people. In Europe, nations now generally impose fines on carriers for transporting people with false or inadequate documents, a practice that has long been part of U.S.

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85. LOESCHER, *supra* note 30, at 127.

law. These nations have also selectively legalized fingerprinting to prevent multiple filings by particular applicants and have created expedited administrative procedures to speed the processing of applicants who appear not to qualify for protection at the time of their initial interview. Finally, some have changed their underlying law to permit the government to reject some claims without providing a hearing at all.<sup>86</sup>

Canada, again following the European lead, has simplified its asylum procedures to speed refugee processing and the removal of the unqualified.<sup>87</sup> The United States is currently seeking to expedite refugee processing through legislation and the adoption of new administrative procedures.<sup>88</sup> However, it already has limited refugee rights significantly by refusing to grant asylum hearings to Haitian "boat people" and by obtaining favorable judgments from the U.S. Supreme Court that substantially limit the scope of protection afforded by the governing refugee instruments. Indeed, in the United States, the Supreme Court has probably

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86. See Keely & Russell, *supra* note 61, at 403-04 (noting all of these measures including the revision of Germany's Basic Law to permit expedited or cooperative asylum processing); see also Neuman, *supra* note 77, at 509-21 (for a more thorough discussion of the German changes).

87. See LOESCHER, *supra* note 30, at 110.

88. According to Keely & Russell, *supra* note 61, at 403-04, "the United States introduced the Immigration Enforcement and Asylum Reform Act in July 1993 . . . to screen out clearly unqualified applicants," but the legislation died in Congress.

Proposed regulations are currently pending that would substantially change INS asylum proceedings. See Summary, Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14,779 (1994).

This rule would amend existing regulations to streamline the adjudication of asylum applications submitted to Asylum Officers within the Immigration and Naturalization Service (INS). The rule would allow the INS to grant asylum to deserving applicants more promptly and to resolve expeditiously the great number of meritless and abusive applications being filed each year. Under the rule, Asylum Officers would no longer prepare detailed denials in cases where they do not grant asylum to applicants who have no legal immigration status, but instead would automatically issue mandatory referrals of these applications to Immigration Judges for completion of the adjudication as part of exclusion or deportation proceedings. In addition, the rule makes interviews discretionary, authorizing the Asylum Officers to refer claims immediately to Immigration Judges. The rule also would restrict employment authorization to applicants for asylum or withholding of deportation whose claims have been pending for more than 150 days, a period which would not run until the alien has filed a complete application and would not include delays sought or caused by the applicant. This rule also would conform existing regulations to the current practice of receiving applications for asylum and withholding of deportation at the four INS Service Centers. To provide necessary funding for the asylum adjudications process, the rule would provide for imposition of a filing fee for asylum applications and for employment authorization applications based on a pending asylum application.

been as influential as the “political branches” of government in narrowing the rights accorded refugees.

In *INS v. Stevic*,<sup>89</sup> the Court held that mandatory “withholding of deportation” under INA § 243(h) (a statutory provision that tracks Article 33, the *non-refoulement* provision of the 1951 Refugee Convention, almost word-for-word) applies “only if the alien’s life or freedom ‘would’ be threatened in the country to which he would be deported; it does not require withholding if the alien ‘might’ or ‘could’ be subject to persecution.”<sup>90</sup> Although the force of this “more likely than not” standard was mitigated in a later case assessing an applicant’s burden of proof when he or she has sought discretionary “asylum” under INA § 208,<sup>91</sup> its effect was still to impose a surprisingly heavy burden on applicants denied discretionary relief. In *INS v. Elias-Zacarias*,<sup>92</sup> the Court adopted a similarly surprising and narrow view of what persecution “*on account of*” political opinion consists of. As a result, the motives of an applicant confronting an abusive and threatening authority have become more important than the human rights abuser’s own acts or motives. Finally, in *Sale v. Haitian Centers Council, Inc.*,<sup>93</sup> decided in 1993, the Court accepted the government’s argument that “its international obligation not to return refugees to countries of persecution does not apply outside the borders of the United States.”<sup>94</sup> This decision permitted the Clinton administration to deny Haitians picked up on the high seas by U.S. officials the right to apply for asylum.

#### *E. Diminution of Financial Support*

The United States has contributed a great deal of money to refugee resettlement over the past fifty years. It and the other industrialized nations will probably continue to do so when confronted with refugee emergencies of the magnitude of the Rwandan outpouring. Indeed, the budget of the UNHCR has more than doubled since 1990.<sup>95</sup> Industrialized nations

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89. *INS v. Stevic*, 467 U.S. 407 (1983).

90. *Id.* at 422.

91. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-50 (1986) (interpreting “well-founded fear of persecution” to include a subjective element and not to require a showing that persecution is “more likely than not.”).

92. *INS v. Elias-Zacarias*, 112 S. Ct. 812, 816 (1992).

93. *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993).

94. Neuman, *supra* note 77, at 503 (citing *Sale*, 113 S. Ct. at 2562-63).

95. *The Evolution of the UNHCR*, *supra* note 26, at 421-22 (noting that the budget jumped from

probably have good cause to consider their money well-spent, to the extent that the UNHCR continues to focus on repatriation and on-site emergency aid and avoids pressing its principal contributors too hard to afford more legal protection for asylum-seekers or to open up more resettlement slots.

Nevertheless, it is clear that the dramatic increase in the number of people seeking refuge has had a negative financial effect. Sadako Ogata acknowledges that “compassion fatigue” exists; she hopes that the “great strain on governments to meet our needs . . . will be phased out,” although she presents no timetable when she believes that will occur.<sup>96</sup> Meanwhile, the UNHCR and all the other agencies involved in refugee relief, repatriation, and resettlement have to contend with what Gil Loescher has identified as “the inadequacy of the existing resource base.”<sup>97</sup> According to Loescher, not only are new situations mushrooming up all around the world, but “humanitarian missions today are likely to be protracted affairs with no clear outcome.” As a consequence, “UNHCR is now in danger not only of overextending itself because of its involvement in vicious and intractable conflicts, but also of exhausting the political interest of donor governments in continuing to fund such protracted operations.”<sup>98</sup>

#### *F. The Intergovernmental Option*

The final limit on the international refugee regime is implicit in the discussion of the ways that governments have cooperated in allocating “responsibility” for asylum applications and in paying for refugee relief. In both cases, governments have agreed among themselves about the best way to act, but have generally refused to surrender decision-making power to the UNHCR, the Council of Europe, or any other international or supranational organization.

Cooperation in the interests of particular States has thus become customary—but only to the extent that the States continue to give their active and ongoing consent. Keely and Russell have made the point well:

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\$500 million in 1990 to \$1.1 billion in 1992, and that the agency remained “fully funded”).

96. *Id.* at 421-22. Elsewhere in the interview, she answers the question, “Do you expect fewer emergencies in the future?” with this far-from-encouraging response: “I would like to hope so, but the world is in a period of deep trouble, and it’s also going from a bipolar Cold War era to whatever it will have next. All I’m saying is that there has to be some order—some order has to emerge.” *Id.* at 422.

97. Loescher, *supra* note 56, at 367.

98. *Id.*

In response to rising applications for asylum . . . industrial countries have sought to coordinate their . . . policies. "Harmonization" became the buzzword for attempts to agree upon and implement policies undertaken jointly or collectively or, if pursued unilaterally, that nevertheless are compatible and similar in goals, content, and style. As previously noted, over 100 meetings among developed countries in Europe and North America addressed this issue in 30 forums in 1991 alone. These diplomatic forums have been distinctively intergovernmental. Each government reserved for itself the competence to deal with the issue.<sup>99</sup>

I believe that the phenomenon they describe is widespread and likely to continue. Thus, I accept their view that "[t]he close relation of protecting borders to the traditional concept of an international community based on nation-states makes the transfer of entry control to a multilateral agency controversial. States are reluctant to cede asylum decisions to the United Nations or any other multilateral body."<sup>100</sup>

#### G. NAFTA—and the Muted Message from Maastricht

Despite their reluctance to surrender the sovereign power to make ultimate decisions about who crosses their borders—decisions that "cut close to the core of nation-states' vital functions"<sup>101</sup> and even closer to their core of political identity<sup>102</sup>—it is clear that some governments have in fact surrendered a portion of that power in the name of the "single market." Ongoing economic unification in Europe has had political and institutional consequences, including the adoption by EU Member States of a common labor migration policy and an aggressive process of "harmonization" that has led to the virtual abolition of constraints on the ordinary movement and job-hunting of EU "citizens."<sup>103</sup> Although the Member States retain the right

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99. Keely & Russell, *supra* note 61, at 407.

100. *Id.* at 408.

101. *Id.*

102. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the Chinese Exclusion Case).

That the government of the United States . . . can exclude aliens from its territories is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.

*Id.* at 603-04.

103. The issue of EC "citizenship" is addressed below. See *infra* note 111. For a discussion of

to withdraw from the union, as members they are bound to follow the lead of the EC's supranational legislative and judicial bodies. Thus, they have not only committed themselves to a unified market in capital, goods, and labor, but have also committed themselves, in a constitutional sense, to a *permanent* immigration policy that has been collectively determined and is, at least within the borders of the EC, surprisingly "open."

Do these developments in Europe have any significance for the United States? Have the signatories of NAFTA embarked on a similar course? Will the promise of a single North American market lead in the direction of greater continental unity, the erosion of national domination of immigration policy and practice, or the promulgation of new collective institutions? Can we, in other words, derive any positive, locally applicable lessons about the globalization—or at least the strong regionalization—of a major segment of immigration policy by examining the process of European unification from its post-World War II roots to the ratification of the Maastricht treaty?

There are no simple answers to these questions. Clearly, Maastricht gives some reason to hope for a more genuinely collaborative and less restrictive North American policy. A closer look at the European and North American situations, at the differences between them, and at the limits of the measures taken to date on each continent, however, suggests that even where labor migration is concerned, truly "open" borders are difficult to achieve

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recent policy, see R. OWEN & M. DYENES, *TUTTLE GUIDE TO THE SINGLE EUROPEAN MARKET* 86 (1992) ("One of the main benefits of 1992 is the promise it holds out [for] free movement . . ."). The authors further add:

As a result of legislation governing professional and worker mobility, EC nationals are entitled to take up employment or set up a business anywhere in the Community. Much of the impenetrable bureaucracy that used to confront people attempting to work abroad has been dismantled, thereby giving professionals, workers and even the unemployed unprecedented opportunities to pursue employment prospects outside their country of origin. Although Community nationals are still required to obtain residence permits, the need to obtain work permits has been abolished. Nevertheless, much work remains before the Commission's goal of creating a genuinely free market for labour is complete. Even before the advent of 1992, some member states (notably France) have been erecting new barriers to labour mobility in an effort to protect their own domestic labour markets.

*Id.* at 118.

See also John Pinder, *The Single Market: A Step Towards Union*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 51 (Juliet Lodge ed., 2d ed. 1993). The author points out that "the objective of ensuring free movement of EC citizens to take up jobs anywhere in the Community . . . has in the past been impeded by differing requirements for professional qualifications; but the EC has by now enacted legislation contributing largely to the removal of this restriction on the freedom of its citizens." *Id.* at 53.

anywhere and are not likely to emerge in the foreseeable future in this hemisphere.

#### *H. The Lure of Efficient Markets*

A fair history of European unification needs to distinguish between original intentions and later theoretical justifications. The progenitors of the idea of a unified Europe believed in “efficient markets,” but also pursued pragmatic objectives that could not be met by a simple economic theory. Their mixed agenda from the beginning embraced political as well as economic goals. Their politics, influenced by the desire to end centuries of Franco-German conflict and to halt the spread of Communism, favored local cooperation over local competition, and accepted a considerable amount of State intervention in the workings of the marketplace. Coordinated industrial policy in a limited but key area—the coal and steel industries—was at least as important to them as “free trade.”<sup>104</sup>

104. According to Pascal Fontaine, the European unification initiative had its origins in concerns about dealing with Germany after the onset of the Cold War: “The United States wanted to speed up economic recovery of a country on the edge of the continental divide and voices in Washington were already [in 1949] calling for German rearmament.” PASCAL FONTAINE, *EUROPE—A FRESH START: THE SCHUMAN DECLARATION, 1950-1990*, at 9 (1990).

The initiative was launched on May 9, 1950, with the issuance of the Schuman Declaration, which had already been approved by the French and German governments. It called for a joint French-German initiative “to rebuild Europe . . . . This will open the door to other joint activities inconceivable hitherto. Europe will emerge from all this; a Europe that is firmly united and solidly built; a Europe where living standards will rise as a result of the pooling of production and the expansion of markets leading to lower prices.” *Id.* at 13.

Fontaine further notes:

The Declaration . . . defines a set of principles: Europe will not be built all at once; it will be built by concrete achievements which first create *de facto* solidarity:

- (i) The age-old rivalry between France and Germany was to be eliminated: the venture would be of immediate concern to France and Germany but would be open to all European nations sharing the same objectives.
- (ii) Immediate action would focus on a ‘limited, but decisive target’: Franco-German coal and steel production, which would be placed under a common High Authority.
- (iii) The merging of economic interests would help raise the standard of living and pave the way for the establishing of an economic community.
- (iv) The High Authority’s decisions would be binding on the countries that joined. Its members would be independent figures, jointly appointed. Its decisions would be enforceable.

*Id.*

On June 20, 1950, representatives of the governments of France, Germany, the three Benelux countries, and Italy met to hammer out the framework for agreement. “The Treaty Establishing the European Coal and Steel Community [ECSC] was signed on 18 April 1951 for a period of 50 years. It was ratified by the six signatory States, and on 10 August 1952 the High Authority, with Jean Monnet



Yet, for tactical reasons, those promoting a unified Europe quickly began to emphasize one of the three “communities” that France, Germany, Italy, and the Benelux countries had created, namely, the “European Common Market.” A federalist political program proved difficult to sell within the original Member States and had little appeal to other potential Members. As memories of World War II and the threat of Soviet military expansion receded, “efficient market” arguments—which had always been part of the justification for unification—assumed a greater importance. Post-war recovery was substantial but uneven. A bigger Europe without tariffs and fewer barriers to the movement of goods, capital, and people, it was argued, would be able to create bigger and more efficient firms, produce and sell goods more cheaply, and be in a much better position to compete in the world marketplace. The goal of creating a “common market” that could promote these goals was specifically set forth in the Treaty Establishing the European Economic Community (EEC Treaty),<sup>105</sup> which treated labor as a “factor of production” quite similar to venture capital.<sup>106</sup>

By drafting the treaty this way, its authors—in common with many scholars—assumed a link between “free trade” and the relatively free movement of labor. Because they also assumed that many of the industrialized countries were capable of sustained growth, yet were held back by low birthrates and a small population of native-born labor market

as its President, opened for business in Luxembourg.” *Id.* at 15.

In 1957, the six original Members established “the European Economic Community (EEC) and the European Atomic Energy Community (also called Euratom) by the Treaties of Rome of 25 March 1957.” JEAN-VICTOR LOUIS, *THE COMMUNITY LEGAL ORDER* 7 (2d ed. 1990). According to Louis:

[s]ince the entry into force of the Rome Treaties on 1 January 1958, three distinct Communities based on separate constitutions have existed. But the three Communities were set up to achieve the same fundamental objectives: the creation of an ‘organized Europe’, ‘an even closer union among the peoples of Europe’ and a ‘common effort’ contributing to ‘the prosperity of their peoples’.

*Id.*

105. See EEC Treaty, as modified by the Single European Act, 1987 O.J. [L169], art. 8A, at 1,7 (setting forth the goal of establishing “the internal market . . . [that] shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty”); see also *id.* at art. 2 (indicating that freedom of movement is intended to promote “a harmonious development of economic activities”).

Kevin Johnson, who glosses these provisions, notes that “[t]he EEC Treaty thus afforded freedom of movement to European Union [sic] ‘nationals as economic actors, not citizens per se.’” Johnson, *supra* note 18, at 971, 972 (quoting Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the ‘Euro-solution’ to the German Immigration Dilemma*, 16 B.C. INT’L & COMP. L. REV. 201, 204 (1993)).

106. See EEC Treaty, arts. 8A, 3C; Johnson, *supra* note 18, at 976.

entrants, immigration was treated as an economic virtue.<sup>107</sup> At the national level, the concept of “open borders” was extended in practice not only to job-seekers resident in the EC, but also to “guestworkers” from outside the community who, it was believed, could be hired temporarily to fill needs cheaply and then sent home when economic conditions warranted it.<sup>108</sup>

Perhaps because it has proved so difficult to remove guestworkers, contemporary EU policy focuses only on migration within the boundaries of the community. Within these boundaries, however, the Members appear to have moved *beyond* what W.R. Böhning has characterized as the “neo-liberal international economic order,”<sup>109</sup> first codified by the International Labour Organisation after World War II: “It should be the general policy

107. See W.R. BÖHNING, *STUDIES IN INTERNATIONAL LABOUR MIGRATION* 92 (1984) (“A growing economy requires mobility of capital and labour.”). Böhning focuses generally on “guestworkers” rather than on intra-EC migrants. He specifically avoids discussing the option of “settlement immigration,” which he claims “is politically unacceptable in nation-states that are not countries of settlement.” *Id.* at 70. Part of his argument depends on the demographic characteristics of guestworkers and the likelihood that they will be the first persons fired during a recession. However, much of what he says theoretically applies to both categories. His argument assumes that the general trend is toward more economic growth. It also assumes the existence of “mature” labor markets, a “self-feeding” process of labor migration that cannot easily be reversed, and the likelihood that as economic conditions in the country of employment change, the rate of labor migration will also change and—in cases of economic recession—even turn temporarily downward. *Id.* at 70. Under these conditions, Böhning argues that immigration does not cause unemployment, although it may very well worsen the competitive situation for some sectors of the indigenous work force. *Id.* at 71. Instead, immigration generally *raises* wages in the receiving country rather than lowers them, and generally benefits the *economy* of the receiving country, although their numbers may contribute “to social unrest on the part of the indigenous population and to political intervention by the decision-makers.” *Id.* at 85, 86-104.

108. Böhning notes that:

[e]mployers hit by the initial labour shortages naturally seek redress from their governments. [They claim that] [t]heir profitability and productivity situation is ‘obviously’ too precarious to sustain pay raises sufficient to attract indigenous labour, which means that sooner or later they will have to go out of business with consequential drastic setbacks to the regional and national economy. Foreign workers, however, would surely be prepared to do the jobs at the prevailing wage rates, and if and when the vagaries of the business cycle should hit the industry in question, one would incur few social problems by dismissing them.

*Id.* at 70.

Böhning further suggests that “guestworkers” are not nearly so easy to remove once they have been admitted, since the process of migration is

self-feeding . . . and it cannot be reversed except by a fundamental political decision. [Once the process has begun,] it is incomparably more difficult to make such a decision—because of the increased internal and additional international constraints—than it would have been to adopt a strongly reformist manpower policy when the first gaps in the labour market appeared.

*Id.*

109. BÖHNING, *supra* note 107, at 6.

of Members to develop and utilize all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those that have a deficiency . . . ."<sup>110</sup> Thus, EU rules governing labor movement of EU "citizens" within the territory of the union do not specifically relate to labor surpluses or deficiencies;<sup>111</sup> instead, it is assumed that the labor market is essentially self-regulating, that workers will go where the jobs are, and that their free circulation will enhance production and economic growth throughout the union.

This vision of the world is also attractive to some of the supporters of NAFTA. While most seem willing to assume that an agreement that focuses only on the flow of goods, services, and capital can generate more efficient markets, a few have noted that relatively free migration between Mexico and the United States is a necessary part of the equation and, if permitted, would be likely to promote enhanced economic growth.<sup>112</sup> Their argument is a

110. *Id.* at 6-7 (quoting International Labour Organisation, Migration for Employment Recommendation (Rev.), 1949, para. 4(1)).

111. The Treaty on European Union, Feb. 7, 1992, for the first time established common "citizenship" within the EC. Article 8 establishes "citizenship of the Union," and provides that "[e]very person holding the nationality of a Member State shall be a citizen of the Union." Article 8(a) provides that: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limits and conditions laid down in this Treaty and by the measures adopted to give it effect." *Id.*

The right to travel—and to work within the territory of other Member states—had already been established in the 1957 EEC Treaty, and had been strengthened in the "Single European Act" (proposed in 1985, adopted and ratified in 1986, and entered into force on July 1, 1987), which, among other things, added a new Article 8(a) to the EEC Treaty (which has been redesignated as Article 7(a) by the Maastricht Treaty) to "deal with the persistence of barriers of all kinds to the free movement of people, goods and services, and capital within the Community." LOUIS, *supra* note 104, at 23.

However, by making free movement and residence in a territory without "internal frontiers" a quasi-constitutional right, the Maastricht Treaty has gone well beyond treating "nationals as economic actors, not citizens per se." Johnson, *supra* note 18, at 972 (quoting Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the 'Euro-solution' to the German Immigration Dilemma*, 16 B.C. INT'L & COMP. L. REV. 201, 204 (1993)).

112. According to Ojeda Hinosa and McCleery, (who favor "managed interdependence" rather than totally "free markets"):

[i]nter-country flows [of goods, capital, and labor] are inevitable and symptomatic of the differences in wages and rental rates between the two countries, and attempts to stem them in one area can provoke compensating changes in other areas that may be surprising and perverse from the perspective of the social actors and policymakers. . . . [G]reater exchange yields more economic benefit. . . . [T]here are significant gains to policy coordination that promote increased U.S.-Mexican interaction, through capital flows from North to South, labor flows from South to North, and increased trade flows in both directions.

Ojeda Hinosa & McCleery, *supra* note 34, at 140-41.

powerful one. Johnson has presented it well:

Free market principles suggest that a restrictionist NAFTA allowing member states to make every effort to curtail illegal immigration into their respective territories may not represent sound economic policy. As the European Union recognized, free movement of persons, services, and capital as factors of production further [sic] economic aims.<sup>113</sup>

### *I. Forging a "Union"—Europe as a Positive Model*

Despite his faith in open labor markets, Johnson is skeptical about the possibility of achieving one in North America:

It seems readily apparent that a majority of the U.S. citizenry is more uncomfortable with open borders with Mexico than it is with free trade with Mexico. *A proposal for open immigration borders, for example, would not be taken seriously in the political process.* More open trade borders—as NAFTA's ultimate success illustrates—would be. In other words, *in today's political climate, the freer flow of trade is in the realm of political possibility in the United States, while freer immigration is not.*<sup>114</sup>

The evolution of the EU over a course of nearly five decades, however, may provide a glimmer of hope.

That hope does not stem from the "original understanding" that bound the European States together; there is simply no parallel in North America to the labor shortage that developed in Europe during the 1950s and 1960s and the early European commitment to free labor migration among EC Member States. Instead, it derives from the observation of a political and bureaucratic process that led, very gradually, to the "harmonization" of EC Members' laws to eliminate barriers and the institutionalization and

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113. Johnson, *supra* note 18, at 976.

114. *Id.* at 967 (emphasis added). For a similarly pessimistic view, see Trejo Reyes, *supra* note 33, at 267, stating:

Of course, as has been pointed out in the past, there may be a natural complementarity of Mexican and U.S. labor markets. However, it becomes clearer each day that the political will to develop the advantages that might accrue to both countries from closer cooperation in this area is simply not present; each country, but especially the United States, is unwilling to contemplate the implications of such cooperation.

expansion of the “harmonizing” process. The central component of that process has probably not been treaty-making, but rather the creation, slow empowerment, and even slower legitimization of supranational administrative bodies having all of the following characteristics:

- (1) substantial, although not complete, administrative independence from the governments of Member States;
- (2) substantial, although not complete, political legitimacy because some of the Members of the European Parliament and some of its most important initiatives, including the key provisions of the Maastricht Treaty, have been approved by plebiscite or the legislatures of the Members;
- (3) significant legislative power in areas of “community concern,” including virtually every matter affecting the “single market,” but not including the power to pre-empt the authority of individual Members to enact their own substantive immigration laws;
- (4) significant judicial power to direct Member States to abide by their commitments and conform to EC policies in areas of “community concern;” and
- (5) a general commitment to more “integration” of the Member States and the continuation of the process whereby “sovereignty” over particular matters has been surrendered (as a matter of fact, if not always of law) by Member States to the EC.

The centrality of alternative institutions has been a hallmark of the EC since its inception. The Schuman Declaration established a “High Commission” in 1950 with the principle that its “decisions would be binding on the countries that joined. Its Members would be independent figures, jointly appointed. Its decisions would be enforceable.”<sup>115</sup> The same year, the six original signatory States agreed to add “a Council of Ministers [representing the Member States], . . . [a] Parliamentary Assembly, and a Court of Justice . . . .”<sup>116</sup> Executive, legislative, and judicial bodies were, thus, empowered to deal with matters of “community concern” from the beginning. As those bodies have evolved,<sup>117</sup> they have gained

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115. FONTAINE, *supra* note 104, at 13.

116. *Id.* at 15.

117. *See* LOUIS, *supra* note 104, at 7.

As from 1 July 1967 the executive organs of the three Communities, the Council and the Commission, were merged in a single Council and Commission under the merger Treaty signed in Brussels on 8 April 1965. The Assembly (European Parliament) and the Court of Justice had been common to the three Communities from the beginning under a convention signed in Rome in 1957

considerable power and, in the process, deprived Member States of the effective ability to deal with particular matters unilaterally.

The European Court of Justice, in an opinion that may have been overly expansive, stated the principle in legal terms:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>118</sup>

As the Maastricht process demonstrated, however, the EC has been transformed from a unique alliance to a proto-federal State, albeit through the usually grudging, but nevertheless real, political willingness of Member States to put their faith in the market paradigm, follow the "Eurocrats," accept the authority of these new institutions, and bind themselves and their nationals to "European" solutions to common problems.<sup>119</sup>

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together with the EEC and Euratom Treaties. The three Communities are thus functionally the same organization.

*Id.*

118. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 593.

119. Writing in 1980, Stanley Hoffman asserted:

[g]one are the days when the champions and the theorists of European integration either called for or predicted the gradual transfer of powers from the nation-state to a new European entity, either through voluntary abdication of sovereignty, or through the subtle interplay of functional processes and economic interdependence.

Stanley Hoffman, *Reflections on the Nation-State in Western Europe Today*, in *THE EUROPEAN COMMUNITY: PAST, PRESENT AND FUTURE* 21 (Loukas Tsoukalis ed., 1983). He was particularly skeptical about the ability of market theory and pragmatic institution-building to motivate deep political change:

After the remarkable explosion of theories about integration in the 1950s and early 60s, we find a sudden drought.

The grand theory which has been, implicitly, Jean Monnet's and, explicitly, Ernst Haas', has performed much better as an initial goad than as a permanent explanation. Derived from the theories of industrial society, it suffered from the same weaknesses. It relied on technology as the fuel, and on the logic of the market as the motor of integration: the drive for economic modernization would lead to political unity. It was the old Saint-Simonian

This transformation has resulted in substantial progress in eliminating the so-called "internal frontiers" (i.e., checkpoints and other border controls regulating movement from one Member State to another). It has brought the EC to the threshold of eliminating other "us"- "them" distinctions among the nationals of the various States through the institution of EU "citizenship." It has extended collaboration into non-economic realms and laid the groundwork for continuing social and political integration of a vast and diverse territory.

For those desiring a more unified and cooperative approach to labor migration in this hemisphere, Maastricht and all of the politics, treaty-making, and institution-building that preceded it thus convey some hope. They demonstrate that a significant integration of States sharing common interests is possible. Reciprocal commitments by these States can lead to an expansively-defined "single" or "common" market and to "open" labor migration within the territory of that market for the nationals of each State.

Such a market need not involve States that are in all respects similar or economically alike. The EC has expanded in stages from its original six-Member core, first bringing in England, Denmark, and Ireland, and later, Greece, Portugal and Spain. With the exception of Ireland, the first nine Member States (the so-called EC-9) are quite heavily industrialized and relatively rich; the more recent additions (the so-called EC-3) are poorer and generally less heavily industrialized. Yet the European experience demonstrates that a single labor market is a political possibility even under these conditions, and even when some of the nations participating in that market have populations that are generally less well-educated and have lower wage expectations than their counterparts in the more highly "developed" regions. Finally, the lack of progress in this hemisphere need not be totally discouraging. The movement toward such a market can progress over several decades, proceed in stages, and rely on consensus and institution-building to prepare the political ground for more integration at a future date.

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dream of depoliticized progress, accompanied by one idea that, at first sight, seemed on the contrary, quite political: the idea that the gradual dispossession of the nation-state and the transfer of allegiance to the new Community would be hastened by the establishment of a central quasi-federal political system (however it was conceived of as largely bureaucratic in nature).

*Id.* at 29.

Recent events suggest that the "grand theory" has fared much better than Hoffman predicted.

*J. The Case for Pessimism*

The most positive construction of the European experience emphasizes accomplishments over the last half-century in integrating a dozen national economies and creating a “single market” for labor. This approach highlights the attractiveness of “efficient markets,” the gradual evolution of law and policy in the direction of eliminating barriers, and the role that new political institutions (and their staffs) can play in facilitating—indeed, in constituting—change. It plays down everything that appears to be unique about the European experience, and ignores the limitations to truly “open borders” that have characterized its response. I believe that the accomplishments have been real, but I also believe that the situation in Europe after World War II was, in many respects, unique and that its program of integration cannot be duplicated in North America. I also believe that the measured pace of EC expansion and its current drive to close Community borders to “outsiders,” even as it moves to abolish “internal frontiers,” tell us something important about the fundamental limits of “openness” in a world where the rich are surrounded by so many mobile poor. For these reasons, I suspect that Europe’s promise is more limited than an optimist would credit, and that its process of transnational labor market integration is not likely to be emulated soon on this side of the Atlantic.<sup>120</sup>

The origins of the Schuman Declaration have already been noted. The conjunction of post-World War II reservations about nationalism, economic distress during a period of post-war reconstruction, and apprehension about the spread and influence of Communism cannot be recaptured. No one with the vision and objectives of Jean Monnet has surfaced in United States. No superpower exists to prod the United States into closer cooperation with its neighbors. No political or legal tradition exists here to promote the subordination of U.S. interests to any supranational entity, whereas the EC at its inception created political institutions that permitted it to pursue a

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120. One possible—perhaps even likely—exception to this conclusion involves labor migration between Canada and the United States. The similarity between the economies of the two countries suggests that free movement of labor across the U.S.-Canadian border would be far less politically controversial than any arrangement that included Mexico—or any other Caribbean or Latin American country. Were Québec to declare independence, it seems likely that the remaining Atlantic provinces would have a strong incentive to strengthen their political ties to the United States, and perhaps to seek more comprehensive economic integration than NAFTA provides.



quasi-independent policy and to promote a “progressive” idea of integration. In comparison, NAFTA is a fairly conventional treaty, almost completely lacking in bureaucratic superstructure.

Standing alone, these differences are not necessarily fatal. Arguably, the logic of the marketplace will in time lead the NAFTA signatories to expand the agreement and include labor within the umbrella of the “single market.” Business interests, always anxious to fully staff their firms and hire as cheaply as possible, will substitute for an absent bureaucracy in promoting greater integration. Global competition will provide a spur to change.

Three points need to be made about the integration of the European labor market: first, it involves only a fraction of the countries in Europe, and excludes the rest of the world; second, it has been accomplished only after careful screening of potential Members; and third, it remains subject to local, that is, national, political influence.

The first point leads us to a paradox or “contradiction”: “free markets” *exclude* even as they *include*. “Single” or “common markets,” particularly where labor is concerned, are bounded. They are not now, and perhaps never have been, “open to all.” Even when “internal frontiers” are eliminated, external boundaries remain to distinguish “insiders” from “outsiders.” Although the former may trade their services freely, the latter often are excluded from entering the market at all. Greeks—at least as a matter of law—are now welcome to work in Germany, but Turks are not; Algerians who have obtained French citizenship may work in Belgium, but those who have not may not legally work anywhere within the EC.

The existence of boundaries and their dual function is philosophically interesting. Whether boundaries are inevitable or not, it is certain that, in the labor market context, they have been employed with regularity to identify people from economically “advanced” countries as “insiders” and people from “underdeveloped” or “developing” countries as “outsiders.” The significance of the “insider”-“outsider” distinction varies with the type of market that intending migrants confront. If the labor market is a “national” one, decisions about which outsiders to admit and under what conditions remain with the nation-state. It may choose to welcome migrants from any part of the world, grant those it admits immigration rights ranging from protected “permanent residence” to “parole” (which, at least in the United States, is revocable at will), and grant civil and political rights ranging from full citizenship to disadvantaged “guestworker” status. If the market is a “common” one, where “internal frontiers” still exist, the host

State has less leeway. As a practical matter, the obligation to admit job-seekers from other Member States will probably limit the willingness to admit third-country nationals. The experience of the EC in the 1960s and 1970s, however, demonstrates that, at least during periods of economic boom, many of its Members were able to continue to “entertain” (“exploit” might be the better word) “guestworkers” with the hope that they could easily be repatriated. When that hope turned out to be ill-founded (as it often did), these EC Members were stuck with suddenly unwelcome guests. Nevertheless, if “internal frontiers” have been abolished and a true “single market” has been established, its Members have a much stronger incentive to adopt collective policies discouraging or even prohibiting the entry of job-seeking third-country nationals, since admission by *one* is tantamount to admission to *all* Members.

The logic of progressive integration is thus the logic of progressively more stringent selection. The history of the EC supports this conclusion. With the exception of Italy—whose future was a matter of considerable concern to the United States and the rest of western Europe—each of the six original Members was one of the most heavily industrialized countries in Europe. In this century, at least, they had demonstrated no long-term tendency to produce labor *emigrants*. Labor migration *from* their respective territories was unlikely to be massive; instead, it was likely to involve the movement of a relatively small number of highly-skilled artisans and professionals to neighboring countries where their skills were in demand. Essentially, the same situation occurred when England, Ireland, and Denmark entered the EC. Although Ireland was clearly the poorest of the group and did have a recent history of emigration, it had a small population, a stable political system, was attractive to investors, and seemed to be developing rapidly. The expansion from nine to twelve Members was much more difficult. Greece, Spain, and Portugal, the EC-3 countries, were politically less stable than their EC-9 counterparts,<sup>121</sup> and on a per capita basis, had gross national products that were slightly more than two-fifths of the EC-9 countries’. By every measure, they were substantially poorer, and—based on past migration patterns—could reasonably be expected to

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121. Each had also experienced a significant period of authoritarian military rule during the post-World War II era, and had produced refugees. The most significant refugee migration from these countries occurred in Spain during the late 1930s, when Franco unseated the Spanish Republican government.

export workers seeking higher wages.<sup>122</sup> Their admission was, therefore, tied to seven-year limits on labor migration. “With the enlargement of the EC, there was concern about increased immigration from the poorer regions and restrictions were placed on immigration from Greece [admitted in 1981] until 1988 and until 1993 for Spain and Portugal [admitted in 1986].”<sup>123</sup> With the sudden end of the Cold War, many of the countries in eastern and central Europe have expressed an interest in joining the EC. Eventually, some—the Czech Republic and Slovakia are two likely candidates—will almost certainly be admitted. Concerns about uncontrolled migration occasioned by political instability, large wage differentials, or both, are likely to delay expansion considerably.

If Europe, which accepts the notion of an integrated labor market, is so cautious about expanding that market, it seems certain that the United States, which does not, will proceed with even greater caution in dealing with Mexico—or any of its other Latin or Caribbean neighbors. Any attempt to expand NAFTA to permit free labor migration will have to confront the fact that the economic differential between the United States and Canada on the one hand, and Mexico on the other, is between two and five times greater than the differential between the EC-9 and the EC-3.<sup>124</sup> Further, the

122. See ROBERT C. SHELBURNE, U.S. DEP'T OF LABOR, ECONOMIC DISCUSSION PAPER 39, THE NORTH AMERICAN FREE TRADE AGREEMENT: COMPARISONS WITH SOUTHERN EC ENLARGEMENT (1991), reprinted in NORTH AMERICAN FREE TRADE AGREEMENT: OPPORTUNITIES AND CHALLENGES 43, 45 (Koshrow Fatemi ed., 1993). (Table 4.1 Income and Population Comparisons, indicates that the “per capita GNP” ratio of EC-3 to EC-9 countries was 0.43 and the “per capita GDP” ratio of EC-3 to EC-9 countries was 0.57).

Shelburne notes that “[i]mmigrants from the EC-3 accounted for approximately 1.5 per cent of the workforce of the EC-9 in 1984” —three years after Greece was admitted to the EC and two years before Spain and Portugal were admitted. *Id.* at 51.

123. *Id.* at 51-52.

124. The following table, based on 1988 data, summarized and compiled by Shelburne, illustrates the comparative differences in wealth and also indicates that Mexico has a comparatively larger population than its EC-3 counterparts:

Per capita GNP	
EC-3/EC-9	0.43
Mexico/Canada-U.S.	0.09
Per capita GDP	
EC-3/EC-9	0.57
Mexico/Canada-U.S.	0.28
Population	
EC-3/EC-9	0.22
Mexico/Canada-U.S.	0.31
GNP	
EC-3/EC-9	0.10

number of potential job-seekers from the EC-3, as determined by gross population, birthrate, age distribution, and secular unemployment rates, was and is, in both relative and absolute terms, much smaller than the number from Mexico (the difference in magnitude, if we consider any sort of western hemisphere market, is staggering). This disparity has meant that ongoing legal and illegal migration from Mexico (and other nearby western hemisphere countries) to the United States is greater, both in relative and absolute terms, than was the migration from the EC-3 countries at the time of their entry into the EC, and this disparity is likely to increase.<sup>125</sup>

Although economic development in Mexico may eventually lower migration demand, current political instability there<sup>126</sup> raises the prospect that migration totals could soar. It is important to note that political instability in Mexico today is much greater than it was in Portugal, Greece, or Spain when they secured admittance to the EC, or than it currently is in the Czech Republic, Slovakia, Hungary, Poland, and a number of other countries carved out of the Soviet Union and the former "Eastern bloc." The Mexican political system is nearly more comparable to the situation prevailing today in Russia, and has considerable potential for promoting a large migrant stream.

For all of these reasons, Maastricht appears largely irrelevant in the North American context. There is little reason to believe that its equivocal example or the appeal of an efficient international labor market is going to outweigh domestic fears about possible unregulated migration from a large and overpopulated neighbor. The refusal of the United States to even

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Mexico/Canada-U.S.

0.03

See *id.* at 45, Table 4.1, Income and Population Comparisons.

125. See, e.g., *id.* at 52.

Since 1960 the United States has on average granted permanent residence status to over 50,000 Mexicans a year; in addition, Mexicans may enter as temporary workers—22,500 Mexicans entered under this provision in 1989. Significant numbers of Mexicans enter the United States illegally; during 1990 over a million Mexicans were caught trying to illegally cross into the United States. Currently about 2 percent of the U.S. workforce were born in Mexico; this is similar to the proportion of EC-3 workers in the EC-9.

The two cases are therefore similar in that the new regions have a long history of supplying labor to the core areas. One major difference, however, is that the trend had decreased or even turned negative in Europe prior to enlargement while Mexican emigration to the United States continues to rise.

*Id.* It should be noted that the 50,000 per year average Shelburne gives appears to ignore the approximately 3,000,000 people—the great majority Mexican—who were "legalized" under the provisions of the Immigration Reform and Control Act of 1986. See IRCA, *supra* note 35.

126. See *supra* note 29 and accompanying text.

*consider* bringing free labor migration under the NAFTA umbrella is probably a harbinger of things to come.<sup>127</sup>

#### IV. CONCLUSION

The world is a much smaller place than it was when the present international system of independent nation-states was first established. It houses many more people, and it links them much more closely through an elaborate communication and transportation network. Events in different countries or on different continents have the power to affect the entire world: disease can overrun the planet, pollution destroy its oceans and poison its air. However global the world's problems are, they usually affect some people more directly and harshly than others. Overpopulation, poverty, persecution, and persistent warfare are distributed unequally over the face of the earth. The gulf between rich and poor States and the gulf between States that respect the integrity of the person and those that do not, is probably growing. In the face of such inequality, it is probably inevitable that an increasing number of the threatened, the desperate, and the chronically underemployed will find their way to more favored places.

The residents of such places—the United States and Canada, Australia and New Zealand, the EC countries, and the developed countries of Asia—have four responses available: concerted attempts to solve or at least manage the problems generating migration; carefully-measured, self-interested generosity, coupled with rigorous border control at the national level; coordinated measures to deter or regulate migration; or the elimination of borders. A truly global response to immigration problems must address

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127. See Sidney Weintraub, *The Coming Debate on NAFTA*, in NORTH AMERICAN FREE TRADE AGREEMENT: OPPORTUNITIES AND CHALLENGES 18, 28-29 (Koshrow Fatemi ed., 1993).

When Mexico took the initiative for a free trade agreement with the United States, both Mexican officials and private citizens suggested that migration issues should be included in the negotiations. The reasoning was twofold: this is an important issue in the relationship and some formal understandings would be desirable; and if capital movements were to be included, as of course they were, then the movement of the other major factor of production—labor—should also be part of the agreement.

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This was not accepted by the United States . . . . Indeed, I know from personal discussions that the Mexican authorities were told there would be no free trade discussions if they insisted on migration provisions, other than those related to temporary entry for business people.

root causes, yet doing so is very difficult: such responses tend to proceed piece-meal over extended periods of time, and raise many questions that this article cannot and does not address. In most respects, the second option—ordinary immigration law and policy—is local, particular, nationalistic, and selfish. Driven mainly by interest-based politics and making use of the various devices employed by States to establish their borders and identify and separate “insiders” from “outsiders,” it establishes exclusion as the norm, admission as a special act of grace.

The third option, systematic cooperation, has been employed most successfully in dealing with refugees created between the end of World War II and the late 1970s. The global refugee regime, which emerged during the Cold War period and helped resettle millions of involuntary migrants from Asia and eastern Europe and care for millions of others from Africa and Central America, appears, however, to be rapidly running out of gas due to the large and growing numbers of refugees, the loss of a common anti-Communist purpose, and adverse local reaction to resettlement. Consequently, energies have been refocused on collective deterrence and the rapid repatriation of refugees.

The willingness of the developed nations to provide massive on-site aid during “emergencies,” such as the one now occurring in Rwanda, suggests that some progress has been made. Yet, as far as resettlement is concerned, the current U.S. response to Haitian “boat people” is probably quite typical.<sup>128</sup> Thus, it appears that the world has returned to where it was during the days of the Third Reich, when the United States and other nations routinely refused to let shiploads of Jews land, instead returning the “coffin ships” to Germany.<sup>129</sup>

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128. The practice of refusing to let refugee boats land and seek asylum is apparently a fairly common practice. For a particularly brutal example, which aroused the humanitarian sentiments of western countries when it occurred, see LOESCHER & SCANLAN, *supra* note 21, at 128 (describing the practice of Malaysian and Thai officials, who pushed crowded refugee boats back to sea during the Indochinese migration, with considerable loss of life).

129. The parallels between the past and the present are far from exact, since the developed countries are far richer, racial and ethnic prejudice within their borders is not officially tolerated (although it undoubtedly exists), and the worldwide refugee population is so much larger. Nevertheless, there are many rough similarities—including the “compassion fatigue” that was present then and is so evident today. The observations of Walter Adams, made in the spring of 1939, thus, are still relevant:

The refugees from German Nazism are relatively few in number. . . . A quarter of a million in the course of six years is a small total compared with the great numbers involved in the Greek, Russian, and Armenian movements. The stubbornness of the problems raised by the German emigration lies in the circumstances that condition it. It originates in a persecution

The final option, elimination of borders, is by far the most radical. Arguably, eliminating borders, particularly if the efforts are confined only to those seeking work, would better match jobs with those qualified to fill them. It would also increase production, create wealth, and help reduce poverty.<sup>130</sup> Developments in Europe prove that “internal frontiers” can, in fact, be almost totally eliminated. Nonetheless, as W.R. Böhning has indicated:

In each case, the countries that relax the controls on entry and employment of selected nationalities expect this move to be in the interests of their citizens, in a narrow economic sense or in a broader political way. Preferential treatment does not remove the ‘we-they’ or ‘in-out’ distinction but adds gradations. Sovereignty, as such, is not relinquished. Exclusion or expulsion of foreigners on grounds of public order or security remains a national prerogative. And the general principle of final say rests in national hands, even where supra-national powers are conferred to joint bodies (as in the European Economic Community), for national governments keep the reserve power of withdrawal from the supra-national mechanism to which they voluntarily acceded.<sup>131</sup>

In the EU, recent developments suggest that “self-interest” can extend beyond national borders and that traditional “sovereignty,” in some or all of its particulars, can yield to a new federal order. Concerns about disparities in wealth and the possibility of politically-inspired mass migration, however, have put definite limits on the expansion of the EU. In North America,

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of minorities even more cruel because more deliberate than that of the Armenians. It has occurred at a time of economic crisis that has almost stopped normal migration. It has been accompanied by the organized stimulation throughout the world of an anti-Semitism which has rendered the settlement and even temporary asylum of the refugees more difficult. It has occurred at a time when public opinion has been numbed, if not brutalized, by an ever increasing accumulation of horrors.

Adams, *supra* note 65, at 32.

130. See, e.g., BÖHNING, *supra* note 107:

One can tentatively conclude: (i) the migration of economically active persons (other than refugees and family members) is occasioned by production needs in the country deliberately admitting them, (ii) the migrant-receiving country, the migrants themselves and probably the migrant-sending country benefit from the move, and (iii) in a world where production is woefully inadequate in relation to known needs, such migration invariably satisfies needs and, especially where it involves people going from poor to rich countries, contributes to the reduction of world poverty.

*Id.* at 35.

131. *Id.* at 41.

similar concerns have placed labor migration outside the universe of “free trade,” economic arguments have been trumped by political ones,<sup>132</sup> borders are policed locally, and the State persists in all its selfish glory.

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132. See, e.g., *id.* at 46:

[T]he rest of this century will very likely see increased emigration pressures from poor countries, which are usually populous and their typical inhabitant young. More development in the rich and poor countries will, if anything, accelerate this secular trend—until that unlikely day when living standards tend toward rough comparability within and between countries.

In the face of rising emigration pressures on a planet limited in space and cut up into mutually exclusive sovereignties, governments will become more sensitive about immigration.

...

No doubt, *economic forces will continue to open borders much of the time while social and political will tend to close them most of the time.*

*Id.* (emphasis added).



