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Elizabeth L. Gunn

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REGIONALIZING LABOR POLICY THROUGH NAFTA: BEYOND PRESIDENT BUSH'S TEMPORARY WORKER PROPOSAL

ELIZABETH L. GUNN*

Abstract: The North American Free Trade Agreement (NAFTA) sought to create an expanded and secure market for the goods and services produced in its member territories. It represented huge improvements in the freedom of goods, services, and investments to move between member nations, but remained silent on the issue of freedom of movement of labor. The major objection to unrestricted movement of labor within NAFTA was the concern of permanent immigration from Mexico into, mainly, the United States. In early 2004, President George W. Bush introduced a proposal to allow, unilaterally, freer movement of temporary laborers into the United States. This Note argues that the President's proposal is flawed because it fails to seek a multilateral agreement for the freedom of movement beyond that which flows into the United States, and especially ignores U.S. citizens seeking employment abroad. Rather than the United States acting unilaterally, this Note argues for a re-consideration of movement of labor within NAFTA.

INTRODUCTION

In the Winter of 1992, during the height of negotiations for the North American Free Trade Agreement (NAFTA), the United States Commissioner of the Immigration and Naturalization Service (INS) commented that "if immigration is not formally on the table, someone at the table will sooner or later realize as a practical matter that moving goods and services in international commerce also involves moving the people who trade in those goods and services."¹ The Commissioner's connection between the free movement of capital (goods and services) and that of labor is a key concept in the theory of economic efficiency, which calls for the unrestricted movement of

* Elizabeth L. Gunn is the Solicitations & Symposium Editor of the *Boston College International & Comparative Law Review*.

¹ Noemi Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15 ARIZ. J. INT'L & COMP. L. 365, 365 (1998).

capital and labor to where its marginal output would be the highest.² Discussions of free movement of labor, however, inevitably are accompanied by concerns of permanent immigration and the resulting detrimental effects on the native labor force.³ Because of the high levels of illegal immigrants passing from Mexico into the United States, both the migration and immigration of workers have become increasingly contentious political issues in the United States.⁴

In January 2004, the debate about immigration again came to the political forefront in the United States when President George W. Bush outlined his new proposal for a restructured temporary worker program.⁵ The plan, as proposed, would allow employers to hire willing foreign workers to fill jobs when no willing U.S. worker could be found, and would give those workers temporary legal status for three years.⁶ Depending on its ultimate scope, the program would restructure, if not replace, the current H-2 visas for non-immigrant unskilled workers.⁷ The President's plan would open up U.S. immigration policy with respect to unskilled workers, as opposed to the current status of U.S. law with respect to restricted temporary entry of business person provisions under NAFTA.⁸ Upon the expiration of the three-year period, workers would be allowed to file for a renewal of their status, but the program would be required to have "an end" and would not

² See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371, 373 (1998).

³ See Jason C. Messenger, Comment, *Opening the U.S.-Mexico Border: Problems and Concerns for the Bush Administration, the Countries, and the Legal System to Consider*, 9 TULSA J. COMP. & INT'L L. 607, 619 (2002).

⁴ Philip L. Martin, *Economic Integration and Migration: The Case of NAFTA*, 3 UCLA J. INT'L L. & FOREIGN AFF. 419, 421 (1998).

⁵ See *President Bush Announces Immigration Initiative*, 81 No. 2 INTERPRETER RELEASES 33, 33 (2004) [hereinafter *Bush Announcement*].

⁶ *Id.* at 33-34.

⁷ See 8 U.S.C. § 1101(a)(15)(H)(ii) (2003). H-2 visas require that an employer has attempted to hire U.S. nationals by offering the prevailing wage and has failed before hiring the foreign workers, but it provides no legal status for those workers nor does it provide a central system to assist employers in the search for U.S. workers. *Id.* Additionally, there is a limit on the number of temporary workers allowed under the current law. 8 C.F.R. § 214.2(h)(8)(i)(C) (2003).

⁸ See Harry J. Joe, *Immigration and Labor, in NAFTA AND BEYOND: A NEW FRAMEWORK FOR DOING BUSINESS IN THE AMERICAS*, 421, 428-29 (Joseph J. Norton & Thomas L. Bloodworth eds., 1995). The four classes of business persons allowed temporary entry under NAFTA are business visitors, traders and investors, intra-company transferees, and professionals. *Id.* See generally Michael D. Patrick, *Possible New Options for Skilled Foreign Professionals*, 231 N.Y.L.J. 3 (2004) (implying that, though the main benefactors of the President's plan will be unskilled workers, the plan also could lead to benefits for skilled professionals over the current law which sets a cap on the number of available visas).

provide any advantage to temporary workers with respect to pursuing U.S. citizenship.⁹ The President stressed that one of the expectations and goals of the program is for temporary workers to return permanently to their country of origin.¹⁰

This Note explores the social, political, and economic justifications presented in favor of the President's initiative. Specifically, this Note addresses how temporary workers fit within the theory of economic efficiency, NAFTA, and the long term consideration of immigration. While President Bush's initiative is applicable to temporary workers from any nation, this Note focuses on the issue of immigration between the United States and Mexico. Part I discusses the treatment of capital and labor within NAFTA, the specifics of President Bush's initiative, and presents statistics about immigration between the United States and Mexico. Part II examines the direct and indirect economic and social effects immigration has on native workers and seeks to explain the phenomenon that temporary worker programs tend to end in permanent dependence and immigration. Part III argues that, based on the President's stated goals of the temporary worker program, the plan creates negative effects on foreign workers because of its limited time and scope. Further, it asserts that, rather than a unilateral change in immigration policy by the United States, the issue of movement of labor and immigration should be considered as a new NAFTA provision so as to complete the agreement's treatment of free trade within the region.

I. LABOR TREATMENT IN NAFTA, THE BUSH INITIATIVE, AND IMMIGRATION INTO THE UNITED STATES

One of the prime motivating factors for the United States to enter into NAFTA was to help ensure an economically strong Mexico.¹¹ However, the debate surrounding the ratification of the trade agreement went beyond the economic factors included in its language to include heated and highly public debates about labor and the environment.¹² One such debate concerned the issue of Mexican immigrants and their effect on the U.S. job market.¹³ President Bush's proposal again

⁹ See *Bush Announcement*, *supra* note 5, at 33.

¹⁰ *Id.* at 34.

¹¹ See Sylvia Ostry, *The NAFTA: Its International Economic Background*, in *NORTH AMERICA WITHOUT BORDERS?* 21, 27 (Stephen J. Randall ed., 1992).

¹² See Joe, *supra* note 8, at 450.

¹³ See *id.* (characterizing organized labor's lobbying of Congress as intensive and extremely vocal).

brought Mexican immigration to the forefront, this time in the context of amending the United States' immigration policy and law.¹⁴

A. NAFTA, a Trade Agreement Not a Social Contract

This section explores how labor and immigration, despite the fact that they were not primary considerations in the NAFTA negotiations, were brought to the forefront of the NAFTA debate within the United States. The Preamble to NAFTA states, in part, that the member nations resolve to "create an expanded and secure market for the goods and services produced in their territories" and "protect, enhance and enforce basic workers' rights."¹⁵ NAFTA significantly enhanced the scope of trade in goods, services, and investment between its member nations, but it remained silent as to the free movement of labor, or, in other words, the rights of workers to seek employment in other member nations.¹⁶

Under NAFTA, all goods that meet the required rules of origin standards will have their tariffs eliminated between the member nations by 2008 at the latest, allowing for the unrestricted trade of goods.¹⁷ NAFTA also provides common rules for investment between its members, liberalized restrictions on foreign investment, and a dispute resolution mechanism for investors and other governments.¹⁸ In addition, NAFTA was one of the first international treaties to include provisions on trade of services, and it established a set of rules and obligations that facilitate trade in services among the member nations.¹⁹ The provisions relating to services include Chapter 12, which applies to cross-border trade in services, and Chapter 16, which establishes the mechanisms for temporary entry of business persons into member states.²⁰

¹⁴ See Maureen Minehan, *Bush's Temporary Worker Proposal Gives Employers Central Immigration Role*, 21 No. 5 EMP. ALERT 3 (2004) (quoting the executive director of the National Immigration Forum Frank Sharry who claimed the President's announcement "re-started a long overdue discussion of immigration reform").

¹⁵ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., pmbl., 32 I.L.M. 269, available at http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?CategoryID=42 (index page for full NAFTA text) [hereinafter NAFTA].

¹⁶ See BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 4 (1994); Gal-Or, *supra* note 1, at 373-74.

¹⁷ See APPLETON, *supra* note 16, at 25. In order to qualify, goods must originate in North America if they are wholly North American. See *id.* Goods containing non-regional materials qualify if those materials are sufficiently transformed in the NAFTA region. See *id.*

¹⁸ *Id.* at 79.

¹⁹ *Id.* at 91.

²⁰ NAFTA, *supra* note 15, ch. 12, 16.

With respect to movement of labor, beyond the statement in the Preamble, no provision of NAFTA directly addresses labor issues.²¹ In fact, Chapter 16 emphasizes the fact that NAFTA only covers temporary entry of business-people into member nations, stating “this Chapter reflects . . . the need to ensure border security and to protect the domestic labor force and permanent employment in [the] respective territories.”²² Additionally, there is no authority or obligation on the part of any country to grant a citizen of any other country entry for the purpose of permanent residence.²³ NAFTA specifically allows for member nations to maintain their individual immigration laws.²⁴

Movement of labor, and thus immigration, was not brought to the NAFTA negotiation table by the United States government; in fact, it was deliberately excluded.²⁵ During negotiation and ratification of the treaty, debate over immigration occurred mostly in the public arena.²⁶ Two major schools of thought emerged.²⁷ Economists and business interests asserted that NAFTA would be economically beneficial for all nations involved.²⁸ They stressed both the benefits to economic efficiency within the region and individual member economic growth, which would lead to the creation of jobs in all member nations, especially Mexico.²⁹ Organized labor and others, including Ross Perot, claimed that NAFTA would encourage employers to flee to Mexico for lower wage rates, and therefore, cost U.S. workers their jobs.³⁰ Additionally, the issues of Mexican labor conditions, environmental concerns, and illegal immigrants permeated and further fueled an already heated political debate.³¹

Interestingly, it was not during the negotiations to formulate the provisions of NAFTA, but during the debates for ratification, that interest groups began to link immigration and migration issues with

²¹ Gal-Or, *supra* note 1, at 372.

²² NAFTA, *supra* note 15, ch. 16, art. 1601.

²³ Joe, *supra* note 8, at 428.

²⁴ NAFTA, *supra* note 15, art. 1607 (stating that, except as specifically provided in the agreement, no provision of NAFTA shall impose any obligation on a member nation regarding its immigration measures).

²⁵ See Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940 (1994); Gal-Or, *supra* note 1, at 373.

²⁶ See Johnson, *supra* note 25, at 950–53.

²⁷ See *id.* at 939.

²⁸ See *id.*

²⁹ See *id.* at 939, 951.

³⁰ See *id.* at 939.

³¹ See Gal-Or, *supra* note 1, at 372–73.

ratification of the treaty.³² It was increasing pressure from interest groups that caused immigration to become a crucial factor during the domestic debate surrounding NAFTA.³³

The issues raised by the NAFTA negotiations also became a major focus in the 1992 presidential election.³⁴ After the election, public debate continued even after the signing of NAFTA.³⁵ The issues surrounding the threats of illegal immigration gained even more attention due to events such as the plight of the Haitian boat people and the passing of California Proposition 187 in 1994.³⁶ As the Clinton Administration progressed, however, the public and governmental debates about the viability of free movement of labor between NAFTA member states faded and other issues took center stage.³⁷

B. *New Debate on Immigration: President Bush's Temporary Worker Plan*

When announcing his immigration initiative, President Bush pointed out that immigration reform must begin by confronting “a basic fact of life and economics” with respect to labor—some jobs being created in the United States are not being filled by U.S. citizens.³⁸ On January 7, 2003, the President proposed a new and reformed temporary worker program to “match willing foreign workers with willing U.S. employers when no U.S. citizen can be found to fill the jobs.”³⁹ Two of the reasons cited by the President for his revival of the debate surrounding immigration reform include, first, that the new program would increase national security because there would be better accounting of those who enter the country; and second, that the

³² See Johnson, *supra* note 25, at 941.

³³ Gal-Or, *supra* note 1, at 373.

³⁴ Judith H. Bello & Alan F. Holmer, *The North American Free Trade Agreement: Its Major Provisions, Economic Benefits, and Overarching Implications*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 1, 4 (Judith H. Bello et al. eds., 1994); see Jorge F. Perez-Lopez, *Labor and the North American Free Trade Agreement*, 11 *DICK. J. INT'L L.* 565, 575–76 (1993).

³⁵ See Christopher J. Cassise, Note, *The European Union v. The United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions*, 46 *SYRACUSE L. REV.* 1343, 1374–75 (1996).

³⁶ See *id.* Proposition 187 bars undocumented aliens from receiving social services. See *id.*

³⁷ See, e.g., Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 *OHIO ST. L.J.* 731 (1997) (examining President Clinton's effect on the law and liberal constitutional theory as related to the issues of abortion and welfare rights in America).

³⁸ *Bush Announcement*, *supra* note 5, at 33–34.

³⁹ *Id.* at 33.

program may aid in the long-term expansion of economic opportunity between NAFTA members, which in theory would decrease illegal immigration into the United States.⁴⁰

Under the President's proposed plan, temporary foreign workers would be granted legal status in the United States for three years, dependent upon maintenance of their employment status, and, upon the expiration of their status, they have to apply for renewal or return to their home country permanently.⁴¹ The President stressed that the program would not change permanent immigration standards, retaining the requirement that workers pursue permanent legal status through traditional legal immigration procedures.⁴² However, while the President asserted that the plan is the best long-term way to reduce the pressures that create illegal immigration,⁴³ participants in the temporary worker program would not receive an advantage in their applications for U.S. citizenship.⁴⁴ The President was explicitly clear that he opposes amnesty and would not place undocumented workers on the "automatic path to citizenship," regardless of whether they subsequently entered the temporary worker program.⁴⁵ Furthermore, to give temporary workers an incentive to return home, the President said he would work with other countries to give temporary workers credit in their home country's retirement system for their time worked in the United States.⁴⁶ Finally, the President called for Congress to work with him to increase the annual number of green cards issued and to speed up the current citizenship process.⁴⁷

Consistent with the President's policy on amnesty, unamended, the proposed temporary worker program would be open only to those illegal aliens within the United States who had jobs on the day of his January announcement.⁴⁸ In other words, any illegal alien entering the United States, or unemployed on the date of the announcement, would be excluded from eligibility.⁴⁹ Eligible undocumented aliens in the

⁴⁰ *Id.* at 34.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *President Suspends Entry of Persons Engaged in or Benefiting from Corruption as President Fox Endorses Proposed Temporary Worker Program*, 81 No. 3 INTERPRETER RELEASES 81, 81 (2004) [hereinafter *Fox Endorsement*].

⁴⁴ *Bush Announcement*, *supra* note 5, at 34.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Bush, Fox Emphasize Cooperation in News Conference*, WICHITA EAGLE, Mar. 7, 2004, at 1, available at 2004 WL 68816412 [hereinafter *Bush-Fox News Conference*].

⁴⁹ *See id.*

United States would be required to pay a one-time registration fee as a condition of participation.⁵⁰ Potential participants residing outside the United States before entering the program would not be required to pay a fee due to their implied compliance with U.S. immigration laws.⁵¹ Illegal immigrants entering the country after January 7, 2004 would be ineligible to enroll in the program from within the United States.⁵² All other provisions of the proposal would apply to every worker entering the program regardless of their original point of origin.⁵³

The development of the specific language of the proposed program has been left to Congress, which, as of November 2004, has yet to fully consider the issue.⁵⁴ The closest legislation to the issue was Senate Bill S. 2010, proposed in January 2004 and sponsored by then Senate Minority Leader Thomas Daschle (D-SD) and Senator Chuck Hagel (R-NE), which proposed a more comprehensive approach to immigration reform, including reforms to the current foreign worker program.⁵⁵ The main difference between the President's plan and S. 2010 is the proposal for the creation of an earned adjustment process.⁵⁶ Despite the lack of specific details and ultimate viability of the program,⁵⁷ many immigration scholars felt that the President's announcement was beneficial because it jump-started discussion and debate surrounding immigration reform.⁵⁸ As the 2004 presidential campaign progressed, however, the issue again lost momentum and ultimately was not a prominent feature in the 2004 campaign.⁵⁹

⁵⁰ See *Bush Announcement*, *supra* note 5, at 34.

⁵¹ See *id.*

⁵² See *Bush-Fox News Conference*, *supra* note 48.

⁵³ See *Bush Announcement*, *supra* note 5, at 34.

⁵⁴ See Rhonda McMillion, *Congress and the ABA Tackle President Bush's Temporary Worker Plan*, 90 A.B.A.J. 68, 68 (2004); *Bush, Fox Talk Immigration Reform*, CNN.COM, Nov. 21, 2004, available at <http://www.cnn.com/2004/WORLD/Americas/11/21/apcc.ap/index.html> [hereinafter *Immigration Reform*].

⁵⁵ See McMillion, *supra* note 54, at 68.

⁵⁶ Patrick, *supra* note 8. An earned adjustment process allows qualifying workers automatically to become eligible to apply for adjustment of status to lawful permanent residents. *Id.*

⁵⁷ See Kelly Patricia O'Meara, *Do Borders Matter to President Bush?*, INSIGHT ON THE NEWS 30 (Feb. 20, 2004), available at <http://www.insightmag.com/news/2004/03/02/National/Do.Borders.Matter.To.President.Bush-607367.shtml> (claiming the President's immigration proposal likely will find its way to oblivion).

⁵⁸ See Minehan, *supra* note 14; *U.S. & Mexico: Immigration Policy & The Bilateral Relationship: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. 2 (2004) (statement of Dr. Demetrios G. Papademetriou, President, Migration Policy Institute), at <http://foreign.senate.gov/testimony/2004/PapademetriouTestimony040323.pdf> [hereinafter Papademetriou Testimony].

⁵⁹ See *Immigration Reform*, *supra* note 54.

C. *Issues and Statistics Surrounding the Movement of Labor Between the United States and Mexico*

Immigration accounts for almost forty percent of the United States' population growth,⁶⁰ and sixty percent of the 500 million aliens whom the Department of Homeland Security admits to the United States each year pass across the border between the United States and Mexico.⁶¹ At the same time, virtually all Mexican emigrants head for the United States.⁶² Beyond a claim of loss of U.S. jobs to foreigners, there are a number of other potential internal and external effects on the labor market and the economy that can be associated with freer movement of labor between the United States and Mexico.⁶³ Immigration affects everything from wage rates and job availability to the demand for housing, education, and social services.⁶⁴ Furthermore, immigration has an economic impact that goes beyond those with whom immigrants compete for jobs.⁶⁵ Additionally, immigrants can directly affect politics at all levels, especially presidential elections.⁶⁶

Despite the problem of illegal immigration, social, economic, and political forces within the United States have been set to maintain the current immigration laws.⁶⁷ Some scholars question if liberalization of the United States' laws would improve the wages and conditions of migrant and immigrant workers.⁶⁸ The maintenance of the status quo does not address the issue that most Mexican immigrants, legal and illegal, leave their home country due to social and economic forces and "go north for opportunity" with the hope of a better life.⁶⁹ One of the goals under NAFTA was to stimulate the Mexican economy's growth, a policy theorized, and also recently supported by President Bush, as a

⁶⁰ Peter H. Schuck, *Immigration at the Turn of the Century*, 33 CASE W. RES. J. INT'L L. 1, 3 (2001).

⁶¹ *U.S. & Mexico: Immigration Policy & The Bilateral Relationship: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. 1 (2004), at <http://foreign.senate.gov/testimony/2004/VerderyTestimony040323.pdf> (statement of Assistant Secretary for Border and Transportation Security Policy and Planning Stewart Verdery) [hereinafter Verdery Testimony].

⁶² See Martin, *supra* note 4, at 419.

⁶³ See Schuck, *supra* note 60, at 3–4.

⁶⁴ *Id.* at 4.

⁶⁵ See *id.*

⁶⁶ *Id.* at 4 (noting that the 2000 elections were the first in many years in which immigration was not a major campaign issue).

⁶⁷ See Cassise, *supra* note 35, at 1378.

⁶⁸ See Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J. L. & TRADE AM. 121, 139, 140 (1998).

⁶⁹ See *id.* at 125, 140; Martin, *supra* note 4, at 419.

way to help stem Mexican migration and illegal immigration across the border.⁷⁰ Proponents of NAFTA claimed the treaty represented the nation's long-run solution to illegal immigration; however, the President's proposal is evidence that more is needed to achieve that goal.⁷¹

II. THE VARIED IMPACT OF IMMIGRATION

Though NAFTA does not explicitly address illegal immigration, the INS Commissioner, Doris M. Messinger, testified at Congressional hearings that, in all likelihood, NAFTA should result in the long-term reduction of illegal immigration into the United States.⁷² At the same time, President Bush's proposal seeks to further the goals of increasing national security and reducing illegal immigration through the use and expansion of the temporary worker program.⁷³ However, while temporary workers would provide economic benefits for employers and the U.S. economy, there are a number of negative externalities that may result from their legally residing and working in the United States.⁷⁴ First, even with a reduction in numbers of illegal immigrants, the economic and social costs of immigrants on natives reaches beyond competition for jobs.⁷⁵ Second, and perhaps more important, the experience of guest and temporary worker programs throughout the world has led to the saying, "[t]here is nothing more permanent than temporary workers."⁷⁶ This section explores some of the general economic and social costs immigrants have on the U.S. economy, and discusses the practical results which accompany a policy based on "temporary" workers.

A. *Economic and Social Costs of Immigrant Labor on Native Workers*

The most direct way immigrants affect the U.S. economy is through the labor market.⁷⁷ Immigration restrictions allow domestic laborers to demand a higher price for their services because of the limited supply of laborers.⁷⁸ Economists argue that this restriction

⁷⁰ See Ostry, *supra* note 11, at 27; *Bush Announcement*, *supra* note 5, at 34.

⁷¹ See Johnson, *supra* note 25, at 941.

⁷² Joe, *supra* note 8, at 423 (citing 70 INTERPRETER RELEASES 1546, 1547 (1993)).

⁷³ See *Fox Endorsement*, *supra* note 43, at 81.

⁷⁴ See Chang, *supra* note 2, at 378-84.

⁷⁵ See *id.*

⁷⁶ Martin, *supra* note 4, at 437.

⁷⁷ See Schuck, *supra* note 60, at 3-4. To what degree that effect is felt by individual workers remains a heated issue of debate between analysts. See *id.*

⁷⁸ See Chang, *supra* note 2, at 379-80.

creates economic inefficiency.⁷⁹ The argument is that protectionism of domestic laborers causes distortions in domestic production and consumption due to higher production costs, and ultimately U.S. consumers lose due to the resulting higher cost of goods and an inefficient market.⁸⁰ On an international level, standard trade theory calls for the same analysis and, further, is centered on the assertion that free trade in goods, services, and labor is needed to maximize national and international economic welfare and efficiency.⁸¹

One issue surrounding a change in the U.S. laws is whether the benefits from temporary labor, with respect to economic efficiency, outweigh the possible economic and social costs.⁸² The President's plan implicitly assumes that the temporary workers would be substitutes for U.S. workers, suggesting they would demand and be offered the same wage rate.⁸³ In contrast, economic theory on free movement of labor would call for an adjustment in wages to create the optimal and efficient distribution and use of foreign labor.⁸⁴ This creates two possible outcomes.⁸⁵ In the first, employers maintain their wage rates and treat the availability of temporary workers as perfect substitutes for U.S. workers without accounting for the fact that most foreign workers would accept a lower wage rate for the same work.⁸⁶

The second outcome theorizes that employers would adjust their wage rate so that they pay the lowest wage possible while still maintaining a full labor force.⁸⁷ As a result, general wage rates would decrease, thereby causing U.S. workers to be unwilling to fill jobs they currently occupied, and allowing for more openings for "willing foreign workers."⁸⁸ Theoretically, the U.S. economy as a whole would "benefit from the honest labor of foreign workers" because the mar-

⁷⁹ See *id.* at 379.

⁸⁰ See *id.*

⁸¹ See *id.* at 379.

⁸² See *id.* at 378–84.

⁸³ See *Bush Announcement*, *supra* note 5, at 33–34.

⁸⁴ See Chang, *supra* note 2, at 373.

⁸⁵ See generally Edward Funkhouser & Stephen J. Trejo, *The Labor Market Skills of Recent Male Immigrants: Evidence from the Current Population Survey*, 48 INDUS. & LAB. REL. REV. 792, 802–06 (1995) (discussing the differences in wage rates between immigrant and native workers).

⁸⁶ Cf. *id.* at 802 (finding that there remains an immigrant-native wage differential even when controlling data for education and potential labor market experience are considered).

⁸⁷ See *id.* (finding that immigrants earned about thirty percent less than native workers at the end of the 1980s for the same jobs).

⁸⁸ *Fox Endorsement*, *supra* note 43, at 81; see Minehan, *supra* note 14.

ket would be more efficient, however, the result would be more unemployed U.S. workers due to the fact that some would be replaced by foreigners demanding a lower wage rate.⁸⁹

The increase in labor mobility with temporary workers, while economically beneficial, creates a number of social problems for U.S. citizens.⁹⁰ Directly, temporary workers create a loss of U.S. jobs and an increased dependence on foreign workers by U.S. producers.⁹¹ Immigrants, especially those with legal status, can gain access to, and therefore, increase the burden on, a number of government programs and public goods such as public schools, health care, and roads.⁹² Due to increased usage of a finite amount of services, all U.S. citizens are potentially subject to the effects of higher levels of immigrants, not just those competing with immigrants for jobs.⁹³ Finally, while many immigrants pay taxes, the net fiscal burden of unskilled immigrants on the United States is, and would continue to be, negative because the consumption of public goods and government services is much greater than the taxes paid by the individuals.⁹⁴ Indeed, a recent report by the Center for Immigration Studies found that the lifetime fiscal effect on the U.S. economy of the average low-skilled immigrant worker is a *negative* \$55,200.⁹⁵

Additionally, Hispanics (particularly Mexican-Americans) make up an already large and rapidly increasing part of the electorate in the United States⁹⁶, and therefore, can have a profound effect on the political process.⁹⁷ Because of the large bloc of Hispanic voters in some regions, it is difficult for elected officials to go on record as opposing immigration reform.⁹⁸ The President's proposal is an example of how immigrant communities can affect the campaigns and decisions of candidates and incumbents.⁹⁹ This is highlighted by the fact that, even though President Bush talked about immigration reform since early in his first term, he mentioned it infrequently during his 2004

⁸⁹ *Fox Endorsement*, *supra* note 43, at 81; Minehan, *supra* note 14.

⁹⁰ *See* Chang, *supra* note 2, at 393–94.

⁹¹ *See id.*

⁹² *Id.* at 382–83.

⁹³ *See id.* Consider, for example, the increased congestion on roads. *See id.* at 383.

⁹⁴ *See id.* at 390–91.

⁹⁵ O'Meara, *supra* note 57, at 31.

⁹⁶ Papademetriou Testimony, *supra* note 58, at 4.

⁹⁷ *See* Minehan, *supra* note 14, at 3.

⁹⁸ *Id.*

⁹⁹ *See* Austin T. Fragomen, Jr. & Steven C. Bell, *President Unveils Immigration Reform Proposal*, IMMIGRATION BUSINESS NEWS AND COMMENT, Feb. 1, 2004, at 2, at 2004 WL 102714 (citing critics who call the President's plan merely part of his re-election strategy).

re-election campaign; indeed, even at those times when the issue was mentioned during the campaign, it was in Southwestern border states or before Hispanic audiences where it was believed it could give the President a political boost.¹⁰⁰

The President's proposed temporary worker program would do nothing to improve or alter the inherent social costs of immigrants on the U.S. economy.¹⁰¹ Despite the added tax revenue, the temporary workers would continue to equate to negative fiscal burdens, as opposed to possible long term fiscal gains from those immigrant families who remain in the United States for generations.¹⁰² The National Research Council found that the descendants of current immigrants in the United States are likely to have an overall net positive fiscal effect on the economy.¹⁰³ With respect to temporary workers, there is no hope of the families of the immigrants reversing the negative fiscal effects because the workers are expected to return home permanently; therefore, there is no chance for recovering any of the net social and fiscal loss the economy suffers during their time in the United States.¹⁰⁴

B. *Permanent Temporary Workers*

The purpose and theory behind temporary worker programs such as the President's is to add workers to the labor force without adding permanent residents to the population.¹⁰⁵ Virtually all guest worker programs fail, though, when measured against this goal, because employers become dependent on foreign workers, and many workers find ways to settle permanently in the host country.¹⁰⁶ The President's plan would call for the registration of the eight to twelve million illegal aliens currently residing in the United States, about three-fifths of whom are Mexicans.¹⁰⁷ Many of these illegal immigrants

¹⁰⁰ See Press Release, Office of the Press Secretary, President Holds Press Conference (Dec. 20, 2004), available at www.whitehouse.gov/news/releases/2004/12/print/20041220-3.html [hereinafter Press Release]; *Immigration Reform*, *supra* note 54.

¹⁰¹ See Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 467 (2002).

¹⁰² See *id.* at 467.

¹⁰³ See Chang, *supra* note 2, at 389-90 (citing NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 328 (James P. Smith & Barry Edmondston eds., 1997)).

¹⁰⁴ See *id.* at 388-90; *Bush Announcement*, *supra* note 5, at 34.

¹⁰⁵ Martin, *supra* note 4, at 436.

¹⁰⁶ *Id.*

¹⁰⁷ O'Meara, *supra* note 57, at 30; Papademetriou Testimony, *supra* note 58, at 2.

remain in the country because of the dangers involved with a possible future return if they attempt to leave due to enhanced border protection.¹⁰⁸ Migration of people into the United States may be more permanent than the legal flow of trade, and, because of enforcement problems, those immigrants often remain in the country and have a lasting impact on the nation as discussed above.¹⁰⁹ Additionally, the phenomenon is due in part to the host employers' increasing dependence on both foreign workers and foreign labor markets.¹¹⁰

President Bush described the situation faced by many immigrants, especially illegal immigrant workers in the United States, as "wrong" and claimed that the changes to immigration law he proposed must be made to show the compassion and the heart of the American people, consistent with the ideals of common sense and fairness with respect to immigrant workers.¹¹¹ In addition to emphasizing the compassion of the American people, the President voiced his disapproval of an amnesty process which would guarantee those same workers the full protection and access to the laws within the U.S. labor market, insisting that amnesty instead encourages violation of U.S. laws.¹¹² At the same time, allowing the use of temporary immigrant laborers creates a dependence on those workers by U.S. employers, but fails to detail what types of protections must be guaranteed to such workers and how those protections will be enforced.¹¹³ In essence, the program can be seen to serve the needs of large corporations while creating a "new kind of second-tier worker."¹¹⁴

The issue many undocumented aliens or foreign citizens may have to deal with, when evaluating the temporary worker programs, is the conflict between enrolling in a program which would ultimately force them to leave the country when, if they did not enroll, they could continue to work illegally and indefinitely.¹¹⁵ Many illegal aliens currently residing and working in the United States have already de-

¹⁰⁸ Martin, *supra* note 4, at 422-23; Papademetriou Testimony, *supra* note 58, at 6.

¹⁰⁹ Johnson, *supra* note 25, at 968.

¹¹⁰ See Martin, *supra* note 4, at 436-37.

¹¹¹ Press Release, *supra* note 100; President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004) (transcript available at www.whitehouse.gov/news/releases/2004/01/print/20040107-03.html) [hereinafter Bush Remarks].

¹¹² Bush Remarks, *supra* note 111.

¹¹³ See *id.*

¹¹⁴ *Bush Announcement*, *supra* note 5, at 35 (quoting John J. Sweeney, President of the AFL-CIO).

¹¹⁵ See *id.* (quoting co-director of the Migration Policy Institute Demetrios Papademetriou in an interview with the Washington Post).

veloped deep social and economic roots in their communities, and a program that allows only temporary status is not likely to provide sufficient inducement for them to come forward and register.¹¹⁶ Additionally, without strict supervision of the program, those workers entering from abroad may be unwilling to return voluntarily to their home countries, and instead may choose to use their temporary worker status as a means toward establishing themselves permanently in the United States.¹¹⁷

III. THE NEED TO APPROACH IMMIGRATION REFORMS THROUGH NAFTA

During the ratification process, the debate about immigration under NAFTA was based primarily on the issue of fear of migration of jobs to Mexico and illegal immigration from Mexico.¹¹⁸ The President's plan allows for employers to fill jobs that U.S. citizens are unwilling to take by opening the border to temporary workers at a time when there are eight to twelve million unemployed citizens, as well as eight to twelve million illegal aliens in the United States.¹¹⁹ It seems plausible that the reason that many available jobs are not being filled does not have to do with a lack of unemployed U.S. citizens, but rather with the conditions and circumstances of employment, and the amount of money the employer is willing to pay.¹²⁰ The unilateral amendment of immigration laws by the United States to allow for temporary foreign workers, especially from Mexico, allows for temporary workers to have a type of dual citizenship, while no rights or benefits would be reciprocated to U.S. workers in foreign countries.¹²¹ This section argues that the current debate should shift to the core issue of negotiating NAFTA provisions governing the movement of all types of labor, not just professionals, between the United States, Canada, and Mexico, rather than the inherent flaws in a unilateral law and policy change by the United States.

¹¹⁶ See Papademetriou Testimony, *supra* note 58, at 5.

¹¹⁷ See *id.* at 6; O'Meara, *supra* note 57, at 30.

¹¹⁸ Johnson, *supra* note 25, at 950–53.

¹¹⁹ See O'Meara, *supra* note 57, at 30.

¹²⁰ See *id.* at 31 (quoting Representative Tom Tancredo (R-CO)).

¹²¹ See *id.* at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform); Papademetriou Testimony, *supra* note 58, at 9.

A. *Unilateral Change Without Direct Domestic Benefits*

The President's plan, while supported and endorsed by President Vicente Fox of Mexico, is a one-sided and unilateral change to the United States' immigration laws.¹²² The majority of the direct benefits of this change will not be felt by U.S. citizens; instead, they will go to the hundreds of thousands of illegal and potential immigrants who would become part of the program.¹²³ The President has claimed that the change would help increase national security, as well as create a speculative economic boost.¹²⁴ In overall fiscal terms, there may be no measurable benefit to the United States, but merely the assertion that the United States is safer because of an increase in border control and greater monitoring of foreigners entering the country.¹²⁵

The need for a multilateral, as opposed to unilateral, change to immigration laws within North America can be explained and emphasized through both an economic and social analysis of President Bush's plan.¹²⁶ However, because of the advanced nature of the economies of the United States and Canada, when compared with the developing economy of Mexico, completely unrestricted movement of labor between members of NAFTA is not currently feasible.¹²⁷ A multilateral plan which reduces the restrictions on the movement of labor would directly increase economic efficiency and positively affect each individual nation.¹²⁸ At the same time, restructuring of immigration and labor laws to allow for unlimited temporary labor on a unilateral level maintains, if not heightens, economic inefficiency and social problems created by legal and illegal immigration.¹²⁹

¹²² See O'Meara, *supra* note 57, at 33 (quoting Glen Spencer, head of American Boarder Patrol, who characterizes the President's proposal as a kind of one-way merger).

¹²³ See *id.*

¹²⁴ See Press Release, *supra* note 111; *Press Conference of President Bush and Mexican President Fox*, White House Press Releases and Documents, Mar. 6, 2004, available at 2004 WL 61638157 [hereinafter *Press Conference*].

¹²⁵ See O'Meara, *supra* note 57, at 32, 33.

¹²⁶ See *Bush Announcement*, *supra* note 5, at 33-34; Minehan, *supra* note 14, at 3.

¹²⁷ See Johnson, *supra* note 25, at 952 (asserting that Mexico is a developing nation, while the United States and Canada are not, and this causes the focus of the debate about immigration to center on the United States' neighbor to the south); O'Meara, *supra* note 57, at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform, asserting that there cannot be a completely free hemispheric labor market unless all countries are at economic parity and have parity in their social-benefit systems).

¹²⁸ See Chang, *supra* note 2, at 373.

¹²⁹ See O'Meara, *supra* note 57, at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform, who claims that the President's proposal is like surrendering to a situation that leaves Americans to absorb all the costs and impacts).

The President's temporary worker program, in theory, would entice the registration of illegal immigrants through a promise of temporary legal status.¹³⁰ Upon registration, the immigrants would pay a fee and register their names and addresses, so that after their legal status expires the government can identify them and return them to their home country.¹³¹ The President's plan asks for illegal immigrants to register themselves with the knowledge that, three years from that date, the INS would notify them that their legal status has expired and they must leave the country, but, if the immigrants did nothing, they could maintain their status quo indefinitely.¹³² The plan assumes that illegal immigrants would weigh the advantage of the ability to travel between the United States and their home country with the three year expiration date on their residence in the United States, and find obtaining legal status worth restricting their time in the country.¹³³ As a further deterrent, many immigrants may fear that registration could be used against them in other detrimental ways.¹³⁴ Economically, the United States would be instituting an implicit time limit on existing sources of labor within its economy, not just attracting temporary labor.¹³⁵ Those foreign workers who would enter the United States through the temporary worker program would also face the three year deadline, but the expiration of their status could have less of a direct economic effect in reduction of current labor levels because of the circularity of the workers.¹³⁶

For each temporary laborer sent home, there would be an implicit economic loss in human capital.¹³⁷ The President cites as support for his proposal the fact that, after their time in the United States, workers would return to their home countries with additional skills and training which would aid their home economy.¹³⁸ Such skills and training would be learned at the expense of, and through training by, U.S. companies.¹³⁹ While U.S. companies would be able to get workers through the program, they would also lose those workers in

¹³⁰ See *Bush Announcement*, *supra* note 5, at 34; O'Meara, *supra* note 57, at 31.

¹³¹ See O'Meara, *supra* note 57, at 31.

¹³² See *Bush Announcement*, *supra* note 5, at 35 (quoting Co-Director of the Migration Policy Institute, Demetrios Papademetriou); O'Meara, *supra* note 57, at 31.

¹³³ See O'Meara, *supra* note 57, at 31.

¹³⁴ See Papademetriou Testimony, *supra* note 58, at 5.

¹³⁵ See *Press Conference*, *supra* note 124.

¹³⁶ See Papademetriou Testimony, *supra* note 58, at 3.

¹³⁷ See Patrick, *supra* note 8.

¹³⁸ See *Press Conference*, *supra* note 124.

¹³⁹ See Patrick, *supra* note 8.

whom they had invested time, money, and training.¹⁴⁰ Pursuant to an economic analysis, it stands to reason that companies would be reluctant to train temporary workers past the lowest necessary level because any investment in the worker would only benefit the company for three years.¹⁴¹ By asking U.S. companies to comply with a three year program, the President would implicitly be limiting the amount of training and on-the-job education that temporary workers would be given, and with which they would return home.¹⁴² This resulting limit on training undermines the assertion that returning workers would have a great impact on their home economy.¹⁴³

Additionally, if labor laws were not vigorously enforced, the finite term of possible employment would expose temporary workers to negative, and possibly illegal, treatment by employers.¹⁴⁴ There may be companies which would seek to exploit temporary workers by maintaining the lowest possible wage rates, restricting promotions, and instituting programs which use the fixed time frame as a major factor against temporary workers.¹⁴⁵ Economically, companies face much higher costs if there is turnover in more advanced positions filled by temporary workers because of higher levels of training and investment in human capital.¹⁴⁶ It is very possible that, under the Bush plan, temporary workers would be subject to implicit and structural employment discrimination because of their legally defined period of employment.¹⁴⁷

Furthermore, under the plan, a temporary worker must hold and maintain employment to retain legal status, and some employers may

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *Press Conference*, *supra* note 124.

¹⁴⁴ See *Bush Announcement*, *supra* note 5, at 35 (referencing Jared Bernstein of the Economic Policy Institute as supporting the need for the President's proposal to enable temporary workers to be protected by labor laws).

¹⁴⁵ Cf. Papademetriou Testimony, *supra* note 58, at 9; *U.S. & Mexico: Immigration Policy & The Bilateral Relationship: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 7 (2004), at <http://foreign.senate.gov/testimony/2004/NoriegaTestimony040323.pdf> (statement of The Honorable Roger F. Noriega Assistant Secretary, Department of State Bureau of Western Hemisphere Affairs) [hereinafter *Noriega Testimony*].

¹⁴⁶ See Patrick, *supra* note 8.

¹⁴⁷ See *Bush Announcement*, *supra* note 5, at 35 (quoting AFL-CIO President John J. Sweeney as stating the President's proposal creates a new type of second-tier worker, implying that temporary workers would be treated differently than American workers).

use this unstable legal status to exploit workers.¹⁴⁸ While probably illegal, it is not impossible to imagine scenarios where temporary workers might seek to exercise their rights by seeking to join unions, requesting raises, or pursuing other benefits, and an employer would threaten termination of employment, and thus legal status, to stifle such actions.¹⁴⁹ Overall, the temporary worker program potentially would leave foreign workers in an extremely weak bargaining position.¹⁵⁰

B. *Recent Events and Multilateral Negotiation*

In March 2004, President Bush acknowledged that his proposal faced a tough time in Congress.¹⁵¹ Over two months after the announcement of his proposal, the Senate Foreign Relations Committee held a hearing on the issue of United States-Mexico relations, but no language had been drafted regarding the President's proposal.¹⁵² After the hearings, the Republican-controlled Congress did nothing further to move on the President's proposal in 2004.¹⁵³ Despite the lack of progress for the President's plan, the debate about immigration reform came to the political forefront that spring.¹⁵⁴ The meeting between President Bush and President Fox in early March 2004 emphasized the Bush Administration's focus on protecting the nation from terrorism through stemming the flow of illegal immigrants.¹⁵⁵ During the second meeting of the two leaders in November 2004, President Bush renewed his support for his plan and changes to U.S. immigration law, but did not pledge to push for the enactment of his pro-

¹⁴⁸ See Minchan, *supra* note 14 (quoting AFL-CIO President John Sweeney asserting that the Bush plan deepens the potential for abuse and exploitation of temporary workers).

¹⁴⁹ See Chang, *supra* note 101, at 470–71; *Bush Announcement*, *supra* note 5, at 34.

¹⁵⁰ See Chang, *supra* note 101, at 470–71.

¹⁵¹ See *Press Conference*, *supra* note 124 (responding to a question of timing of his proposal, President Bush stated that he certainly hoped Congress would take the issue, but nothing was certain because 2004 was an election year); Ron Hutcheson, *Bush Promises to Ease Borders; Proposal for Illegal Mexican Workers Not Favored in Congress*, SUN HERALD (Biloxi, MS), Mar. 7, 2004, at 1, available at 2004 WL 70754435.

¹⁵² See *U.S. Senate Committee on Foreign Relations Hearing Schedule*, 108th Cong. 7 (2004), at <http://foreign.senate.gov/hearings/2004/hrg040323a.html>.

¹⁵³ See *Immigration Reform*, *supra* note 54.

¹⁵⁴ See, e.g., Hutcheson, *supra* note 151 (quoting a statement issued by Senator John Kerry, Democratic presidential candidate, saying "Latinos can tell it's an election year because George W. Bush is finally paying attention to them.").

¹⁵⁵ See *Press Conference*, *supra* note 124.

posal.¹⁵⁶ The meetings between the two leaders could have been ideal moments to re-open discussions about regional, instead of merely unilateral, immigration and/or labor agreements between, not just the United States and Mexico, but all of the members of NAFTA.¹⁵⁷

Canadian support and approval would be necessary to add the final aspect of free trade (movement of labor) to the NAFTA agreement.¹⁵⁸ Realistically, obtaining Canadian support for a multilateral plan likely would not be a major hurdle to a region-wide agreement.¹⁵⁹ The immigration standards between the United States and Canada maintain a level of freedom which would not need major amendments in order to facilitate negotiations to add labor to NAFTA.¹⁶⁰ Canada's interest in expanded movement of labor is the attraction of human capital and talent into their economy, a goal which would be furthered through a region-wide agreement.¹⁶¹ From Canada's perspective, NAFTA began a period of increased continental integration which could, in the future, include freer (but not unrestricted) movement of, not only goods, capital, and ideas, but also people.¹⁶²

C. Negotiation Through NAFTA

The proposed temporary worker program essentially would have the effect of opening the U.S. job market to any foreign worker willing to fill a job at a wage that a native worker would be unwilling to

¹⁵⁶ See *Immigration Reform*, *supra* note 54.

¹⁵⁷ See *Press Conference*, *supra* note 124.

¹⁵⁸ See Joseph J. Norton, *The NAFTA "Process" in Context*, in *NAFTA AND BEYOND: A NEW FRAMEWORK FOR DOING BUSINESS IN THE AMERICAS* 5, 6-7 (Joseph J. Norton & Thomas L. Bloodworth eds., 1995) (discussing the role of NAFTA as an on-going process for doing cross-border business, one which would serve as a catalyst for significant legal reform within the region).

¹⁵⁹ See Gal-Or, *supra* note 1, at 379 (discussing the amendments made to Canada's immigration law in order to implement NAFTA while retaining a much less restrictive temporary entry regime for Canadians entering the United States). Amendments to immigration laws between Canada and Mexico and Canada and the United States are beyond the scope of this Note; however, illegal immigration between Canada and Mexico has always been a much smaller problem than that between the United States and Mexico. See e.g. Morton Weinfeld, *North American Integration and the Issue of Immigration: Canadian Perspectives*, in *NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO* 153, 158-60 (Stephen J. Randall ed., 1992) (citing the number of Hispanic immigrants into Canada in 1987 as 5,513 people, when in the same year the U.S. Census Bureau reported the immigration of 11.8 million Mexicans into the United States).

¹⁶⁰ See Gal-Or, *supra* note 1, at 379.

¹⁶¹ See Melinda McGehee, *Using Immigration as a Protectionist Mechanism While Promoting Free Trade*, Comment and Casenote, 8 L. & BUS. REV. AM. 667, 675 (2002).

¹⁶² Weinfeld, *supra* note 159, at 154.

accept.¹⁶³ The Bush Administration has emphasized that a principal target of the program is Mexico and illegal Mexican immigrants.¹⁶⁴ The temporary worker program would provide an unlimited amount of Mexicans with the legal right to work and live in the United States, without any reciprocal rights for U.S. citizens within Mexico.¹⁶⁵ Hence, the overall effect is a unilateral opening of the United States' borders for the primary benefit of another NAFTA member nation, without provisions allowing for the protections that could be gained through an international agreement.¹⁶⁶

If President Bush's main focus is to control and deter illegal immigration from Mexico through an amendment to immigration policy, there is no reason to open the United States' borders to all countries.¹⁶⁷ When NAFTA was negotiated, labor was left off of the bargaining table mainly because of the United States' fear of Mexican immigrants.¹⁶⁸ As it currently stands, NAFTA reinforces the immigration status quo between the United States and Mexico while economic and other pressures favor change.¹⁶⁹ In March and November 2004, Presidents Bush and Fox met to discuss the temporary worker program, and both were supportive of advancing the policy of movement of labor between the United States and Mexico, adding to the pressures favoring change.¹⁷⁰ With the primary obstacle to negotiating labor within the original NAFTA debates (namely, U.S. opposition to Mexican workers) now open to negotiation and discussion, the appropriate forum for those negotiations is within the framework of NAFTA.¹⁷¹ By negotiating within NAFTA, the member nations would be able to ensure that any amendments to labor and immigration law and policies would fully "protect, enhance, and enforce workers' rights" in all member nations, and therefore, further the standards established in the original negotiations.¹⁷²

¹⁶³ See O'Meara, *supra* note 57, at 32 (quoting Dan Stein).

¹⁶⁴ Noriega Testimony, *supra* note 145, at 7.

¹⁶⁵ See O'Meara, *supra* note 57, at 32 (quoting Dan Stein and Rep. Tom Tancredo).

¹⁶⁶ See *id.*; Papademetriou Testimony, *supra* note 58, at 10.

¹⁶⁷ See Noriega Testimony, *supra* note 145, at 7.

¹⁶⁸ See Gal-Or, *supra* note 1, at 366 (noting that, because of the extremely volatile immigration situation in U.S.-Mexican relations, the Parties to NAFTA opted to by-pass it to avoid jeopardizing the real "directly trade related issues" at stake).

¹⁶⁹ Johnson, *supra* note 68, at 126; Cassise, *supra* note 35, at 1378.

¹⁷⁰ See *Immigration Reform*, *supra* note 54; *Press Conference*, *supra* note 124.

¹⁷¹ See Papademetriou Testimony, *supra* note 58, at 9 (testifying that an issue as complex as immigration cannot be managed as well unilaterally as it can with the cooperation of the United States' neighboring countries).

¹⁷² See NAFTA, *supra* note 15, pmb.; Papademetriou Testimony, *supra* note 58, at 10.

An amendment to NAFTA would not have to establish a uniform approach to standards for permanent legal status for immigrants within the three member nations, but it should set out a minimum accepted level of treatment for applicants from within NAFTA.¹⁷³ Without the possibility of permanent legal status, even a multinational worker movement policy would be susceptible to those who seek to avoid control by moving through illegal channels.¹⁷⁴ However, each country within NAFTA faces different immigration issues from the rest of the world and is, and must continue to be, afforded the opportunity and ability to set its own immigration policy and laws.¹⁷⁵

NAFTA's Preamble establishes the standard for workers' rights, but currently that promise is not supported in the actual language of the treaty.¹⁷⁶ Freer movement of labor across borders is an underlying economic necessity to further enhance and maximize the efficiency of member nations' economies.¹⁷⁷ However, completely free movement of labor between the member nations, such as is the case in the European Union, is not feasible because of the economic, social, and political differences of Mexico compared to the other two NAFTA member countries.¹⁷⁸ A unilateral legal change by the United States to allow for Mexican temporary workers would do little, if nothing, to improve that economic differential.¹⁷⁹ A multilateral agreement to allow for controlled, but expanded, movement of workers between member nations would allow for economic growth and higher levels

¹⁷³ See Ellen G. Yost, *The North American Free Trade Agreement: Chapter Sixteen, "Temporary Entry for Business Persons," A United States Perspective*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 247, 248, 259 (Judith H. Bello et al. eds., 1994) (discussing the ability of NAFTA Chapter 16 to allow for temporary entry of business persons on a reciprocal basis while recognizing the need to ensure border security and protect the domestic labor force and permanent employment).

¹⁷⁴ See O'Meara, *supra* note 57, at 31.

¹⁷⁵ See NAFTA, *supra* note 15, ch. 16, art. 1607.

¹⁷⁶ NAFTA, *supra* note 15, pmb.; Stanley M. Spracker & Gregory M. Brown, *Labor Issues Under the NAFTA: Options and Resolutions*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 351, 351 (Judith H. Bello et al. eds., 1994).

¹⁷⁷ See Chang, *supra* note 2, at 373.

¹⁷⁸ See O'Meara, *supra* note 57, at 32.

¹⁷⁹ See *U.S. & Mexico: Immigration Policy & The Bilateral Relationship: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. 9 (2004), at <http://foreign.senate.gov/testimony/2004/ValenzuelaTestimony040323.pdf> (statement of Arturo Valenzuela, Professor of Government and Director of the Center for Latin American Studies at the Edmund A. Walsh School of Foreign Service at Georgetown University).

of economic efficiency in each country.¹⁸⁰ Lower skilled laborers from Mexico could fill jobs in the United States and/or Canada, while higher skilled and trained workers could enter Mexico and, theoretically, work to improve and strengthen the Mexican job market and therefore the Mexican economy.¹⁸¹

During the original debates over NAFTA, the need for freer movement of foreign investment, capital, and services between members was agreed upon, but the final economic factor (labor) was left unaccounted for in the text.¹⁸² By negotiating to add the final economic factor to the equation, the United States' goals of developing and furthering the economic stability of Mexico and increasing national security would be more complete.¹⁸³ Moreover, amending NAFTA to include a provision on immigration and labor would not need to undermine each individual country's immigration laws and policies with respect to outside nations.¹⁸⁴ Chapter 16 of NAFTA currently provides for freer movement of business persons between the member nations, while still allowing each individual nation to set its immigration standards for business persons from abroad; the same type of provision could be negotiated for low and un-skilled laborers.¹⁸⁵ Furthermore, if there was a region-wide agreement on border enforcement and policy, the security of each member nation would increase substantially more than would occur with a unilateral increase in protection, simply because of the heightened degree of regional cooperation and coordination in immigration and anti-terrorist practices.¹⁸⁶

A regional labor movement policy would also eliminate the "opening of the floodgates" feel of a nationality-neutral, unilateral temporary worker program.¹⁸⁷ To address the primary issue of illegal Mexican immigrants, the President's plan would unnecessarily open the United States' borders to temporary workers from all nations.¹⁸⁸

¹⁸⁰ See Chang, *supra* note 2, at 373.

¹⁸¹ See *id.* (indicating that market forces would direct labor to the market where its marginal product would be the highest).

¹⁸² See Spracker & Brown, *supra* note 176, at 351.

¹⁸³ See Ostry, *supra* note 11, at 27.

¹⁸⁴ See Yost, *supra* note 173, at 248 (stating that the inherent tension between the goals of preserving national autonomy and border security, and protecting the permanent employment of each Party's domestic labor force on the one hand, and encouraging the liberalization of trade on the other, has already been accomplished once in NAFTA through Chapter 16).

¹⁸⁵ See NAFTA, *supra* note 15, ch. 16, app. 1603.

¹⁸⁶ See Papademetriou Testimony, *supra* note 58, at 10.

¹⁸⁷ O'Meara, *supra* note 57, at 32; Noriega Testimony, *supra* note 145, at 7.

¹⁸⁸ See O'Meara, *supra* note 57, at 32.

In contrast, creating a movement of labor provision in NAFTA would address the specific issue of Mexican workers, while allowing for the member nations to maintain domestic immigration laws to meet the needs and policies relating to immigrants from non-member nations.¹⁸⁹ A labor and/or immigration provision in NAFTA would finally bring the last economic factor of production¹⁹⁰ entirely within the provisions of the treaty, as well as further the goals of national security and border control.¹⁹¹

CONCLUSION

NAFTA was a groundbreaking agreement with respect to the cross-border trade in services. An amendment to NAFTA dealing with controlled regional movement of labor could be equally groundbreaking, allowing for more efficient uses of labor while not requiring a comprehensive integration of economies and social policies. The benefits of working on a regional level, as opposed to unilateral action by the United States, would be felt most directly by U.S. workers. In order to create a higher level of economic efficiency without destroying the U.S. labor market, the agreement would need to include provisions to restructure the ability of workers to move between all member nations without removing all restrictions. With a regional policy and agreement, the U.S. economy would be less exposed to potential economic losses caused by immigrants than it would with unilateral action. The skills and training of immigrant workers would not suffer limitations due to a finite expiration date, and at the same time foreign workers would be less likely to encounter exploitation and discriminatory treatment in the workplace. Additionally, legal immigrant laborers would add to the tax base of the host country, resulting in increased tax revenue. Finally, national security would increase because of decreased need for enforcement coupled with increased multilateral efforts to control illegal border crossings.

The issues that surrounded the original NAFTA debates about labor and economic standards within Mexico would undoubtedly arise during debates over a regional labor movement policy. It is probable that the admittance of U.S. workers to the Mexican labor

¹⁸⁹ See Papademetriou Testimony, *supra* note 58, at 9, 10.

¹⁹⁰ The four basic pillars of a comprehensive free trade regime, as defined by the European Union, are the free movement of goods, services, capital, and persons. See Chang, *supra* note 2, at 372.

¹⁹¹ See *id.* at 372-73; *Bush Announcement*, *supra* note 5, at 34.

force, especially in management positions, would have a much more direct and immediate impact on Mexican labor, environmental policies, and the economy, than the current indirect effect of improvement of policies with the gradual improvement of the Mexican economy. A direct negotiation between member countries for regional immigration and labor provisions would likely lead to faster and better results than would be possible through a unilateral action by any member. The goals of improving national security for each member nation and enhancing regional economic stability are more likely to be implemented successfully if there is regional cooperation within NAFTA.