

## **NAFTA AND IMMIGRATION INTERTWINED: THE IMPACT OF THE TRUMP ERA ON MEXICAN-U.S. MIGRATION**

*Emily A. Welch\**

### **ABSTRACT**

Ignoring the nuanced history of U.S.-Mexican relations, the Trump administration has cultivated a nationalist, xenophobic approach to discourse on Mexican immigration. President Trump has propagated this rhetoric amidst renegotiations of the North American Free Trade Agreement, fusing the two previously discrete policy issues of immigration and trade liberalization. This Comment reviews the evolution of NAFTA, as well as the past century of relations between the United States and Mexico, focusing on economic trends and migration patterns. The countries' historical supply and demand of labor created a dependency of the U.S. economy on Mexican laborers, and correspondingly, higher rates of both documented and undocumented immigration. However, U.S. leaders have neglected to discuss this causal relationship in increasingly controversial immigration policymaking. Thus, it is imperative that future NAFTA negotiations consider the potential immigration-related repercussions, as parties have previously failed to do. In acknowledging the inexorable relationship between U.S.-Mexican trade and migration, both countries stand to benefit from a more holistic, mutually beneficial trade agreement that was originally promised over twenty years ago.

### TABLE OF CONTENTS

I.	INTRODUCTION .....	90
II.	THE NORTH AMERICAN FREE TRADE AGREEMENT: INCEPTION AND DEVELOPMENT.....	94
	A. <i>The Formation of NAFTA</i> .....	95
	B. <i>NAFTA's Key Agricultural Provisions</i> .....	96
	C. <i>Mexico's Changing Economy and Its Effect on Migration Trends</i> .....	99
III.	CURRENT EVENTS AFFECTING NAFTA AND IMMIGRATION .	104
	A. <i>The 2016 U.S. Presidential Election</i> .....	104
	B. <i>The Trump Administration's Troubling Agenda</i> .....	108
IV.	RECOMMENDATIONS FOR FUTURE NEGOTIATIONS .....	113
V.	CONCLUSION.....	116
VI.	AFTERWORD .....	117
	Appendix.....	118
	Figure 1.....	118

### I. INTRODUCTION

International free trade agreements are often analyzed under the comparative advantage theory,<sup>1</sup> which assumes each country can produce some set of goods at a lower cost than other countries.<sup>2</sup> Theoretically, countries enter into free trade agreements in order to trade their cheaper goods for other countries' cheaper goods, ideally benefitting all parties involved.<sup>3</sup> The North American Free Trade Agreement (NAFTA)<sup>4</sup> began as a trilateral agreement to increase trade among Canada, Mexico, and the United States.<sup>5</sup> Although economic globalization and significant technological advances have made it more difficult to determine NAFTA's exact

\*J.D. Candidate, Temple University James E. Beasley School of Law, 2019; M.P.A., Villanova University, 2016; B.A., Spanish, and B.A., Communication, Villanova University, 2014. Thank you to the TICLJ staff for your unwavering commitment to this journal, Professor Ramji-Nogales for your mentorship, and Professor Nancy Knauer for your transformative Law & Public Policy Program. Thanks also to my family and friends for your support throughout my academic career. Finally, to my patient husband, Shawn: thank you for encouraging me to apply to law school and pursue my passions.

1. STEVEN M. SURANOVIC, INTERNATIONAL TRADE THEORY AND POLICY 37 (2010).

2. *Id.* at 67.

3. *Id.*; see also BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION 22 (2010) (explaining that the United States' promotion of the North American Free Trade Agreement as a creator of jobs was misleading and that the main benefit was lower prices).

4. North American Free Trade Agreement, Dec. 17, 1992–Dec. 8, 1993, 19 U.S.C. 3301, 32 I.L.M. 289 and 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

5. See *North American Free Trade Agreement (NAFTA)*, EXEC. OFF. OF THE PRESIDENT, <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Sept. 13, 2018) [hereinafter EXEC. OFF. OF THE PRESIDENT] (noting that NAFTA came about after bilateral negotiations began between the United States and Mexico, in which Canada later joined).

effect on the continent's economy,<sup>6</sup> member countries estimate that NAFTA has contributed \$17 trillion to the combined North American economy and created approximately 39.7 million jobs between 1993 and 2008.<sup>7</sup> Due to NAFTA, member countries substantially reduced tariffs on goods from the other member countries after the agreement entered into force, and completely removed all tariffs by 2008.<sup>8</sup> NAFTA's impact on the United States alone resulted in an increase in goods traded—with both other NAFTA members and non-member countries—from \$291 billion in 1993 to \$1.1 trillion in 2016.<sup>9</sup>

NAFTA's effect on the Mexican and U.S. economies showcases a causal relationship between job growth and immigration patterns. NAFTA was drafted over twenty years ago as a mutually beneficial endeavor to increase trade amongst Canada, Mexico, and the United States.<sup>10</sup> Despite some U.S. officials' hesitation to involve Mexico, as they considered their southern neighbor a less developed country,<sup>11</sup> the United States was eager to benefit from liberalizing agricultural trade between the two countries.<sup>12</sup> In liberalizing trade, both Mexico and the United States hoped to boost their economies independently *and* as a collective region.<sup>13</sup>

A country's economic health is interconnected with migration patterns.<sup>14</sup> When a country's economy is strong and the unemployment rate is low, inhabitants are much more likely to remain in that country, since they are able to make a living

6. See Chad P. Brown, *What is NAFTA, and What Would Happen to U.S. Trade Without It?*, WASH. POST (May 18, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/what-is-nafta-and-what-would-happen-to-u-s-trade-without-it/?utm\\_term=.2099d19287d1](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/what-is-nafta-and-what-would-happen-to-u-s-trade-without-it/?utm_term=.2099d19287d1) (asserting that major concurrent events such as China's emergence as a global player, the United States' entry into the WTO, and technological advances make it difficult to assess NAFTA's effects on North America's economy).

7. *Fast Facts*, NAFTA NOW, <http://www.naftanow.org/facts/> (last visited Sept. 30, 2018).

8. EXEC. OFF. OF THE PRESIDENT, *supra* note 5; see also Patrick Gillespie, *NAFTA: What It is, and Why Trump Hates It*, CNN MONEY (Nov. 15, 2016, 5:17 PM), <http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/index.html> (providing a background on NAFTA).

9. Brown, *supra* note 6.

10. EXEC. OFF. OF THE PRESIDENT, *supra* note 5.

11. See HING, *supra* note 3, at 10–11 (discussing the concerns of free trade skeptics in the early 1990s, who opposed free trade agreements generally and a free trade agreement with Mexico specifically).

12. James McBride & Mohammed Aly Sergie, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/naftas-economic-impact> (last updated Oct. 1, 2017).

13. See *Results: North Americans are Better Off After 15 Years of NAFTA*, NAFTA NOW, [http://www.naftanow.org/results/default\\_en.asp](http://www.naftanow.org/results/default_en.asp) (last visited Sept. 30, 2018) (discussing how NAFTA liberalizing trade between North American countries has affected the regional and individual nations' economies).

14. See Expert Group Meeting on New Trends in Migration: Demographic Aspects, Ronald Skeldon, *Global Migration: Demographic Aspects and its Relevance for Development*, at 7, U.N. Technical Paper No. 2013/6 (Dec. 17, 2013), [http://www.un.org/esa/population/migration/documents/EGM.Skeldon\\_17.12.2013.pdf](http://www.un.org/esa/population/migration/documents/EGM.Skeldon_17.12.2013.pdf) (noting that economic disparities continue to be a major driver of migration).

there.<sup>15</sup> Accordingly, a weak economy and high unemployment rate can, and often does, lead to increased emigration from that country.<sup>16</sup> Mexico and the United States have a long and interdependent economic relationship that involves labor and agriculture, which has historically altered migration trends.<sup>17</sup> Although the parties' respective heads of state signed NAFTA to strengthen their countries' economies,<sup>18</sup> Mexico's economy did not flourish as anticipated, resulting in an uneven distribution of the promised benefits of NAFTA.<sup>19</sup> Correspondingly, immigration from Mexico to the United States increased.<sup>20</sup> Had Mexico's economy not performed so poorly following NAFTA's entry into force,<sup>21</sup> immigration may not have become such a highly politicized and contested issue in the United States.<sup>22</sup>

Immigration is one of the most discussed policy issues of this decade and it was especially significant in the 2016 U.S. Presidential campaign.<sup>23</sup> Despite the renewed American focus on immigration, the long history of the United States incentivizing Mexican laborers to venture north<sup>24</sup> is often forgotten in the increasingly controversial discourse regarding Mexican immigration, over which U.S. politicians have fought in recent years.<sup>25</sup>

U.S. President Donald Trump's candidacy and administration focus on

15. *See id.* at 23 (discussing how Mexico's economic growth has led to Mexican urban centers becoming migrant destinations and to decreased immigration from Mexico).

16. *Id.*

17. *See HING, supra* note 3, at 35–36 (discussing how the Mexican and U.S. economies were entwined even as far back as the second Roosevelt administration).

18. *See McBride & Sergie, supra* note 12, at 2 (exploring the reasons for NAFTA's creation).

19. M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL34733, NAFTA AND THE MEXICAN ECONOMY 7 (June 3, 2010). *See HING, supra* note 3, at 12 (noting that increased trade between the United States and Mexico did not result in more jobs for Mexican workers).

20. *See HING, supra* note 3, at 12–13 (discussing how the volume of migrants from Mexico to the United States increased following NAFTA's entry into force).

21. VILLARREAL, *supra* note 19, at 7.

22. MARK WEISBROT ET AL., CTR. FOR ECON. AND POLICY RESEARCH, DID NAFTA HELP MEXICO? AN ASSESSMENT AFTER 20 YEARS 15 (Feb. 2014), <http://cepr.net/documents/nafta-20-years-2014-02.pdf>.

23. Prior to the 2016 U.S. Presidential election, 70% of voters considered immigration a very important issue to determine their vote. Notably, 79% of supporters of then-candidate Trump considered immigration a very important issue in determining their vote, compared to 65% of candidate Hillary Clinton's supporters. The increase in these numbers has reflected a noticeable increase in the issue's importance over the past few years: 54% of 2008 presidential election voters said immigration was very important in determining their vote, and just 41% of voters in 2012 said the same. It is also worth noting that of the 2016 election voters, 51% thought Hillary Clinton would have done a better job "dealing with immigration," compared to 42% of voters who thought Trump would do a better job. *See generally 2016 Campaign: Strong Interest, Widespread Dissatisfaction, U.S. Politics & Policy*, PEW RESEARCH CTR. (July 7, 2016), <http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

24. *See, e.g., HING, supra* note 3, at 17 (discussing the history of the Bracero and Maquiladora programs in the twentieth century).

25. *See Claire Felter & Danielle Renwick, The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounders/us-immigration-debate-0> (last updated July 2, 2018) (providing a general background on immigration in the recent political climate).

immigration as a major topic of concern in the United States.<sup>26</sup> He regularly uses immigration enforcement as a bargaining chip for NAFTA negotiations with Mexican President Enrique Peña Nieto,<sup>27</sup> further conflating trade and immigration into one subject without recognizing the causal relationship between the two.<sup>28</sup> Additionally, as both candidate and later president, Trump spews anti-immigrant propaganda: during his campaign, he repeatedly degraded Mexican immigrants and announced plans to build a physical wall to keep “illegal immigrants” out of the United States.<sup>29</sup> President Trump’s executive orders, policies, and dialogue reflect isolationist and nationalist policies, which amplify NAFTA’s negative economic and social impacts on Mexico, thereby exacerbating the preexisting dysfunctional immigration patterns between the two countries.<sup>30</sup>

This Comment explores the causal relationship between negotiations of NAFTA and Mexican migration to the United States. Part II explains the history of the agreement and its relevant parties. Part III identifies and analyzes current events affecting NAFTA and immigration policymaking, and in particular, how discussions of NAFTA have often become conflated with immigration. Finally, Part IV considers proposals that call attention to the need for a change in framing the issues at hand. The subject of free trade has become inextricably linked with immigration in relations between Mexico and the United States. In present renegotiations of the agreement,<sup>31</sup> which are discussed in the Afterward of this Comment, it is essential to address this issue, rather than ignore it, as leaders have historically done.<sup>32</sup>

26. See, e.g., *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> (relaying then-candidate Trump’s presidential announcement speech, in which he states his plans to build a border wall and roll back Obama-era Executive Orders on immigration).

27. Note that newly-elected President Andrés Manuel López Obrador will be inaugurated on December 1, 2018 and will replace President Enrique Peña Nieto. Madeleine Ngo, *López Obrador, a Trump-bashing Leftist, Just Won Mexico’s Presidency in a Landslide*, VOX (July 2, 2018, 12:20 PM), <https://www.vox.com/world/2018/7/2/17525236/mexico-president-mexican-election-andres-manuel-lopez-obrador>.

28. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 26, 2017, 5:55 AM), [https://twitter.com/realDonaldTrump/status/824616644370714627?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html](https://twitter.com/realDonaldTrump/status/824616644370714627?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html) (threatening to cancel a meeting with President Peña Nieto if Mexico does not pay for a border wall).

29. Seth McLaughlin, *Donald Trump Vows to Build Border Wall, Says Mexico Will Pick up Tab*, WASH. TIMES (June 16, 2015), <https://www.washingtontimes.com/news/2015/jun/16/donald-trump-vows-build-border-wall/>; Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm\\_term=.9b6310a57bf8](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.9b6310a57bf8).

30. See *infra* Part III.B for a detailed discussion of NAFTA’s negative impact on Mexico and the role of the Trump administration in exacerbating NAFTA’s problems.

31. Heather Long, *U.S., Canada and Mexico Just Reached a Sweeping New NAFTA Deal. Here’s What’s in It.*, WASH. POST (Oct. 1, 2018), [https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm\\_term=.1d3f92aac4d8](https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.1d3f92aac4d8).

32. See, e.g., Cyrille Rogacki, *An Interview with Ambassador Julius Katz*, 26 COLUM. J.

## II. THE NORTH AMERICAN FREE TRADE AGREEMENT: INCEPTION AND DEVELOPMENT

As a precursor to NAFTA, the United States and Canada first entered into a bilateral trade agreement in 1988, called the U.S.-Canada Free Trade Agreement (CUSFTA).<sup>33</sup> The main objectives of CUSFTA were to eliminate trade barriers, liberalize investment, and increase cooperation between the two countries.<sup>34</sup> The United States and Canada implemented CUSFTA by eliminating tariffs, reducing non-tariff barriers, addressing trade in services, and creating a dispute settlement system.<sup>35</sup>

As a result of CUSFTA, Canada was able to gain better access to the U.S. economy, and in turn the United States accessed Canada's energy and cultural industries.<sup>36</sup> In the year the agreement was announced, 90% of Canadians held an opinion on the agreement, while just 39% of surveyed Americans were even aware of the agreement's existence.<sup>37</sup> In contrast to the Canadian public's engagement, the American public's general apathy towards the deal highlights the United States' status as a major global power and introduces the recurring theme of the United States' protectionist attitude in coming NAFTA negotiations.<sup>38</sup>

As CUSFTA's objectives suggest, both parties considered the possibility of including other countries in what was initially a bilateral agreement.<sup>39</sup> In 1989, former Mexican President Carlos Salinas de Gortari initiated negotiations to include Mexico in the agreement, hoping "to expand and protect Mexican markets in the United States and elsewhere, to attract foreign investment to Mexico, and to resolve some of the political, social, and diplomatic problems" in U.S.-Mexican relations.<sup>40</sup> The ties between Mexico and Canada were minimal, and thus the negotiations between the two countries developed somewhat as an afterthought, while trade with the United States remained at the forefront of both Mexico and Canada's priorities.<sup>41</sup>

WORLD BUS. 38, 39 (1991) ("The issues of immigration and labor, or the admission of Mexican labor to the United States, is not considered to be a subject of the free trade negotiations.").

33. EXEC. OFFICE OF THE PRESIDENT, *supra* note 5.

34. Canada-U.S. Free Trade Agreement, Can.-U.S., art. 102, Jan. 2, 1988, 27 I.L.M. 281. The objectives of CUSFTA were to "eliminate barriers to trade in goods and services between the territories of the Parties; facilitate conditions of fair competition within the free-trade area; liberalize significantly conditions for investment within this free-trade area; establish effective procedures for the joint administration of the Agreement and the resolution of disputes; and lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of the Agreement." *Id.*

35. *Canada-U.S. Free Trade Agreement*, GOV'T. OF CAN. (June 5, 2018), [http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united\\_states-etats\\_unis/fta-ale/background-contexte.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng).

36. JOHN HERD THOMPSON & STEPHEN J. RANDALL, *CANADA AND THE UNITED STATES: AMBIVALENT ALLIES* 273 (4th ed. 2008).

37. *Id.* at 274.

38. *See Here's Donald Trump's Presidential Announcement Speech*, *supra* note 26 (calling for the United States to focus on domestic issues rather than external ones).

39. Canada-U.S. Free Trade Agreement, *supra* note 34, art. 102.

40. THOMPSON & RANDALL, *supra* note 36, at 280.

41. *Id.*

The resultant NAFTA, negotiated and implemented by U.S. Presidents George H.W. Bush and Bill Clinton, respectively,<sup>42</sup> entered into force on January 1, 1994.<sup>43</sup>

#### A. *The Formation of NAFTA*

The objectives of NAFTA are almost identical to those of CUSFTA—aside from an additional provision to protect the intellectual property rights of each party—and include the same dispute settlement measures.<sup>44</sup> The major focuses of trade liberalization in NAFTA dealt with agriculture, textiles, and automobile manufacturing.<sup>45</sup>

Before Mexico's incorporation into NAFTA, its economy had been thriving under a developmentalist<sup>46</sup> and protectionist model.<sup>47</sup> From 1960 to 1980, Mexican real gross domestic product (GDP) per capita grew by 98.7%.<sup>48</sup> Mexico sought to enter NAFTA in the hopes that trade liberalization with the United States and Canada would continue this trend of impressive economic growth in coming years.<sup>49</sup>

As a country with a developing economy, Mexico's inclusion led to concerns by U.S. politicians about the possibility of weakening the two highly developed economies of the United States and Canada.<sup>50</sup> Their chief concerns centered on Mexico's minimal GDP compared to that of both the United States and Canada, changing labor standards, and the outsourcing of jobs to Mexico due to lower wages and standards.<sup>51</sup> Accordingly, in domestic NAFTA discussions, the United States framed Mexico as a weaker power receiving the better end of the deal due to its

42. McBride & Sergie, *supra* note 12.

43. EXEC. OFFICE OF THE PRESIDENT, *supra* note 5.

44. *Compare* Canada-U.S. Free Trade Agreement, *supra* note 34, with NAFTA, *supra* note 4. *See generally* Laura Macdonald, *Canada and NAFTA*, CANADIAN ENCY (Mar. 29, 2017), <https://www.thecanadianencyclopedia.ca/en/article/north-american-free-trade-agreement-nafta>.

45. McBride & Sergie, *supra* note 12.

46. For a definition of “developmentalism” see *Developmentalism*, OXFORD DICTIONARIES, [www. https://en.oxforddictionaries.com/definition/developmentalism](http://www.oxforddictionaries.com/definition/developmentalism) (last visited Oct. 8, 2018) (“An economic policy concerned with improving the economy, and thus national autonomy, of an underdeveloped country by fostering the development of dynamic internal markets through such means as imposing high tariffs on imported goods.”).

47. Aaron Tornell & Gerardo Esquivel, *The Political Economy of Mexico's Entry into NAFTA*, 4 NAT'L BUREAU OF ECON. RESEARCH 25, 27 (1995). The authors point out that the Mexican government protected its economy in the 1980s via import permits, increasing trade barriers, and initially declining to accede to the GATT. The government's eventual accession to the GATT marked the beginning of an economic liberalization period, leading to its involvement in NAFTA. *Id.*

48. WEISBROT ET AL., *supra* note 22, at 1.

49. *Id.* at 18; *see generally* Tornell & Esquivel, *supra* note 47 (discussing NAFTA as one part of economic liberation in Mexico).

50. *See* THOMPSON & RANDALL, *supra* note 36, at 283 (noting that a 1992 U.S. presidential candidate argued trade liberalization would lead to a “giant sucking sound” of U.S. jobs fleeing across the border).

51. *See id.* at 281–83 (elaborating on the domestic tensions that arose in NAFTA discussions).

smaller economy.<sup>52</sup>

Because of lingering worries in the United States that Mexico's inclusion into the agreement would disproportionately outsource labor to Mexico, a side agreement to NAFTA, the North American Agreement on Labor Cooperation (NAALC), sought to improve labor standards by creating oversight mechanisms to ensure enforcement of those standards.<sup>53</sup> The NAALC ensured that the presence of low-wage workers in Mexico would not lead to the demise of U.S. jobs through the outsourcing of American employment to Mexico.<sup>54</sup> As discussed later in this Comment, U.S. fears regarding labor outsourcing would soon prove to be unsubstantiated for a number of reasons.<sup>55</sup>

NAFTA did not include explicit language regarding the agreement's potential effects on immigration.<sup>56</sup> At the time NAFTA negotiations took place, Deputy U.S. Trade Representative Julius Katz did not acknowledge a relationship between the plans for trade liberalization and immigration.<sup>57</sup> He indicated that "[t]he issues of immigration . . . [are] not considered to be a subject of the free trade negotiations . . . [w]hen we get into broad scale immigration, you're not dealing with trade . . . you're dealing with social issues . . . and we've agreed that will not be part of this negotiation."<sup>58</sup> Thus, there was no plan in the event that Mexico's agricultural industry declined; no transition period for farmers to adjust; no incentive for farmers to shift to more competitive crops; and no other job development opportunities.<sup>59</sup>

### **B. NAFTA's Key Agricultural Provisions**

Every section of NAFTA was negotiated as part of the trilateral agreement, except for the section regarding agriculture.<sup>60</sup> In trading with both Mexico and the United States, Canada enforces key restrictions and quotas on products such as dairy and poultry.<sup>61</sup> Despite these restrictions, Canada is currently the leading importer of

52. *Id.*

53. *Id.* at 282; *North American Agreement on Labor Cooperation: A Guide*, U.S. DEP'T OF LABOR (Oct. 2005), <https://www.dol.gov/ilab/trade/agreements/naalcgd.htm>.

54. Brown, *supra* note 6.

55. See *infra* Part II.B for a discussion on how the provisions of NAFTA relating to agricultural trade led to job losses for Mexican workers.

56. NAFTA, *supra* note 4.

57. Rogacki, *supra* note 32, at 39.

58. *Id.*

59. See HING, *supra* note 3, at 14–15 (quoting Laura Carlsen's argument that the lack of plans significantly harmed Mexican farmers).

60. This Comment will focus specifically on the relationships between Mexico and the United States, and Canada and the United States, respectively. The bilateral agricultural agreement between Mexico and Canada can be found in Annex 703.2, Section B of NAFTA.

61. See *Tariff Elimination*, GOV'T OF CAN., <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/tariff-accel.aspx?lang=eng> (last visited Sept. 28, 2018) (explaining that NAFTA eliminated tariffs on almost all goods from Canada except for dairy, poultry, eggs, and sugar); see also *Revisiting NAFTA: The Stakes for Key Industries*, N.Y. TIMES (Apr. 27, 2017), [https://www.nytimes.com/2017/04/27/business/economy/nafta-impact-industries-cars-agriculture-apparel-pharmaceuticals.html?\\_r=0](https://www.nytimes.com/2017/04/27/business/economy/nafta-impact-industries-cars-agriculture-apparel-pharmaceuticals.html?_r=0) (explaining how Canada's tight control on dairy, poultry, and



U.S. agricultural products.<sup>62</sup> U.S. horticultural exports to Canada increased almost 30% within the first six years of the agreement,<sup>63</sup> and agricultural trade between the two countries has more than tripled since NAFTA took effect.<sup>64</sup>

Agricultural trade liberalization is a large contributing factor to Mexico's job loss for two primary reasons: the pervasive effect of U.S. governmental subsidies on Mexico<sup>65</sup> and the corresponding demand for low-wage workers in the United States.<sup>66</sup> Prior to the enactment of NAFTA, small rural farmers composed the majority of the over eight million agricultural jobs in Mexico.<sup>67</sup> Yet following NAFTA's enactment, these workers were forced to compete with the larger and more powerful U.S. agricultural workforce, partly due to existing governmental subsidies for U.S. farmers.<sup>68</sup> Because of the Great Depression, the U.S. government implemented agricultural subsidies<sup>69</sup> at the federal and local levels in order to stabilize farm income.<sup>70</sup> They guaranteed a price floor and paid farmers more for crops such as corn, cotton, and wheat.<sup>71</sup> Once the government implemented these subsidies, the subsequent job loss in Mexico logically led to increased migration out of Mexico and into its northern neighbor, the United States.<sup>72</sup>

egg production shuts out imports from the United States and Mexico).

62. McBride & Sergie, *supra* note 12.

63. *NAFTA Good for Farmers, Good for America*, EXEC. OFF. OF THE PRESIDENT (June 2001), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2001/june/nafta-good-farmers-good-america>.

64. McBride & Sergie, *supra* note 12.

65. It is worth mentioning that the Trump administration has identified subsidies as a key target of renegotiations of the agreement: "the Administration will work to eliminate unfair subsidies, market-distorting practices by state owned enterprises, and burdensome restrictions on intellectual property." *USTR Releases NAFTA Negotiating Objectives*, OFFICE OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, (July 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating>.

66. See HING, *supra* note 3, at 14–15 (arguing that NAFTA caused much of the agricultural job loss in Mexico resulting in many Mexicans leaving for the United States); *NAFTA at Year Twelve: Hearing Before the Subcomm. on Int'l Trade of the S. Comm. on Fin.*, 109<sup>th</sup> Cong. 19–22 (2006) [hereinafter *NAFTA at Year Twelve*] (statement of Sandra Polaski, Senior Associate and Director, Trade, Equity, and Development Project, Carnegie Endowment for International Peace).

67. HING, *supra* note 3, at 14.

68. See generally *Farm Income & Finances: 2018 Farm Sector Income Forecast*, U.S. DEP'T OF AGRIC., ECON. RES. SERV. <https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-sector-income-forecast/> (last updated Sept. 04, 2018) (outlining projected U.S. farm incomes, including income from government subsidies); see Bradley J. Condon & J. Brad McBride, *Do You Know the Way to San Jose? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEORGETOWN IMMIGR. LAW J. 251, 261–62 (2003) (explaining how the demand for illegal immigrant workers from Mexico has increased due to a variety of factors, including U.S. government subsidies to farms).

69. See Tom Philpott, *Where Farm Subsidies Came From, and Why They're Still Here*, GRIST (Jan. 31, 2007), [https://grist.org/article/farm\\_bill2/](https://grist.org/article/farm_bill2/) (noting that the Roosevelt administration, in response to the Great Depression, subsidized farmers to help stabilize prices).

70. *Farm Income & Finances: 2018 Farm Sector Income Forecast*, *supra* note 68.

71. *Id.*

72. Condon & McBride, *supra* note 68, at 261–62.

The influence of the agricultural production subsidy on immigration undoubtedly stemmed from Mexico's dependence on agriculture as a key feature of its economy and its contribution to NAFTA.<sup>73</sup> Approximately 40% of the materials going into Mexican exports are produced in the United States—meaning that forty cents of each dollar spent on Mexican goods support U.S. jobs.<sup>74</sup> Agricultural trade between the United States and Mexico accounted for a large portion of NAFTA's achievements, reaching almost \$12 billion within the first six years of the agreement.<sup>75</sup> NAFTA allowed for a much more liberal expansion of trade to Mexico, leading to a burst in Mexican exports to Canada and the United States, particularly of crops.<sup>76</sup>

NAFTA's impact on the changing agricultural industry was a central factor that led to an increase in Mexican immigration.<sup>77</sup> Mexico's economic reliance on its low-skilled laborers for agricultural work prior to NAFTA was, whether intentionally or unintentionally, overlooked in negotiations for agricultural trade liberalizations.<sup>78</sup> Experts argue that this provision subsidizing agricultural production, an industry upon which many Mexicans heavily relied, led to about two million Mexican farmers losing jobs in a sixteen-year period following the agreement.<sup>79</sup>

Mexico's inability to compete with the U.S.-subsidized agricultural workforce led to widespread job loss, and eventually incentivized agricultural workers to migrate to where jobs were available—the United States.<sup>80</sup> Mexican agricultural liberalization created an inverse correlation in job availability between the United States and Mexico.<sup>81</sup>

The U.S. agricultural industry boomed following NAFTA's enactment,<sup>82</sup> creating a large demand for cheap labor.<sup>83</sup> However, there was already a large disparity in compensation for laborers between the two countries: at the time of NAFTA's enactment in the early 1990s, Mexican workers were earning approximately 15% of the compensation of a U.S. worker.<sup>84</sup> Mexico's fears of

73. *NAFTA at Year Twelve*, *supra* note 66 (statement of Craig Lang, President of Iowa Farm Bureau Federation).

74. Letter from Enrique Peña Nieto, President of Mexico, to Donald J. Trump, Republican Presidential Nominee (Aug. 25, 2016), *available at* [https://www.gob.mx/cms/uploads/attachment/file/145457/Carta\\_DT.pdf](https://www.gob.mx/cms/uploads/attachment/file/145457/Carta_DT.pdf).

75. *NAFTA Good for Farmers, Good for America*, *supra* note 63.

76. VILLARREAL, *supra* note 19, at 13.

77. McBride & Sergie, *supra* note 12.

78. *See id.* (suggesting that new measures are required to help low-skilled laborers to decrease labor migration out of Mexico).

79. WEISBROT ET AL., *supra* note 22, at 13; *NAFTA at Year Twelve*, *supra* note 66.

80. McBride & Sergie, *supra* note 12.

81. *Id.*; Jason Ackleson, *Achieving "Security and Prosperity": Migration and North American Economic Integration*, 4 IMMIGR. POL'Y IN FOCUS 2, 3–4 (Feb. 2006); HING, *supra* note 3, at 29.

82. Kevin Skunes, *NAFTA has Helped Grow American Agriculture for Two Decades*, HILL (Jan. 23, 2018, 5:45 PM), <http://thehill.com/opinion/energy-environment/370363-nafta-has-helped-grow-american-agriculture-for-two-decades>.

83. Condon & McBride, *supra* note 68, at 262–63.

84. *See* HING, *supra* note 3, at 16 (noting that this statistic was taken in 1994).

exporting jobs to the United States came true, with the results amplified due to the millions of lost jobs in Mexico.<sup>85</sup> From the comparative advantage theory framework,<sup>86</sup> low-wage workers unintentionally had become the foreign “goods” who were traded at the lowest cost.<sup>87</sup>

Following NAFTA’s enactment, the U.S. agricultural industry encouraged more labor migration from Mexico than before.<sup>88</sup> Mexico became increasingly dependent on the United States for food because of the same cheap exports that previously ran Mexican agricultural workers out of business.<sup>89</sup> The United States benefitted disproportionately from Mexico’s cheap labor and declining agricultural industry, rendering NAFTA ineffective and even harmful for Mexico from a comparative advantage perspective.<sup>90</sup>

Although NAFTA’s stated purpose was to benefit the countries’ economies and increase jobs, the combination of Mexico’s job market decline and the United States’ labor recruitment created a troublesome pattern of Mexican migration to the United States.<sup>91</sup> Through the changing agricultural provisions, the countries’ relationship further enforced Mexico’s emergence as a “labor-intensive” country and cemented the United States as a “capital-intensive” country.<sup>92</sup>

### ***C. Mexico’s Changing Economy and Its Effect on Migration Trends***

Concerns about the increasing number of undocumented Mexican immigrants in the United States grew after NAFTA negotiations.<sup>93</sup> Although NAFTA’s only immigration-related provision pertained to nonimmigrant business visas,<sup>94</sup> the

85. McBride & Sergie, *supra* note 12 (noting that NAFTA put almost two million small Mexican farmers out of work).

86. See SURANOVIC, *supra* note 1, at 40 (explaining comparative advantage theory).

87. See McBride & Sergie, *supra* note 12 (quoting former Mexican President Salinas de Gortari, who hoped NAFTA would help Mexico “export goods, not people”).

88. *Id.*

89. JEFF FAUX, *THE GLOBAL CLASS WAR: HOW AMERICA’S BIPARTISAN ELITE LOST OUR FUTURE—AND WHAT IT WILL TAKE TO WIN IT BACK* 134 (2006).

90. See generally HING, *supra* note 3, at 29. The author explains that economic experts agree that Mexico’s potential effect on U.S. labor standards paled in comparison to that of China, given that China rejoined the global economy during the same time as NAFTA negotiations. Mexico’s annual growth rate of 3% over the past decade—one of the worst in Latin America—is attributed to, in large part, China and Asia’s growing competitive markets. *Id.*

91. Ackleson, *supra* note 81, at 3–4.

92. See HING, *supra* note 3, at 39–45 (outlining Mexico’s spectacular economic growth through petroleum, to its failure to retain wealth through this “capital intensive” industry, leading to Mexico’s reliance on the United States and NAFTA to restore its economy). A “capital-intensive” industry is dependent on financial resources to create wealth, as compared to a “labor-intensive” industry that is focused on labor processes to produce goods or services. See Skeldon, *supra* note 14, at 26.

93. Ackleson, *supra* note 81, at 3–4.

94. See NAFTA, *supra* note 4 (“[T]he United States shall annually approve as many as 5,500 initial petitions of business persons of Mexico seeking temporary entry under Section D of Annex 1603 to engage in a business activity . . .”).

agreement effectively liberalized immigration between North American countries, particularly with regard to immigration between the United States and Mexico:

At best, the effects of NAFTA in Mexico have been uneven, especially in rural areas and among low-skilled groups; when those workers need work, they tend to migrate to the United States. Moreover, the wages for low-wage manufacturing workers have suffered as the rural poverty rate has increased. The creation of jobs by NAFTA that would reduce pressure to migrate simply has not occurred.<sup>95</sup>

Due to their longstanding relationship, both the United States and Mexico played important roles in shaping each others' political development throughout the twentieth century.<sup>96</sup> Despite the highly politicized distress over migration patterns during the past few decades, trends of Mexican immigration to the United States began long before NAFTA negotiations.<sup>97</sup> Political unrest leading to the Mexican Revolution of 1910—combined with the economic slump following World War I—resulted in high unemployment rates and increased poverty in Mexico.<sup>98</sup> Simultaneously, the Industrial Revolution in the United States led to unprecedented job growth and demand for additional laborers during a period of dramatic economic expansion.<sup>99</sup> The United States' overtly racist policies preventing Asian immigration during this time<sup>100</sup> caused the U.S. government to heavily recruit Mexican laborers, leading to approximately 200,000 Mexican immigrants entering the United States from 1910 to 1920.<sup>101</sup>

The discovery of oil also factored into the U.S.-Mexico relationship during the 1910s.<sup>102</sup> The United States' interest in Mexican petroleum kept relations between the two countries positive, as both economies benefitted from the negotiations of its sale in the U.S. market.<sup>103</sup> As a result, the U.S.-Mexican social and economic relationship ebbed and flowed throughout the beginning of the twentieth century.<sup>104</sup> The combination of Mexico's nationalization of its oil holdings and assistance of

95. HING, *supra* note 3, at 13; *see also* Ackleson, *supra* note 81, at 3–4 (underscoring the disparate impact of NAFTA on low-wage workers, compared to that of skilled workers).

96. Renata Keller, *U.S.-Mexican Relations from Independence to the Present*, OXFORD RES. ENCYCLOPEDIAS (Mar. 2016), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-269> (describing how each country affected the other's political, economic, social, and cultural development over the past two centuries).

97. HING, *supra* note 3, at 30–31.

98. *Id.*

99. *Id.*

100. Dubbed the “Exclusion Era” in the early twentieth century, the United States sought to prohibit migration from Asian countries—particularly from China and Japan. In 1917, the Asiatic Barred Zone Act of 1917 prohibited immigration from most of Asia. Seven years later, the Immigration Act of 1924 imposed quotas for immigrants from the Eastern hemisphere altogether. *See generally* MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

101. HING, *supra* note 3, at 31.

102. *Id.* at 32.

103. *Id.*

104. *See generally id.* at 34–35 (detailing the fluctuating relationship between the United States and Mexico in the early twentieth century).

45,000 soldiers and workers to the United States during World War II sparked the first step towards large-scale immigration into the United States.<sup>105</sup>

### 1. Mexican Immigration in the Mid-Twentieth Century

Due to the United States' increasing dependence on Mexican labor, U.S. President Franklin D. Roosevelt created the Bracero Program in 1942<sup>106</sup> to grant seasonal Mexican workers permission to work in the United States under conditions of minimum wage, appropriate living and work conditions, and return transportation.<sup>107</sup> This program not only reinforced the need for Mexican laborers in the U.S. market, but also unintentionally caused a significant number of Mexican workers to enter the United States outside of the Bracero Program, and without the Bracero Program's promised worker protections.<sup>108</sup> While Mexico's economy was growing during this time, its population also increased significantly, doubling from 16 million to 32 million people in less than thirty years.<sup>109</sup> The population increase was reflected in the growing Mexican population in the United States, which was facilitated by the Bracero Program and increasing globalization.<sup>110</sup>

The Bracero Program ended in 1964.<sup>111</sup> The U.S. government reasoned that "the dramatic drop in demand for indentured Mexican labor corresponded to the overall decline in farm employment resulting from the extensive mechanization of U.S. agriculture during the 1960s."<sup>112</sup> However, some experts argue that the true rationale was more political than economic because an unprecedented amount of undocumented workers had rendered the program impractical and uncontrollable.<sup>113</sup> The final stages of the Bracero Program marked the beginning of an unsustainable paradigm of labor supply and demand between the two countries in both documented and undocumented immigration numbers.<sup>114</sup>

Exacerbating Mexico's growing concerns of immigration, Mexico's economy began to decline in the 1980s.<sup>115</sup> In the beginning of that decade, Mexico's status as the world's largest petroleum producer had allowed the country to negotiate

105. *Id.*

106. See Elizabeth W. Mandeel, *The Bracero Program 1942–1964*, 4 AM. INT'L J. OF CONTEMP. RES. 171 (2014), [http://www.ajjernet.com/journals/Vol\\_4\\_No\\_1\\_January\\_2014/17.pdf](http://www.ajjernet.com/journals/Vol_4_No_1_January_2014/17.pdf) (providing more general information about the history of the Bracero Program's rise and fall).

107. HING, *supra* note 3, at 35–36.

108. *Id.* at 36–37.

109. *Id.* at 37.

110. *Id.*

111. Mandeel, *supra* note 106, at 105.

112. Richard D. Vogel, *Transient Servitude: The U.S. Guest Worker Program for Exploiting Mexican and Central American Workers*, MONTHLY REV. §§ 1, 6 (Jan. 2007), [https://monthlyreviewarchives.org/index.php/mr/article/view/MR-058-08-2007-01\\_1/4585](https://monthlyreviewarchives.org/index.php/mr/article/view/MR-058-08-2007-01_1/4585).

113. See Mandeel, *supra* note 106, at 179–80 (citing the establishment of illegal migratory methods).

114. HING, *supra* note 3, at 37.

115. *Id.* at 40 (citing a severe devaluation of the peso, a drop in oil prices, and an exodus of capital into offshore accounts).

effectively with the United States.<sup>116</sup> However, Mexico's centralized focus on oil created a "capital-intensive" rather than "labor-intensive" industry, leaving almost half of the Mexican population unemployed.<sup>117</sup> As oil prices declined, undocumented immigration into the United States swelled even more.<sup>118</sup>

Between 1960 and 1980, the number of Mexican immigrants in the United States surged from 575,900 to 2,199,200.<sup>119</sup> In 1986, the United States responded to this influx with the Immigration Reform and Control Act (IRCA), granting amnesty for immigrants in the United States that arrived prior to 1982, and additionally some agricultural workers who came to the United States after 1982.<sup>120</sup> In addition, Mexico shifted toward a free-market economy, providing the first step towards restoring its relationship with the United States.<sup>121</sup> With this shift, Mexico intended to reduce its foreign debt and begin negotiating a free trade agreement.<sup>122</sup>

## 2. Mexican Immigration in the Late Twentieth Century

A main objective of the NAFTA negotiations was to incorporate Mexico into a high-wage environment similar to that of the United States and Canada.<sup>123</sup> Undocumented immigration was a growing concern in the United States at the time, and some politicians criticized NAFTA because of the increasing numbers of migrants and a perceived lack of jobs for U.S. citizens.<sup>124</sup> Despite the Deputy U.S. Trade Representative's prior refusal to consider the "social issue" of immigration in NAFTA negotiations,<sup>125</sup> the Clinton administration advertised NAFTA as an agreement that would reduce the amount of immigrants entering through the southern border.<sup>126</sup> In October 1993, U.S. Attorney General Janet Reno declared:

The bottom line, though, is this: people come to America illegally because they seek better jobs. We will not reduce the flow of illegal immigrants into this country until these illegal immigrants find decent jobs, at decent wages, in Mexico. Our best chance to reduce illegal immigration is sustained, robust Mexican economic growth. NAFTA will create jobs in

116. *Id.* at 39.

117. *Id.*; *see also* Skeldon, *supra* note 14, at 26 (discussing the connection between the change from labor-intensive to capital-intensive economy and changes in labor flows).

118. HING, *supra* note 3, at 40; *see also* Skeldon, *supra* note 14, at 26 (discussing the connection between the change from labor-intensive to capital-intensive economy and changes in labor flows).

119. *Mexican-Born Population Over Time, 1850–Present*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/programs/data-hub/charts/mexican-born-population-over-time?width=1000&height=850&iframe=true> (last visited Oct. 4, 2018).

120. HING, *supra* note 3, at 40.

121. *Id.*

122. HING, *supra* note 3, at 42.

123. McBride & Sergie, *supra* note 12.

124. *Id.*

125. Rogacki, *supra* note 32, at 39.

126. *See* DEP'T OF JUST., ARCHIVE, U.S. ATTORNEY GENERAL JANET RENO DISCUSSION: NORTH AMERICAN FREE TRADE AGREEMENT AND U.S. IMMIGRATION ISSUES 6 (Oct. 7, 1992, 1:00 PM), <https://www.justice.gov/archive/ag/speeches/1993/10-07-1993a.pdf> (arguing that NAFTA will effectively reduce illegal immigration by creating good jobs in Mexico).

Mexico, jobs for Mexican workers who otherwise cross illegally into America. These jobs will help us deal with the immigration problem.<sup>127</sup>

Mexico's president at the time, Carlos Salinas de Gortari, agreed: NAFTA would export "goods, not people."<sup>128</sup> Despite NAFTA's enactment and given the continued substantial wage gap, Mexican workers—especially workers with lower education levels, who experienced starker disparities—were incentivized to migrate north in order to find work.<sup>129</sup> Further complicating the matter, President Salinas de Gortari's dishonest practices inflated Mexico's economy, worsening the persistent economic crisis in Mexico and leading to widespread poverty soon after NAFTA began.<sup>130</sup>

In the decades following NAFTA's entry into force, the undocumented Mexican immigrant population in the United States more than doubled.<sup>131</sup> From 1995 to 2000 alone, approximately three million Mexicans immigrated to the United States.<sup>132</sup> While both Mexican and U.S. administrations hoped to curtail Mexican migration to the United States through NAFTA, in reality, "the movement of goods and capital cannot substitute for the movement of people . . . . [F]ree trade agreements lay important groundwork for, but can never replace, effective migration management."<sup>133</sup>

Though there are a myriad of reasons for changing immigration patterns, economic reasons are generally regarded as a significant contributor to large-scale migration.<sup>134</sup> From 1960 to 1980, Mexico's income per-capita almost doubled, along with many other Latin American countries.<sup>135</sup> There was a 98.7% growth in GDP per capita in the country.<sup>136</sup> Yet in the years following NAFTA, Mexico's income

127. *Id.* at 8.

128. *Mexico: NAFTA, Corn*, MIGRATION NEWS, Vol. 7, No. 2 (Feb. 2000), <https://migration.ucdavis.edu/mn/more.php?id=2025>.

129. See Robert A. Blecker, *The Mexican and U.S. Economies After Twenty Years of NAFTA*, 43 INT'L J. OF POL. ECON. 5, 8 (Apr. 8, 2014) ("For example, as of 2000, a 35-year old male Mexican worker could make 4.4 times more (adjusted for PPP) by migrating to the United States compared with staying in Mexico if he had 8 years of education, 2.9 times more if he had finished high school, and 2.4 times more if he had completed college.").

130. See HING, *supra* note 3, at 43–45 (highlighting President Salinas de Gortari's corrupt economic practices during his presidency).

131. *Ten Years of NAFTA Fails to Stem Illegal Immigration*, MIGRATION POLICY INST. (Nov. 18, 2003), <http://www.migrationpolicy.org/news/ten-years-nafta-fails-stem-illegal-immigration>; see *Illegal Immigration, Population Estimates in the United States, 1969-2016*, PROCON, <https://immigration.procon.org/view.resource.php?resourceID=000844#iv> (last updated Mar. 18, 2016) (citing findings from Pew Research Center and the U.S. Department of Homeland Security).

132. Jeffrey S. Passel, D'Vera Cohn & Ana Gonzalez-Barrera, *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RES. CTR. (Apr. 23, 2012), <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

133. *Ten Years of NAFTA Fails to Stem Illegal Immigration*, *supra* note 131.

134. See Skeldon, *supra* note 14, at 7 (noting that economic disparities continue to be a major driver of migration).

135. WEISBROT ET AL., *supra* note 22, at 5–6.

136. *Id.*

per-capita dropped sharply, with total growth at just 8.2% from 2000 to 2013.<sup>137</sup> Correspondingly, in the six years immediately following NAFTA, Mexican migration to the United States increased dramatically by 79%—from 430,000 in 1994 to 770,000 in 2000.<sup>138</sup> Appendix figure 1 shows a spike in growth of the Mexican-born population in the United States in the early 1990s. The economic aftershocks of NAFTA continue to reverberate in the political climate of both the United States and Mexico.<sup>139</sup>

### III. CURRENT EVENTS AFFECTING NAFTA AND IMMIGRATION

#### A. *The 2016 U.S. Presidential Election*

U.S. immigration policy came to the forefront of political debate at the turn of the twenty-first century.<sup>140</sup> The George W. Bush administration's creation of the Department of Homeland Security (DHS) following the September 11 attacks<sup>141</sup> cast immigration into the spotlight, and the issue has remained highly controversial and politicized ever since.<sup>142</sup> In the 2016 U.S. presidential election, 70% of registered voters considered immigration a very important issue, compared with just 41% of registered voters in the 2012 election.<sup>143</sup>

NAFTA renegotiations were also hotly contested throughout the 2016 U.S. presidential election.<sup>144</sup> Early in his campaign, then-candidate Donald Trump did not hesitate to criticize the agreement, calling it a “disaster.”<sup>145</sup> Candidate Trump's campaign platform promoted buying and selling goods produced within the United States, rather than importing goods made overseas.<sup>146</sup> Accordingly, Trump vowed

137. *Id.*

138. Passel, Cohn, & Gonzalez-Barrera, *supra* note 132; WEISBROT ET AL., *supra* note 22, at 14; see Elizabeth Grieco, Deborah W. Meyers & Kathleen Newland, *Immigration Since September 11, 2001*, MIGRATION POL'Y INST. 2 (Sept. 2003) <https://www.migrationpolicy.org/research/immigration-september-11-2001> (explaining that migration numbers decreased significantly after the Sept. 11, 2001 attacks and due to related increase in border security, leading to a dip in numbers following 2000).

139. See McBride & Sergie, *supra* note 12 (showing how NAFTA continues to affect the United States' and Mexico's economies).

140. *2016 Campaign: Strong Interest, Widespread Dissatisfaction*, *supra* note 23.

141. KATHLEEN J. TIERNEY, RECENT DEVELOPMENTS IN U.S. HOMELAND SECURITY POLICIES AND THEIR IMPLICATIONS FOR THE MANAGEMENT OF EXTREME EVENTS 1 (2006), <https://training.fema.gov/emiweb/downloads/tierney2005japanfinal2.pdf>.

142. See *2016 Campaign: Strong Interest, Widespread Dissatisfaction*, *supra* note 23 (noting that immigration is an issue that has increased in importance among both Republicans and Democrats).

143. *Id.*

144. See *id.* (finding that 57% of registered voters considered trade policy “very important”); see Xenia V. Wilkinson, *Mexico, NAFTA and Election 2016*, AM. FOREIGN SERV. ASS'N (Oct. 2016), <http://www.afsa.org/mexico-nafta-and-election-2016> (arguing that NAFTA is one of the major issues in the 2016 presidential campaign).

145. Jill Colvin, *Trump: NAFTA Trade Deal a 'Disaster,' Says He'd 'Break' It*, ASSOC. PRESS (Sept. 26, 2015), <https://apnews.com/982f8146e10942b2b7f6a07e2077576d/trump-nafta-trade-deal-disaster-says-hed-break-it>.

146. See Andrea Gonzales Ramirez, *15 Trump Products That Don't Qualify for his "Made*



to renegotiate NAFTA to further benefit the United States, or leave the agreement entirely.<sup>147</sup> He also showed interest in imposing a tax on goods from U.S. companies that outsource production to Mexico.<sup>148</sup>

On the campaign trail and now in office, President Trump's promises and policy goals have treated NAFTA as a bargaining chip for immigration reform and vice versa.<sup>149</sup> In doing so, Trump conflates the two issues even more so than in the past and furthers his isolationist and nationalist agenda.<sup>150</sup> Ironically, the Trump administration is pursuing the very same nationalistic model that Mexico abandoned in the decade prior to entering NAFTA negotiations.<sup>151</sup>

### 1. The Trump Campaign's Fusion of NAFTA and Immigration

As the campaign carried on, Mexican President Enrique Peña Nieto emphasized the importance of NAFTA to candidate Trump.<sup>152</sup> On August 25, 2016, President Peña Nieto wrote a letter to candidate Trump, reminding him of the interdependence of the two countries.<sup>153</sup> President Peña Nieto noted that the countries trade over half a trillion dollars each year and over six million U.S jobs "depend directly on our bilateral trade."<sup>154</sup> Accordingly, he invited Trump to meet with him to discuss the nature of the important relationship between the two countries, in order to "be even more prosperous and secure than ever before, if we move forward together . . ."<sup>155</sup>

*in America*” *Week*, REFINERY29 (July 17, 2017, 3:10 PM), <https://www.refinery29.com/2017/07/163731/trump-made-in-america-campaign-products> (noting that President Trump is launching an event to promote products made in the United States, keeping in line with his 2016 campaign).

147. Colvin, *supra* note 145.

148. Gillespie, *supra* note 8.

149. *See e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 26, 2017, 5:51 AM), [https://twitter.com/realDonaldTrump/status/824615820391305216?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html](https://twitter.com/realDonaldTrump/status/824615820391305216?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html) (“The U.S. has a 60 billion dollar trade deficit with Mexico. It has been a one-sided deal from the beginning of NAFTA with massive numbers. . .”); *see also* Trump, *supra* note 28 (“[O]f jobs and companies lost. If Mexico is unwilling to pay for the badly needed wall, then it would be better to cancel the upcoming meeting.”); *see also* Doina Chiacu & Anthony Esposito, *Trump Says May Tie Mexican Immigration Control to NAFTA*, REUTERS (Apr. 23, 2018, 10:14 AM) <https://www.reuters.com/article/us-trade-nafta-trump/trump-says-may-tie-mexican-immigration-control-to-nafta-idUSKBN1HU1ZE> (“Mexico . . . must stop people from going through Mexico and into the U.S. We may make this a condition of the new NAFTA agreement.”).

150. Sarah Gray, *Here's What the Trump Administration's NAFTA Negotiations Mean for You*, FORTUNE (Apr. 25, 2018), <http://fortune.com/2018/04/25/trump-nafta-canada-mexico/> (explaining that President Trump has threatened to tie immigration to NAFTA negotiations, but Congress may not approve of an immigration proposal).

151. *See* WEISBROT ET AL., *supra* note 22, at 18 (noting that Mexico had a developmentalist and protectionist economic model prior to 1980).

152. *See generally* Letter from Enrique Peña Nieto, President of Mexico, to Donald J. Trump, Republican Presidential Nominee, *supra* note 74.

153. *Id.*

154. *Id.*

155. *Id.*

The international response to President Peña Nieto's invitation was swift and harsh.<sup>156</sup> Candidate Trump not only condemned NAFTA during his campaign, he also made several offensive comments about Mexican immigrants when he first announced his candidacy: “[t]hey’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”<sup>157</sup> Candidate Trump also made an early campaign promise to build a wall between Mexico and the United States, which Mexico would fund, in order to prevent undocumented immigrants from entering the United States.<sup>158</sup> President Peña Nieto sent out a press release—titled “Why did I meet with Donald Trump?”—which stressed that he made clear to Trump that the people of Mexico were insulted by his remarks, and that any future collaboration between the countries would need a basis in respect.<sup>159</sup> President Peña Nieto also described the mutual dependency between the countries and collaboration on trade and border enforcement in both his statement and on Twitter, denying that Mexico would pay for a wall along the border.<sup>160</sup> One Mexican journalist remarked that the meeting “will be remembered as one of the lowest points in Peña Nieto’s presidency.”<sup>161</sup>

Critics disagreed with President Peña Nieto’s account of the meeting, stating that Trump bulldozed over him by taking charge of the meeting and refusing to compromise.<sup>162</sup> Just hours after former President Peña Nieto’s statement, candidate Trump fired back his response on Twitter: “Mexico will pay for the wall!”<sup>163</sup> Candidate Trump’s hostile interactions effectively disregarded the historic interdependence of the countries by presenting the United States as the more powerful country.<sup>164</sup> Yet, for better or for worse, Mexico and the United States are interconnected by their geographical proximity, NAFTA, and by extension, their

156. See Ioan Grillo, *Why Did Peña Nieto Invite Trump to Mexico?*, N.Y.TIMES (Sept. 1, 2016) <https://www.nytimes.com/2016/09/02/opinion/why-did-pena-nieto-invite-trump-to-mexico.html> (noting that after President Peña Nieto sent out an invitation to Trump, the public viewed President Peña Nieto as weak and submissive).

157. Lee, *supra* note 29.

158. McLaughlin, *supra* note 29.

159. Press Release, Enrique Peña Nieto, President of Mexico, *Why Did I Meet with Donald Trump?* (Sept. 1, 2016), <https://www.gob.mx/presidencia/articulos/why-did-i-meet-with-donald-trump>.

160. *Id.*; see also Enrique Peña Nieto (@EPN), TWITTER (Aug. 31, 2016, 6:51 PM), <https://twitter.com/EPN/status/771118159654891520> (“Al inicio de la conversación con Donald Trump dejé claro que México no pagará para el muro.” [“At the beginning of my conversation with Donald Trump, I made it clear that Mexico will not be paying for the wall.”]).

161. Jorge Ramos, *Jorge Ramos: Mexico’s Shrinking President*, SPLINTER (Sept. 6, 2016, 12:56 PM), <https://splinternews.com/jorge-ramos-mexico-s-shrinking-president-1793861671>.

162. See *id.* (remarking that Trump’s stance on the border wall did not change following the meeting).

163. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 1, 2016, 3:31 AM), <https://twitter.com/realDonaldTrump/status/771294347501461504>.

164. See Kate H. Tennis, *Trump’s Border Wall Ignores a Long History of U.S. Cooperation with Mexico. That’s a Problem.*, WASH. POST (Feb. 14, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/14/trumps-wall-with-mexico-ignores-a-long-history-of-bilateral-cooperation-thats-a-problem/?utm\\_term=.a029731ba606](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/14/trumps-wall-with-mexico-ignores-a-long-history-of-bilateral-cooperation-thats-a-problem/?utm_term=.a029731ba606) (discussing the long history of cooperation between Mexico and the United States).

economies.<sup>165</sup>

## 2. Conflicting Post-Election Priorities

After the 2016 U.S. election, former Mexican President Peña Nieto was optimistic about developing a good relationship with the newly-elected President Trump.<sup>166</sup> Two weeks after President Trump's election, President Peña Nieto issued a press release about taking advantage of this new era as a means to modernize NAFTA.<sup>167</sup> When asked about the relationship between the two presidents, President Peña Nieto commented: “[w]e understand that Mexico, like the rest of the world, is about to embark on a new stage in relations with the United States, and in commercial terms, we want to give this strategic relationship the true value it has today.”<sup>168</sup>

Following President Trump's inauguration, President Peña Nieto issued another press release to further enforce his stance on NAFTA, immigration, and border enforcement with the United States.<sup>169</sup> The list of President Peña Nieto's goals included preserving NAFTA and increasing exports to both the United States and Canada.<sup>170</sup> In addition to preserving NAFTA, President Peña Nieto emphasized that it should be expanded to include additional sections in areas such as telecommunications, energy, and e-trade.<sup>171</sup> In order to level the global playing field, President Peña Nieto also called for better wages for Mexican workers.<sup>172</sup>

Finally, President Peña Nieto commented on the importance of treating Mexican migrants with respect and humanity:

Although Mexico recognizes the rights of any sovereign nation to guarantee its security, Mexico does not believe in walls. Our country believes in bridges, in highway and railway crossings and in the use of technology as the best allies, in order to become good neighbors. Our border should be the best space for co-existence; a space of security,

165. See Letter from Enrique Peña Nieto, President of Mexico, to Donald J. Trump, Republican Presidential Nominee, *supra* note 74 (“We share the busiest border in the world . . . [m]ore than 6 million U.S. jobs depend directly on our bilateral trade.”).

166. See Press Release, Enrique Peña Nieto, President of Mexico, NAFTA Can be Modernized to Make America a More Productive and Competitive Region (Nov. 19, 2016), <https://www.gob.mx/presidencia/prensa/nafta-can-be-modernized-to-make-america-a-more-productive-and-competitive-region-enrique-pena-nieto> (“We are at the stage of encouraging dialogue as a path to building a new agenda in the bilateral relationship.”).

167. *Id.*

168. *Id.*

169. See generally Press Release, Enrique Peña Nieto, President of Mexico, The Mexican Government's 10 Goals in the Negotiation with the United States (Jan. 23, 2017), <https://www.gob.mx/presidencia/en/articulos/the-mexican-government-s-10-goals-in-the-negotiation-with-the-united-states?idiom=en>.

170. See *id.* (stating that the sixth goal is to preserve free trade between the three North American countries).

171. *Id.*

172. *Id.*

prosperity, and shared development.<sup>173</sup>

Once again, President Peña Nieto attempted to remind President Trump of the customary collaboration of the two countries, particularly with regard to the interconnected issues of immigration and trade liberalization.<sup>174</sup> However, just two days later, President Trump issued two new Executive Orders that tested President Peña Nieto's resolve on border policies yet again.<sup>175</sup>

### **B. The Trump Administration's Troubling Agenda**

President Trump issued two Executive Orders that addressed immigration enforcement within his first five days in office: *Enhancing Public Safety in the Interior of the United States* (EO 13768)<sup>176</sup> and *Border Security and Immigration Enforcement Improvements* (EO 13767).<sup>177</sup> The following week, the Executive Office for Immigration Review within the U.S. Department of Justice released a memorandum identifying the new administration's case processing priorities,<sup>178</sup> which effectively rescinded President Barack Obama's February 3, 2016 and March 24, 2015 memorandums regarding deportation prioritizations.<sup>179</sup>

EO 13768 expresses a policy goal to "ensure that aliens ordered removed from the United States are promptly removed."<sup>180</sup> The order identifies specific groups of "aliens"<sup>181</sup> that are priority for removal, including those who "[h]ave abused any

173. *Id.*

174. *See generally id.* (recognizing that free trade between Canada, the United States, and Mexico should be preserved, and the issue of undocumented migrants still exists).

175. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (stating that "sanctuary jurisdictions" that fail to comply with immigration enforcement measures will not be eligible for federal funds); *see also* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (stating that a physical wall will be built in the southern border of the United States to prevent illegal immigration and transnational crimes).

176. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Philip Martin, *President Trump and U.S. Migration After 100 Days*, GIANNINI FOUND. OF AGRIC. ECON., U. OF CAL.: ARE UPDATE, May–June 2017, at 5.

177. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

178. Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges, All Court Administrators, and All Immigration Court Staff (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>.

179. *Id.* The increase in detention and adjudication of detained respondents demonstrates a large departure from the Obama administration's efforts to prioritize those who had committed serious crimes instead of targeting populations thought to be vulnerable, including unaccompanied minors and non-detained adults. In an effort to further prioritize cases and minimize backlog, in 2011 DHS began to request administrative closure, a process that shelves certain cases in which DHS found respondents were not public safety threats and had ties to the United States. Mica Rosenberg & Reade Levinson, *Exclusive: Trump Targets Illegal Immigrants Who Were Given Reprieves from Deportation by Obama*, REUTERS (June 9, 2017, 12:45 PM), <http://www.reuters.com/article/us-usa-immigration-deportations-exclusiv-idUSKBN190214>.

180. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

181. Although Executive Order 13768 does not define who is considered an alien, the Immigration and Nationality Act defines an alien as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2018).

program related to receipt of public benefits” and “[i]n the judgment of an immigration officer, otherwise pose a risk to public safety or national security.”<sup>182</sup>

EO 13768 further authorizes the Secretary of Homeland Security to hire 10,000 additional immigration officers for detention purposes.<sup>183</sup> Perhaps the most infamous portion of the order, Section 9(b), outlines a provision that allows the DHS Secretary to publish a weekly “list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”<sup>184</sup> Given both the apparent punishment of sanctuary cities and the lack of correlation between undocumented immigrants and high crime rates in the United States, Section 9(b) received substantial criticism.<sup>185</sup>

EO 13767 contains language that highlights another goal of the Trump administration: detain undocumented individuals and “expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States.”<sup>186</sup> The order further calls for an expansion of detention generally, authorizing an increase in the amount of detention facilities along the nation’s Mexican border and assigning additional resources for immigration judges to adjudicate in those facilities.<sup>187</sup> Most notably, EO 13767 authorizes the “immediate construction of a physical wall on the southern border . . . so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”<sup>188</sup>

Both Executive Orders showcase President Trump putting “America First”—a campaign promise fulfilled.<sup>189</sup> Decreasing immigration numbers and increasing border security puts a substantial strain on NAFTA renegotiations and ignores the nuanced history of the aforementioned twentieth century policies, like the Bracero Program, that brought so many migrant families to the United States.<sup>190</sup> These harsh

182. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

183. *Id.*

184. *Id.*

185. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); see S. M., *Donald Trump Vows to Fight a Court Ruling on Sanctuary Cities*, ECONOMIST (Apr. 27, 2017), <https://www.economist.com/democracy-in-america/2017/04/27/donald-trump-vows-to-fight-a-court-ruling-on-sanctuary-cities> (describing a federal lawsuit brought by sanctuary cities in California against President Trump because of his threatening language in Executive Order 13768 to withhold their federal funds); see Richard Pérez-Peña, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html> (“Analyses of census data from 1980 through 2010 show that among men ages 18 to 49, immigrants were one-half to one-fifth as likely to be incarcerated as those born in the United States. Across all ages and sexes, about 7 percent of the nation’s population are noncitizens, while figures from the Justice Department show that about 5 percent of inmates in state and federal prisons are noncitizens.”).

186. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

187. *Id.*

188. *Id.*

189. *President Donald J. Trump’s Six Months of America First*, WHITE HOUSE (July 20, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-six-months-america-first/>.

190. See Javier E. David, *Trump Links US Border Wall to NAFTA Renegotiation, Warns*

policies create “a familiar dichotomy of stiff enforcement [of border control], on the one hand, and enticing and exploiting Mexican laborers, on the other. This conflicting paradigm persists today as recruitment of low-wage immigrant workers continues while interior U.S. Immigration and Customs Enforcement (ICE) [operation] remains a high priority.”<sup>191</sup>

### 1. U.S. Immigration Enforcement Measures Could Undermine NAFTA Negotiations

Both Executive Orders exhibit the Trump administration’s primary focus on detained individuals, pursuant to Section 2(c) of EO 13767.<sup>192</sup> In the first three months of the Trump administration, immigration-related arrests increased 38% from the previous year.<sup>193</sup> The increase in detention and adjudication of detained respondents demonstrated a large departure from the Obama administration’s efforts to prioritize populations thought to be vulnerable and to target those who had committed serious crimes.<sup>194</sup>

President Peña Nieto responded to the Executive Orders the day of their signing, condemning the Trump administration’s treatment of immigrants and restating that Mexico did not believe in and would not pay for a border wall.<sup>195</sup> President Peña Nieto added that he would use Mexican consulates in the United States to defend immigrants’ rights.<sup>196</sup> Significantly, he also mentioned the relevance of NAFTA renegotiations to security and migration, and offered Mexico’s friendship to the United States.<sup>197</sup> In doing so, President Peña Nieto inadvertently legitimized President Trump’s characteristic treatment of NAFTA and immigration as a combined issue to be negotiated in tandem.<sup>198</sup>

Though both presidents agreed to meet the following week,<sup>199</sup> President Trump

*Mexico ‘Must Stop Drug, People Flows’,* CNBC (Apr. 1, 2018, 7:28 AM), <https://www.cnbc.com/2018/04/01/trump-links-us-border-wall-to-nafta-renegotiation-warns-mexico-must-stop-drug-people-flows.html> (stating that Trump linked his proposal to build a wall to NAFTA negotiations and talks to renegotiate the pact have become contentious).

191. HING, *supra* note 3, at 37.

192. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges, All Court Administrators, and All Immigration Court Staff, *supra* note 178.

193. Stephen Dinan, *Free of Obama Restraints, Immigration Agents Make 38% More Arrests in Trump’s First 100 Days*, WASH. TIMES (May 17, 2017), <http://www.washingtontimes.com/news/2017/may/17/immigration-arrests-38-percent-under-trump/>.

194. Rosenberg & Levinson, *supra* note 179.

195. Press Release, Enrique Peña Nieto, President of Mexico, A Message to All Mexicans (Jan. 25, 2017), <https://www.gob.mx/presidencia/en/articulos/a-message-to-all-mexicans>.

196. *Id.*

197. *Id.*

198. *See id.* (“These executive orders also come at a time when our country is initiating talks to negotiate the new rules of cooperation, trade, investment, security and migration in the North American region.”).

199. Daniella Diaz, *Mexican President Cancels Meeting with Trump*, CNN (Jan. 27, 2017, 9:40 AM), <http://www.cnn.com/2017/01/25/politics/mexico-president-donald-trump-enrique->

remained steadfast in enforcing his Executive Orders:

The U.S. has a 60 billion dollar trade deficit with Mexico. It has been a one-sided deal from the beginning of NAFTA with massive numbers . . . of jobs and companies lost. If Mexico is unwilling to pay for the badly needed wall, then it would be better to cancel the upcoming meeting.<sup>200</sup> President Peña Nieto canceled the meeting that day.<sup>201</sup>

## 2. Nationalist Policymaking Amidst International Negotiations

Amid cancelled meetings and threats to NAFTA negotiations, nationalist politics—specifically in regards to U.S.-Mexican immigration—have been inextricably linked in negotiations.<sup>203</sup> The presidents of both countries have used one topic as leverage for the other in their statements regarding the relationship between the countries.<sup>204</sup> While NAFTA did not explicitly deal with migration aside from allotting temporary business visas,<sup>205</sup> it is clear that the fate of NAFTA will greatly impact both documented and undocumented immigration from Mexico.<sup>206</sup>

President Trump’s hardline stance on both trade and immigration exemplify his campaign promises: in order to “Make America Great Again,” the United States must protect itself from being taken advantage of by foreign countries.<sup>207</sup> During a speech announcing his candidacy for President, then-candidate Trump linked

pena-nieto-border-wall/index.html.

200. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 26, 2017, 5:51 AM), [https://twitter.com/realDonaldTrump/status/824615820391305216?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html](https://twitter.com/realDonaldTrump/status/824615820391305216?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F01%2F25%2Fpolitics%2Fmexico-president-donald-trump-enrique-pena-nieto-border-wall%2Findex.html).

201. Trump, *supra* note 28.

202. Diaz, *supra* note 199.

203. See *supra* Part III.A.1 for a discussion of the links among immigration, nationalist politics, and NAFTA negotiations.

204. See Press Release, President Peña Nieto, A Message to All Mexicans, *supra* note 195 (affirming Mexico’s friendship with the United States and Mexico’s wish to reach agreements on NAFTA while also condemning Trump’s idea of a border wall); see Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 7:25 AM), <https://twitter.com/realDonaldTrump/status/980451155548491777> (accusing Mexico of doing nothing to stop the flow of illegal immigrants into the United States and threatening to pull out of NAFTA unless Mexico takes action).

205. See NAFTA, *supra* note 4 at ch. 16, pt. 5, app. 1603.D.4 (“[T]he United States shall annually approve as many as 5,500 initial petitions of business persons of Mexico seeking temporary entry under Section D of Annex 1603 to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1.”).

206. Although this Comment does not parse out NAFTA’s respective impacts on undocumented and documented immigration, it is worth mentioning that President Trump’s dialogue generally refers to undocumented Mexican immigrants, whereas President Peña Nieto does not specifically refer to either group. See, e.g., Donald J. Trump (@realDonaldTrump), *supra* note 198.

207. See *Here’s Donald Trump’s Presidential Announcement Speech*, *supra* note 26 (“When do we beat Mexico at the border? They’re laughing at us, at our stupidity. And now they are beating us economically. They are not our friend, believe me. But they’re killing us economically. The U.S. has become a dumping ground for everybody else’s problems.”).

Mexico's economic upturn to migration patterns, saying "[t]hey're sending us not the right people."<sup>208</sup> He also has repeatedly stated, throughout both his campaign and presidency, that Mexico has taken all the U.S. jobs, repeatedly referencing Ford's decision to build an automobile manufacturing plant in Mexico.<sup>209</sup> Furthermore, Trump believes Mexico is building its economy by taking advantage of the United States by "dumping" the worst of its population over the border into U.S. territory and luring American companies away to create jobs for Mexicans.<sup>210</sup>

Presidents Trump and Peña Nieto's various communications have set a precedent to include immigration in NAFTA renegotiations.<sup>211</sup> Job creation and exportation is the major nexus linking NAFTA to immigration.<sup>212</sup> Technical studies of global migration patterns have found that when there are well-paying, stable jobs in one country, there is less of an incentive for citizens to leave for another country.<sup>213</sup> Thus, the relationship between the two is indisputable: unless there are sufficient jobs for all U.S. and Mexican citizens in their respective countries, there will always be a desire for companies to source the cheapest labor and for people to take jobs where there is opportunity for financial stability.

However, there is a danger in reducing immigration to a component of a trade agreement like NAFTA: "[w]hat U.S. observers see as a bargaining tactic for Trump, Mexicans see as a litmus test for our leaders. Any concession to him will be seen as cowering and politically unacceptable for any party, President Enrique Peña Nieto's included."<sup>214</sup> President Trump's Executive Orders limiting immigration from Mexico, in particular EO 13767, reveal his sincerely held beliefs when it comes to relations with Mexico.<sup>215</sup> Rather than seeking a friendship or at least the status quo relationship that President Peña Nieto attempted to create, President Trump has treated Mexico as an inferior, compulsory, and begrudging ally in his America-

208. *Id.*

209. *Id.*

210. *See id.* (containing Trump's position that the United States must build a wall to protect itself from Mexico treating the United States as a "dumping ground").

211. Press Release, President Peña Nieto, A Message to All Mexicans, *supra* note 195; Trump, *supra* note 200.

212. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1993-1994) (explaining the link amongst trade, economic growth, and immigration in NAFTA).

213. *See* Debora MacKenzie, *The Truth About Migration: How it Will Reshape our World*, NEWSIDENTIST (Apr. 6, 2016), <https://www.newscientist.com/article/mg23030680-700-the-truth-about-migration-how-it-will-reshape-our-world/> ("More people expand the economy . . . because people are moving from where they cannot work productively to where they can.") (internal quotations omitted).

214. Jorge Guajardo, *You Won't Like Mexico When It's Angry*, POLITICO (Sept. 11, 2017), <https://www.politico.com/magazine/story/2017/09/11/donald-trump-us-mexico-relations-215594>.

215. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (stating that illegal immigration at the southern border with Mexico will increase the presence of drugs and violent crime in the United States and harm Americans through acts of terror). *But cf.* Pérez-Peña, *supra* note 185 (summarizing a study finding that immigrant men were significantly less likely to be incarcerated than men born in the United States).



centric and nationalist agenda.<sup>216</sup>

Mexico's 2018 presidential candidates all agree on one aspect of Mexican politics: Mexico's relationship with the United States is toxic.<sup>217</sup> All three major candidates are aware that Mexico is nearing a breaking point of negotiations with the Trump administration, and demand dignity and respect before any further discussions take place.<sup>218</sup> Mexico must stand up to President Trump's mischaracterization of Mexico treating the United States as a "dumping ground"<sup>219</sup> to break the cycle of caving to the United States' practice of using immigration and border walls as bargaining chips for NAFTA negotiations.<sup>220</sup>

#### IV. RECOMMENDATIONS FOR FUTURE NEGOTIATIONS

Present discussions regarding potential NAFTA renegotiations afford the United States an opportunity to finally acknowledge its complicated history with Mexican labor migration.<sup>221</sup> In *Ethical Borders: NAFTA, Globalization, and Mexican Migration*, Bill Ong Hing lists several suggestions to reframe the treaty.<sup>222</sup> His approach consists of redesigning NAFTA into a union-based model, creating a labor migration pathway similar to that of the European Union (E.U.), and reconsidering the purpose of borders altogether.<sup>223</sup> This Section presents those recommendations in concert with this author's suggested approach to engaging in future NAFTA negotiations.

Hing first suggests treating NAFTA as a basis for creating a North American Union.<sup>224</sup> Doing so, he asserts, would "promote the general welfare of each nation, as well as the welfare of the corporations that employ them" for a true partnership

216. See Donald J. Trump (@realDonaldTrump), TWITTER (May 4, 2018, 3:22 AM), <https://twitter.com/realDonaldTrump/status/992348740529815552> (stating Mexico is doing little to help stem immigration at the U.S. southern border); see Donald J. Trump (@realDonaldTrump), TWITTER (June 22, 2018, 6:30 AM), <https://twitter.com/realDonaldTrump/status/1010153153084428288> (saying Mexico is economically dependent on the United States because 80% of its exports go to the United States).

217. Guajardo, *supra* note 214.

218. See *id.* (describing the varying assessments of NAFTA and Trump by each Mexican political party candidate).

219. *Here's Donald Trump's Presidential Announcement Speech*, *supra* note 26.

220. Andrés Manuel López Obrador won the 2018 election and has been pushing for Canada's inclusion in NAFTA negotiations and says he wants "firm but friendly" relations with Washington. Stefanie Eschenbacher & David Alire Garcia, *Trump, Lopez Obrador Discuss Immigration, Trade During First Call*, REUTERS (July 2, 2018, 4:01 AM), <https://www.reuters.com/article/us-mexico-election-result/trump-lopez-obrador-discuss-immigration-trade-during-first-call-idUSKBN1JS0R3>.

221. See Nelson Balido, *NAFTA Negotiations are on the Ropes*, HILL (Jan. 11, 2018, 4:00 PM), <http://thehill.com/opinion/international/368517-nafta-negotiations-are-on-the-ropes> (discussing the current NAFTA renegotiations).

222. HING, *supra* note 3, at 133, 141, 143.

223. *Id.*

224. *Id.* at 133.

between the countries.<sup>225</sup> However, this consideration relies upon the assumption that each country agrees that the current partnership is unequal.<sup>226</sup> There is a substantial difference between President Peña Nieto and President Trump's respective understandings of who is benefitting<sup>227</sup> and who is suffering<sup>228</sup> as a result of NAFTA. Moreover, Hing notes that a contributor to the current downfall of NAFTA is the failure to address migration at all.<sup>229</sup> In order for a partnership to exist, both countries must agree on the current state of affairs before moving forward with negotiations.<sup>230</sup> Although President Trump's discourse on immigration is overwhelmingly negative, the fact that he has acknowledged a link between migration and the agreement is an important first step. Accordingly, to avoid repeating previous mistakes, future discussions must incorporate the issue of migration.<sup>231</sup>

Hing next suggests the United States adopt a liberalized labor migration policy similar to that of the E.U.<sup>232</sup> The E.U. model of labor migration allows a relatively free flow of workers to and from member nations, depending on where work is available.<sup>233</sup> As outlined in the European Economic Community Treaty, member nations agreed to the free movement of persons, services, and capital.<sup>234</sup> Hing notes that as a result of the E.U.'s labor migration stance, wage gaps narrowed, mass migration fears dispelled, and new work opportunities in each country led to workers remaining in their home countries.<sup>235</sup> Unlike the Bracero Program's shortcomings,<sup>236</sup> allowing a flow of workers to follow job demand disincentivizes immigrants from coming to the United States without documentation and worker protections.<sup>237</sup>

225. *Id.*

226. Though this Comment does not explicitly address Canada's relationship with Mexico and the United States in regard to NAFTA, see HING, *supra* note 3, at 134–41, for a discussion of Canadian investment in Mexico as a recommendation.

227. See, e.g., Letter from Enrique Peña Nieto, President of Mexico, to Donald J. Trump, Republican Presidential Nominee, *supra* note 74 (detailing how the United States benefits economically from its relationship with Mexico).

228. See, e.g., Colvin, *supra* note 145 (stating that Trump called NAFTA a “disaster” and discussing repercussions for U.S. trade if the United States pulled out of NAFTA).

229. HING, *supra* note 3, at 134.

230. *Id.*

231. *Id.* at 133.

232. *Id.*

233. *Id.* at 142; see generally Christopher J. Cassise, *The European Union v. the United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions*, 46 SYRACUSE L. REV. 1343, 1349–64 (1996).

234. Treaty Establishing the European Economic Community arts. 48–73, Mar. 25, 1957, 294 U.N.T.S. 3.

235. See HING, *supra* note 3, at 143 (utilizing Ireland, a country that went from being primarily a source of emigrants to one attracting immigrants, as an example).

236. For more information, see Mandeel, *supra* note 106, at 175–81.

237. See Carol Roth, *Forget Amnesty; Job Reform Can Solve Our Immigration Problem*, CNBC (June 30, 2014, 3:40 PM), <https://www.cnbc.com/2014/06/13/forget-amnesty-job-reform-can-solve-our-immigration-problemcommentary.html> (proposing immigration reform that would enable workers to follow job demand and arguing that such a program could help migrants travel legally while also boosting both domestic and foreign labor forces).

In order for the United States to adopt this policy with the other members of NAFTA, the Trump administration must dramatically alter how it characterizes Mexican immigrants.<sup>238</sup> President Trump's interactions with President Peña Nieto have fostered a hostile environment that is less than conducive to including migration liberalization in NAFTA renegotiations.<sup>239</sup> Law Professor Kevin R. Johnson found that U.S. immigration laws assume the exclusion of immigrants, and that the "admission of noncitizens is the exception to the rule."<sup>240</sup> Trump's discourse has, thus far, reflected that sentiment.<sup>241</sup>

Capriciously restricting immigration directly undermines NAFTA's aim of creating a truly free market.<sup>242</sup> Labor migration liberalization relies upon the shared belief that workers have the right to accept employment in any member nation and their families have the right to follow and establish new residence there.<sup>243</sup> While labor migration liberalization would likely benefit the U.S. economy and promote the welfare of laborers,<sup>244</sup> current U.S. immigration policies directly oppose this belief.<sup>245</sup> In order for the North American countries to potentially consider implementing labor migration liberalization during future NAFTA renegotiations, there must be a shift in the Trump administration's rhetoric and actions that target immigrants.<sup>246</sup>

Hing also explores the purpose of country borders in the first place.<sup>247</sup> Echoing philosopher Antoine Pécoud, Hing explains that the fear of open borders is unknown and speculative.<sup>248</sup> Although it is unknown what would happen if the United States completely opened its borders, one can assume that most people prefer to remain in their home country, absent a compelling reason.<sup>249</sup> The Trump administration, however, is directly opposing this sentiment through its various policies, including

238. See, e.g., Lee, *supra* note 29 (addressing statements made by Trump that many undocumented Mexican immigrants are rapists and criminals).

239. Ramos, *supra* note 161 (referencing an August 31, 2016 meeting where then-candidate Trump did not apologize to President Peña Nieto for the anti-Mexico and anti-immigrant rhetoric he was using during his campaign).

240. Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 263–64 (2003).

241. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); (stating that sanctuary cities who refuse to turn over undocumented immigrants within their borders to ICE will not be eligible to receive federal funds); see Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (directing a wall be built along the U.S.-Mexico border).

242. *North American Free Trade Agreement (NAFTA)*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/nafta> (last updated Jan. 17, 2018).

243. HING, *supra* note 3, at 142.

244. Johnson, *supra* note 240, at 233–35.

245. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

246. See McLaughlin, *supra* note 29 (reporting on Trump's call for a border wall that would presumably keep out undocumented Mexican immigrants and workers).

247. See HING, *supra* note 3, at 144 (referencing philosopher Antoine Pécoud's preference for borderless migration).

248. *Id.*

249. *Id.*

an attempt to build a wall on the U.S. border with Mexico.<sup>250</sup> Hing, perhaps prophesizing Trump's future policy goal, counters this notion, arguing that "more walls and fences are essentially an admission that the system is not working."<sup>251</sup>

While open borders may make sense from a practical and ethical standpoint, it is highly unlikely that the Trump administration would be interested in pursuing this as a policy goal. However, open borders could serve as a reasonable consideration for future administrations and revolutionize the way nations interact with the United States. For now, the current administration is more focused on building borders than opening them.<sup>252</sup> If Trump realizes his goal of constructing a border wall, it will likely not only inflame relations between Mexico and the United States, it will also contribute to underground economies, and thus, a growing incentive for undocumented migration. Accordingly, rather than build walls, the Trump administration should consider the impact of future NAFTA negotiations on Mexican migration as a means of avoiding the mistakes of the past.

## V. CONCLUSION

Among other objectives outlined in the preamble, NAFTA aimed to "[strengthen] the special bonds of friendship and cooperation among their nations; . . . [create] new employment opportunities and improve working conditions and living standards in their respective territories; . . . [and protect], enhance and enforce basic workers' rights[.]"<sup>253</sup> In order to uphold these ideals while moving forward with NAFTA renegotiations, it is essential to first explicitly recognize the relationship between the free trade agreement and immigration trends.<sup>254</sup> This causal relationship has created interdependency between the countries. Thus, changing the way the two economies work together will surely impact immigration trends, as it has shown to have done in the past.<sup>255</sup>

Despite a long and tumultuous history of labor relations and migration trends, Mexico's relationship with the United States is at a particularly fragile point in our history. After decades of a give-and-take relationship of Mexican laborers and agricultural exports, President Trump's attitude towards Mexican immigration represents a dangerous paradigm shift<sup>256</sup> and ignores the root causes of mass migration trends. If the U.S. government does not reconsider its policies designed to keep Mexican migrants from entering the United States,<sup>257</sup> the relationship between

250. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

251. HING, *supra* note 3, at 144.

252. See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (stating that Trump is seeking to build a wall along the U.S.-Mexico border).

253. NAFTA, *supra* note 4, at pmbl.

254. Rogacki, *supra* note 32, at 39–41.

255. See *supra* Part II.C for a description of the history of Mexican and U.S. economies and migration trends.

256. Mandeel, *supra* note 106, at 171.

257. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (ordering the withholding of federal funds from sanctuary cities who protect immigrants from removal by ICE); see Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (stating the many ways that Trump ordered changes in U.S. immigration policies after assuming office because illegal immigrants pose a

the two countries will only suffer more. This spirit hinders any hope of negotiating a more just and mutually beneficial trade agreement and attempts to rewrite the complicated history between the North American countries. Finally, when considering trade liberalization, one must consider the lives impacted by such an agreement, and why the initial reaction to the opening of borders is not met with a corresponding willingness.

## VI. AFTERWORD

On October 1, 2018, the three states parties to NAFTA finalized renegotiations.<sup>258</sup> Dubbed the United States-Mexico-Canada Agreement (USMCA),<sup>259</sup> this new trade deal will take effect in 2020, following its signing and the approval of each country's legislature.<sup>260</sup> At present, USMCA's future effect on Mexican migration patterns is difficult to predict. Though previously a critic, Mexico's president-elect, Andrés Manuel López Obrador, has praised the negotiations: his future foreign minister said it "promotes certainty in the financial markets and investment and job creation in our country."<sup>261</sup>

There are several changes that will undoubtedly alter labor conditions in Mexico, and correspondingly, affect migration trends. Two key changes are pay increases for Mexican autoworkers and increased labor union rights.<sup>262</sup> In order to stimulate North American auto production, 40% of a car must be made by workers earning \$16 per hour to avoid tariffs.<sup>263</sup> This amount is five times what Mexican manufacturing workers currently earn.<sup>264</sup> USMCA also includes rules that allow workers to organize and form independent labor unions, which are currently government-controlled in Mexico.<sup>265</sup>

One U.S. expert opined that the USMCA "produced an unwieldy set of compromises among the three countries."<sup>266</sup> While these renegotiations appear positive, it is questionable when Mexican laborers will see the effects of these

"significant threat" to national security).

258. Heather Long, *USMCA: Who Are the Winners and Losers of the 'New NAFTA'?*, WASH. POST (Oct. 1, 2018), [https://www.washingtonpost.com/business/2018/10/01/winners-losers-usmca-trade-deal/?noredirect=on&utm\\_term=.54569764f2fd](https://www.washingtonpost.com/business/2018/10/01/winners-losers-usmca-trade-deal/?noredirect=on&utm_term=.54569764f2fd).

259. Reports have stated that President Trump sought to adopt this new title in order to fulfill his campaign promise of getting rid of NAFTA. One expert suggests that the title itself "accomplishes Trump's goal of putting America first, at least in name even if not in terms of the country's long-term interests." See Alan Rappoport, *What's in a Name Change? For Those Saying U.S.M.C.A., a Mouthful*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/usmca-nafta-name-acronym.html>.

260. Long, *supra* note 31.

261. Elisabeth Malkin, *Mexico's New Leader, Once a Nafta Foe, Welcomes New Deal*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/world/americas/nafta-mexico.html>.

262. Long, *supra* note 31.

263. Long, *supra* note 258; Long, *supra* note 31.

264. Carrie Kahn, *Will NAFTA 2.0 Really Boost Mexican Wages?*, NPR (Oct. 17, 2018, 9:05 AM), <https://www.npr.org/2018/10/17/657806248/will-nafta-2-0-really-boost-mexican-wages>.

265. *Id.*

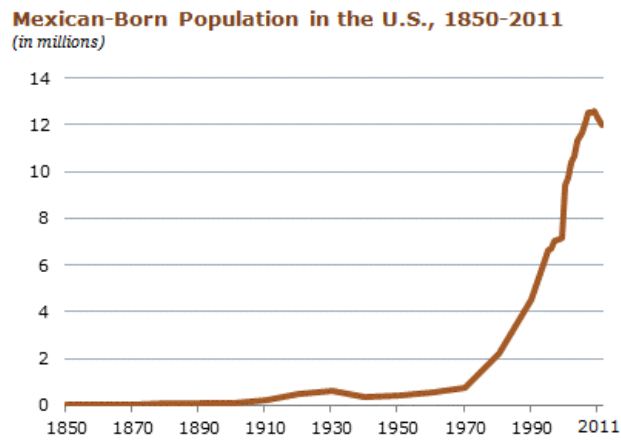
266. Malkin, *supra* note 261.

provisions, if ever.<sup>267</sup> Rather than paying workers more, companies may elect to pay the tariff.<sup>268</sup> There are also doubts regarding realistic enforcement of union protections.<sup>269</sup> Despite these challenges, if the USMCA is successfully implemented, history tells us that improvements to Mexico's labor conditions will likely result in a decline of Mexican migration to the United States. Only time will tell whether or not Mexican laborers are realistically able to benefit from these alterations.

#### APPENDIX

**Figure 1**<sup>270</sup>

The following chart shows a sharp rise in the Mexican-born population in the U.S. following the enactment of NAFTA in the early 1990s.



267. *Id.*

268. *Id.*

269. Long, *supra* note 31.

270. Passel, Cohn & Gonzalez-Barrera, *supra* note 132.