2006

Labor as Property: Guestworkers, International Trade, and the Democracy Deficit

Ruben J. Garcia

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: http://scholars.law.unlv.edu/facpub

Part of the International Trade Commons, and the Labor and Employment Law Commons

Recommended Citation

http://scholars.law.unlv.edu/facpub/654

This Article is brought to you by Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.
Labor as Property: Guestworkers, International Trade, and the Democracy Deficit

Ruben J. Garcia*

I. INTRODUCTION

"The labor of a human being is not a commodity or an article of commerce."¹

"The comparative advantage of workers in poor countries is cheap labor."²

The current proposals over immigration reform, which include a broad expansion of temporary labor programs to bring more “guestworkers” to the United States, took place in an age of increased labor commodification.³ The above quotes represent the two poles of the dilemma that guestworkers face which frames this Article. In the current political debate about immigration reform, the term “guestworkers” has been given various meanings, including providing temporary status for undocumented immigrants already in the country.⁴ This Article focuses on “guestworker” programs that seek to bring

---

unskilled workers into the United States on a temporary basis.\(^5\) This Article describes the lack of bargaining power and voice that guestworkers have on the global labor market—and how this lack of bargaining power leads the workers to be treated like commodities in international trade, widening the democratic deficit both globally and within the United States. International labor agreements and human rights instruments may provide some protection for guestworkers, but the best solution is to have fewer guestworker programs, rather than to expand them as current legislation proposes.

This Article views guestworker programs as leading to the commodification of labor and a widening of the democracy deficit. Guestworkers are commodified because they are treated as articles of trade without bargaining power or voice in the substantive transaction. Their inherently temporary nature makes guestworkers unable to enforce their legal rights. Further, they are unlikely to leverage their collective bargaining power to obtain better working conditions or ability to stay in the United States permanently. Temporary workers have no voice in their new country, less influence with their country of origin, and no voice at work if they are unable to enforce their rights. This is why any guestworker program that cycles workers through on a temporary basis—even one that purports to grant workers the same rights as U.S. residents—is bound to commodify guestworkers and exacerbate the democracy deficit.

“Commodification” is the idea that in a market economy everything, from body parts to knowledge, can be bought and sold.\(^6\) Indeed, in the current economy it is hard to think of anything that is not commodified, including pain and suffering.\(^7\) Developments in law and society in the last

---

by Any Other Name, N.Y. TIMES, May 24, 2006, at A27.

5. Highly skilled temporary workers face potential exploitation and lack of bargaining power, but they generally have more bargaining power than low-skilled workers. For this reason, I am limiting my analysis to unskilled temporary workers, including those currently working legally in the United States under such programs as the H-2A and H-2B programs.


fifty years have chipped away at the de-commodification of labor that aimed
to give workers greater agency and bargaining power in transactions
regarding their own labor. This Article discusses how the laws protecting
collective action are now swimming upstream in a globalized economy
where workers, particularly immigrant and foreign workers, are seen as
articles of commerce without bargaining power; thus, labor is being re-
commodified.

On a global scale, workers have lost significant bargaining power over
the last fifty years as barriers to trade have been removed. Historically, the
concept of “comparative advantage” in international trade referred to
commodities such as natural resources or raw materials that countries could
trade with each other in the global marketplace. The new source of
comparative advantage in the global economy is cheap labor. Recent
interest in the United States in an expanded guestworker program
exemplifies this commodification of labor. Countries jockey for position in
the global marketplace to offer the cheapest labor to multinational
corporations.

Trade agreements such as the North American Free Trade Agreement
(“NAFTA”) privilege the protection of investment over the protection of
labor. The commodification of labor mutes the voice of the workers who
will be most affected by these trade negotiations. This can be seen in the
recent negotiations between the United States and Mexico for a guestworker
program. The potential guestworkers are treated as commodities without

8. For example, the Clayton Act of 1914 explicitly stated that “the labor of a human being is
not a commodity or an article of commerce.” Clayton Antitrust Act, 15 U.S.C. § 17 (1914). The
National Labor Relations Act, enacted twenty-one years later in 1935, gave legal protection to
collective bargaining, thus providing voice to workers. National Labor Relations Act, Section 7, 29

9. See generally BETH SHULMAN, THE BETRAYAL OF WORK: HOW LOW WAGE JOBS FAIL 30
MILLION AMERICANS AND THEIR FAMILIES (2003); ANDY STERN, A COUNTRY THAT WORKS:
GETTING AMERICA BACK ON TRACK (2006).

10. See David Ricardo, The Principles of Political Economy and Taxation, in The Works

11. As Carlos Fuentes wrote in his fictional novel, THE CRYSTAL FRONTIER, “Mexico [is]
exporting more labor than cement or tomatoes.” Carlos Fuentes, The Crystal Frontier, in THE
CRYSTAL FRONTIER 166, 167 (1997).

Bargaining Regimes in Canada and the United States Post-NAFTA, 26 COMP. LAB. L. & POL’Y J.
97, 104–05 (2004); see also Sanford E. Gaines, NAFTA As a Symbol on the Border, 51 UCLA L.

POLICY 3 (2004).

In particular, I conceptualize migration policymaking as a two-stage, two-level game.
In the first stage, Congress and the president negotiate over legislation, with the
President playing a subordinate but significant role by introducing legislation, shaping
agency or an interest in the outcome of agreements between countries.\textsuperscript{14} This Article finds lacking the theories of virtual representation that may close the "democracy deficit" between the workers' interests and the imperatives of international trade and politics.

By definition, guestworkers have little bargaining power in determining their employment conditions. Specifically, they have the choice between destitution in their home countries and temporary work in the United States. The material benefits of working in the United States should not be underestimated, but these benefits do nothing to provide guestworkers with a say in their employment conditions. This Article argues that in order for workers to have bargaining power in the inevitable global market for labor, they must be given a voice in the negotiations over trade agreements through representatives of their own choosing. Further, this Article argues that guestworker status is fundamentally incompatible with the ability to exercise meaningful bargaining power over their labor conditions.

Part II of this Article will discuss three theoretical phenomena that frame the analysis: the commodification of labor, globalization, and the democracy deficit. The commodification of labor is a long-term historical process that extends directly from slavery and moves through the history of the labor movement with its goal of de-commodification. Globalization complicates de-commodification precisely because knowledge and intangible labor are so highly valued today.\textsuperscript{15} In the global economy, workers would have more freedom of movement if they were considered to be goods rather than people. The democracy deficit refers to the global institutions, such as trade agreements, that are negotiated by governments often without the input of the people who are most affected by them. Recently, scholars have argued for the creation of global administrative legal institutions to close the democracy deficit.\textsuperscript{16} On the domestic front, guestworkers are by nature unrepresented in their new country, and their home country representatives often have little incentive to represent fully their interests. Thus, increasing the presence of a large number of noncitizen

---

the public debate, and potentially vetoing bills. . . . In addition, migrant-sending states may influence policymaking at either stage, including through traditional lobbying efforts, by influencing migrations outcomes directly, and/or by linking U.S. policy to other bilateral issues.

Id.


workers will only exacerbate the democracy deficit.

Part III will examine guestworker programs in light of the dilemmas posed by commodification. There have been legislative proposals and high-level negotiations between the United States and Mexico regarding a guestworker program for all sectors of the United States economy. These negotiations take place between the heads of state of the two countries, Presidents Bush and Fox, but do not involve the workers who would be directly affected by these countries.\textsuperscript{17} Congress is currently considering elements of these proposals in comprehensive immigration reform.\textsuperscript{18} Potential guestworkers in countries other than Mexico, however, are unable to influence democratically these legislative proposals. Instead, the workers are treated as commodities to be traded between countries. The commodification of workers adds another dimension to the moral problems inherent in guestworker programs. These moral objections as well as the economic, policy, and historical problems with guestworker programs are examined in Part IV.

Part IV will look at the current state of workers in the global economy and how the "democracy deficit" affects the voice of global workers. Trade agreements such as NAFTA place a higher value on goods than people, so again workers are faced with a choice—seek equal status with goods and as protection of the "investment" of private actors or seek protection based on their own human dignity and international human rights principles. Despite the many objections to guestworker programs, they will likely continue to exist in one form or another. Part V will conclude this Article with ways to make these programs more responsive to workers to narrow the democracy deficit.\textsuperscript{19}

Finally, before beginning my discussion of guestworkers, I should mention the facets of immigration and temporary labor that this Article will not discuss. First, while many of the issues affecting the undocumented also overlap with guestworkers, this Article will not focus directly on the labor rights of the estimated twelve million undocumented workers.\textsuperscript{20} Second, this


\textsuperscript{20} For a discussion on the size of the undocumented population, see JEFFREY S. PASSEL, PEOH HISPANIC CENTER, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT
Article will not discuss guestworker programs in countries other than the United States, except to note that such programs have seen mixed results. Finally, while the labor market effects of greatly expanded guestworker programs have been hotly debated, this Article makes no claim about how guestworkers will affect wages and unemployment for workers who are already here. This Article will, however, touch on how both existing and proposed unskilled temporary worker programs in the United States will affect the enforcement of labor rights for all workers and how the introduction of a large number of workers, who are essentially unable to organize, negatively affects the bargaining power of all workers.

II. COMMODIFICATION, GLOBALIZATION, AND THE DEMOCRACY DEFICIT

All labor can be regarded as a commodity to be bought and sold. The history of the labor movement in many respects is the struggle to obtain the maximum price for labor that the market will bear. Labor history is also, however, the story of the movement for greater voice and respect in the terms and conditions of employment; essentially for greater bargaining power in labor transactions. This is the story of labor de-commodification. This Article examines three modern, interrelated phenomena about guestworkers: (1) the commodification of labor, (2) globalization, and (3) the democracy deficit.

A. Commodification of Labor in Historical Context

The traditional notion of a commodity is a good or material that can be bought or sold in the market. As trade between countries began in earnest in the late 1700s, economist David Ricardo identified the theory of

---


22. For a sampling of the debate among economists, particularly George Borjas and David Card, see Roger Lowenstein, The Immigration Equation, N.Y TIMES MAGAZINE, July 9, 2006, at 36.


comparative advantage. Comparative advantage is the idea that increased trade benefits all countries in the world because each nation has a comparative advantage in some commodity over another. Thus, countries that did not have certain types of raw materials could trade things that they did have with other countries. In the end, so the theory goes, everyone is better off. This theory underlies much of international trade today.

In the late nineteenth century Karl Marx examined the commodification of labor. This was the idea that labor had an inherent value that could be traded on the open market. This was called the surplus value of labor. Marx believed that labor had to have value in order for workers to claim an ownership interest in the outputs of capital. Marx also critiqued the commodification of labor because it reduced everything to an economic transaction, what he called the “fetishism of the commodities.” Marx also made clear, however, that a commodity was an “object outside us, a thing that by its properties satisfies human wants of some sort or another.” Thus, the commodity and the economic unit of labor, or the outputs, had to exist outside the individual.

Marx’s conception of commodification was only the beginning for many of the scholars who followed. Commodification is now viewed not as a dichotomous “either-or” question, but rather as a continuum running from full commodification to partial or incomplete commodification. Modern commodification theorists focus on not whether or not to commodify, but instead on the fairness of the transaction and the relative bargaining power of the parties to the transaction. Although workers will always be

27. See Friedman, supra note 15 at 225–27 (2005) (concluding that Ricardo is right about the theory of comparative advantage).
28. See Whelan, supra note 2, at 21.
30. Id.
31. Id.
32. Id.
34. Id. at 7.
36. See, e.g., Miranda Joseph, The Multivalent Commodity: On the Supplemenarity of Value and Values, in Rethinking Commodification: Cases and Readings in Law and Culture 383 (Martha M. Ertman and Joan C. Williams eds., 2005) (describing theories of the commodification of labor); Joan C. Williams & Vivian Zelizer, To Commodify or Not to Commodify: That is NOT the
essentially selling their labor, the goal is to make the transaction as fair as possible for the parties involved. In an ongoing employment context, anti-commodification theory also means having the voice to protect oneself and enforce legal protections enacted for their benefit.

Modern writers on economics, globalization, and international trade have applied the theory of comparative advantage to the labor relationship. In the new economy, where businesses roam the globe looking for labor, there is little doubt that labor is a valuable commodity in the global marketplace. Feminist theorists have also struggled with commodification. The unpaid labor of female caretakers in the home has posed a dilemma for feminist theorists. While women have contributed a great deal of unpaid labor to the economy in the form of household labor and family caretaking, compensation and monetization of family caregiving reduce acts of love to economic transactions. Margaret Jane Radin, Joan Williams, and Martha Fineman have attempted to address the dichotomy between paid work and caregiving, among other forms of commodification. In some ways, the dichotomy has been addressed by change in the economy, with more women participating in the paid labor force.

Not all theorists struggle with the commodification of labor. For example, the commodification of labor is not problematic to law and economics theorists. New commodification theorists also accept that

---

*Question, in Rethinking Commodification: Cases and Readings in Law and Culture* 362 (Martha M. Ertman & Joan C. Williams eds., 2005) (arguing that in the modern economy, the debate is not about whether commodification will occur but on what and whose terms).

37. See Friedman, supra note 15; Whelan, supra note 2.


40. See generally Margaret Jane Radin, Contested Commodities (1996); Bridget Anderson, Just Another Job? The Commodification of Domestic Labor, in Global Woman, Nannies, Maids and Sex Workers in the New Economy 104 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003).


43. See Elisabeth Landes & Richard A. Posner, The Economics of the Baby Shortage, in
commodification is inevitable to some degree. This Article seeks to specify the conditions that lessen the commodification of guestworkers. History shows workers progressively gaining more bargaining power over the terms and conditions of their employment over the last two centuries. That progress has been threatened in recent years by increased trade and manufacturing in areas where economic deprivation has decreased workers' bargaining power, and collective bargaining to increase wages is complicated by a lack of protection for freedom of association.

Modern commodification theory attempts to recognize the complications of resisting commodification in a global economy where nearly everything is monetized. Native Americans use intellectual property law in order to prevent the degradation of their heritage by sports teams, but they must choose between making much needed profit from the symbols or stopping their use outright. The reproductive capacity of women is valued by many who cannot procreate, and thus, women, particularly the economically stressed, face the choice of whether to put their eggs on the global market.

While theorizing about property interests in body parts and organs has caused new commodification theorists to confront difficult questions, the commodification of labor has led to even more complicated theories. For example, when is a worker in the modern economy fully commodified, as one who is trafficked or held in slavery, and when is a worker only partially commodified, such as a janitor, low wage worker, or undocumented

RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 46 (Martha M. Ertman & Joan C. Williams eds., 2005).

44. See Margaret Jane Radin & Madhavi Sunder, The Subject and Object of Commodification, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 8 (Martha M. Ertman & Joan C. Williams eds., 2005).

45. While the number of workers organized in unions has been falling in recent years, the number of statutes protecting worker rights has actually increased. This has been particularly true at the state level, such as in California. See, e.g., Private Attorneys General Act of 2004, CAL. LAB. CODE § 2698 (2006) (allowing workers to sue for violations of the labor laws).


50. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 26 (2004) (describing what Marx called "commodification" as containing certain limits on the sale of babies, for example).
immigrant whose health and safety are disregarded? This Article argues that the test of commodification is the extent to which workers have bargaining power and voice over the substantive terms of their employment. In the case of guestworkers, leverage might include being able to obtain permanent residency in the United States.

In the contemporary labor context, commodification is about the lack of voice in the political sphere and in the workplace. This lack of voice in the political sphere widens the democracy deficit. Another immediate consequence of the lack of voice is the inability to change working conditions either with the employer or with the government. The lack of voice at work has been exacerbated by the declining number of workers represented by unions in the United States. The large number of workers who are marginalized because they are undocumented or lacking full time employment is lessening the bargaining power for all workers.

Workers, and guestworkers in particular, face difficulty in maximizing the full value of their labor, as will be shown in the following section. Nevertheless, the bargaining position of workers in the global economy will be affected by the basic laws of supply and demand. Because there is a large supply of workers globally, wages have stagnated. But, based on the apparent need for guestworkers to fill jobs within this country, temporary workers would seem to have a great deal of bargaining power. Given the public discourse of immigration reform, it would seem that guestworkers are


52. Marion Crain has described the commodification of professional workers that comes from lack of voice as a result of legal decisions that strip workers of collective bargaining rights. See generally Crain, supra note 35.


badly needed in the American economy. 57 Nevertheless, guestworkers have
little leverage to negotiate terms and conditions of employment, which
might include permanent residency in the United States.

The law has recognized a historic trajectory from simple
commodification to voice. From the post-Civil War Reconstruction era
through the mid-twentieth century, American law formally rejected the idea
of human labor as property, an idea that had existed since the founding of
the country. 58 The Constitution’s Thirteenth Amendment ended slavery and
involuntary servitude in 1865. 59 Nearly fifty years later, in 1914, the U.S.
Congress declared that “the labor of a human being is not a commodity or
article of commerce” in the Clayton Antitrust Act. 60 While the practical
reason for this section of the Clayton Act was to exempt labor negotiations
from antitrust liability, the Clayton Act was also a component of the legal
rejection of the commodification of human labor that began with the
abolition of slavery in the 1860s. 61 The National Labor Relations Act
(“NLRA”) of 1935 also rejected the commodification of labor by protecting
the right to associate and bargain collectively. 62 Since 1919, the United
States has also assumed obligations as a member of the International Labor
Organization, which has a preamble that rejects the idea that labor is a
commodity. 63

B. Globalization Heightens the Commodification of Labor

Globalization refers to the movement of people, as well as goods,
across borders. Globalization is not a new process, but it is marked in the
modern era by an increasing income inequality between countries. 64 The

57. One example of the true need for guestworkers is the advocacy of Tamar Jacoby of the
Manhattan Institute, a traditionally conservative think tank. See Tamar Jacoby, Immigration Nation,
FOREIGN AFF., Nov./Dec. 2006, at 50.

58. U.S. CONST. art. I.

59. U.S. CONST. amend. XIII.


(“The policy behind the statutory labor exemption protects the right of workers to act collectively to
seek better wages . . . .”).

see Brown, 518 U.S. at 253 (1996).

63. International Labour Organization, Declaration of Philadelphia (1944), available at
commodity.”).

64. See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 25 (2002) describing
the challenge, upon assuming the presidency of the World Bank in 1997, of “1.2 billion people
around the world living on less than a dollar a day,” and “2.8 billion people living on less than $2 a
day”).
global income gap has led many to seek work in the developed world, even
while many opportunities are being shipped out of developed countries. The
neoliberal paradigm assumes that everything can be freely traded. Guestworkers fit into this paradigm as another article to be traded. The rise
of free trade agreements marks the global economy in the twenty-first
century. These trade agreements aim to break down trade barriers, eliminate tariffs on imports, and increase global competition among
unskilled workers.

In his book, The World is Flat: A Brief History of the Twenty-First Century, Thomas L. Friedman heralds the “flattening” of the world, or the
leveling of the playing field through technology, which has allowed billions
of new workers to compete for the jobs of United States workers. Through
call centers in Mumbai and in other parts of the world, workers in
developing countries are competing with American workers, who must
either “skill up” through improved education and training or face fewer
opportunities. Contrary to Friedman’s “flat world,” guestworkers find
many barriers to mobility and residency in the global labor marketplace.
Thus, while the value of immigrant workers to the economy may be high,
this value is not reflected in the actual bargaining power of guestworkers in
their working conditions or the ability to gain residency in the United States,
as this Article will show.

State and federal domestic labor regulation has historically affected the
bargaining power of workers two ways. First, the National Labor Relations


66. See Steven R. Weisman, Financial Leaders Gather, A Bit Tensely, N.Y. TIMES, Sept. 16, 2006, at C9 (describing a proposal to include more input from countries such as China, Mexico, and Turkey).


68. See MICHAEL D. YATES, NAMING THE SYSTEM: INEQUALITY AND WORK IN THE GLOBAL ECONOMY 21-22 (2003) (describing how free trade policies can lead to economic insecurity among a majority of the world’s population).


70. Id. at 21–28.

71. The H1-B program for technology workers offers some ability to petition for residency with the help of an employer, but that program has been plagued by delays and limitations. Workers in that program, because of the need to be tied to one employer, lack the full mobility that Friedman touts. David N. Pellow & Glenna Matthews, Immigrant Workers in Two Eras: Struggles and Successes in Silicon Valley, in CHALLENGING THE CHIP: LABOR RIGHTS AND ENVIRONMENTAL JUSTICE IN THE GLOBAL ELECTRONICS INDUSTRY 129 (2005) (describing the difficulties of organizing in Silicon Valley because of the largely temporary workforce).
Act of 1935 (NLRA) mandated the procedures that would have to be followed by workers and employers. The NLRA requires American employers to bargain in good faith with representatives of employees. Second, the Fair Labor Standards Act (FLSA) of 1938 set the minimum standards for negotiations, such as minimum wage and overtime laws. Neither the NLRA nor the FLSA explicitly apply to work relationships that take place outside the country. Although the International Labour Organization promulgates conventions on freedom of association, the global economy is notable for its lack of enforceable procedures and standards governing collective bargaining. Instead, multilateral trade agreements such as NAFTA and the new Central American Free Trade Agreement (“CAFTA”) presume that there will be no enforceable standards in labor transactions between countries; instead, NAFTA requires that countries enforce their own labor laws and was not intended to deal with migration.

Trade agreements are also increasingly becoming part of the global economy. The signing of NAFTA in 1994 started a series of free trade agreements that attempted to open trade of goods and services across the borders. The NAFTA was not intended to deal with the issue of migration. It did, however, commit the United States, Canada, and Mexico to provide migrant workers in each country’s territory with the same legal protection as that country’s nationals with respect to working conditions. Unfortunately, undocumented immigration from Mexico into the United States only increased in the twelve years since NAFTA has been enacted.

78. Congress recently passed the Central American Free Trade Agreement (CAFTA-DR), which focuses on the countries south of Mexico and north of Panama, as well as the Dominican Republic. In the last fifteen years the United States has also entered into a number of bilateral free trade agreements (FTAs) such as the U.S-Chile FTA and the U.S-Jordan FTA. See Sandra Polaski, supra note 67, at 14.
80. For example, when the Immigration Reform and Control Act (IRCA) was enacted in 1986, an estimated 3.6 million people were legalized under the amnesty provisions of that law. The number of people who might qualify for legalization under the proposal considered by the Senate in 2006 would be closer to 10–12 million people, based on numbers provided by the Pew Hispanic
In the global economy, trafficking is becoming an increasing problem.\textsuperscript{81} One of the ironies of the global era is that as the world has focused increased attention on the fight against human trafficking while the terminology used in the immigration debate tracks the idea that immigrants can be traded or imported like goods.\textsuperscript{82} Several significant pieces of legislation have been passed to combat the spread of human trafficking, in which humans are smuggled like contraband.\textsuperscript{83}

At the same time that trafficking is seen as a major problem, trading workers as commodities has been looked upon as commonplace, a necessary byproduct of the global economy.\textsuperscript{84} The debate about a new guestworker program has also used the language of “importing workers.”\textsuperscript{85} Several commentators on all sides of the political debate have decried the “importing of guestworkers” embodied in various legislative proposals.\textsuperscript{86} In the context of legal guestworker programs that are in place in the Northern Mariana Islands, government officials criticized the “importation of guestworkers” that was occurring instead of a regulated immigration scheme.\textsuperscript{87} Thus, the


\textsuperscript{82} Condoleezza Rice, U.S. Secretary of State, Remarks upon the Release of the Sixth Annual Trafficking in Persons Report (June 5, 2006), available at http://www.state.gov/secretary/rm/2006/67551.htm (“Defeating human trafficking is a great moral calling of our time and under President Bush’s leadership the United States is leading a new abolitionist movement to end the sordid trade in human beings.”).


\textsuperscript{84} See infra text accompanying notes 115–16.

\textsuperscript{85} Id.

\textsuperscript{86} See, e.g., Philip Martin, There is Nothing More Permanent Than Temporary Foreign Workers, CTR. FOR IMMIGR. STUD. BACKGROUNDER, Apr. 2001, available at http://www.cis.org/articles/2001/back501.html (“Importing guest workers—some of whom will settle—in such a situation is analogous to importing mine workers just before the ore runs out.”); Ruben Navarette, Here We Go Again, USA TODAY, Apr. 4, 2006, at 13A (“I’m talking about importing hundreds of thousands of new foreign workers from a country such as Mexico to work in farming, construction, hotels or restaurants.”); Robert J. Samuelson, We Don’t Need ‘Guest Workers,’ WASH. POST, Mar. 21, 2006, at A21.

connection between temporary labor programs and imports is firmly rooted.

Linguist Otto Santa Ana has described the rhetoric surrounding illegal immigration, studying the media's treatment of Proposition 187. In his study, Santa Ana found that undocumented immigrants were most often portrayed as animals in the press. In 1994, the Los Angeles Times reported that "employers hungering for really cheap labor hunt out the foreign workers." Federal officials in the mid-1990s, according to Santa Ana, called for increased border patrols to "ferret out" immigrants. With images such as these in the popular press, it is easier for Americans to see both legal and illegal immigrants as lacking any rights.

Other linguists have discussed the importance of framing in political discourse. What is the importance of framing guestworkers as goods to be imported? This Article will argue that this frame leads to a conception of guestworkers as lacking any agency in the terms and conditions of their employment. The frame also leads to the missing connection between guestworkers and human rights principles, which will be discussed later in this Article. Finally, commodification of labor leads to apathy concerning guestworkers' lack of voice in the political process. Guestworker programs exacerbate the democracy deficit.

C. The Democracy Deficit: Workers Lacking Voice in Politics and at Work

The "democracy deficit" is a concept that has been used to describe the increasing importance of unelected institutions in the global environment. Many argue that the increasing importance of institutions such as the World Bank and the International Monetary Fund are displacing the democratically elected institutions in poor countries. Many believe that the democracy deficit legitimizes and increases the wealth deficit between rich and poor

---

89. Id. at 83–89.
90. Id. at 84 (emphasis added).
91. Id.
92. GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 386–88 (2002); Geoffrey Nunberg, Fresh Air Commentary: Aliens, (National Public Radio April 11, 2006), available at http://www-csli.stanford.edu/~nunberg/aliens.html ("[W]e don't usually describe law-breakers as being illegal in themselves. Jack Abramoff may have done illegal lobbying, but nobody has called him an illegal lobbyist. And whatever laws Bernie Ebbers and Martha Stewart may have broken, they weren't illegal CEO's [sic].").
The democracy deficit also applies to the large number of people, both legal and illegal, who do not currently have the right to vote in the United States. While the right to vote might legitimately be granted or withheld based on an individual’s immigration status or past crimes, a growing gap between the represented and the right of the represented to choose their representatives should be cause for concern.\footnote{See Joseph E. Stiglitz, Making Globalization Work 19 (2006) (describing democratic deficits).}

There may be ways to close the gap between people with little political power and their governments. One of these ways might involve representative international institutions and nongovernmental organizations, such as the International Labor Organization (“ILO”) and the UN. There are limitations on the democratic nature of the ILO, however, since the ILO is an unelected, three-part structure that involves governments, workers, and employers.\footnote{Jamin Raskin, Lawful Disenfranchisement: America’s Structural Democracy Deficit, 32 Human Rights Magazine 12 (Spring 2005), available at http://www.abanet.org/irr/hr/spring05/lawful.html (describing the disenfranchisement of ex-felons).} This tripartite structure can sometimes lead to the absence of workers’ voices, unless they are virtually represented by unions and governments. Unions will generally represent the interests of workers, but with only about thirteen percent of workers in the United States represented by unions, a significant democracy deficit remains.\footnote{For more information about the ILO structure, see International Labour Organisation, Structure of the ILO, http://www.ilo.org/public/english/decls/fact.htm (last visited Jan. 28, 2006); see also Ed Lorenz, Bringing Law to Globalization Through ILO Conventions: A Labor Perspective on the Core Labor Standards, 11 Mich. St. U.-D.C.L. J. Int’l L. 101, 103 (2002) (describing the ILO “tri-partied system of governance”).}

In analyzing guestworker programs, it is important to exercise caution about the limitations of democracy theory. The right to vote, for example, is not the \textit{sine qua non} of democratic participation. In Spring 2006, over one million of people, including many noncitizens, marched in reaction to various Congressional proposals to change immigration laws.\footnote{BLS Reports Percentage of Workers in Unions Still 12.5 Percent, But Overall Numbers Up, Daily Lab. Rep. (BNA) No. 14, at AA-1 (Jan. 23, 2006). The latest Bureau of Labor Statistics data shows an continually worsening trend. See Union Membership Falls to 12 Percent, SAN DIEGO UNION-TRIB., Jan. 26, 2007, at 4 (noting that union membership was 35 percent in the mid-1950s.).} Their activism may have had a major impact on the shape of the bill that was passed by the Senate, which included an earned legalization program and lacked many of the most draconian components of the House of Representatives’ immigration bill. It remains to be seen whether the large public demonstrations will have an overall positive or negative impact on any immigration legislation. The influence of the recent demonstrations, despite the inability of many immigrants to vote, shows that there are many
ways to influence policy democratically.

In addition, foreigners living abroad may be "virtually represented" by their governments through the foreign policy actions of their leaders. In the case of guestworkers, virtual representation has not worked very well because low-wage workers usually lack political power in their home countries.98 In theory, virtual representation might work, but with the realities of geopolitics today, world leaders will pay little attention to workers who are living between two countries.

International institutions can do little to remedy the nonresponsiveness of government officials to their own people. In Mexico, for example, the access that poor workers have to their government is defined by the history of one-party rule in that country.99 The PRI ruled Mexico for eighty-three years until the PAN won the presidency in 2000.100 Throughout that time, Mexico became increasingly neoliberal and, in 1994, entered into the NAFTA.101 When investors, protecting their investment, have the ability to trump national laws, the voice that citizens have in their government is diminished.

With regard to immigrants and guestworkers, the democracy deficit is even more pronounced. These workers have the right to vote in their home countries, unless those countries do not give expatriates the right to vote.102 There are many ways, however, that individuals can engage in political action besides voting. Immigrants and citizens, for example, took to the streets throughout the country in May 2006 to make their voices heard on immigration proposals in Congress.103 Nevertheless, noncitizens are ineligible to vote in the United States and thus have little ability to influence


legislation.\textsuperscript{104} There may be some opportunities to influence legislation through unions and other activism, but by and large, the political arena is dominated by large corporate interests, further exacerbating the democracy deficit. Indeed, immigration reform will likely be shaped by business needs, thus ensuring expanded guestworker programs into the future.

Generally, representative democracy presumes that governments respond to the interests of their people through representative institutions. This theory is embedded in many of the institutions of representative democracy.\textsuperscript{105} Congress and other institutions are intended to represent voters. Most immigrants are unable to vote and influence their representatives in their new or home countries.\textsuperscript{106}

Democratic theories rely heavily on the consent of the governed. Consent theories are also used to justify the commodification of labor, as they have been used to justify much commodification.\textsuperscript{107} The idea as applied to guestworkers is that as long as guestworkers freely choose to come to the United States, the transaction is substantively not problematic. Many come to the United States on temporary visas, such as students and foreign visitors.\textsuperscript{108} Because they are not able to vote when in the United States, the "democracy deficit" is thereby increased. Political theorist Joseph Carens argues that the difference is the amount of time that those visitors are here.\textsuperscript{109} Foreign visitors, for example, are only here for a limited amount of time and rarely have the need for protection from elected representatives.

There are fundamental differences between students, tourists, and workers. A guestworker's stay in a country can implicate many more legal rights and remedies than will tourists' or students' stays. Further, because the State is much more entwined with labor as regulator, employer, and enforcer, as it was during the Bracero Program, there is a need for workers

\textsuperscript{104} See Rubio-Marin, \textit{supra} note 102, at 126-28.


\textsuperscript{106} The Fifteenth Amendment to the Constitution protects the right of citizens to vote. U.S. Const. amend XV. In some cases, however, the right to vote is available to noncitizens. For example, Mexicans living in the United States can cast ballots in Mexican elections. Noncitizens living in certain jurisdictions, such as Takoma Park, Maryland, can vote in local school board elections. Jamin B. Raskin, \textit{Legal Aliens, Local Citizens: The Historical, Constitutional and Legal Meanings of Alien Suffrage}, 141 U. Pa. L. Rev. 1391, 1463 (1993) (describing how the city of Takoma Park, Maryland, extended the right to vote in local school board elections to noncitizens).

\textsuperscript{107} See Ertman & Williams, \textit{supra} note 36, at 3 ("The classic justification of the market is the idea of freedom of contract.").

\textsuperscript{108} ROGER DANIELS, \textit{Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882} 256—57, Table 12.4 (2004) (H-1B cap was increased for fiscal years 1999 and 2000.).

to be able to influence legislation that will directly affect the terms and conditions of their employment. Guestworkers have limited ability to influence legislation in workplaces that are heavily regulated by the government.

In response to the need to have a politically active workforce, many make the argument that workers have freely consented to be guestworkers and thus there is no need for political participation. There are several responses to this argument. First, the bargaining power of guestworkers is likely to be significantly less than students or technology workers. Further, students and highly skilled workers have a greater ability to change their status. Finally, these workers have more powerful, organized constituencies to look after their interests than do large, diffuse groups that might advocate on behalf of guestworkers. The agricultural lobby notwithstanding, temporary labor advocates have been relatively less successful in efforts to increase the caps on temporary labor programs for non-farm employment.

III. A MUFFLED VOICE FOR GUESTWORKERS

In the current debate about immigration reform, the term “guestworker” has been used to mean many different things. In order to have a palatable legislative proposal containing what many see as “amnesty” for undocumented workers, a path to citizenship for unauthorized workers has been called a “guestworker” program. Under various versions of these proposals, unauthorized workers in the country would be required to register for a temporary worker program that might lead to legal residency if the worker met certain conditions, such as paying a fine and back taxes and learning English. In discussing guestworkers, this Article is referring only to truly temporary labor programs. Unauthorized workers in the United


States also face commodification and the democracy deficit. Ironically, though, these workers face fewer obstacles to enforcing their rights than guestworkers. First, they are more likely to be members of unions because they often have long-term ties to the United States. Although they face the constant possibility of deportation, unauthorized workers are probably aware of the low likelihood of actual worksite enforcement. Finally, unlike workers under current temporary programs, unauthorized workers are not tied to the employer who sponsored them into the United States. Thus, while unauthorized workers certainly face a democracy deficit, the historical evidence shows that temporary worker programs are even more problematic for enforcing rights.

A. Historical Lessons: The Problems of the Braceros

Throughout U.S. history, there have been examples of temporary worker programs that exploited different racial groups. The Bracero Program, in effect at various times during from 1917 to 1964, formalized a temporary labor system for agriculture. The Program began during World War I with approximately 77,000 workers for agricultural labor shortages. The Program ramped up again during World War II, but even after the war was over, growers’ purported needs for agricultural workers continued. From 1942 to 1964 over 4.6 million Mexicans were brought to the United States through the Bracero Program. Although they were promised transportation and prevailing wages, they rarely obtained all of these

115. See Milkman, supra note 54, at 129 (immigrants have shown more interest in unions than native-born workers as shown by a study conducted by the University of California Institute for Labor and Employment).


117. See Evelyn Nakano Glenn, Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor 190–96 (2002) (Japanese and Haoles in Hawaii were treated strictly as laborers, not as settlers and potential citizens. At first, the policy for Asian workers favored single men free of family ties—this minimized housing costs, and indeed the housing conditions were very bad—Japanese were brought in as temporary workers from 1870–1930); see also Shannon Leigh Vivian, Be Our Guest: A Review Of The Legal And Regulatory History Of U.S. Immigration Policy Toward Mexico And Recommendations For Combating Employer Exploitation Of Nonimmigrant And Undocumented Workers, 30 Seton Hall Legis. J. 189, 196–98 (2005).


Moreover, the agreement worked out between the United States and Mexico encouraged workers to return to Mexico to receive “savings accounts,” which was money deducted from their paychecks in the United States. The problem was that many of the workers were not able to obtain access to these accounts and later brought litigation to recover the monies. Former Braceros brought suit in federal court in 2002 to recover the withheld funds in a lawsuit titled Cruz v. United States. Their claims against the United States, Mexico, and the various banks were met with a variety of worthy defenses such as sovereign immunity of nations, the limited duties owed by banks to depositors, and the statute of limitations. The federal court in Oakland, California dismissed the lawsuit in 2003, but many of the claims based on state law found new life in legislation to extend the statute of limitations in the California state legislature. The legislation showed the Braceros’ effectiveness in the democratic system well after the Program had been terminated, but it was not until the participants in the Bracero Program were citizen participants in the United States that they had the ability to enforce basic rights.

The Bracero Program and the ensuing litigation displays the democracy deficit in plain sight. The Bracero Program was a negotiated compromise between the United States and Mexico, with those directly affected by it having little or no say in the process. Both the United States and Mexico had reasons for favoring a temporary worker program, with little thought to how the plan would work in practice. Once conditions were not as promised in the United States, the Braceros had no option to exercise their rights.

B. H-2A, H-1B, and H-2B Workers

Even though the Bracero Program formally ended in 1964, various temporary labor programs sprouted from the Immigration and Nationality

121. Id.
124. Id. at 1031–33.
125. Id. at 1032.
126. CAL. CIV. PROC. CODE § 354.7 (West 2006).
127. Perhaps because of the problems they experienced with the Bracero Program, many ex-Braceros who have been interviewed believe that current guestworker proposals should ensure higher wages and long-term contracts. Anna Gorman, Ex-Braceros Back Senate Plan, But With Upgrades, L.A. TIMES, June 18, 2006, at B1.
Act of 1965. The most often used of these programs are the H-2A and H-1B programs. The H-2A program is intended to bring workers on a temporary basis to work in agriculture. The H-1B program is intended mostly for technology workers. H-2A programs have been more prone to abuse because of the lesser bargaining power that agricultural workers have compared to other workers in society.

By definition, guestworker programs are temporary and respond to actual labor market needs. Several historical and current guestworker programs have satisfied neither of these conditions. The Bracero Program has been one of the most prominent examples. There also continues to be debate about whether there is an actual shortage of agricultural labor. In the absence of a Bracero Program, Congress enacted a patchwork of temporary labor programs in the Immigration and Nationality Act of 1965 with an alphabet soup of designations (H1-A, H1-B, H2-A, and H2-B) corresponding to the different sections of the Code. Even in these programs, the labor certification process managed by the Department of Labor has been criticized for overstating actual labor shortages. Thus, temporary programs to address labor shortages have rarely been temporary or in response to actual labor shortages.

The abuses in these contemporary guestworker programs have been highlighted by recent NAFTA complaints. In February 2003, the Farmworker Justice Program filed a complaint under the North American Agreement on Labor Cooperation, the side agreement to the NAFTA that protects labor rights. The complaint alleged federal and state authorities


131. See COMPA, supra note 46, at 36–38.

132. Of course, some guestworker programs in technology can lead to the worker staying permanently, if the employer sponsors the worker and has an ongoing need for the labor. See DANIELS, supra note 108, at 256–57.

133. See CHACÓN & DAVIS, supra note 120, at 139–47 (discussing the Bracero program).


“have failed to implement and effectively enforce the labor laws applicable to agricultural workers under the H-2A program.”¹³⁸ In April 2005, the Brennan Center for Justice and the Northwest Worker Justice Project filed a NAALC complaint, alleging that H-2B workers had been denied the right to counsel.¹³⁹

The complaint process under NAFTA has had mixed results in enforcing labor standards in North America.¹⁴⁰ Some unions and nongovernmental organizations have given up on the NAFTA process because the labor side agreement merely requires NAFTA countries to enforce their own labor laws, which does not always offer adequate protection to workers.¹⁴¹ Indeed, the Farmworker Justice Fund complaint floundered because the United States responded that federal law provided little coverage to agricultural workers.¹⁴² The NLRA’s guarantees of freedom of association and collective bargaining, for example, do not apply to agricultural workers.¹⁴³ Further, many of the protections for H-2A workers in North Carolina were based on state law.¹⁴⁴ As a result, the NAFTA complaint did not get past the U.S. Labor Department.¹⁴⁵

Possible remedies to address the lack of worker protection might include giving workers representatives of their own choosing in negotiations. Legal alternatives might include bringing a claim under the NAFTA labor side agreement or an international labor rights claims. The theory of this claim would be that in the negotiations over the guestworker


¹⁴³. Section 152(3) of the National Labor Relations Act excludes agricultural workers from the definition of “employee” 29 U.S.C. § 152(2) 1935.


program, the United States and Mexico are failing to protect the freedom of association of guestworkers "to establish and join organizations of their own choosing to further and defend their interests."\textsuperscript{146} By not affording guestworkers a voice in the negotiations over the terms of their work in the United States, the United States and Mexico also are not promoting the right of guestworkers to "freely engage in collective bargaining on matters concerning the terms and conditions of their employment."\textsuperscript{147} Other international labor rights claims might be brought if the working conditions of the guestworkers fall below accepted international labor standards.\textsuperscript{148} In these ways, international labor rights standards could serve to de-commodify labor in the global economy. The commodification problem, however, is only one aspect of the challenge of raising and enforcing labor standards for workers in the global economy.

The Northwest Workers Justice Complaint alleging that the H2-B workers had been denied their statutory right to counsel is still under review by the DOL.\textsuperscript{149} It may have a better chance of succeeding than other complaints because of the statutory denial of access to counsel, but the NAFTA complaint process will provide formidable challenges.\textsuperscript{150} Despite the obstacles presented by the NAFTA complaint process, H-2B workers have utilized other avenues to challenge deprivations of worker rights.\textsuperscript{151} The Southern Poverty Law Center ("SPLC") in Montgomery, Alabama has brought several cases to vindicate the labor rights of H-2A and H-2B workers in recent years, primarily challenging abuse of seasonal forest workers in Montana as well as violations by the Del Monte food company against H-2A agricultural workers.\textsuperscript{152} These lawsuits, as well as numerous


\textsuperscript{147} Id.

\textsuperscript{148} For example, guestworkers in the United States would have the opportunity to file an action under the Alien Torts Claims Act of 1789, 28 U.S.C. § 1391 (2000). For a discussion on how these actions could be brought, see Michael J. Wishnie, \textit{Immigrant Workers and the Domestic Enforcement of International Labor Rights}, 4 U. Pa. J. Lab. & Emp. L. 529, 533–43 (2001).


\textsuperscript{150} See Consolidated Appropriations Act of 2005, Pub. L. 108-447, 118 Stat. 2809 ("None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . ."); 45 C.F.R. § 1626 (2006) (recipients of federal legal assistance funds may "provide legal assistance only to citizens of the United States and eligible aliens").


\textsuperscript{152} For complaint summaries, see Southern Poverty Law Center, Hector Luna, et al. v. Del
personal interviews of H-2B workers conducted by the SPLC, tell a story of exploitation and threats of retaliation or harm. These workers stated that they were told that they would not be recruited to work again in the United States if they refused to drop the lawsuit. All of these abuses exist in temporary programs that, on paper, have strong worker protections. These programs show the inherent difficulty in enforcing rights of guestworkers because of their lack of voice in their own working conditions. In considering expanding guestworker programs, the lessons of the existing H-2A, H-1B, and H-2B programs should be closely examined. While there may be a place for a truly temporary and seasonal worker program, the reality of the abuses of these programs shows that they are more often used to maintain a cheap, compliant work force. If the United States has true labor needs in certain occupations, employers in these occupations are likely to persist and call for workers with residency, if not citizenship, so that the workers have a political voice.

C. Objections to Expanded Guestworker Programs

The language of the current debate makes clear that guestworkers are being viewed as disposable workers. What Edward R. Murrow said about migrant workers in his 1960 documentary Harvest of Shame is also true of many temporary workers: “They are the slaves we rent.” This quote highlights the moral problems with “importing” predominantly nonwhite workers into the country to do jobs that predominantly white Americans will not do.

A number of policy and economic objections to guestworker programs


154. Id.


156. Harvest of Shame (CBS television broadcast 1960).

157. For a further discussion of the moral objections to guestworker programs, see Stephanie Franklin, 'Jobs that Americans Won't Do' Filled By Desperate Migrants, CHI. TRIB., Jan. 17, 2005, at 1.
can also be raised. This Article will briefly survey these objections and the arguments used to oppose them in the following sections. President Bush’s desired guestworker program, as articulated as recently as the State of the Union address in January 2007, would be a three- to six-year temporary program subject to all labor and employment laws. This Article will then turn to how guestworker programs, even subject to labor protections, are inconsistent with legal protections against commodification.

1. Policy and Political Objections

Guestworker programs have often been criticized as bad policy. Along these lines, many scholars argue that guestworker programs do not fulfill their stated objectives. Besides not always working properly, guestworker programs also represent a failure of the political process. Often, labor needs have been addressed based on the political power of the various constituencies rather than actual labor needs. Hence, agricultural worker programs are one of the few sectors of the economy to have temporary worker provisions. Thus, the programs represent capture of the machinery of government by powerful moneyed interests. Further, the interests of workers, both in the United States and in other countries, are lost in the equation. In this way, these programs further the democracy deficit between workers and their governments. When the programs skew actual labor market needs, they negatively affect the workers in the host countries. When the actual conditions of workers are not as promised, the workers in the sending countries suffer. Guestworker programs thus represent a failure of the vision of the political system as more than a plutocratic process for doling out benefits to powerful corporate interests.

158. See Samuelson, supra note 86 (arguing against expanded guestworker programs).


160. See, e.g., Samuelson, supra note 86; Martin & Teitelbaum, supra note 134.

161. See Samuelson, supra note 86; Martin & Teitelbaum, supra note 134.

162. See Lauren Gilbert, Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003, 42 HARV. J. ON LEGIS. 417 (2005) (describing how the legislative debate over the AgJobs Bill of 2003, seeking to increase the number of workers in agriculture, failed to meet the needs of both farmworkers and growers).


The end of the Bracero Program resulted in many of the workers involved in the program working illegally in non-agricultural areas of the economy. This might show that a new, expanded guestworker program would reduce the flow of undocumented workers into the United States. Or, it might mean that workers hired into the United States for one purpose might eventually be working for an entirely different employer than the one for which they were originally hired. Unfortunately, the phenomenon of migration is complex and belies easy solutions. There is no guarantee that new guestworker programs would prevent people from trying to immigrate if they found the requirements too onerous, or if the limits of the program are reached, as has been the case with the H-1B and H-2B workers.

2. The Thirteenth and Fourteenth Amendments: Consent and Full Personhood

The Thirteenth Amendment to the Constitution states: “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” The Amendment was passed in 1865 to end the practice of chattel slaveholding by private parties, but it had a much more expansive promise. First, the Thirteenth Amendment applies directly to private action. Further, neither consent nor payment for the worker’s labor necessarily means that a labor relationship does not violate the Thirteenth Amendment’s prohibition against slavery.

The end of chattel slavery in the United States under the Thirteenth Amendment represented the legal de-commodification of labor by giving workers a voice in their conditions of work and the opportunity to exit oppressive relationships. The importance of the Thirteenth Amendment

---


165. CHACÓN & DAVIS, supra note 120 at 146-47.

166. ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 256-57 (2004) (showing that the H-1B cap was increased for fiscal years 1999 and 2000).

167. U.S. CONST. amend. XIII.


169. Id.


was not lost on the progenitors of the modern labor movement when they argued that Congress could protect freedom of association and collective bargaining under the authority of section two of the Thirteenth Amendment.\textsuperscript{172} While Congress instead used the Commerce Clause as the basis for the right to collective bargaining in the NLRA, labor's broader vision of the Thirteenth Amendment is being looked to again today as a means of redressing the conditions of some of the most aggrieved workers in the global economy.\textsuperscript{173}

The Thirteenth Amendment challenge to guestworker programs also faces substantive obstacles. First, the Amendment does not protect the right to associate and bargain collectively, although many of the progenitors of the NLRA sought to ground those rights in the Thirteenth Amendment.\textsuperscript{174} Second, the Supreme Court has held that the threat of deportation is not sufficient to constitute "involuntary servitude."\textsuperscript{175} Nevertheless, several scholars are arguing for a broadened concept of the Thirteenth Amendment to include these concepts, and constitutional history shows that their interpretation may eventually prove correct.\textsuperscript{176}

A frequent justification of guestworker programs is that the participants in such programs freely choose to be part of them.\textsuperscript{177} The consent of desperate workers in the global economy should be closely interrogated. While the prospect of working in the United States for some period of time and then returning to their home countries might be appealing to some workers, other potential "guestworkers" have many family members in the United States and would like to immigrate permanently. In either case, adding workers without rights can only increase the democracy deficit.

\footnotesize

\textsuperscript{172} See generally James Gray Pope, Labor's Constitution of Freedom, 106 YALE L.J. 941 (1997) (detailing the history of labor's use of the Constitution before the passage of the National Labor Relations Act).


\textsuperscript{174} See Pope, supra note 173, at 7 (discussing the debate over whether to ground the NLRA in the Thirteenth Amendment or the Commerce Clause).

\textsuperscript{175} United States v. Kozinski, 487 U.S. 931, 952 (1988) (holding that the employer's ability to frustrate the employees' immigration application was not involuntary servitude under the Thirteenth Amendment).

\textsuperscript{176} See Pope, supra note 173; Ontiveros, supra note 168, at 679–80.

\textsuperscript{177} See Carens, supra note 109, at 106.
3. Democracy Deficit Problems with Guestworker Programs

In analyzing guestworker programs, it is important to exercise caution about the limitations of democracy theory. The right to vote, for example, is not the *sine qua non* of democratic participation. In Spring 2006, millions of people, including many noncitizens, marched in reaction to various Congressional proposals to change immigration laws. Their activism may have had a major impact on the shape of the bill that was passed by the Senate, which included an earned legalization program and lacked many of the most draconian components of the House of Representatives’ immigration bill. It remains to be seen whether the large public demonstrations will have an overall positive or negative impact on any immigration legislation. The influence of the recent demonstrations, despite the inability of immigrants to vote, however, shows that there are many ways to influence policy democratically.

As many have discussed, the merits of any guestworker program include a possible decrease in the number of migrants who die trying to cross the desert in the inhospitable Arizona deserts. It is not clear, however, whether all of the would-be illegal crossers would use a guestworker program, nor whether a program could accommodate them all. Despite implementation of a guestworker program, the most important variable in border deaths would likely continue to be the ways that border authorities push migrant flows to areas where the chance of capture is smaller. Thus, the effects of a guestworker program on border enforcement are hard to quantify.

D. International Labor Rights: The (Missing) Connection between ILO Principles and Guestworker Programs

Guestworker programs may violate international labor standards, but

---

178. See HING, supra note 3, at 9.


181. Leslie Berestein, Border Deaths on Record Pace, SAN DIEGO UNION-TRIB., July 22, 2006, at A1 ("During fiscal year 2005, 472 people are known to have died attempting to cross the border illegally, making it the deadliest year on record.").

182. HING, supra note 3, at 3.
there has been little thought about how to square guestworker programs with international labor standards. In one sense, only domestic standards are relevant because the guestworkers will be working entirely within the United States. Nevertheless, the international nature of these transactions call for more attention to the international standards to which the United States and Mexico have agreed. First, both the United States and Mexico are members of the ILO. In 1998, the ILO promulgated four basic rights that were conditions of ILO membership in its Fundamental Declaration. These rights are: (1) freedom of ILO membership and collective bargaining; (2) freedom from forced labor; (3) the elimination of child labor; and (4) freedom from discrimination. These rights are also protected in various ILO conventions, which members can choose to ratify. Conventions 87 and 98 protect freedom of association and collective bargaining, and though the United States has not ratified either of these conventions, Mexico has ratified both of them. The United States has also committed itself to the principle of freedom of association in other conventions that it has ratified, such as the International Covenant on Civil and Political Rights.

The NAFTA also contains freedom of association and collective bargaining as principles that each of the three NAFTA countries shall “strive to promote.” While the precise nature of this obligation is unclear, it seems to lay the groundwork for a North American labor law regime. Other principles that the countries should strive to promote are directly relevant to guestworkers. Article III of NAFTA requires the three countries to treat migrant workers the same as native workers in respect to labor law enforcement. These rights are directly relevant to guestworkers but as

183. For a list of International Labour Organization member countries, which includes the United States and Mexico, see http://www.ilo.org/public/english/standards/relm/country.htm (Oct. 5, 2006).


189. Id. at art. 11(1)(3).
shown below, it is very unlikely that the federal or state governments will be able to effectively enforce these laws as required by the NAFTA labor side agreement.

IV. GIVING VOICE TO GUESTWORKERS

A. Recent Guestworker Proposals

In the current debate over immigration reform, the question of what labor rights would be afforded to guestworkers has gone largely unanswered. In proposing a temporary worker program on January 7, 2004, President George W. Bush stated that he wanted to see Congress pass a temporary worker plan because it would be a more “compassionate” way for immigrants to work legally in the United States: “Decent, hardworking people will now be protected by labor laws, with the right to change jobs, earn fair wages, and enjoy the same working conditions that the law requires for American workers.”\(^\text{190}\) As history shows, however, even when rights are granted on paper, they are often not available in practice. The failures of the Bracero Program are evidence of the gap between law on the books and law in practice.\(^\text{191}\)

The House of Representatives took the opening salvo in immigration reform in December 2005 by passing H.R. 4437.\(^\text{192}\) The bill did not contain a temporary worker program, nor did it contain any way for the estimated eleven to twelve million unauthorized migrants in the country to regularize their status.\(^\text{193}\) Instead, it called for mass deportations, a fence running the length of the U.S.-Mexico border, and for making all undocumented migrants in the country felons. The House bill was the product of many Representatives acceding to the concerns in their districts about the impact of illegal immigration.\(^\text{194}\) Massive street protests took place in cities throughout the country in Spring 2006, focusing on the draconian impact of H.R. 4437, and calling for broad based immigration reform.\(^\text{195}\)

In the wake of the House bill, various senators crafted bills that attempt


\(^{191}\) See infra Part III.A.


\(^{194}\) See Johnson, supra note 192.

\(^{195}\) See HING, supra note 3, at 9.
to do more than the enforcement-only approach of the House. The Senate passed S. 2611 on May 25, 2006, which included an “earned legalization program” that would lead to citizenship for many of the estimated eleven to twelve million unauthorized workers in the country. The Senate bill ultimately went nowhere in the then-Republican controlled House. As passed by the Senate, however, S. 2611 provided no additional labor protections for the estimated 200,000 temporary workers who would come into the United States each year. On May 23, 2006, the Senate rejected Senator Edward Kennedy’s amendment to S. 2611 that would enhance enforcement of labor protections for guestworkers and all U.S. workers. These workers would be brought to the country on a three-year visa, renewable one time, to work in any sector where there are “willing employers.” This would greatly expand the current temporary worker programs in agriculture and high tech industries. The congressional debate over immigration proposals in Spring 2006 shows that guaranteeing labor rights for guestworkers is not a priority in any legislative proposal for immigration reform. In fact, the bill the Senate passed in April 2006 calls for guestworkers in the new H-2C program to have the same “working conditions that are normal to workers similarly employed in the area of intended employment.”

One of the major distinctions in the various bills is whether the guestworkers will be able to petition for permanent residency on their own or whether an employer must sponsor them. Guestworkers in the new H-2C program would be able to adjust their status to permanent resident after

---

197. See id., at 37-38.
202. See Eric Lekus, Senate Approves Plan to Create System Requiring Electronic Verification of New Hires, Daily Lab. Report (BNA) No. 100, May 24, 2006, at AA-1 (discussing the defeat of Senator Kennedy’s amendment to the Senate Bill 2611, which would have required increased labor protections for guestworkers brought to the United States under the bill).
204. HING, supra note 3, at 36.
four years in the program, regardless of their employer's sponsorship.\textsuperscript{205} Guestworkers in the program less than four years would have to petition through their employer. The H-2C program would allow workers to change to other employers within the program.\textsuperscript{206}

\textbf{B. The Problem of Enforcement: The Hoffman Story}

Even if labor rights are granted in new immigration legislation, the major difficulty will be enforcement. The temporary nature of the workers makes it more difficult to enforce these rights.\textsuperscript{207} Consider the case of José Castro, the fired worker in the U.S. Supreme Court's decision \textit{Hoffman Plastic Compounds, Inc. v. NLRB}.\textsuperscript{208} In that case, Castro was terminated for his union activities at Hoffman Plastic Compounds in 1989.\textsuperscript{209} One of the other employees laid off in alleged retaliation for union activities filed a charge with the National Labor Relations Board ("NLRB") in 1989, and the NLRB filed a complaint against Hoffman in 1990.\textsuperscript{210} After a hearing in April 1990, an NLRB Administrative Law Judge ("ALJ") found that the company had retaliated against Castro for his union activities.\textsuperscript{211}

The ALJ's finding was largely upheld by the NLRB in Washington, D.C. in January 1992.\textsuperscript{212} At the hearing in June 1993 to determine the amount of back pay Hoffman owed Castro as a result of his unlawful firing, Castro admitted that he was unauthorized to work in the United States and had used a fake birth certificate to obtain employment.\textsuperscript{213} The ALJ denied

\begin{itemize}
  \item \textsuperscript{205} See \textit{id.} at 38 (discussing S. 2611).
  \item \textsuperscript{206} See \textit{id.} at 31 (discussing S. 2611).
  \item \textsuperscript{207} See \textit{MARTIN ET AL., supra} note 163, at 129 (arguing that guestworker programs can lead to fewer workplace rights).
  \item \textsuperscript{208} 535 U.S. 137 (2002).
  \item \textsuperscript{210} Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).
  \item \textsuperscript{211} \textit{Id.} at 141.
  \item \textsuperscript{212} Fisk & Wishnie, \textit{supra} note 209, at 411.
\end{itemize}
back pay based on Castro’s admission of his unauthorized status. The NLRB General Counsel appealed the case through the internal Board process, eventually leading the five-member appellate Board to decide in 1998 that Castro should not have been denied back pay. The General Counsel moved to enforce the order in the D.C. Circuit, which, after a three-judge panel and an en banc hearing, decided that Castro’s status did not preclude him from back pay. The Supreme Court order reversing the D.C. Circuit did not come until March 27, 2002. By that time, Castro had waited thirteen years to find out what the remedy would be for his unlawful firing: the employer would have to post a notice and know that the next violation would be punishable by contempt proceedings.

José Castro’s case is not unique. An average of one in every twenty workers in the United States is fired for trying to organize a union. Employer resistance to unions has grown steadily since Ronald Reagan fired the Air Traffic Controllers in 1981. As a result, the number of workers represented by unions has decreased to about 8% in the private sector, even though union representation is higher in the public sector, at 36.5%. Even when workers are able to organize a union at their workplace, they are often stifled by the employers in negotiation of the contract, with half actually securing a first contract after winning the right to bargain. If the employer violates its legal obligation to bargain with the majority of its employees, the NLRB can order the employer to bargain in good faith. As the Hoffman case shows, these remedies can take years to enforce. This deficit of democracy in the workplace affects both documented and

215. Id. at 142.
218. Id. at 152.
224. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984) (a worker’s availability to work in the United States will also affect his or her ability to collect back pay).
undocumented workers.

Recent rulings of the NLRB also make it more difficult to organize temporary workers because they cannot be placed into the same bargaining unit as permanent workers without employer consent. In 2000, the NLRB held in *M.B. Sturgis* that the Board could not certify a bargaining unit that contained both temporary and permanent workers without the employer's consent. The decision was based on the wide latitude that the NLRB had in determining appropriate bargaining units under Section 9(b) of the NLRA. Four years later, however, the composition of the Board changed and a majority of its five members had been appointed by President George W. Bush. In 2004, the Board overruled *M.B. Sturgis* in *H.S. Care, L.L.C.* The Board held that the NLRA does not allow for joint employer bargaining units without employer consent, in this case a bargaining unit of employees of the temporary staffing agency and the regular employees of the employer using the staffing agency. The decision will affect any attempts to organize guestworkers if they are matched with willing employers through international staffing companies.

In the current climate for organizing, it is unrealistic to think that guestworkers have the same rights as other workers to organize unions. Indeed, even if they did, that would not be sufficient to have real leverage to bargain with their employers. If guestworkers are dependent on their employers to petition to change their legal status, they are likely to be unwilling to enforce labor rights that they have. Even if workers could petition for resident status in the United States, under the current Senate proposal they would have to work as guestworkers for four years before having that ability. While the Senate’s immigration bill would allow guestworkers to change jobs, this is not the touchstone of voice on the job, but rather exit. This will do little to improve conditions for other

---

225. Recent decisions of the NLRB have constricted the definition of “employee.” See Brown University, 342 N.L.R.B. No. 42 (2004) (graduate students are not employees eligible for collective bargaining); Oakwood Healthcare, Inc., Case 348 N.L.R.B. No. 37 (2006) (one of the “Kentucky River cases” which held that charge nurses are not employees).


228. See National Labor Relations Board: NLRB Board Members, http://www.nlrb.gov/about_us/overview/board/index.aspx (click on board member to display biography) (last visited Nov. 17, 2006).


230. Id.


232. See Albert O. Hirschmann, Exit, Voice & Loyalty: Responses to the Decline in Firms, Organizations and States 33–34, 55 (1970) (arguing that in many cases voice is a
guestworkers or to prevent the same conditions from repeating themselves at a new workplace. Alternative ways of providing voice to these global temporary workers are needed.

C. Alternate Models to Give Guestworkers Greater Voice at their Workplaces

Guestworker programs may not be workable within the current system of collective bargaining, marked by long delays in the time it takes for the resolution of claims of unfair labor practices. There are new models, however, that might mitigate the negative effects of temporary status. One of these is the pact between the Farm Labor Organizing Committee in North Carolina ("FLOC"). In 2004, the FLOC reached an agreement with the North Carolina Growers Association to advocate on behalf of workers in the H-2A program.233 The pact seeks an end to alleged blacklisting against workers who sought to enforce their rights.234 Another example is the United Farm Workers Union ("UFW") pact with Global Horizons. In April 2006, the UFW entered into an agreement with Global Horizons, a Southern California labor contractor that matches temporary workers with employers.235 The new arrangement was timely and necessary, apparently, because of an existing federal probe into Global Crossing’s abuses of H-2A workers in Hawaii that resulted in a $300,000 settlement.236

The FLOC and UFW campaigns to represent H2-A workers highlight the important role that unions and nongovernmental organizations can play in closing the democracy deficit. These programs are incomplete, however, since much of the role of unions today is not simply to bargain for an increase in material conditions but also to involve its members in noncitizen "citizenship" activities such as demonstrations and political education.237

Guestworkers should utilize the NAFTA labor side agreement process and international forums to challenge the lack of worker protections and inability to exercise freedom of association. Indeed, the ILO and the North

more effective mechanism than exit).


234. Id.


American Agreement on Labor Cooperation have recently focused more seriously on the issue of migrant workers. 238 While these forums are not ideal avenues for quick resolution, they do provide an international spotlight on labor violations that are truly international since the workers themselves are at a democracy deficit in the sending and receiving countries. In this regard, as other scholars have recently written, international administrative legal structures may help to close the global democracy deficit. 239 With respect to guestworkers, there may be a need for an administrative structure specifically created to review claims against employers.

In the end, guestworkers may gain some protection and voice through agreements with non-governmental organizations and use of international administrative structures. The temporary nature of the programs will always prevent full realization of any rights that are guaranteed. Thus, any new labor immigration program should provide unskilled workers with the option to petition for permanent residency. The expansion of temporary worker programs would only further commodify workers in the global economy through the loss of democracy both at their workplaces (through the inability to enforce their rights) and at the ballot box (through a lack of influence with legislators and government officials).

V. CONCLUSION

On October 26, 2006, President George W. Bush signed the Secure Fence Act of 2006, authorizing a 700-mile fence along the U.S.-Mexico border. 240 The bill represents the end of legislative efforts for comprehensive reform in 2006, but it does not contain most of the draconian elements of H.R. 4437. 241 While the prospects for reform are unclear in the new Congress, the debate over immigration reform in 2006 shows that the idea of a guestworker program has broad political appeal. 242 Because of the malleability of the term “guestworker,” elements of many proposed guestworker programs may appeal to a variety of different political constituencies. For many employers, guestworker programs mean a steady supply of labor. 243 For some immigrant advocates it may mean a safer,


241. See id.

242. See HING, supra note 3, at 17 (describing the broad appeal of a “guestworker” program).

243. See MANOLO I. ABELLA, INT’L LABOUR ORGANIZATION, SENDING WORKERS ABROAD:
better way for immigrants to migrate to the United States. These are both worthy, necessary goals, but there may be other ways to accomplish them, such as through legalizing the estimated twelve million undocumented workers already here, and through increasing the number of regular visas in all unskilled labor categories and enforcing labor standards.

Whatever the ultimate outcome of the immigration bills in Congress, it seems reasonably clear that United States’ reliance on guestworker programs will continue in some form or another. If there is no new guestworker program, it is likely that the existing guestworker programs in agriculture, seasonal work, and high technology will be continued and expanded. Temporary worker programs with no chance of permanent residency in the United States should be resisted. As this Article has argued, the expansion of guestworker programs will inevitably exacerbate the democracy deficit, lead to more worker abuses, and lead to a greater number of people without voice over the terms and conditions of their work. The lack of voice both at work and in the political process for guestworkers, and the history of labor abuses in such programs, commodifies the workers involved.

The brutal needs of persons who migrate to survive must also be considered. Temporary worker programs provide some economic relief to people all over the world, even if on a temporary basis. This Article argues that in order for the transaction to be as fair as possible, guestworkers need to work in concert with organizations in the United States, organizations in their own countries, or both. Ideally, guestworkers would maximize their bargaining power through collective action and the clear needs of U.S. businesses for their labor. In reality, though, as in most situations where there is a surplus of labor, the hiring entities (here, American corporations utilizing immigration law) maintain a great degree of leverage and workers are left to “take it or leave it.” For this reason, unless guestworkers can leverage their apparent economic power to seek better conditions, temporary labor programs will necessarily commodify workers.

The free labor system guaranteed by the Thirteenth Amendment is at odds with guestworker programs. The ability to quit at any time is illusory if that means that you will be deported. Worse still, these workers are unable to

A Manual for Low- and Middle-Income Countries 5–12 (1997) (examining the institutional and policy implications of the role played by the government and the private sector in facilitating the migration of workers).

244. See David Bacon, Workers, Not Guests, The Nation, Feb. 19, 2007, at 5, 8 (discussing the alliance of the labor federation Change to Win with the Essential Worker Immigrant Coalition to lobby for a guestworker program).


246. See Michael J. Mayerle, Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, If Not Impossible, Question, 6 J. SMALL & EMERGING BUS. L. 559, 578 (2002) (discussing the fear many temporary workers have of challenging their employer’s practices, resulting in depressed wages and poor working conditions).
exercise meaningful voice over their working conditions. Thus, guestworker programs exacerbate the democracy deficit that already exists for noncitizens and other temporary workers in the United States. Unless temporary workers have the option and ability to stay in the country, they will be unable to exercise the rights that are apparently guaranteed to them on paper. Without voice, these workers will be little more than objects of trade in the global economy.