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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

* Associate Professor of Law, California Western School of Law. I would like to thank the Volume 10 and 11 editors of *The Journal of Gender, Race & Justice* for inviting me to their annual Symposium and for their editing of this Article. Thanks to California Western law student research assistants Justin Prato, Bart Parsley, Dwayne Stein, Jay Aboudi, and Lorriane Nisbet. I would also like to thank Marty Malin, my California Western colleagues William Aceves, John Noyes, and Paul Gudel. Finally, thanks to my wife Tori for her patience, editorial suggestions, and support.

1. The Clayton Antitrust Act, 15 U.S.C. § 17 (1914).

2. CHARLES WHELAN, *NAKED ECONOMICS: UNDRRESSING THE DISMAL SCIENCE* 201 (2002).

3. See BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY* 10–11 (2006) (describing H.R. 4437 and the Senate bill that included a guestworker program); EDWARD J.W. PARK & JOHN S.W. PARK, *PROBATIONARY AMERICANS: CONTEMPORARY IMMIGRATION POLICIES AND THE SHAPING OF ASIAN AMERICAN COMMUNITIES* 108–14 (2005) (describing current guestworker proposals, balancing flexibility with efficiency).

4. See George Lakoff & Sam Ferguson, *The Framing of Immigration* (2006), <http://www.rockridgeinstitute.org/research/rockridge/immigration> (describing the “framing” of immigration). Of course, the proponents of more liberal immigration policies also use language liberally in pushing “earned legalization” rather than “amnesty.” See Edwin Meese III, *An Amnesty*

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.

6. Intellectual labor, in particular, is becoming more valuable in the global economy. See David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1143–45 (2005) (describing the sometimes close connection between race and commodification, even in the intellectual property domain); see also Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229, 1230 (2004) (describing the connection between labor and commodification). Traditional contract law doctrine has been utilized more frequently in high-tech settings by employers seeking to protect their “investment” in certain workers. See ALAN HYDE, *WORKING IN SILICON VALLEY: AN ECONOMIC AND LEGAL ANALYSIS OF A HIGH VELOCITY LABOR MARKET* 27–40 (2003).

7. See Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 282–91 (2006); Mary Anne Case, *Pets or Meat*, 80 CHI-KENT L. REV. 1129 (2005) (discussing the commodification of affection for pets); Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC’Y REV. 257, 258 (2002) (discussing commodification of human sperm and eggs).

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.⁸ 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.⁹ 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.¹⁰ The new source of comparative advantage in the global economy is cheap labor.¹¹ 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.¹² 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.¹³ 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 U.S.C. § 151 (1935).

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 AND CORRESPONDENCE OF DAVID RICARDO* 11–20 (Piero Saffa & M.H. Dobb eds., 1970).

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).

12. See Eric Tucker, “*Great Expectations*” Defeated? *The Trajectory of Collective 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. REV.* 143, 167–70 (2003).

13. See MARC R. ROSENBLUM, *THE TRANSNATIONAL POLITICS OF U.S. IMMIGRATION 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.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.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.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.

14. ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 129–82 (2004) (discussing the implications of the globalizing state for law reform).

15. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 373–74 (2005) (discussing “technological determinism”).

16. See AMAN, *supra* note 14, at 129–81 (2004) (arguing for an administrative law solution to globalization problems); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490, 1523–41 (2006) (proposing a new administrative law framework for global problems).

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.¹⁷ Congress is currently considering elements of these proposals in comprehensive immigration reform.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.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.²⁰ Second, this

17. See generally Camille J. Bosworth, *Guest Worker Policy: A Critical Analysis of President's Bush's Proposed Reform*, 56 HASTINGS L.J. 1095 (2005); Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 LA RAZA L.J. 125 (2004); 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 (2005).

18. See generally Judith Golub, *Immigration Reform Post 9/11*, 13 U.S.-MEX. L.J. 9 (2005).

19. See William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715, 750–51 (2001); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 996–98 (1995).

20. For a discussion on the size of the undocumented population, see JEFFREY S. PASSEL, PEW 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.²¹ 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.²² 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.²³ 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.²⁴ 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.²⁵ As trade between countries began in earnest in the late 1700s, economist David Ricardo identified the theory of

POPULATION IN THE U.S. (2006), available at <http://pewhispanic.org/reports/report.php?ReportID=61>.

21. Compare MANUEL GARCÍA Y GRIEGO, CANADA: FLEXIBILITY AND CONTROL IN IMMIGRATION AND REFUGEE POLICY, IN *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 119 (Wayne Cornelius et al. eds., 1994) (describing the successes of the Canadian guestworker program), with KITTY CALAVITA, IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE 42–43, 46 (2005) (analyzing problems with guestworker programs in Spain and Italy).

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.

23. See generally JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); HOWARD KIMELDORF, *BATTLING FOR AMERICAN LABOR: WOBBLIERS, CRAFT WORKERS, AND THE MAKING OF THE UNION MOVEMENT* (1999).

24. See generally NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (2003).

25. Webster's Dictionary defines "commodity" as an "article of commerce . . . something useful or valued." THE MERRIAM-WEBSTER DICTIONARY 106 (1998).

comparative advantage.²⁶ 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.²⁷ This theory underlies much of international trade today.²⁸

In the late nineteenth century Karl Marx examined the commodification of labor.²⁹ This was the idea that labor had an inherent value that could be traded on the open market.³⁰ This was called the surplus value of labor.³¹ Marx believed that labor had to have value in order for workers to claim an ownership interest in the outputs of capital.³² Marx also critiqued the commodification of labor because it reduced everything to an economic transaction, what he called the “fetishism of the commodities.”³³ 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.”³⁴ 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.³⁵ 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.³⁶ Although workers will always be

26. Ricardo, *supra* note 10, at 11–20.

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.

29. Karl Marx, *Capital, Volume One*, in THE MARX-ENGELS READER 191, 308–19 (Robert C. Tucker ed., 2d ed. 1978).

30. *Id.*

31. *Id.*

32. *Id.*

33. Arjun Appadurai, *Commodities and the Politics of Value*, in THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE 3, 4 (Arjun Appadurai ed., 1986).

34. *Id.* at 7.

35. See Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 556–62 (2004).

36. See, e.g., Miranda Joseph, *The Multivalent Commodity: On the Supplementarity 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.³⁷ 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.³⁸ The unpaid labor of female caretakers in the home has posed a dilemma for feminist theorists.³⁹ 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.⁴⁰ Margaret Jane Radin, Joan Williams, and Martha Fineman have attempted to address the dichotomy between paid work and caregiving, among other forms of commodification.⁴¹ In some ways, the dichotomy has been addressed by change in the economy, with more women participating in the paid labor force.⁴²

Not all theorists struggle with the commodification of labor. For example, the commodification of labor is not problematic to law and economics theorists.⁴³ 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.

38. See Bridget Anderson, *Just Another Job? The Commodification of Domestic Labor in GLOBAL WOMAN, NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* 104, 113 (Barbara Ehrenreich & Arlie Russell Hochschild, eds, 2003).

39. See generally MICHELLE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Katherine Silbaugh, *Commodification and Women's Household Labor, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW AND SOCIETY* 338 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

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).

41. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT (AND WHAT TO DO ABOUT IT)* (2000); RADIN, *supra* note 40.

42. In 2005, women comprised forty-six percent of the workforce and are "projected to account for fifty-one percent of the increase in total labor force growth between 2004 and 2014." U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings, 2005 Annual Averages and the Monthly Labor Review*, November 2005, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (last visited Jan. 26, 2007).

43. See Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage, in*

commodification is inevitable to some degree.⁴⁴ 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.⁴⁵ 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.⁴⁶

Modern commodification theory attempts to recognize the complications of resisting commodification in a global economy where nearly everything is monetized.⁴⁷ 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.⁴⁸ 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.⁴⁹

While theorizing about property interests in body parts and organs has caused new commodification theorists to confront difficult questions,⁵⁰ 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).

46. See LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 71 (2d ed. 2004) (citing reports documenting the rise in violations of workers' rights in the 1980s).

47. See Martha M. Ertman & Joan C. Williams, *Freedom, Equality, and the Many Futures of Commodification*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 1–2 (Martha M. Ertman & Joan C. Williams eds., 2005).

48. Sarah Harding, *Culture, Commodification and Native American Cultural Patrimony*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 137 (Martha M. Ertman & Joan C. Williams eds., 2005).

49. See Landes & Posner, *supra* note 43, at 54–55.

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?⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ 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

51. See LANCE COMPA, HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (2005).

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.

53. See Crain, *supra* note 35, at 601. See generally ALBERT O. HIRSCHMANN, EXIT, VOICE & LOYALTY: RESPONSES TO THE DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970) (explaining how voice is sometimes a more effective mechanism than exit in changing organizations).

54. See RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 2 (2006) (citing Hirsch and Macpherson's compilations for the figure that union membership has decreased in the private sector from twenty-four percent in 1973 to eight percent in 2005). For more statistics on union membership over the past twenty years, see Unionstats.com, Union Membership and Coverage Database From the CPS (Documentation), available at <http://www.trinity.edu/bhirsch/unionstats> (last visited Jan. 26, 2007).

55. See DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 113–14 (2005) (“Being undocumented is precarious. Fearing deportation, you will think twice about contesting your wages or working conditions.”).

56. See THE ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2006/2007, (2006), available at http://www.stateofworkingamerica.org/intro_exec.html (discussing the stagnation of wages in the United States since 2000). This stagnation affects the wages of all workers, as argued by the AFL-CIO in its petition with the United States Trade Representative over labor rights violations in China. Petition of the AFL-CIO with the United States Trade Representative, at 89–90, available at http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/china_petition.pdf.

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.

60. The Clayton Antitrust Act, 15 U.S.C. § 17 (1914).

61. See *Brown v. Pro Football League*, 518 U.S. 231, 253 (1996) (Stevens, J., dissenting) ("The policy behind the statutory labor exemption protects the right of workers to act collectively to seek better wages . . .").

62. National Labor Relations Act, 29 U.S.C. § 151, cmt. 16 (1935). On the labor exemption, see *Brown*, 518 U.S. at 253 (1996).

63. International Labour Organization, Declaration of Philadelphia (1944), available at <http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/page5.pdf> ("Labour is not a 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.⁶⁵ The neoliberal paradigm assumes that everything can be freely traded.⁶⁶ 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.⁶⁷ These trade agreements aim to break down trade barriers, eliminate tariffs on imports, and increase global competition among unskilled workers.⁶⁸

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.⁶⁹ 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.⁷⁰ Contrary to Friedman’s “flat world,” guestworkers find many barriers to mobility and residency in the global labor marketplace.⁷¹ 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

65. See Dean Hubbard, *What Kind of Globalization? Organizing for Workers' Human Rights*, 9 WORKINGUSA 315, 318 (2006).

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).

67. See Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13, 14 (2003) (describing trade agreements between the U.S. and Chile, the U.S. and Singapore). Examples of recent trade agreements include the United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 117 Stat. 909; United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 117 Stat. 948.

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).

69. See FRIEDMAN, *supra* note 15, at 22–28.

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.⁷² The NLRA requires American employers to bargain in good faith with representatives of employees.⁷³ Second, the Fair Labor Standards Act (FLSA) of 1938 set the minimum *standards* for negotiations, such as minimum wage and overtime laws.⁷⁴ Neither the NLRA nor the FLSA explicitly apply to work relationships that take place outside the country.⁷⁵ 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.⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹ Unfortunately, undocumented immigration from Mexico into the United States only increased in the twelve years since NAFTA has been enacted.⁸⁰

72. National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. (2000).

73. 29 U.S.C. § 158(a)(5) (2000).

74. Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19 (2000).

75. Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees outside the United States*, 17 LAB. LAWYER 417, 423 (2002).

76. LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 44–46 (2000) (describing the ILO framework).

77. Sarah Paoletti, *Making Visible the Invisible: Globalization’s Impact on Workers in the United States*, 13 IND. J. GLOBAL LEGAL STUD. 105, 126 (2006).

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.

79. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., principle 11, Sept. 14, 1993, 32, I.L.M. 1499 [hereinafter NAALC].

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.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.⁸² Several significant pieces of legislation have been passed to combat the spread of human trafficking, in which humans are smuggled like contraband.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.⁸⁴ The debate about a new guestworker program has also used the language of “importing workers.”⁸⁵ Several commentators on all sides of the political debate have decried the “importing of guestworkers” embodied in various legislative proposals.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.⁸⁷ Thus, the

Center. According to Pew, unauthorized migrant families were comprised of 13.9 million people in 2004, of which 4.7 million were children. Of the 4.7 million children, 3.1 million were United States Citizens. PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS (2006), available at <http://pewhispanic.org/files/reports/46.pdf>.

81. See Jennifer M. Chacon, *Misery And Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2981–82 (2006); Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 *U.C. DAVIS J. OF INT'L L. & POL'Y* 169, 188–93 (2003); Dennis Wagner, *Phoenix's Hidden \$2 Billion Industry; Human Smuggling; Vicious Organizations Move Thousands of Immigrants Through Valley Every Day*, *THE ARIZONA REPUBLIC*, July 23, 2006, at 1 (describing human smuggling as a \$2 billion a year business); Bernice Yeung, *Trafficked: How Three Attorneys Rescued a Former Sex Slave from Deportation*, *CAL. LAW.*, Dec. 2004, at 31 (telling the story of a trafficking victim).

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.”).

83. Trafficking Victims Protection Act, 22 U.S.C. § 7103 (2000).

84. See *infra* text accompanying notes 115–16.

85. *Id.*

86. See, e.g., Philip Martin, *There is Nothing More Permanent Than Temporary Foreign Workers*, *CTR. FOR IMMIGR. STUD. BACKGROUNDERS*, 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.

87. S. REP. NO. 106–24, at 32 (1999), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:sr204.106.pdf (“The INA reflects the American

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 187.⁸⁸ In his study, Santa Ana found that undocumented immigrants were most often portrayed as animals in the press.⁸⁹ In 1994, the *Los Angeles Times* reported that "employers *hungering* for really cheap labor *hunt out* the foreign workers."⁹⁰ Federal officials in the mid-1990s, according to Santa Ana, called for increased border patrols to "ferret out" immigrants.⁹¹ 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.⁹² 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

tradition of employing U.S. workers in private sector jobs that promote the growth of a middle class, rather than importing and exploiting a rolling stream of alien workers, without permanent immigrant status or family ties, in low-paid permanent positions, most to be kept almost all the time on their employers' premises.").

88. OTTO SANTA ANA, *BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE* 65–103 (2002).

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].").

countries.⁹³ 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.⁹⁴

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.⁹⁵ 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.⁹⁶

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, over one million of people, including many noncitizens, marched in reaction to various Congressional proposals to change immigration laws.⁹⁷ 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

93. See JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 19 (2006) (describing democratic deficits).

94. 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).

95. For more information about the ILO structure, see International Labour Organisation, Structure of the ILO, <http://www.ilo.org/public/english/depts/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").

96. *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 a 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.).

97. *Hundreds of Thousands Rally Nationwide for Immigrant Rights, Path to Citizenship*, Daily Lab. Rep. (BNA), No. 70, Apr. 12, 2006, at A-2.

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

98. Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 430–35 (2003) (discussing consent as the revolutionary claim for independence).

99. Enrique De La Garza Toledo, *Free Trade and Labor Relations in Mexico*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 227 (Robert J. Flanagan & William B. Gould IV eds., 2003).

100. See ROGER BLANPAIN, ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS 211–12 (2007).

101. SHEREEN HERTEL, UNEXPECTED POWER: CONFLICT AND CHANGE AMONG TRANSACTIONAL ACTIVISTS 101–03 (2006) (describing the changes proposed by President Fox’s labor secretary Ralph Absacal that would make Mexican labor law more business-friendly).

102. Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. Rev. 1 (2006); Ruth Rubio-Marin, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 N.Y.U. L. Rev. 117, 126–28 (2006).

103. See Randal C. Archibold, *Immigrants Take to U.S. Streets in a Show of Strength*, N.Y. TIMES, May 2, 2006, at A1 (discussing marches that took place nation-wide on May 1); *Immigrants, Supporters Rally May 1 For Rights, Comprehensive Legislation*, Daily Lab. Rep. (BNA) No. 84, May 2, 2006, at A11.

legislation.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.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.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.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.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.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

104. See Rubio-Marin, *supra* note 102, at 126–28.

105. Jeremy Waldron, *Deliberation, Disagreement and Voting*, in *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* 210 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

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, *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).

107. See Ertman & Williams, *supra* note 36, at 3 (“The classic justification of the market is the idea of freedom of contract.”).

108. ROGER DANIELS, *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.).

109. Joseph H. Carens, *Citizenship and Civil Society: What Rights for Residents?*, in *DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN EUROPE AND THE U.S.: THE REINVENTION OF CITIZENSHIP* 100, 108 (Randall Hanson and Patrick Weil eds., 2002).

to be able to influence legislation that will directly affect the terms and conditions of their employment.¹¹⁰ 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.¹¹¹ 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.¹¹²

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.¹¹³ 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.¹¹⁴ In discussing guestworkers, this Article is referring only to truly temporary labor programs. Unauthorized workers in the United

110. See generally Michael R. Triplett, *White House Outlines Immigration Reforms, Including Guestworker Programs, Worker IDs*, Daily Lab. Report (BNA) No. 15, Jan. 24, 2007, at A-13.

111. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 122–40 (2006) (discussing theorists that separate “membership” in a community from “citizenship”).

112. See *Cap Reached for H-2B Visas, Homeland Security Says*, Daily Lab. Rep. (BNA) No. 67, at A-11 (Apr. 7, 2006) (discussing how quickly the H-2B visa cap is reached).

113. See, e.g., George W. Bush, U.S. President, Remarks by the President on Immigration Policy (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>. Bush took care to distinguish his proposal from an “amnesty.” *Id.* “Those who make th[e] choice [to apply for citizenship] will be allowed to apply in the normal way. . . . I oppose amnesty, placing undocumented workers on the automatic path to citizenship. Granting amnesty encourages the violation of our laws, and perpetuates illegal immigration.” *Id.*

114. Eric Lekus, *Senate Votes to Restore Language Allowing Guestworkers to Self-Petition for Green Cards*, Daily Lab. Rep. (BNA) No. 97, May 19, 2006, at AA-1.

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ The Program ramped up again during World War II, but even after the war was over, growers' purported needs for agricultural workers continued.¹¹⁹ From 1942 to 1964 over 4.6 million Mexicans were brought to the United States through the Bracero Program.¹²⁰ 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).

116. See 8 U.S.C. § 1184(c) (2000) (describing the petition process of the "importing employer").

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).

118. Camille J. Bosworth, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1095-120 (2005).

119. KITTY CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR 1820-1924* (1984).

120. JUSTIN AKERS CHACÓN & MIKE DAVIS, *NO ONE IS ILLEGAL: FIGHTING RACISM AND STATE VIOLENCE ON THE U.S.-MEXICO BORDER* 139-47 (2006).

rights.¹²¹

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.¹²² 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*.¹²³ 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.¹²⁴ 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.¹²⁵ 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.¹²⁶

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.¹²⁷

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.*

122. *Cruz v. United States*, 219 F. Supp. 2d 1027, 1051 (N.D. Cal. 2005).

123. *Cruz v. United States*, 2003 WL 21518119 (N.D. Cal. 2003), *reconsideration granted in part*, 219 F. Supp. 2d 1027 (N.D. Cal. 2005).

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 1965.¹²⁸ The most often used of these programs are the H-2A and H-1B programs.¹²⁹ The H-2A program is intended to bring workers on a temporary basis to work in agriculture.¹³⁰ 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.¹³¹

By definition, guestworker programs are temporary and respond to actual labor market needs.¹³² Several historical and current guestworker programs have satisfied neither of these conditions.¹³³ 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.¹³⁴ 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 H-2B) corresponding to the different sections of the Code.¹³⁵ Even in these programs, the labor certification process managed by the Department of Labor has been criticized for overstating actual labor shortages.¹³⁶ 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.¹³⁷ The complaint alleged federal and state authorities

128. SASKIA SASSEN, *GUESTS AND ALIENS* 144–45 (1999).

129. Immigration and Nationality Act of 1965, §§ 101(a)(15)(H)(i)(b), 101(a)(15)(H)(ii)(a), 101(a)(15)(H)(ii)(b) (2006).

130. *See generally* 8 U.S.C. § 1188 (2000).

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).

134. Philip L. Martin & Michael Teitelbaum, *The Mirage of Guest Workers*, FOREIGN AFFAIRS, Nov.-Dec. 2001, at 117, 129.

135. Immigration and Nationality Act of 1965, §§ 101(a)(15)(H)(i)(b), 101(a)(15)(H)(ii)(a), 101(a)(15)(H)(ii)(b).

136. DAVID TAJGMAN & KAREN CURTIS, *FREEDOM OF ASSOCIATION: A USER'S GUIDE* (International Labour Office ed., 2000).

137. *See* U.S. Department of Labor, Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC) (2006), <http://www.dol.gov/ilab/programs/nao/status.htm#iib8> (last visited Feb. 3, 2007) (describing the status of Mexico NAO Submission 2003-1 (North Carolina)).

“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

138. Petition to the National Administrative Office of Mexico Under the North American Agreement on Labor Cooperation, submitted by the Central Independiente de Obreros Agrícolas y Campesinos and Farmworker Justice Fund, Inc. (2003) (on file with *The Journal of Gender, Race & Justice*).

139. The current status of NAFTA petitions can be found at U.S. Department of Labor, Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC), <http://www.dol.gov/ilab/programs/nao/status.htm#iib8> (last visited January 24, 2007).

140. *But see* Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 AM. J. OF SOC. 715, 742–44 (2005) (discussing the success of global governance institutions such as NAFTA).

141. *See* Mathew Schafer, *The Role of Nongovernmental Organizations in Canada-U.S. Relations*, 30 CAN.-U.S. L.J. 69, 79 (2004) (describing the labor side complaint process and its shortcomings).

142. *See* U.S. Department of Labor, Responses to Questions Submitted by Mexico (on file with *The Journal of Gender, Race & Justice*).

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.

144. *See generally* Alejandro V. Cortes, *The H-2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights*, 21 OHIO ST. J. ON DISP. RESOL. 409 (2006).

145. *See* LANCE COMPA, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC) 37–58 (Kluwer Law International, 2001).

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.”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.”¹⁴⁷ Other international labor rights claims might be brought if the working conditions of the guestworkers fall below accepted international labor standards.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.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.¹⁵⁰ Despite the obstacles presented by the NAFTA complaint process, H-2B workers have utilized other avenues to challenge deprivations of worker rights.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.¹⁵² These lawsuits, as well as numerous

146. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499.

147. *Id.*

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, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 533–43 (2001).

149. U.S. Department of Labor, Memorandum in Support of Petition on Labor Law Matters Arising in the United States (Apr. 13, 2005), available at <http://dol.gov/ilab/media/reports/nao/submissions/2005-01memo.htm>.

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”).

151. For status on the complaint, see U.S. Department of Labor, Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC), <http://www.dol.gov/ilab/programs/nao/status.htm#iib7> (last visited Jan. 26, 2007).

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.¹⁵³ Several 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.¹⁵⁴

All of these abuses exist in temporary programs that, on paper, have strong worker protections.¹⁵⁵ 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.”¹⁵⁶ This quote highlights the moral problems with “importing” predominantly nonwhite workers into the country to do jobs that predominantly white Americans will not do.¹⁵⁷

A number of policy and economic objections to guestworker programs

Monte Fresh Produce (Southeast), Inc., <http://www.splcenter.org/legal/docket/files.jsp?cdrID=57&sortID=0> (last visited Jan. 28, 2007) (alleging wage violations by Del Monte); Southern Poverty Law Center, Federico Salinas-Rodriguez v. Alpha Services, Inc., <http://www.splcenter.org/legal/docket/files.jsp?cdrID=48&sortID=3> (last visited Jan. 28, 2007) (discussing “minimum wage and overtime protections, and other violations of the Migrant and Seasonal Agricultural Worker Protection Act”); Southern Poverty Law Center, Rosiles-Perez, et al. v. Superior Forestry Service, Inc., <http://www.splcenter.org/legal/docket/files.jsp?cdrID=56&sortID=0SPL> (last visited Jan. 28, 2007) (discussing the Fair Labor Standards Act and Migrant and Seasonal Workers Protection Act).

153. SOUTHERN POVERTY LAW CENTER, *BENEATH THE PINES: STORIES OF MIGRANT TREE PLANTERS* 14–15 (2005) available at http://www.splcenter.org/images/dynamic/main/ijp_beneaththepines_web.pdf.

154. *Id.*

155. For example, guestworkers in the H-2B program must be paid the prevailing wage. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000) (the H-2B provision); 8 C.F.R. § 214.2(h)(6)(iv) (2006).

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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ Along these lines, many scholars argue that guestworker programs do not fulfill their stated objectives.¹⁶¹ Besides not always working properly, guestworker programs also represent a failure of the political process.¹⁶² 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.¹⁶³ 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.¹⁶⁴

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

159. See Michael R. Triplett, *White House Outlines Immigration Reforms, Including Guestworker Programs, Worker IDs*, Daily Lab. Rep. (BNA) No. 15, Jan. 24, 2007, at A-13.

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).

163. See PHILIP MARTIN, MANOLO ABELLA & CHRISTINE KUPTSCH, *MANAGING LABOR MIGRATION IN THE TWENTY-FIRST CENTURY*, 55-82 (2006) (describing highskilled guestworker programs); PHILIP L. MARTIN, *PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS* 53-54 (2003) (describing how the political power of agriculture lead to temporary worker programs).

164. See Elisabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES, Jan. 7, 2004, at 1; H.G. Reza, *Bush Plan No Migrant Lure*, L.A. TIMES, Feb. 15, 2004, at 1; Leonel Sanchez, *Latinos Split on Bush's Immigration Plan, Citing Repatriation Provision*, SAN

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.¹⁶⁵ 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.¹⁶⁶

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.”¹⁶⁷ The Amendment was passed in 1865 to end the practice of chattel slaveholding by private parties, but it had a much more expansive promise.¹⁶⁸ First, the Thirteenth Amendment applies directly to private action.¹⁶⁹ 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.¹⁷⁰

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.¹⁷¹ The importance of the Thirteenth Amendment

DIEGO UNION-TRIB., Jan. 30, 2004, at A3; Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, Feb. 8, 2004, at A1.

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.

168. See Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L. J. 651, 671–74 (2004) (arguing that the conditions of undocumented workers in the United States may be violations of the Thirteenth Amendment).

169. *Id.*

170. See *id.*; Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1047–49 (2002) (arguing that the conditions of workers employed by U.S. companies abroad may be a violation of the Thirteenth Amendment).

171. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 51–52, 79–80 (2004) (discussing the application of the Thirteenth Amendment to labor rights).

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.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.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.¹⁷⁴ Second, the Supreme Court has held that the threat of deportation is not sufficient to constitute "involuntary servitude."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.¹⁷⁶

A frequent justification of guestworker programs is that the participants in such programs freely choose to be part of them.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.

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).

173. See JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT 195-96 (2005) (grounding the right to strike in the Thirteenth Amendment). See generally James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) (arguing for an expanded use of the Thirteenth Amendment, as opposed to the Commerce Clause, to enforce labor and human rights).

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).

175. *United States v. Kozminski*, 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).

176. See Pope, *supra* note 173; Ontiveros, *supra* note 168, at 679-80.

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.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ 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.¹⁸² 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.

179. See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2d. Sess. 2006); see also *Immigration and the 2006 Election*, BACKGROUND (Nat'l Immigration Forum, Washington, D.C.), available at <http://www.immigrationforum.org/documents/TheDebate/CivicParticipation/2006VoteAnalysis.pdf> (last visited February 2, 2007).

180. See JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 268–73 (2005); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. (forthcoming 2007) (on file with *The Journal of Gender, Race & Justice*); Edward Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 724 (2001) (analyzing different forms of democratic participation).

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.¹⁸³ In 1998, the ILO promulgated four basic rights that were conditions of ILO membership in its Fundamental Declaration. These rights are: (1) freedom of association and collective bargaining; (2) freedom from forced labor; (3) the elimination of child labor; and (4) freedom from discrimination.¹⁸⁴ These rights are also protected in various ILO conventions, which members can choose to ratify.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

The NAFTA also contains freedom of association and collective bargaining as principles that each of the three NAFTA countries shall “strive to promote.”¹⁸⁸ 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.¹⁸⁹ 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).

184. International Labor Organization, *Fundamental Principles and Rights at Work*, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN (last visited Nov. 17, 2006).

185. See International Labor Organization Convention No. 87, *Concerning Freedom of Association and Protection of the Right to Organize*, July 9, 1948, 68 U.N.T.S. 17; see also International Labor Organization Convention No. 98, *Concerning the Application of the Principles of the Right to Organize*, July 1, 1949, 96 U.N.T.S. 257.

186. See International Labor Organization, *Ratifications of ILO Convention 87*, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C087> (last visited Dec. 19, 2006).

187. International Covenant on Civil and Political Rights, art. 22, § 1, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/english/law/ccpr.htm>; Maria Pabon Lopez, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 *BRANDEIS L.J.* 611, 628 (2006) (applying International Labour Organization principles to noncitizen workers' rights).

188. North American Agreement on Labor Cooperation, U.S.-Mex.-Can., Annex 1, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

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.”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.¹⁹¹

The House of Representatives took the opening salvo in immigration reform in December 2005 by passing H.R. 4437.¹⁹² 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.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.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.¹⁹⁵

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

190. George W. Bush, U.S. President, Remarks on a New Temporary Guestworker Program (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

191. See *infra* Part III.A.

192. Fawn Johnson, *House Passes Enforcement Only Bill Containing No Guestworker Language*, Daily Lab. Rep. (BNA) Dec. 20, 2005, at AA-1.

193. Report Supplement, *Legislation, Lawmakers to Revisit Unfinished Business, Pension, Business, Immigration*, Daily Lab. Rep. (BNA) No. 243, Jan. 17, 2006, at S-5 [hereinafter Report Supplement].

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.¹⁹⁶ 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.¹⁹⁷ The Senate bill ultimately went nowhere in the then-Republican controlled House.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ 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.”²⁰¹ 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.²⁰² 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.”²⁰³

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.²⁰⁴ Guestworkers in the new H-2C program would be able to adjust their status to permanent resident after

196. See Report Supplement, *supra* note 193.

197. See *id.*, at 37–38.

198. Fawn Johnson, *In Signing Border Security Measure, Bush Calls for Guestworker Program*, Daily Lab. Rep. (BNA) No. 193, Oct. 5, 2006, at A-10 (explaining how a comprehensive immigration bill was blocked by House Republicans in favor of the border fence bill).

199. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2d. Sess. 2006).

200. See *Republican Policy Committee Urges Removal of Wage Language*, Daily Lab. Rep. (BNA) No. 13, at A-11 (July 17, 2006) (referring to a proposal on enhanced wage protections that was rejected in the final bill).

201. See *With Caveats, House Hearing Witnesses Express Support for Guestworkers*, Daily Lab. Rep. (BNA) No. 139, at A-1 (July 19, 2006).

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).

203. Comprehensive Immigration Reform Act of 2006, S.2611, 109th Cong. (2d Sess. 2006).

204. HING, *supra* note 3, at 36.

four years in the program, regardless of their employer's sponsorship.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.²⁰⁶

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.²⁰⁷ Consider the case of José Castro, the fired worker in the U.S. Supreme Court's decision *Hoffman Plastic Compounds, Inc. v. NLRB*.²⁰⁸ In that case, Castro was terminated for his union activities at Hoffman Plastic Compounds in 1989.²⁰⁹ 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 1990.²¹⁰ After a hearing in April 1990, an NLRB Administrative Law Judge ("ALJ") found that the company had retaliated against Castro for his union activities.²¹¹

The ALJ's finding was largely upheld by the NLRB in Washington, D.C. in January 1992.²¹² 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.²¹³ The ALJ denied

205. See *id.* at 38 (discussing S. 2611).

206. See *id.* at 31 (discussing S. 2611).

207. See MARTIN ET AL., *supra* note 163, at 129 (arguing that guestworker programs can lead to fewer workplace rights).

208. 535 U.S. 137 (2002).

209. See Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Workers*, in LABOR LAW STORIES 399, 408–09 (Laura Cooper & Catherine L. Fisk eds., 2005) (describing the fact that Jose Castro was indisputably fired for his union activities); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 11–20 (2003) (describing how the goals of the NLRA are often viewed by courts as less important than other statutory schemes when construed with other statutory schemes); Jennifer C. Chang & Christopher Ho, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 485–92 (2005) (examining the way in which *Hoffman* will affect the remedies available under other employment statutes).

210. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

211. *Id.* at 141.

212. Fisk & Wishnie, *supra* note 209, at 411.

213. See *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994).

back pay based on Castro's admission of his unauthorized status.²¹⁴ 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.²¹⁵ 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.²¹⁶ The Supreme Court order reversing the D.C. Circuit did not come until March 27, 2002.²¹⁷ 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.²¹⁸

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.²¹⁹ Employer resistance to unions has grown steadily since Ronald Reagan fired the Air Traffic Controllers in 1981.²²⁰ 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%.²²¹ 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 only about half actually securing a first contract after winning the right to bargain.²²² 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.²²³ As the *Hoffman* case shows, these remedies can take years to enforce.²²⁴ This deficit of democracy in the workplace affects both documented and

214. *Hoffman Plastic Compounds*, 535 U.S. at 141.

215. *Id.* at 142.

216. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 232, (D.C. Cir. 2000).

217. *Hoffman Plastic Compounds*, 535 U.S. at 137.

218. *Id.* at 152.

219. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781(1983).

220. There is some debate about whether or not Reagan's firing actually spurred more employer resistance to unions. See Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 314-17 (2006).

221. *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).

222. See Gordon R. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 110, 111-13 (Sheldon Friedman et al. eds., 1994) (describing the gap between winning NLRB elections).

223. 29 U.S.C. § 158(a)(5) (2000).

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.²²⁵ 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.²²⁶ The decision was based on the wide latitude that the NLRB had in determining appropriate bargaining units under Section 9(b) of the NLRA.²²⁷ 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.²²⁸ In 2004, the Board overruled *M.B. Sturgis* in *H.S. Care, L.L.C.*²²⁹ 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.²³⁰ 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.²³¹ 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.²³² 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).

226. 331 N.L.R.B. 1298 (2000).

227. See 29 U.S.C. § 159(b) (1935).

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

229. *H.S. Care, L.L.C.*, 343 NLRB No. 76 (2004), 2004 WL2681621.

230. *Id.*

231. See Eric Lekus & Heather M. Rothman, *Senate Votes to Keep Path to Citizenship in Proposed H-2C Temporary Visa Program*, Daily Lab. Rep. (BNA) No. 98, May 22, 2006, at AA-1.

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).

233. Steven Greenhouse, *Growers' Group Signs First Union Contract with Guestworkers*, N.Y. TIMES, Sept. 17, 2004, at A6.

234. *Id.*

235. Steven Greenhouse, *Farmworkers' Union is Set to Announce First National Contract for Guest Workers*, N.Y. TIMES, Apr. 11, 2006, at A17; Jerry Hirsch, *Farm Labor Contractor, Union in Pact*, L.A. TIMES, Apr. 12, 2006, at C2.

236. *Labor Firm to Pay Nearly \$300,000 to Settle DOL Back Pay Claims for Thai Farmworkers*, Daily Lab. Rep. (BNA) No. 101, at A-1 (May 25, 2006).

237. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 237 (2005); Paul Johnston, *Citizenship Movement Unionism: For the Defense of Local Communities in the Global Age*, in UNIONS IN A GLOBALIZED ENVIRONMENT: CHANGING BORDERS, ORGANIZATIONAL BOUNDARIES, AND SOCIAL ROLES 236 (Bruce Nissen ed., 2002).

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,

238. Lee Swepton, *Closing the Gap Between International Labor Law and U.S. Law, in WORKERS' RIGHTS AS HUMAN RIGHTS* 53, 64 (James A. Gross ed., 2003).

239. See Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490, 1494 (2006).

240. *Bush Signs Border Fence Bill, Calls for Guestworker Program*, Daily Lab. Rep. (BNA) No. 208, at A-2 (Oct. 27, 2006).

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.²⁴⁴ 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.²⁴⁵ 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."²⁴⁶ 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).

245. See generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993).

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.

